DOCTORAL (PhD) DISSERTATION

Dispute Settlement Systems of International Investment Law: Analyses of the Systems and Reform Proposals

by

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Abstract

The current reform initiatives related to Investor-State Dispute Settlement (ISDS) emerged because of growing criticisms and dissatisfaction. There are criticisms over its fairness, transparency, and impact on State sovereignty. Under the current dispute settlement system, foreign investors are permitted to bypass domestic courts. They can bring claims to the international investment arbitration against host States. However, this system has faced backlash and criticisms.

To understand the criticisms of current ISDS system and the ongoing reform initiatives, this thesis offers a critical examination of international investment law (IIL) and ISDS. It analyzes historical evolution, current debates, lessons from the World Trade Organization (WTO)'s dispute settlement system, and reform positions on dispute settlement and UNCITRAL WGIII's drafts. Moreover, to evaluate historical evolution, the thesis employs Third World Approaches to International Law (TWAIL) to highlight persistent structural inequalities that favors capital-exporting States and their investors. This approach also highlights that international investment law (IIL)'s important principles or standards were deeply influenced by European and United States' imperial practices. Moreover, reason for the creation of investment protection was to secure the interests of foreign investors from economically and politically dominant States. Host States, specifically the Latin American States, disagreed and resisted many principles and standards which many European and American scholars wrongly claimed as customary international law. These factors underscore that IIL often prioritize investor rights over regulatory and policy autonomy of host States, particularly developing and least developed countries. The thesis thus argue that understanding IIL's evolution is essential to offer any meaningful reform proposal.

To trace IIL's evolution, the thesis evaluates the shift from diplomatic protection mechanism to BIT regime. This has provided a better-equipped mechanism for investor protection. However, its development is connected to the aspirations and practices of the capital exporting States of the previous era. Diplomatic protection was mostly advocated by capital exporting States. This has laid the groundwork for unorthodox investor protection which continues till today. The incorporation of investor-State dispute settlement has institutionalized investor rights to an unprecedented level which sometimes comes in the shadow of structural asymmetries.

The thesis critically analyzes dispute settlement systems, however, by focusing specifically on ISDS system which is primary and principal mode of dispute settlement. It identifies systemic issues that weaken effectiveness, credibility and legitimacy of the ISDS system. ISDS mechanisms include *ad hoc* and institutional arbitration. These mechanisms enable foreign investors to bypass domestic courts through filing claims directly to the arbitration. The ISDS is considered as a neutral mechanism for dispute resolution, however, this thesis identifies various concerns regarding its impartiality, fairness and effect on State sovereignty. These issues not only highlight structural flaws in ISDS framework but also indicate that ISDS prioritizes foreign investors rights over public policy implementation. Moreover, the thesis recognises that there are both substantive and procedural issues which affect the overall system.

The thesis emphasize the need for reform as well as avoiding the maintenance of the status quo. To do that it draws lessons from the World Trade Organization (WTO)'s dispute settlement system which is recognized for its predictability and consistency. It argues that WTO's two-tier model, particularly its Appellate Body (AB), could be useful for multilateral investment dispute settlement mechanism by providing additional safeguard against erroneous legal interpretations. However, the first instance can be a standing mechanism instead of *ad hoc* panels of the WTO. Moreover, the thesis finds significant limitations on WTO's consensus-based decision-making which engender stagnancy and disenfranchisement. Therefore, instead of consensus-based decision-making other forms of decision-making should be incorporated into the reformed system.

In light of the problematic issues identified in the ISDS system, the thesis examines positions on reform and reform initiatives. It particularly focuses on UNCITRAL Working Group III (WGIII)'s reform initiative. To better understand the approaches towards reform and positions on reform, the thesis uses various categorizations. Regarding approaches towards reform, it categorizes the approaches of the stakeholders into two groups, e.g. idealist approach, and realist approach. Moreover, regarding positions on reform, it categorizes the positions of the stakeholders into three groups, e.g. status quo maintainers, major reform backers, and anti-status quo maintainers. The thesis points out that status quo maintainers argue for preserving the current ISDS system with minor adjustments. They hold the view that existing framework is quite sufficient and effective. Major reform backers champion fundamental changes to existing framework. They support the establishment of Multilateral Investment Court (MIC) and incorporation of appellate mechanism. Anti-status quo

maintainers, on the other hand, anti-status quo maintainers argue for a shift from the current system to a different mechanism, i.e., they support State-to-State dispute settlement mechanism or domestic courts for investment disputes.

Under WGIII, There are some key reform proposals. One of them is related to establishing a standing MIC. The thesis argue that these proposals may bring qualitative changes to the current system, however, without substantive reform these would be able to solve the problematic issues effectively and sustainably. The reform initiatives should solve the problems related to States' sovereignty in addressing human rights, environmental sustainability, public policy space etc. Moreover, it should resolve the issue related to third party participation for ensuring standing of the local community.

Considering all of the factors and analyses, the thesis offers multiple recommendations for the reformation of the existing system and WGIII's reform initiative. For reformation of the existing system, both substantive and procedural reform should take place. Moreover, alternative dispute resolution in place of ISDS should be pursued. For WGIII reform initiative, a standing multilateral legal framework with appellate mechanism for investment disputes should be established. Moreover, the standing bodies should ensure geographical diversity with qualified members. Furthermore, two-thirds majority voting method should be incorporated for smooth decision-making process.

Abbreviations

AB	Appellate Body
ACIIL	Advisory Centre on International Investment Law (ACIIL)
ACFI	Agreement on Cooperation and Facilitation of Investments
ACWL	The Advisory Centre on WTO Law
BIT	Bilateral Investment Treaty
BITs	Bilateral Investment Treaties
CERD	The Charter of Economic Rights and Duties
CETA	Comprehensive Economic and Trade Agreement
DSB	Dispute Settlement Body
FIL	Foreign Investment Law
FTAs	Free Trade Agreements
ECT	Energy Charter Treaty
EU	European Union
FCN	Friendship, Commerce, and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
IBA	International Bar Association
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IIAs	International Investment Agreements
IIL	International Investment Law
ISA	Investor State Arbitration
ISDS	Investor State Dispute Settlement
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
MITs	Multilateral Investment Treaties
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
PCA	Permanent Court of Arbitration
SMEs	Small and Medium Enterprises

SSDS	State-State Dispute Settlement
TTIP	Transatlantic Trade and Investment Partnership
TWAIL	Third World approaches to international law
UN	The United Nations
US	United States
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Trade and Development
USMCA	United States–Mexico–Canada Agreement
WGIII	Working Group III
WTO	World Trade Organization

Chapter I: Introduction

1 Problem statement

Foreign investors anticipated and also encountered risks while investing in a host country. Therefore, the target of the capital-exporting States is to establish protective system for the investment, while goal of the capital-receiving States is to protect their regulatory power.[1] It is claimed that initially the international investment law was shaped by unequal military power and later influenced by the US hegemony. After that it has consolidated through investment treaties and contracts. Despite encountering dissent, ongoing efforts seek to adjust its outer features while maintaining the core. Comprehending the strategies utilized to maintain this prevailing system is essential.[2]

One of the oft repeated claims is that international standard of treatment for foreign investors is a customary international law principle.[3] However, Sornarajah opposes this view.[4] In his view, claiming that there existed customary international law concerning the international minimal standard is incorrect as the international community was divided on accepting the international minimum standard as guaranteed under customary international law.[5] Moreover, Latin American States initially resisted the system based on external minimum standards of treatment, followed by African and Asian States. In addition, he dismissed the assertion of existence of customary international law on this issue as a creation of Western international lawyers' imagination.[6] He also emphasizes that as the power dynamics shifted, so did the system.

The formal beginning of the existing system can be traced back to the 1959 Germany-Pakistan BIT.[7] However, an alternative view suggests its roots in the United States'

[1] Jan Wouters et al., "International investment law: the perpetual search for consensus," in *Foreign direct investment and human development*, ed. Olivier De Schutter, Johan Swinnen and Jan Wouters (Routledge, 2013), 25.
[2] Muthucumaraswamy Sornarajah, "Resistance to Dominance in International Investment Law," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, Sufian Jusoh (Springer, 2021), 2146.
[3] Wouters, "International investment law," 25.
[4] Sornarajah, "Resistance to Dominance," 2148.
[5] Sornarajah, "Resistance to Dominance," 2148.
[6] Sornarajah, "Resistance to Dominance," 2151.
[7] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 1959.

Freedom, Commerce, and Navigation Treaties.[8] So far, over 2,800 BITs have been concluded.[9] Under the current international investment law system, foreign investors are empowered with the right to sue governments.[10] While Beth Simmons highlights that the foreign investors right to sue a government for damages by choosing a forum constitutes the most revolutionary aspect of international law,[11] Professor Gus Van Harten counters by highlighting the institutional biases embedded within ISDS. He asserts that the system favors wealthy claimants, leaving resource-constrained States struggling to put up even a basic defense. He argues further that this imbalance undermines the development of an international rule of law, a concept that remains problematic in itself.[12] Furthermore, Choudhury argues that the IIL can be regarded as a global public good, offering a comprehensive legal framework and creating a system that benefits both States and investors, but its current interpretation and application hinder its effectiveness.[13]

Numerous efforts to conclude a comprehensive multilateral agreement on foreign investment have failed,[14] with notable successes like the International Centre for the Settlement of Investment Disputes (ICSID) Convention.[15] International arbitration became the primary mode of dispute resolution,[16] with ICSID acting as the central institution.[17] However, the significant use of investment arbitration facilitates bypassing national courts.[18] Strikingly, international investment arbitration embodies the unique feature under which only investors

[8] Sornarajah, "Resistance to Dominance," 2151.
[9] "International Investment Agreements Navigator," UNCTAD Investment Policy Hub, accessed November 6, 2024, https://investmentpolicy.unctad.org/international-investment-agreements.
[10] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2021), 188.
[11] Thamil Venthan Ananthavinayagan, "Critical Perspectives on International Investment Law," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, Sufian Jusoh (Springer, 2021), 2163. Beth A. Simmons, "Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment," *World Politics* 66, no. 1 (2014): 17, https://doi.org/10.1017/S0043887113000312.
[12] Gus Van Harten, "Is It Time to Redesign or Terminate Investor-State Arbitration?," *Center for International Governance Innovation*, April 7, 2017, https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration.
[13] Barnali Choudhury, "International investment law as a global public good," *Lewis & Clark Law Review* 17, no. 2 (2013): 484, http://dx.doi.org/10.2139/ssrn.2181414.
[14] Wouters, "International investment law," 33.
[15] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).
[16] Kenneth J. Vandevelde, "A brief history of international investment agreements," *UC Davis Journal of International Law & Policy* 12, no. 1 (2005): 174–175, 184, http://ssrn.com/abstract=1478757.
[17] "ICSID Publishes 2024 Annual Report," ICSID, accessed November 6, 2024, https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-2024-annual-report.
[18] Surya P. Subedi, *International investment law: reconciling policy and principle* (Hart Publishing, 2016), 727.

can initiate arbitration proceedings and seek compensation for violations of investment protections.[19]

The evolution of investor protection in BITs is seen as revealing conflicts of interest in investment relations between capital-exporting and importing States. Utilizing BIT frameworks, developed countries imposed their liberal and protective view on developing countries which weren't available under the customary international law.[20] On the other hand, developing countries have accepted increasingly strong terms in BITs for getting necessary capital and competitive advantages. This lead to significant influence on their regulatory sovereignty. [21] Kate Miles, after employing case studies, contends that international law has been changed to prioritize the interests of foreign investors which neglects interests of local communities and environmental concerns. [22] Moreover, Choudhury's analysis of investor-State arbitration shows a tendency to pay insufficient consideration regarding public interest, favoring investor claims. [23] This imbalance is exacerbated by ambiguous BIT clauses that lacks specifics related to several provisions, such as fair and equitable treatment and expropriation, with arbitral tribunals contributing to the problem through broad interpretation.[24]

Various criticisms have been directed towards ISDS since 2000s,[25] because of alarming increase in investment disputes[26] and pro-investor climate at the arbitral tribunals. With more than 1,300 investment treaty arbitrations filed by 2024, [27] many concerning sensitive regulatory areas, ISDS has become a contentious element of international economic

[19] Daria Davitti, "On the meanings of international investment law and international human rights law: the alternative narrative of due diligence," *Human Rights Law Review* 12, no. 3 (2012): 421, https://doi.org/10.1093/hrlr/ngs013.
[20] Wouters, "International investment law," 25.
[21] Wouters, "International investment law," 26.
[22] Kate Miles, *The origins of International Investment Law: Empire, environment, and the safeguarding of Capital* (Cambridge University Press, 2015), 32.
[23] Choudhury, "International investment law," 484.
[24] Wouters, "International investment law," 49.
[25] Mojtaba Dani, Afshin Akhtar-Khavari, "Rethinking the use of deference in investment arbitration: New solutions against the perception of bias," *UCLA Journal of International Law and Foreign Affairs* 22, no. 1 (2018): 38-39, https://eprints.qut.edu.au/123290/.
[26] "The ICSID Caseload—Statistics," Issue 2024 – 2, ICSID. Accessed November 6, 2024, https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf.
[27] "Total number of known investment treaty cases rises to 1,332," UNCTAD Investment Policy Hub, accessed November 6, 2024, https://investmentpolicy.unctad.org/news/hub/1743/20240327-total-number-of-known-investment-treaty-cases-rises-to-1-332#:~:text=Total%20number%20of%20known%20investment%20treaty%20cases%20rises%20to%201%2C332,-27%20Mar%202024&text=UNCTAD%20has%20updated%20its%20Investment,as%20of%2031%20December%202023.

governance.[28] Recent sensitive cases, including *Vattenfall v. Germany*[29], *Philip Morris v. Australia*[30], *Philip Morris v. Uruguay*[31], and *Lone Pine Resources Inc v. Canada*[32], have engendered public outcry and shaped sentiment against ISDS.[33] Critics question not only the legal merit but also legitimacy of the arbitral tribunals' jurisdiction.

ISDS has drawn criticisms from a diverse range of stakeholders, including academics, jurists, non-governmental organizations, States, citizens, and lawmakers. One of the central criticisms involves the substantive provisions of ISDS, where concerns are raised about host States prioritizing investors' rights over the public interest.[34]

Another central criticism is related to expansive interpretation of treaties. Scholars contend that the broad interpretations of jurisdictional principles and substantive rules within the treaties have been exercised. This approach involves establishing jurisdiction through expansive interpretations of corporate nationality,[35] including bonds sold in foreign stock markets in the definition of investment,[36] allowing forum shopping based on corporate nationality,[37] asserting that the State must maintain a climate of confidence by interpreting the full protection of security standard,[38] and upholding the international minimum standard by interpreting fair and equitable treatment.[39] The expansion of legitimate expectations became evident in awards like the four Argentina Gas Cases – *LG&E*[40], *CMS*[41], *Enron*[42],

[28] Srividya Jandhyala, "The Politics of Investor-State Dispute Settlement: How Strategic Firms Evaluate Investment Arbitration," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, Sufian Jusoh (Springer, 2021), 648.
[29] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (2009), ICSID Case No. ARB/09/6.
[30] Philip Morris Asia Limited v. The Commonwealth of Australia (2011), UNCITRAL PCA Case No. 2012-12.
[31] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (2010), ICSID Case No. ARB/10/7. Philip Morris Asia Limited v. The Commonwealth of Australia (2011), UNCITRAL PCA Case No. 2012-12.
[32] Lone Pine Resources Inc. v. Canada (2013), ICSID Case No. UNCT/15/2.
[33] Zoltán Víg and Gábor Hajdu, "CETA and regulatory chill," *Iurisperitus Kiado* (2018): 49, https://publicatio.bibl.u-szeged.hu/22493/6/3341769.pdf.
[34] Julien Chaisse et al., "Contemporary Developments and New Trends in International Investment Rulemaking and Investor-State Dispute Settlement: An Introduction," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, Sufian Jusoh (Springer, 2021), 2133.
[35] Sornarajah, "Resistance to Dominance," 2154.
[36] Sornarajah, "Resistance to Dominance," 2154.
[37] Sornarajah, "Resistance to Dominance," 2154.
[38] Sornarajah, "Resistance to Dominance," 2155.
[39] Sornarajah, "Resistance to Dominance," 2155.
[40] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic (2002), ICSID Case No. ARB/02/1.
[41] CMS Gas Transmission Company v Argentine Republic (2005), ICSID case no. ARB/01/8.
[42] Enron Creditors Recovery Corp. v Argentine Republic (2007), ICSID case no. ARB/01/3.

and *Sempra*[43] at the beginning of 2000s.[44] Moreover, Mercurio has highlighted particular ways that IIL might violate public policy, like including intellectual property rights in the definition of investment.[45]

Moreover, another focal point in ISDS criticism concerns the independence and impartiality of arbitrators.[46] There is added scrutiny on arbitrators' interpretation, and the limited diversity in their appointments.[47] Empirical studies indicate a handful of arbitrators from Western countries served as both arbitrators and legal counsels, a practice referred to as "double hatting".[48]

Furthermore, another principal criticism involves inconsistency of the awards,[49] especially in the interpretation of the Fair and Equitable Treatment (FET) standard. Unlike the court system, arbitral tribunals are not bound by precedent, leading to varying interpretations.[50] In addition, this inconsistency in the awards has resulted in conflicting decisions on similar factual matters, exemplified by cases like CME v Czech Republic and Lauder v Czech Republic.[51]

Another point of contention centers on the absence of standardized criteria for awarding damages.[52] This allows tribunals to employ diverse valuation methods, leading to

[43] Sempra Energy Int'l v Argentine Republic (2007), ICSID case no. ARB/02/16.
[44] Sornarajah, "Resistance to Dominance," 2156.
[45] Bryan Mercurio, "Safeguarding public welfare?—intellectual property rights, health and the evolution of treaty drafting in international investment agreements," *Journal of International Dispute Settlement* 6, no. 2 (2015): 252-276, https://doi.org/10.1093/jnlids/idv017.
[46] Muhammad Abdul Khalique, "Analyses of the European Union and Its Member States' Proposals on Reforming the ISDS System under the UNCITRAL Working Group III" in *Green and Digital Transitions: Global Insights into Sustainable Solutions*, ed. Marianna Sávai (Faculty of Economics and Business Administration, Doctoral School in Economics, University of Szeged, 2024), 94, https://doi.org/10.14232/gtk.gdtgiss.2024.5.
[47] Giorgetti et al., "Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 441-474, https://doi.org/10.1163/22119000-12340178.
[48] Langford et al., "The revolving door in international investment arbitration," *Journal of International Economic Law* 20, no. 2 (2017): 301-332, https://doi.org/10.1093/jiel/jgx018.
[49] Nagy, Csongor István, "Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns," *Centre for International Governance Innovation, Investor-State Arbitration Series*, Paper No. 16 (2016): 14-15, https://ssrn.com/abstract=2869995.
[50] Zhu, Ying, "Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development," *Natural Resources Journal* 58, no. 2 (2018): 319-364, https://www.jstor.org/stable/26509981.
[51] De Brabandere, Eric, "(Re) Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration," *Boston College Law Review* 59, no. 8 (2018): 2607, https://ssrn com/abstract=3681449.
[52] Marboe, Irmgard, "Damages in Investor-State Arbitration: Current Issues and Challenges," *Brill Research Perspectives in International Investment Law and Arbitration* 2, no. 1 (2018): 1–86, https://doi org/10 1163/24055778-12340004.

inconsistent decisions.[53] The case of *CME Czech Republic B.V. v. Czech Republic*[54] illustrates this concern, as the awarded compensation substantially surpassed the actual value of the investment.

Another concern involves the intervention into a host State's domestic proceedings, challenging its sovereignty.[55] For instance, in the *Puma Energy Holdings v. Benin* case, the emergency arbitrator directed Benin's executive authority to prevent its judiciary from enforcing a judgment until the resolution of the arbitral dispute.[56] Additionally, critique extends to restricting a State's regulatory authority through regulatory chill, where evidence may be limited but indicates its existence.[57]

Moreover, ISDS is criticized for its bias toward foreign investors, providing them the right to initiate proceedings while restricting direct access for States.[58] The *Ubraser Case*[59] at ICSID showcases this bias, with States expressing that counterclaims is the available remedy. Another criticism asserts that ISDS primarily protects resourceful investors due to the significant legal and administrative costs.[60] This affects both claimants and respondent States.

Furthermore, criticism is raised for its lack of transparency, with no limited public access to proceedings. The historical context illustrates that this issue wasn't a significant consideration during the peak period of IIA signings.[61]

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[53] The IBA Arbitration Subcommittee on Investment Treaty Arbitration, "Consistency, efficiency and transparency in investment treaty arbitration," November, 2018, https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.
[54] CME Czech Republic B.V. v. The Czech Republic (2000).
[55] Goldhaber, Michael D., "The rise of arbitral power over domestic courts," *Stanford Journal of Complex Litigation* 1, no. 2 (2012): 374.
[56] Touzet et al., "The investor-state dispute settlement system: the road to overcoming criticism," *Kluwer Arbitration Blog*, August 6, 2018, https://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism/.
[57] Jonathan Bonnitcha, *Substantive protection under investment treaties* (Cambridge University Press, 2014), 154.
[58] Joost Pauwelyn, "At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed," *ICSID Review* 29, no. 2 (2014): 373. https://doi.org/10.1093/icsidreview/siu001.
[59] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.
[60] Lee M. Caplan, "Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises," in *The Future Of Investment Arbitration*, ed. Catherine A. Rogers, and Roger P. Alford (Oxford University Press, 2023), 297.
[61] Julie A. MAUPIN, "Transparency in international investment law: the good, the bad, and the murky," in *Transparency in International Law*, ed. Andrea Bianchi, and Anne Peters (Cambridge University Press, 2013), 151-152.

In addition, another source of concern is high cost and duration of a case, which may continue for several years.[62] Moreover, winning party often find itself with substantial bills as arbitral tribunals typically avoid issuing orders for the reimbursement of its legal expenses. According to the findings of Noam Zamir, the average costs in investor-State arbitration amount to approximately 10–11 million USD for both claimant and respondent.[63] This issue is one of the central issues for the UNCITRAL WGIII.

Mounting concerns and criticisms have prompted reform efforts within UNCITRAL and ICSID. ICSID began the process of updating its rules and regulations in October 2016.[64] Meanwhile, UNCITRAL's WGIII was tasked with discussing and recommending potential ISDS reforms at its 50th Session in 2017.[65] In reality, stakeholders hold diverse views on how to approach the reform. Research categorizes them into three main groups: incrementalists, systemic reformers, and paradigm shifters.[66]

The above-mentioned international investment law climate has certainly prompted some actions by the States. Some States opted out, e.g. Indonesia, India[67], South Africa[68], from the BITs and some withdrawn from the ICSID Convention, e.g. Bolivia, Ecuador, Venezuela[69]). Moreover, the growing concerns about international investment law, the criticisms of ISDS, and the ongoing reform initiatives have provided the space for further research to delve into the ISDS system's weaknesses and explore possible solutions.

It is against this backdrop of heated discussions and ongoing reform efforts, the question arises about the need for reforming the international investment dispute settlement system,

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[62] Zárate et al., "Duration of investor-state dispute settlement proceedings," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 309.

[63] Noam Zamir, "The Issue of Costs: How Much Does ISDS Cost and Who Bears the Cost?," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, Sufian Jusoh (Springer, 2021), 1456.

[64] International Centre for Settlement of Investment Disputes (ICSID), "Proposals for Amendment of the ICSID Rules," Working paper # 3, Volume 1 (August, 2019): 1, https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf.

[65] United Nations (UN), "Report of the United Nations Commission on International Trade Law," Fiftieth session, 3-21 July 2017, UN Doc. A/72/17.

[66] Anthea, Roberts, "Incremental, systemic, and paradigmatic reform of investor-state arbitration," *American Journal of International Law* 112, no. 3 (2018): 410, https://doi.org/10.1017/ajil.2018.69.

[67] The Hindu, "India's bilateral investment pacts under cloud," Businessline, April 9, 2017, http://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece.

[68] Talkmore Chidede, "Investment policy reforms in Africa: How can they be synchronised?," Tralac, June 22, 2017, https://www.tralac.org/discussions/article/11779-investment-policy-reforms-in-africa-how-can-they-be-synchronised.html.

[69] Lars Markert and Catherine Titi, "States strike back – old and new ways for host states to defend against investment arbitrations," in *Yearbook on international investment law & policy 2013–2014*, ed. Andrea K. Bjorklund (Oxford University Press, 2015), 427.

specifically the ISDS. Moreover, considerations include examining the viability of the reforms proposed by UNCITRAL WGIII and the necessary elements that should be integrated into any reform process.

To undertake these examinations, this dissertation studies historical evolution of international investment law and ISDS through the lens of the Third World Approaches to International Law (TWAIL) to showcase the links between past and present. Moreover, the dissertation emphasizes to highlight the positions of the developing countries, and whether the reform would be able to address the historical tensions between the developed and developing countries. Although developed and developing countries might share mutual concerns on some of the issues, and they might opt for similar reforms on some of the issues; however, there are many issues that they differ, and there are many fault lines that need to be addressed to achieve lasting solution. This dissertation will delve into such areas to identify the issues and recommend solutions.

2 Literature review

In recent years, there has been a significant increase in scholarly interest towards the investment treaty system. This surge in interest has led to the adoption of a broader range of theories and methodologies, pushing the frontiers of knowledge in multiple aspects of the investment treaty system.

Sabahi, Laird, and Gismondi [70] argue that a thorough understanding of the origins, functioning, and evolution of the investment treaty system goes beyond a mere analysis of the formal legal texts. To achieve a comprehensive perspective, one must take into account the various actors and entities involved in driving the system's development and shaping its norms and values. Recognizing the significant role played by these stakeholders is essential for a complete assessment of the international investment law regime, contributing to a more holistic understanding.

Throughout history, economic laws have played a pivotal role in upholding economic policies and disseminating dominant economic ideologies.[71] The modern framework for

[70] Sabahi et al., "International investment law and arbitration: History, modern practice, and future prospects," *Brill Research Perspectives in International Investment Law and Arbitration* 1, no. 1 (2018): 1-64.
[71] Ejan Mackaay, "History of law & economics (0200)," in *Encyclopedia of law and economics*, ed. Boudewijn Bouckaert, and Gerrit De Geest (Edward Elgar Publishing, 2000), 65.

safeguarding foreign investments, particularly through bilateral investment treaties (BITs), conforms to this pattern and bears the imprint of the economic liberal principles that originated in the Eighteenth Century, spearheaded by Adam Smith and his peers.[72]

Advocates of positive law advocate for its independence from external factors. They believe that once States agree on treaty terms, these terms should evolve autonomously, free from external manipulation. Classical positivist theory holds that international lawyers should interpret the law objectively, as these rules reflect the genuine intentions of States. Simma and Paulus emphasize that this system of rules constitutes an "objective" reality distinct from the idealized concept of law.[73] Sornarajah, however, argues that the positivist stance of moral and political neutrality can obscure the interests of powerful entities and the role of power in shaping the law. This approach enables the masking of power dynamics that influence rule formation by neglecting factors beyond the legal framework.[74] Moreover, Anthea Roberts observes that in contemporary international investment law, various interested parties contribute to shaping the system and its rules.[75]

In recent times, several analysts have sought to construct comprehensive theories in an effort to provide a rational framework for the contemporary international investment law system, with the goal of enhancing clarity and coherence. Joost Pauwlyn proposes that the current investor-State arbitration mechanism does not constitute a system within the realm of international law.[76] Jose Alvarez underscores the significant extent to which international investment flows have been formalized through legal means. This movement toward legal structures parallels other international regimes, progressing in terms of heightened levels of obligation, precision, and delegation.[77]

Dolzer and Schreuer argue that international investment law is intricately connected to general international economic law, challenging its classification as a distinct set of principles. Despite this relationship, the nature, structure, and purpose of international

[72] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press, 2015), 18, 296.
[73] Bruno Simma, and Andreas L. Paulus, "The responsibility of individuals for human rights abuses in internal conflicts: a positivist view," *American Journal of International Law* 93, no. 2 (1999): 304.
[74] Sornarajah, *Resistance and Change*, 20.
[75] Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System," *American journal of international law* 107, no. 1 (2013): 53.
[76] Pauwelyn, "Edge of Chaos," 372.
[77] José E. Alvarez, *The public international law regime governing international investment*, Vol. 344 (Martinus Nijhoff Publishers, 2011), 24.

investment law exhibit distinctive features within the broader international context.[78] Douglas characterizes the system as a "hybrid" due to the interplay between public international law and domestic law.[79] Kingsbury and Schill view it as part of an emerging global administrative law,[80] while Montt sees it as a specific type of global administrative law.[81] Van Harten regards the system as a subset of public law, emphasizing the State-individual paradigm inherent in modern investment treaty cases.[82] Kahn and Wälde underscores the importance of drawing analogies from similar areas of law to comprehend and refine the system[83], ultimately, Wälde views it as an external discipline and a tool for fostering good governance.[84] Schill, focusing on most favored nation clauses, suggests that bilateral investment treaties contribute to the establishment of a unified and comprehensive multilateral investment system.[85] In contrast, Roberts supports the *sui generis nature* of international investment law, contending that it is likely to incorporate insights from various paradigms rather than relying on a singular approach.[86]

With the increasing complexity of international regimes, scholars are turning their attention to regime complexes, characterized as collections of partially overlapping and non-hierarchical institutions governing specific issue areas.[87] The investment treaty system is now widely recognized as a complex adaptive system or regime complex.[88] Sergio Puig extends this understanding by identifying a more comprehensive regime complex that includes both trade and investment agreements.[89] Bonnitcha, Poulsen, and Waibel present

[78] Dolzer et al., *Principles of international investment law* (Oxford University Press, 2022), 18, 25, 342.
[79] Douglas Zachary, "The hybrid foundations of investment treaty arbitration," *The British Year Book of International Law* 74, no. 1 (2004): 152-53.
[80] Benedict Kingsbury, and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *Institute for International Law and Justice*, September 2, 2009, http://dx.doi.org/10.2139/ssrn.1466980.
[81] Santiago Montt, *State liability in investment treaty arbitration: global constitutional and administrative law in the BIT generation* (Bloomsbury Publishing, 2009), 4.
[82] Gus Van Harten, "The public—private distinction in the international arbitration of individual claims against the state," *International & Comparative Law Quarterly* 56, no. 2 (2007): 372, https://doi.org/10.1093/iclq/lei168.
[83] Kahn, Philippe, and Thomas W. Wälde, *Les aspects nouveaux du droit des investissements internationaux= New aspects of international investment law* (Martinus Nijhoff, 2007).
[84] Thomas Wälde, "Investment Arbitration as a Discipline for Good Governance: Overview and Epilogue," *Oil, Gas & Energy Law* 2, no. 2 (2004): 475, https://doi.org/10.1163/9789004479975_024.
[85] Stephan W. Schill, *The multilateralization of international investment Law*, (Cambridge University Press, 2009), 15-16, 368.
[86] Roberts, "Clash of Paradigms," 94.
[87] Orsini et al., "Regime complexes: A buzz, a boom, or a boost for global governance?," *Global governance* 19 (2013): 28-29. Robert O. Keohane, and David G. Victor, "The regime complex for climate change," *Perspectives on politics* 9, no. 1 (2011): 8. https://doi.org/10.1017/S1537592710004068.
[88] Pauwelyn, "Edge of Chaos?," 381-82.
[89] Sergio Puig, "International regime complexity and economic law enforcement," *Journal of International Economic Law* 17, no. 3 (2014): 493, https://doi.org/10.1093/jiel/jgu028.

the system as the investment treaty regime within the broader context of an investment regime complex.[90] Joost Pauwelyn utilizes insights from complexity science to illustrate the gradual evolution of the investment treaty system through a series of small, historically contingent, and occasionally accidental steps, now functioning as a predominantly decentralized system.[91]

As international investment law has evolved, standards for safeguarding investments have gained prevalent acceptance and have been incorporated into bilateral investment treaties (BITs) and other international investment agreements. The rapid expansion of these agreements has occurred since the early 1990s. While these substantive protections have been coupled with investor-State arbitration as the preferred dispute resolution mechanism over national litigation, concerns have been raised regarding this protection system's perceived legitimacy issues and inherent bias towards foreign investors.[92]

Early interpretations of the investment treaty system often relied on the assumption that States, acting as rational actors, could foresee the consequences of entering into investment treaties and could tailor them to optimize mutual benefits.[93] This perspective has been the subject of further research. For example, Alan Sykes proposes an economic rationale for International Investment Agreements (IIAs), based on the notion that parties would only enter into IIAs if they anticipate being better off with IIAs than without IIAs. An economic theory of IIA formation, therefore, involves identifying sources of mutual benefit, the inefficiencies that these agreements aim to address.[94] While Sykes does not claim that IIA perfectly promote efficiency, he argues that well-drafted and interpreted treaty provisions can alleviate various inefficiencies that would arise in their absence, with numerous existing IIA rooted in this economic logic.[95] However, research along these lines faces challenges, given evidence suggesting that IIA may not address inefficiencies as anticipated, particularly

[90] Bonnitcha et al., *The political economy of the investment treaty regime* (Oxford University Press, 2017), 6-7.
[91] Pauwelyn, "Edge of Chaos?," 374.
[92] UN Trade and Development, "Reform of Investor-State Dispute Settlement: in Search of a Roadmap," no. 2 (June, 2013): 10. https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.
[93] Elkins et al., "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000," University of Illinois Law Review 2008, no. 1 (2008): 301.
[94] Alan O. Sykes, "The economic structure of international investment agreements with implications for treaty interpretation and design," *American Journal of International Law* 113, no. 3 (2019): 483, https://doi.org/10.1017/ajil.2019.25.
[95] Alan O. Sykes, "The economic structure of international investment agreements with implications for treaty interpretation and design," *American Journal of International Law* 113, no. 3 (2019): 483-84, https://doi.org/10.1017/ajil.2019.25.

in instances where investment flows do not correlate with the presence of IIA. Scholars have started questioning why States sign these agreements if there is no additional investment.

Subsequent studies sought to respond to this question by revising the premises underlying rational choice explanations. For example, Poulsen departed from the assumption of rationality by incorporating the concept of cognitive biases, proposing that decision-makers often systematically underestimate the drawbacks and overestimate the advantages of concluding investment treaties.[96]

An alternative viewpoint highlights the importance of power imbalances and concentrates on distributional issues, scrutinizing who benefits and who suffers within the investment treaty system. A pivotal aspect of this perspective involves identifying and denouncing links between imperialism and the current investment treaty system. As Olabisi Akinkugbe aptly states, the critique revolves around rejecting the neo-colonial continuities evident in governance mechanisms and the asymmetry that characterizes the interactions between foreign investors and host States.[97]

Extensive scholarly inquiry has explored the intersections between imperialism and investment treaties, underscoring persistent conflicts of interest between capital-exporting and host States, as well as investors and local communities.[98] This perspective views present-day disputes as echoes of historical power struggles that have influenced international investment law since at least the 19th century, if not before. Some scholars assert that these struggles are inherent to capitalism, contending that formal imperialism represented just one manifestation of capitalism's relentless expansionist tendencies. Moreover, they argue that the argumentative frameworks in international law used to legitimize imperialism that continue to shape contemporary discussions.[99]

Scholars who focus on continuity highlight an ongoing power struggle between influential actors seeking investment protection and other stakeholders, a conflict that persists despite shifts in political landscapes and ideologies. Sornarajah, after outlining this persistent

[96] Lauge N. Skovgaard Poulsen, *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries* (Cambridge University Press, 2015), 17-18.
[97] Olabisi D. Akinkugbe, "Africanization and the reform of international investment law," *Case Western Reserve Journal of International Law* 53, no. 1 (2021): 8, http://dx.doi.org/10.2139/ssrn.3766357.
[98] David Schneiderman, *Investment Law's Alibis*, Vol. 168 (Cambridge University Press, 2022). Miles, *origins of International Investment*. Sornarajah, "Resistance to Dominance." Sornarajah, *Resistance and Change*. Sornarajah, *International Law on Foreign*. Van Harten, "Is It Time."
[99] Schneiderman, *Investment Law's Alibis*, 4. Ntina Tzouvala, *Capitalism as civilisation: a history of international law*, Vol. 142 (Cambridge University Press, 2020), 6.

struggle, asserts that the expansion of the investment treaty system in the 1990s was fueled by the adoption of neoliberalism among influential actors. This ideological stance, characterized by a strong preference for market, trade, and investment liberalization, played a pivotal role in driving the system's growth.[100] According to Sornarajah, powerful States actively promoted the expansion of the investment treaty system with the explicit objective of establishing a legal framework exclusively focused on investment protection, ensuring that this objective remained uncompromised by other considerations.[101] Sornarajah contends that the impact of neoliberalism on the investment treaty system is apparent in the broad interpretation of standards for investment protection.

Supporters of this viewpoint assert that the primary emphasis of the investment treaty system has been on protecting the concerns of foreign investors, frequently at the expense of other vital considerations, including human rights, environmental conservation, and broader public interests.[102] This disparity is noticeable in the design of investment treaty arbitration, where investors have direct access to international tribunals to contest government actions, while local communities frequently lack avenues for redress.[103] Another criticism is that investment treaties can unduly restrict a country's regulatory authority, potentially chilling the enactment of measures aimed at protecting public health or the environment due to the fear of investor-State disputes.[104]

Calls for transformative reform and a rethinking of the global economic structure is notably prominent among scholars from the global south. They contend that the existing system sustains exploitative and unequal patterns, advocating instead for an investment framework that is more fair, inclusive, and in line with the principles of sustainable development.[105]

Initially, the European Union championed the UNCITRAL reform process with the goal of establishing a multilateral investment court to supplant ISDS.[106] However, it became

[100] Sornarajah, *Resistance and Change*, 9.
[101] Sornarajah, *Resistance and Change*, 8.
[102] Sornarajah, *Resistance and Change*, 7.
[103] Nicolás M Perrone, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime," *AJIL Unbound* 113 (2019): 17, https://doi.org/10.1017/aju.2018.92.
[104] Tanaya Thakur, "Reforming the investor-state dispute settlement mechanism and the host state's right to regulate: a critical assessment," *Indian Journal of International Law* 59, no. 1 (2021): 176, https://doi.org/10.1007/s40901-020-00111-2.
[105] Anthea Roberts, and Taylor St John, "Complex designers and emergent design: reforming the investment treaty system," American Journal of International Law 116, no. 1 (2022): 106, https://doi.org/10.1017/ajil.2021.57.
[106] Anthea Roberts, and Taylor St John, "The originality of outsiders: Innovation in the investment treaty system," *European Journal of International Law* 33, no. 4 (2022): 1156, https://doi.org/10.1093/ejil/chac065.

apparent that a single reform initiative would not gain widespread support due to the diverse perspectives on how to address ISDS's limitations. While some countries advocated for improving ISDS through incremental reforms, others endorsed a complete overhaul by replacing ISDS with an international court. A more radical approach proposed dismantling the entire investment treaty regime and eliminating ISDS altogether. Still others endorsed a combination of these reform options.[107]

The incremental and evolutionary approach to lawmaking is made possible by UNCITRAL's decision-making process and flexible working techniques. According to some scholars, incrementalism is cornerstone of UNCITRAL's functioning.[108] Their examination of three different areas of UNCITRAL's legislative activity demonstrates a dynamic incrementalism that has allowed the body to increase its legitimacy, gain more resources, and broaden its purview.[109]

Many in the field of investment law presume that incremental reforms are intended to maintain the status quo. Academics and observers from civil society are concerned that gradual corrective actions could unintentionally reinforce an unstable system.[110] For example, Verbeek cautions that there is a genuine chance that the UNCITRAL process would provide middle-ground solutions that do not deal with the core weaknesses of the ISDS system, thereby allowing the problems to continue and gain legitimacy.[111] Johnson and Cotula also note that putting practicality and adaptability first may help address some of ISDS's current issues. This strategy, nevertheless, restricts a more comprehensive conversation about designing a global framework that can successfully address the social, environmental, and economic issues of today.[112] An incremental approach, according to these critics, stifles the movement toward more extensive reform or perhaps the system's outright elimination. Roberts and St. John points out, however, that a significant group of

[107] Roberts, "Incremental, Systemic, and Paradigmatic," 410.
[108] Susan Block-Lieb, and Terence C. Halliday, *Global lawmakers: International organizations in the crafting of world markets* (Cambridge University Press, 2017), 80–91.
[109] Block-Lieb, *Global lawmakers*, 83.
[110] Sachs et al., "The UNCITRAL Working Group III Work Plan: Locking in a Broken System?," *Columbia Center on Sustainable Development Blog*, May 4 2021, https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system.
[111] Bart-Jaap Verbeek, "The limitations of the UNCITRAL process on ISDS reform," *The Centre for Research on Multinational Corporations*, October 30, 2018, https://www.somo.nl/the-limitations-of-the-uncitral-process-on-isds-reform/.
[112] Lise Johnson, and Lorenzo Cotula, "Guest Post: Pragmatism and flexibility in UNCITRAL Working Group III: Too much of a good thing?," *International Economic Law and Policy Blog*, February 05, 2020, https://ielp.worldtradelaw.net/2020/02/guest-post-pragmatism-and-flexibility-in-uncitral-working-group-iii-too-much-of-a-good-thing.html.

States do view gradual modifications as a means of stabilizing the system rather than altering it.[113]

The UNCITRAL reform approach's adaptable framework would allow individual governments to choose the reforms they wish to implement and make changes to their reform choices and strategies over time. Rather than crafting a single optimal design, this adaptable approach is based on the recognition that States may continue to diverge in their approaches, allowing the instrument to evolve and remain flexible over time.[114]

UNCITRAL adopted a work plan in 2021 with the objective of advancing ISDS reform through the exploration of various procedural and structural reform options. Although the majority of substantive topics are not included at this time, they might be in the future.[115] The underlying premise of the work plan is to integrate these changes into a multilateral instrument, granting governments the flexibility to choose which reforms to endorse based on specific treaties.[116]

The UNCITRAL reform process has drawn polarized opinions. Some arbitrators consider it ill-conceived and overly ambitious,[117] while others argue that it falls short of addressing key concerns. A number of academics and non-governmental organizations (NGOs) criticize the process's focus on procedural issues and its failure to tackle substantive issues.[118]

UNCITRAL participants recognize the complexities of ISDS and strive for meaningful reforms while acknowledging limitations in control and prediction. Reform efforts extend beyond UNCITRAL. There are also ICSID[119] and UNCTAD[120] initiative.

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[113] Roberts, "Complex designers," 131.
[114] Roberts, "Complex designers," 132-33.
[115] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements," Fortieth session, 4–5 May 2021, UN Doc. A/CN.9/WG.III/WP.206.
[116] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform," Thirty-ninth session, 30 March–3 April 2020, UN Doc. A/CN.9/WG.III/WP.194.
[117] Charles N. Brower, and Jawad Ahmad, "Why the demolition derby that seeks to destroy investor-state arbitration," *Southern California Law Review* 91, no. 6 (2017): 1139-1195, https://southerncalifornialawreview.com/wp-content/uploads/2018/10/91_6_1139.pdf.
[118] Johnson, *Pragmatism and Flexibility*.
[119] International Centre for Settlement of Investment Disputes (ICSID), "About the ICSID Rule Amendments," Accessed November 7, 2024, https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about.
[120] UN Trade and Development (UNCTAD). "UNCTAD's Reform Package for the International Investment Regime: 2018 edition." Accessed November 7, 2024. https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.

3 Research questions

The following research questions are considered to examine critical aspects of international investment law and dispute settlement, addressing key issues and exploring potential avenues for reform. Moreover, these research questions aim to contribute to a critical understanding of international investment law, its evolution, and the prospects for reform in the context of ISDS.

1. *What conclusions can be drawn from the evolution of international investment law?*

This research question seeks to evaluate the evolution of international investment law and draw conclusions about its implications and developments over time.

2. *What conclusions can be derived from the assessment of dispute settlement systems of international investment law?*

This research question aims to analyze the dispute settlement systems of international investment law, focusing specifically on the investor-State dispute settlement systems. Moreover, through the analyses of merits and demerits, the research draws important conclusions to understand the positions of different stakeholders.

3. *Are there reasons to reform the current investor-Sate dispute settlement (ISDS) or shift from current system?*

This research question evaluates current ISDS system and examines whether there are grounds for reform or a shift to an alternative system. It seeks to identify and analyze the shortcomings, and criticisms of the existing ISDS mechanism, contributing to the discourse on prospective improvements in the field of international investment law.

4. *What lessons can be taken from the World Trade Organization (WTO) dispute settlement system to inform the current reform of the ISDS?*

This research question aims to examine the WTO dispute settlement system to inform the ongoing reform of the ISDS system. By analyzing the strengths and weaknesses of the WTO system, the research seeks valuable lessons for the improvement of the ISDS, shaping to establish a more effective and equitable international investment dispute resolution framework.

5. *What conclusions can be drawn from the examination of reform proposals and UNCITRAL WGIII drafts? To what extent these can resolve the problems associated with the current ISDS?*

This research question aims to evaluate the strengths and weaknesses of the reform proposals of various stakeholders and drafts prepared by the UNCITRAL WGIII regarding ISDS reform. Through these analyses, the research seeks to examine their potential effectiveness in addressing the existing problems.

4 Research methodology

The methodology selected for this thesis is legal analysis which falls under the broad category of the qualitative legal research. This method is selected to analyze the problems of investor-State dispute settlement, to determine the existing law in this area, and to examine the reform proposals. This method integrates various interpretive approaches to comprehend and apply the law. It is considered a flexible method that provides the scope to incorporate multiple perspectives. Moreover, this is useful to address ambiguity or novelty in legal questions.

This thesis also utilizes the third world approaches to international law (TWAIL). This dissertation examines various perspectives of the diverse stakeholders, particularly focusing on the perspectives of the developing and least developed countries. To do that utilizing the TWAIL approach is helpful as well as necessary for this study. According to Antony Anghie, TWAIL serves not as a fixed methodology but as an analytical tool, facilitating examination of significant issues. It addresses inquiries such as how international law can be employed to examine concerns of the peoples of the Third World and investigates the effects of specific rules or legal frameworks on empowerment or disempowerment within these regions. Whether studying international investment law, environmental law, or international financial institutions, these common inquiries characterizes TWAIL scholars. [121] Moreover, Appiagyei-Atua describes that the TWAIL is focused on uncovering the injustices and

[121] Antony Anghie, "Twail: Past and Future," *International Community Law Review* 10, no. 4 (2008): 480, https://doi.org/10.1163/187197308x36663.

contradictions present embedded within international law.[122] Furthermore, TWAIL focuses on the postcolonial approaches of international law, seeking to examine the diverse political, economic, and social imbalances that originated during the colonial era and have persisted and expanded ever since.[123]

TWAIL's attention to the postcolonial nature of international law aims therefore to uncover, and as we shall see, also to redress, the broad array of political, economic and social asymmetries that were inaugurated in the process of colonization, and which have proliferated across the globe since then.

This thesis also employs the law reform research. This is defined by Ian Dobinson and Francis Johns as:

> A consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, for example, the flaws in such policy. This in turn may lead the researcher to propose changes to the law (law reform).[124]

The law reform research is selected to examine reform initiative in the UNCITRAL WGIII under the framework of international investment law and international law.

This study centers on international instruments, specifically BITs, FTAs, the ICSID convention, and decisions from international investment law arbitrations, as pertinent references. Additionally, UNCITRAL WGIII documents and scholarly works constitute significant part of references due to the chosen research methodology.

5 Limitations of the research

While aiming to comprehensively analyze international investment law, propose reforms, and contribute to existing literature, it's crucial to acknowledge the study's limitations. The multifaceted nature of international investment law makes a comprehensive examination

[122] Kwadwo Appiagyei-Atua, "Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review," *African Journal of Legal Studies* 8, no. 3–4 (2015): 210, https://doi.org/10.1163/17087384-12342063.
[123] Luis Eslava, and Sundhya Pahuja, "Beyond the (Post)Colonial: Twail and the Everyday Life of International Law," *Verfassung in Recht und Übersee* 45, no. 2 (2012):198, https://doi.org/10.5771/0506-7286-2012-2-195.
[124] Ian Dobinson, and Francis Johns, "Legal Research as Qualitative Research," in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui (Edinburgh University Press, 2017), 22.

challenging within this research's scope. Certain issues may receive less scrutiny, and ongoing changes, new treaties, and evolving global dynamics continually shape international investment law. Additionally, limited access to data, such as confidential arbitration proceedings, may restrict analysis depth and lead to potential oversights.

Assessing reform proposals involves subjective judgment, influenced by the researcher's perspective. Despite efforts to maintain a balanced analysis, varying stakeholder opinions on proposed reforms may exist. On the other hand, implementing reforms at the international level poses practical challenges not fully explored in this research.

Reforming international investment law carries the risk of unintended consequences, with potential unforeseen effects on the global investment landscape. Furthermore, the willingness of States and international organizations to adopt proposed reforms depends on political dynamics and shifting priorities, beyond this research's scope.

Addressing the multifaceted issues in international investment law requires an interdisciplinary approach. While attempting to encompass various dimensions, the research may not fully capture each discipline's depth. Despite limitations, this research aims to provide valuable insights, address critical issues, and propose reforms contributing to ongoing discourse on international investment law. Acknowledging its boundaries, the study inspires further research and dialogue for a more equitable and effective international investment regime.

Chapter II: Evaluating the evolution of international investment law

1 Introduction

Over the last few years, there has been a considerable rise in interest concerning the history of international law.[125] Within international investment law (IIL) scholarship, there is a growing attention on historical inquiries.[126] The exploration of the origins and development of contemporary investment law issues continues to attract significant scholarly studies.[127] Moreover, scholars arguing for changes in international investment law have increasingly looked to history to explain their recommendations.

One historical account on international investment law describes that its central principles developed progressively and incrementally since the 19th century from challenges faced by foreign investors mainly from capital-exporting States.[128] Diplomatic efforts sought a minimum standard of treatment and the right to diplomatic protection for violation of that standard. Arbitration emerged as a key means to resolve disputes from the experience of effective application in the 19th-20th century. Throughout the 20th century, treaties and negotiations developed international investment law. Moreover, it follows with the widespread adoption of BITs and the establishment of the ICSID in 1965. This perspective also portrays international investment law as instrumental in advancing economic growth and rule of law.[129]

Another historical account on international investment law finds its roots in European imperial expansion in the 17th century.[130] This perspective stresses that the linking of private investor interests with State lead to the incorporation of investment safeguard in customary international law. Disagreements to this protection arose during the 19th and the first half of 20th centuries, particularly from Latin American States supporting the equal treatment.[131]

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[125] Martti Koskenniemi, , "Histories of international law: significance and problems for a critical view," *Temple International and Comparative Law Journal*, 27, no. 2 (2013): 215, https://sites.temple.edu/ticlj/files/2017/02/27.2.Koskenniemi-TICLJ.pdf.
[126] Schill et al., "International investment law and history: An introduction," in *International Investment Law and History*, ed. Stephan W. Schill, Christian J. Tams, and Rainer Hofmann (Edward Elgar Publishing, 2018), 16.
[127] Schill, "International investment law," 11.
[128] Felipe F. Cole, "Race and the History of International Investment Law," *The University of Chicago Law Review*, 2022. https://lawreview.uchicago.edu/online-archive/race-and-history-international-investment-law.
[129] Cole, "Race and the History."
[130] Kate Miles, *The origins of international investment law: empire, environment and the safeguarding of capital* (Cambridge University Press, 2013), 2.
[131] Miles, *Origins of International*, 69.

Despite the resolution on permanent sovereignty over natural resources, the NIEO, and the CERD; the ICSID Convention and BIT regime continued to prioritize investor rights promoting the position of capital-exporting States. This reflects a broader assertion of imperial power rather than a sincere cooperation for economic progress.[132]

This viewpoint suggests that the current international investment law framework has negatively affected economic growth and the rule of law. It criticizes foreign investment for exacerbating unequal growth and advancing only a few diminishing valuable but limited resources in the process. Moreover, it showcases the asymmetries between the parties.[133] Furthermore, it also highlights how investment arbitration favors investors and undermines State sovereignty and regulatory authority.

In essence, both accounts differ in their interpretation of history's applicability to the current international investment law framework. One view sees international investment law developing from imperial expansion to a nonviolent legal system enforcing investor rights. In contrast, the other view insists that this persistent focus on investor protection over host States' rights stems from historical roots and is embedded in modern international investment law framework.

Not only in scholarly debates, but also in many arbitrations, historical reasoning plays a significant role. The tribunals often depend on past case law as a basis of argument and persuasive precedent. This sometimes become decisive.[134] Such references can be found in the inaugural investment treaty arbitration case *AAPL v. Sri Lanka*[135], where the tribunal significantly referred to pre-World War II cases for the analysis.[136] These historical references fulfilled various objectives, e.g., forming the arguments of the interpretation, bearing the legacy of the past, and informing about legal principles for the contemporary disputes.

Recent scholarly works have analyzed the historical roots of international investment law, providing understandings of its evolution, role of capital-exporting and importing States, and embedded unfairness.[137] Nissel thinks that arbitrators' dependence on positive law

[132] Miles, *Origins of International*, 69.
[133] Cole, "Race and the History."
[134] Schill, "International investment law," 11.
[135] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1987), ICSID Case No. ARB/87/3.
[136] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (1990), Final Award, paras. 39, 40. ICSID Case No. ARB/87/3.
[137] Schill, "International investment law," 12.

arguments and the backing of scholars contributed to this evolution.[138] Moreover, scholars associated with 'Third World Approaches to International Law' (TWAIL) reveal biases stemming from political, cultural and economic factors.[139] They critique simplistic interpretations of international law that hinder a more emancipated legal future.[140]

I will employ The Third World Approaches to International Law[141] to analyze the historical development from the perspective of third world States, which generally fall in the group of developing States or capital importing States. It prompts a reevaluation of international law's colonial roots and contemporary implications. Particularly the writings of Anghie[142] and Koskenniemi[143], after illustrating how ideas and concepts were emerged from colonial encounters, they presented how to locate continuity of that encounters.[144] Anghie, especially, emphasizes how imperialism has influenced global affairs since the 16th century.[145] Although TWAIL approach is dismissed as historical, he maintains that this goes beyond history, and it has ontological importance. He advocates for a critical understanding and insists that such approach of history is vital for guaranteeing equitable treatment of formerly colonized States in the current world order.[146]

TWAIL scholars maintain that the colonization process of the 16th to 19th centuries, and its associated economic system, continues to apply influence.[147] According to Koskenniemi, many of the general principles of international law originated in Europe.[148] If these

[138] Tzvika A. Nissel, "A History of State Responsibility: The Struggle for International Standards (1870–1960)." (PhD diss., University of Helsinki, 2016). https://helda.helsinki.fi/items/24fc7267-6341-48ba-b181-9151febe1cb2.
[139] Luis Eslava, and Sundhya Pahuja, "Beyond the (post) colonial: TWAIL and the everyday life of international law," *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 45, no. 2 (2012): 195, https://www.jstor.org/stable/43256852.
[140] Schill, "International investment law," 16.
[141] Bhupinder S. Chimni, "Third world approaches to international law: a manifesto," *International Community Law Review* 8, no. 1 (2006): 3, https://doi.org/10.1163/187197306779173220.
[142] Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2005).
[143] Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law 1870–1960* (Cambridge University Press, 2001).
[144] Philipp Dann, and Felix Hanschmann. "Post-colonial theories and law." *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 45, no. 2 (2012): 125. https://www.jstor.org/stable/43256847.
[145] Antony Anghie, "Towards a Postcolonial International Law," In *Critical International Law: Postrealism, Postcolonialism, and Transnationalism*, ed. Prabhakar Singh, and Benoît Mayer (Oxford University Press, 2014), 123.
[146] Anghie, "Towards a Postcolonial," 140.
[147] Eslava, "Beyond the (Post)Colonial," 196.
[148] Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," *Journal of the Max-Planck-Institute for European Legal History – Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 19, no. 19 (2011): 155, http://dx.doi.org/10.12946/rg19/152-176.

principles exist, will act as the referral to European conceptualizations.[149] He asserts that European concepts, narratives and positions continue to shape international law's structure and preserve power disparities even in the postcolonial era.[150] He also thinks that this Eurocentric approach has shaped how we comprehend international law's history and continues to affect the current global political economy.[151]

Efforts to study evolutional history or to examine international law's history from a TWAIL lens have encountered criticism for alleged 'amateurism'.[152] Orford challenges the opinion that only historical methods can generate a proper understanding of the past.[153] She argues that the genealogical nature of international law implies its capability to be transmitted and applied as a basis for argumentation.[154] Orford further maintains that containing ourselves to approved historical approaches confines critical engagement.[155] and overlooks the embedded politics within legal rules revealed by historical context.

According to Koskenniemi, there is no single and accurate context for understanding international law.[156] Instead, we must take options about the extent and magnitude of the context. Moreover, context can be availed by interpretation which is then affected by our current perspectives.[157]

In this paper, in section 2, we examine the origin of international investment law in the pre-BIT era period. In section 3, we examine the development of international investment law in the BIT era and explore the connection between the pre-BIT era and the BIT era. In section 4, we provide conclusions from the examinations.

[149] Koskenniemi, "International Law: Dealing," 155.
[150] Koskenniemi, "International Law: Dealing," 155.
[151] Koskenniemi, , "International Law: Significance," 154, 160.
[152] Randall Lesaffer, "International law and its history: the story of an unrequited love," in *Time, history and international law*, ed. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Brill Nijhoff, 2007), 34-35.
[153] Anne Orford, "International Law and the Limits of History," in *The Law of International Lawyers: Reading Martti Koskenniemi*, ed. Wouter Werner, Marieke de Hoon, and Alexis Galán (Cambridge University Press, 2017), 312.
[154] Anne Orford, "On international legal method," *London review of international law* 1, no. 1 (2013): 170, 175, https://doi.org/10.1093/lril/lrt005.
[155] Orford, "International Law," 305-6.
[156] Koskenniemi, , "International Law: Significance," 232-38.
[157] Koskenniemi, , "International Law: Significance," 230.

2 The pre-BIT era and the origins of international investment law

2.1 A brief overview of the historical developments

According to Newcombe et al., a comprehensive account of how international law has addressed the treatment of foreigners, and their assets is lacking.[158] Nevertheless, international agreements dating back to the late 18th century do contain provisions aimed at protecting foreign property.[159]

The evolution of legal framework surrounding the protection and promotion of foreign investments can be linked to historical mechanism adopted by different States to ensure the safety of their nationals and assets abroad.[160] During the pre-BIT era[161], international agreements typically focused on trade relations over safeguarding foreign direct investments. They occasionally included provisions for protecting the property.[162]

Diplomatic protection is an early mechanism for protecting foreign direct investments. This concept is credited to the ideas of Vattel. According to him, the property of the foreigners was seen as an extension of their membership in their home State, and an integral part of their home State's wealth.[163] Therefore, any injury to foreigners or their property by a State was considered an injury to the foreigners' home State.[164] Over time, this notion developed into the international legal principle known as diplomatic protection.[165]

Brownlie points out that diplomatic protection, with its origins reaching back to the Middle Ages or possibly even earlier.[166] This involves a home State seeking remedy from a host State for injury inflicted upon one of its nationals. In other words, if the host State declined to resolve the dispute through arbitration, the sole avenue available under customary law to

[158] Newcombe, Andrew Paul, and Lluís Paradell. *Law and Practice of Investment Treaties: Standards of Treatment*. (Kluwer Law International, 2009), 3.
[159] Kenneth J. Vandevelde, "A brief history of international investment agreements," *UC Davis Journal of International Law and Policy* 12, no. 1 (2005): 158, https://ssrn.com/abstract=1478757.
[160] Chittharanjan Felix Amerasinghe, *Local remedies in international law*, Vol. 31 (Cambridge University Press, 2004), 22.
[161] Pre-BIT era refers to the period that existed before the signing of the Bilateral Investment Treaty (BIT) in 1959.
[162] Vandevelde, "A brief history," 158.
[163] Emer De Vattel, *The Law of Nations; Or, The Principles of Natural Law*, vol. 4, trans. Charles G. Fenwick (Oceana, 1964), 93.
[164] Francisco V. García-Amador, *The Changing Law of International Claims* (Oceana, 1984), 46.
[165] Newcombe, *Law and Practice*, 4.
[166] Ian Brownlie, *Brownlie's principles of public international law*, trans. James Crawford (Oxford University Press, 2019), 610.

enforce diplomatic protection was by means of espousal.[167] This practice of States remained predominant during the 18th and 19th centuries.[168]

In the practice of diplomatic protection, States didn't just rely on settling claims through diplomacy or force. They also established special commissions as well as arbitral tribunals.[169] This approach has roots in the 1794 Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America, also known as *the Jay Treaty*.[170] Among its provisions, the treaty created a commission to address claims related to the treatment of nationals of the parties.[171] Moreover, during the latter half of the 18th century and first half of the 19th century, numerous States formed over sixty arbitral commissions to resolve disputes arising from injuries sustained by foreign nationals.[172] Alongside these, many *ad hoc* tribunals were set up to address particular claims.[173] Regardless of the focus on individual losses to safeguard personal rights, these claims commissions generally adhered to a diplomatic protection model.[174] This meant that the proceedings involved States as the primary parties, excluding direct participation from individuals.

The Treaties of Friendship, Commerce, and Navigation, known as FCN treaties, were one of the earliest forms of treaty practice that included some provisions related to the treatment of aliens. In 1778, the United States and France signed the first FCN treaty.[175] These early FCN treaties were primarily focused on trade matters, providing most-favored-nation treatment.[176] Moreover, within these treaties, 'special protection'[177] or 'full and perfect

[167] Vandevelde, "A brief history," 160.
[168] Newcombe, *Law and Practice*, 7.
[169] Newcombe, *Law and Practice*, 7.
[170] Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America, 1794.
[171] Alexander Marie Stuyt, *Survey of International Arbitrations: 1794-1989* (Martinus Nijhoff Publishers, 1990), 2-3. Brownlie, *Brownlie's principles*, 571.
[172] Brownlie, *Brownlie's principles*, 611.
[173] Stuyt, *Survey of International*, 185, 216.
[174] José G. P. Muñoz, "Mixed Claims Commissions in Latin America during the 19th and 20th Centuries: The Development of International Law in between Caudillos and Revolutions," in *Politics and the Histories of International Law — The Quest for Knowledge and Justice*, ed. Raphael Schäfer and Anne Peters (Brill Nijhoff, 2021), 263.
[175] Kenneth J Vandevelde, *Bilateral investment treaties: history, policy, and interpretation* (Oxford University Press, 2010), 21-23.
[176] Stephan W. Schill, *The multilateralization of international investment law*, vol. 2 (Cambridge University Press, 2009), 29-30.
[177] General Convention of Peace, Amity, Navigation, and Commerce between the United States of America and the Republic of Colombia, 1824.

protection'[178] were incorporated. They also specified that in cases of expropriation the payment of compensation shall be followed.[179] The focus was on safeguarding property, with a specific emphasis on this aspect rather than a broader consideration of investments.

The transformation began after the first of quarter of the 19th century when the United States transitioned from being a capital importer to becoming a capital exporter.[180] The shift in approach became evident in the 1923 FCN treaty between the United States and Germany. There was a systematic expansion of the treaty scope. Primarily focused on protecting the rights of individuals, these treaties developed to also incorporate the interests of companies abroad.[181] Alongside, provision were formulated to strengthen the protection of private property.[182] Moreover, a significant shift occurred in the latter half of the 19th century regarding the contents of FCN treaties. These treaties gradually prioritized the protection of foreign investments, and nearly half of the treaty body was dedicated to cover investments related matters.[183]

Vandevelde[184] also illustrates some of the key characteristics of the pre-BIT era agreements. Initially, agreements commonly bundled trade and property safeguard provisions together. Secondly, the treaties primarily aimed at creating commercial relations, where property protection provisions played a minor role. Lastly, the scope of the treaty network was restricted, and the protection incorporated was notably weak, especially since there were no mechanisms for enforcement in these agreements.[185]

In the latter half of the 19th century, after World War II, the decolonization process shaped the international investment framework significantly. This period saw the emergence of many newly independent States.[186] These States were underdeveloped yet strongly

[178] Treaty of Friendship, Commerce, and Navigation between the Governments of the United States of America, and of the Republic of Paraguay, 1859, article IX.
[179] Treaty of Friendship, Commerce, and Navigation between the Governments of the United States of America, and of the Republic of Paraguay, 1859, article III.
[180] Robert R. Wilson, "A Decade of New Commercial Treaties," *American Journal of International Law* 50, no. 4 (1956): 928, https://doi.org/10.2307/2195633.
[181] Herman Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," *The American Journal of Comparative Law* 5, no. 2 (1956): 229-247, https://doi.org/10.2307/837374. Wayne Sachs, "The New U.S. Bilateral Investment Treaties," *Berkeley Journal of International Law* 2, no. 1 (1984): 196, https://doi.org/10.15779/Z38PD3Q.
[182] Walker, "Treaties for the Encouragement," 243.
[183] Walker, "Treaties for the Encouragement," 234.
[184] Vandevelde, "A brief history," 157-194.
[185] Vandevelde, "A brief history," 157-194.
[186] Landes, David S., *The Wealth And Poverty Of Nations* (W.W. Norton & Co. Ltd. 1998), 431.

protective of their sovereignty.[187] Foreign investment became a contentious issue as these States identified it as a potential form of neocolonialism, given the foreign influence over critical economic resources.[188] Additionally, concerns were voiced about the possible influence of foreign investors in the internal affairs of the State.[189]

2.2 The imperial root

Gothii stresses the importance of examining the historical relationship between colonized and colonizing nations.[190] For Moore-Gilbert, neglecting or avoiding the forceful aspects of colonial history and the present neo-colonial era contributes to maintaining a distorted worldview.[191] Moreover, Slater argues that this approach also enables the removal of imperial influence from historical narrative.[192]

Some insists that the past and imperialism don't matter in the international investment law field because States freely enter or exit BITs, and there's no clear divide between capital-exporting and capital-importing States any longer.[193] Moreover, if States want to receive BITs, they need to sign BITs. However, Miles holds a different view, she didn't say that 19th century imperialism still functions the same way today, imposing treaties on States. Instead, she argued that the rules themselves carry the legacy of imperialism. This legacy is an inherent aspect of modern rules. Miles emphasizes that avenues for enacting more balanced rules were not taken. She further maintains that substantive legal language and procedural processes from the imperial era still persist today that sustains the *status quo*.[194]

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[187] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2021), 142.
[188] Dean M. Hanink, *The international economy: a geographical perspective* (Wiley, 1994), 234.
[189] Robert G. Gilpin, *The political economy of international relations* (Princeton University Press, 1987), 247-48.
[190] Gathii, James Thuo. "International Law and Eurocentricity." *European Journal of International Law* 9, no. 1 (1998): 184. https://doi.org/10.1093/ejil/9.1.184.
[191] Bart J. Moore-Gilbert, *Postcolonial theory: Contexts, practices, politics* (Verso Books, 1997), 10.
[192] David Slater, "Challenging Western visions of the global: The geopolitics of theory and North–South relations," *The European Journal of Development Research* 7, no. 2 (1995): 367, https://doi.org/10.1080/09578819508426644.
[193] Jeanrique Fahner, "The Contested History of International Investment Law: From a Problematic Past to Current Controversies," *International Community Law Review* 17, no. 3 (2015): 377-80, https://doi.org/10.1163/18719732-12341309.
[194] Miles, *Origins of International*, 21-22.

While Cavallar[195] dismisses the strong connection between the rise of international law, and its 21st-century form. However, Miles maintains the strong connection. She suggests several ways to connect ideas from the 16th to the 20th century, highlighting a process-oriented approach. In this approach, the focus is on the process of recalibration of the ideas that links the centuries. This involves ideas like commerce, control, private rights, property, and the merging of State and commercial interests within the legal mechanism. Moreover, she points out that this process occurred along with colonialism and commercial expansionism. From Vitoria[196], Grotius[197], and Vattel's[198] theories to FCN treaty framework and diplomatic protection, this process is embedded, and common conceptual approaches exist.[199] Furthermore, the application of the diplomatic protection doctrine persisted in the first half of the 20th Century and underwent a transformation with the inception of BITs from 1959. Rather than marking a departure from the past, BITs are integral to this narrative.[200]

Scholars maintain that European powers heavily relied on colonization to regulate and uphold foreign investment throughout centuries.[201] They also argue that role of international law was minimal in safeguarding such investments as colonial powers had direct hold over the applicable territories. They used their own legal frameworks, courts, and coercive means to safeguard their nationals' investments.[202] Roy further suggests that cleverly exploited this arrangement as a convenient tool to advance itself under a legal pretext, asserting to the development of the law along specific paths.[203]

From the beginning of the 19th century, Latin America witnessed an influx of foreign investors.[204] These investors engaged with a ruling elite predominantly of European

[195] Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?," *Journal of the History of International Law / Revue d'histoire du droit international* 10, no. 2 (2008): 183, https://doi.org/10.1163/157180508X359828.
[196] Francisco De Vitoria, "On the American Indians," In *Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge University Press, 1991).
[197] Hugo Grotius, "Commentary on the Law of Prize and Booty," In *Major Legal and Political Works of Hugo Grotius*, ed. Martine Julia van Ittersum (Liberty Fund, 2006), 19-50.
[198] De Vattel, *The Law of Nations*.
[199] Kate Miles, "History and International Law: Method and Mechanism – Empire and 'Usual' Rupture," in *International Investment Law and History*, ed. Stephan W. Schill, Christian J. Tams, and Rainer Hofmann (Edward Elgar, 2018), 161.
[200] Miles, "History and International," 160.
[201] Newcombe, *Law and Practice*, 8. Vandevelde, *Bilateral investment treaties*, 19-20.
[202] Newcombe, *Law and Practice*, 10-11. Sornarajah, *International Law on Foreign*, 19.
[203] SN Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?," *American Journal of International Law* 55, no. 4 (1961): 880, https://doi.org/10.2307/2196271.
[204] Frederick S. Dunn, *The protection of nationals: a study in the application of international law* (Johns Hopkins Press, 1932), 53.

lineage.[205] They backed economic liberalism, including *laissez-faire* principles and open doors for foreign investment.[206] However, the Eurocentric political and economic philosophies didn't always align well with the traditions of mainly indigenous populations.[207] Encountered with the inability to employ colonial systems against independent Latin American States,[208] capital-exporting States started to focus on producing novel customary international laws regarding diplomatic protection and State liability for injury to aliens.[209]

Grovogui criticizes legal Polycentricity for neglecting the impact of colonial structures in nations that gained political independence. He argues that this neglect is not only due to the Eurocentric character of international law but also generated from its historical assimilation of the colonized into global structures.[210] Grovogui highlights the insufficient consideration given by Legal Polycentricity to power dynamics, hierarchy, and ideology, especially in its endorsement of civilizational pluralism. He contends that Legal Polycentricity fails to recognize the hegemonic nature of international law and evades examining the structural and cultural foundations of colonial relationships.[211]

2.3 Coercive and Unequal Economic Relations and Forcible Interventions

Grovogui scrutinizes international law and order, portraying them as manifestations of hegemony of the West.[212] He highlights that political, interest-based, norms' reliance on western culture has compromised the universality in international law.[213]

In the pre-BIT era, diplomacy sometimes provided expected recourse. In the 19th century, the Latin American States were swayed by the United States to be agreed to opt for

[205] Dunn, *The protection of nationals*, 53.
[206] Amy L. Chua, "The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries," *Columbia Law Review* 95, no. 2 (1995): 223-303, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5580&context=faculty_scholarship.
[207] Dunn, *The protection of nationals*, 53-54.
[208] Ryan J. Bubb, and Susan Rose-Ackerman, "BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment," *International Review of law and Economics* 27, no. 3 (2007): 294, https://doi.org/10.1016/j.irle.2007.07.005.
[209] Brownlie, *Brownlie's principles*, 611.
[210] Siba N'Zatioula Grovogui, *Sovereigns, quasi sovereigns, and Africans: Race and self-determination in international law*, vol. 3 (University of Minnesota Press, 1996), 185.
[211] Grovogui, *Sovereigns, quasi sovereigns*, 195.
[212] Grovogui, *Sovereigns, quasi sovereigns*, 16.
[213] Grovogui, *Sovereigns, quasi sovereigns*, 3.

arbitration for claims of injuries to its nationals.[214] Usually, they consented to arbitration reluctantly.[215] Military force was also used to get favorable protection and to collect due of its nationals,[216] backed by the Roosevelt Corollary and the Monroe doctrine,[217] until the Roosevelt administration's introduction of good neighbor policy.[218]

The usual scenario was that developing States signed the draft presented by developed States. Generally, there are minor changes from the draft offered on the table.[219] This practice set some ideological agendas. Despite both parties formally accepting the same terms and conditions, the agreements were observed as asymmetrical. In practice, burdens were carried by the developing States.[220]

Ryan argues that despite potential power asymmetries in BIT negotiations between developed and developing States, international investment law relies on the consent of all parties involved.[221] Many developing States themselves pursue bilateral investment relationships to attract foreign direct investment.[222] He further stresses that despite potential challenges in negotiating with developed States, the keenness of the developing States is evident.[223] Likewise, the existence of many BITs among developing States suggests voluntary participation rather than coercion.[224] Ultimately, States assess multiple aspects when determining their approach to international investment agreements.[225]

[214] Lionel M. Summers, "Arbitration and Latin America," *California Western International Law Journal* 3, no. 1 (1972): 7, https://scholarlycommons.law.cwsl.edu/cwilj/vol3/iss1/2.
[215] Summers, "Arbitration and Latin America," 5.
[216] Summers, "Arbitration and Latin America," 5-6.
[217] Joseph Smith, *The United States and Latin America: A History of American Diplomacy, 1776-2000* (Routledge, 2005), 70.
[218] Smith, *United States and Latin America*, 94.
[219] Kenneth J. Vandevelde, "The Bilateral Investment Treaty Program of the United States," *Cornell International Law Journal* 21, no. 2 (1988): 211-12, https://scholarship.law.cornell.edu/cilj/vol21/iss2/1.
[220] Sornarajah, *International Law on Foreign*, 172, 211. Newcombe, *Law and Practice*, 43.
[221] Christopher M. Ryan, "Discerning the Compliance Calculus: Why States Comply with International Investment Law," *Georgia Journal of International & Comparative Law* 38 (2009): 79, https://digitalcommons.law.uga.edu/gjicl/vol38/iss1/6.
[222] Ryan, "Discerning the Compliance," 80.
[223] Ryan, "Discerning the Compliance," 80.
[224] Ryan, "Discerning the Compliance," 80.
[225] Ryan, "Discerning the Compliance," 94.

2.4 Historically one-sided in favor of capital-exporting States

Alschner points out that FCN treaties were symmetrical and concluded between Developed States.[226] On the other hand, BITs represented asymmetrical relations.[227] Unlike FCN treaties, BITs didn't involve a reciprocal exchange but rather a 'grand bargain' where Northern capital was traded for Southern States' commitment to investment safeguard.[228] He thinks that the approaches of the FCN treaties and BITs were different, although both approaches tried to achieve same goal.[229] Despite their differences, FCN treaties have left a lasting effect, and still can be related to the emergence of a new generation of investment treaties where trade and investment are covered together.[230]

Miles emphasizes how the evolution of international investment law is deeply linked with the expansive reach of European trade and investment.[231] Regardless of claims of universality and neutrality, the resulting legal framework strongly favors capital-exporting States. It also exhibits imperial and hegemonic nature of international law.[232] She further asserts that considering the treatment of environmental concerns, this historical one-sided characteristic is evident and continues to influence the current legal framework.[233]

Roy also makes similar point that while the rule of law is applicable to all States irrespective of their power or prestige, differences in physical and economic strength often favor the stronger States.[234]

[226] Wolfgang Alschner, "Americanization of the BIT universe: the influence of friendship, commerce and navigation (FCN) treaties on modern investment treaty law," *Goettingen Journal of International Law* 5, no. 2 (2013): 458, https://www.gojil.eu/issues/52/52_article_walschner.pdf.
[227] Alschner, "Americanization of the BIT," 458.
[228] Jeswald W. Salacuse, and Nicholas P. Sullivan. "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain," in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, ed. Karl P. Sauvant and Lisa E. Sachs (Oxford University Press, 2009), 120.
[229] Alschner, "Americanization of the BIT," 458.
[230] Alschner, "Americanization of the BIT," 459.
[231] Miles, *Origins of International*, 21.
[232] Miles, *Origins of International*, 2-3.
[233] Miles, *Origins of International*, 20, 45-46.
[234] Roy, "Law of Responsibility," 866.

2.5 Resistance from the capital-importing States

Schwebel maintains that there was disagreement within the international community concerning the laws governing foreign investment treatment.[235] Developed States generally embraced international law's role related to the treatment of foreign nationals, expanding this to govern treatment of foreign investments.[236] However, developing States resisted expanding international law into what they considered domestic matters.[237] From 1950-70, developing States actively opposed establishing higher protection standards for foreign investors, determined to maintain full control over their natural resources and the authority to regulate them, including adjudicating claims related to resource exploitation.[238]

In the 19th century, Latin American States faced numerous claims, often from stronger States.[239] This raised concerns about taking unfair advantage,[240] and potential misuse of legal processes.[241] In response, Latin American States resisted.[242] Moreover, to maintain the Calvo doctrine formulated by Carlos Calvo, they enacted laws to ensure equality between domestic and foreign investors,[243] and even included in their constitutions.[244] However, the United States and powerful European States didn't back this idea.[245]

[235] Stephen M. Schwebel, "The influence of bilateral investment treaties on customary international law," in *Proceedings of the ASIL Annual Meeting*, vol. 98 (Cambridge University Press, 2004), 27.
[236] Schwebel, "Influence of bilateral," 27.
[237] Schwebel, "Influence of bilateral," 27.
[238] Schwebel, "Influence of bilateral," 27.
[239] Dunn, *The protection of nationals*, 55-57.
[240] Dunn, *The protection of nationals*, 55-56.
[241] Dunn, *The protection of nationals*, 55-56.
[242] Dunn, *The protection of nationals*, 56. Miles, *Origins of International*, 49-51. Newcombe, *Law and Practice*, 9.
[243] Wenhua Shan, "Is Calvo Dead?," *The American Journal of Comparative Law* 55, no. 1 (2007): 125, https://doi.org/10.1093/ajcl/55.1.123.
[244] Shan, "Is Calvo Dead?," 125.
[245] Schwebel, "Influence of bilateral," 28.

3 The BIT era and continuation of imperial legacy

3.1 A brief overview of the historical developments

With the signing of Germany and Pakistan BIT[246] in 1959, It has been argued that the modern international investment agreement has emerged.[247] Regardless, this newer form of agreement encouraged other Western European countries to quickly follow suit. BITs started including arbitration clause, one of the key features of modern international investment agreements, where an investor can sue the host State.[248] The year 1965 marked a milestone in international investment law framework with the founding of ICSID under the World Bank.[249]

Predecessor of these BITs were FCN treaties that were actively signed and relied on by the United States. Initially focusing on commercial affairs, FCN treaties started introducing more investment protective measures after World War II.[250] These treaties influenced the drafting of the Abs-Shawcross Draft Convention, which in turn shaped terms of early BITs. The BITs introduced key standards like 'fair and equitable treatment' (FET).[251] FCN treaties were in place signifying the American approach to international investment agreements until the 1960s.[252]

From 1960-80, developing States tried to assert their positions in international economic relations. At the UN General Assembly, they passed resolutions like the 1962 Resolution 1803 on Sovereignty over National Resources. This resolution addressed that for expropriation, compensation would be granted.[253] However, the Charter specifies that compensation for expropriation is to be decided under national laws, without mentioning international minimum standard.[254] Additionally, other two important instruments were the

[246] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 1959.
[247] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2022), 9.
[248] Vandevelde, "A brief history," 174.
[249] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).
[250] Alschner, "Americanization of the BIT," 457.
[251] Francis A. Mann, "British treaties for the promotion and protection of investments," *British Yearbook of International Law* 52, no. 1 (1981): 242, https://doi.org/10.1093/bybil/52.1.241.
[252] Alschner, "Americanization of the BIT," 458.
[253] United Nations General Assembly, "Permanent sovereignty over natural resources," General Assembly resolution 1803 (XVII) of 14 December 1962, para. 4.
[254] United Nations General Assembly, "Permanent sovereignty over natural resources," General Assembly resolution 1803 (XVII) of 14 December 1962, para. 4.

Charter of Economic Rights and Duties of States[255] and the Declaration on the Establishment of a New International Economic Order (NIEO Declaration).[256]

The NIEO Declaration links neo-colonialism and income inequality within the global economic system as barriers for developing States. It restates the principle of permanent sovereignty over natural resources and provides a new economic framework. This framework covered areas such as trade terms, monetary system reform, development financing, technology transfer, and transnational corporate oversight. The Charter also includes positions concerning international investment.[257] It maintains States' authority to regulate foreign investment within their territories and asserts that preferential treatment cannot be pushed on any State.[258]

After widespread criticisms emerged from the beginning of the 21st century and onwards, States started to amend or renegotiate the existing BITs. However, fixing the substantive issues related to international investment agreements is far from over.

Currently, there are more than 2800 agreements signed between the States in the form of BITs and FTAs to regulate international investments.[259] Sometimes, States also conclude investment contracts with private investors and corporations to deal with their investments.

3.2 The succession of the BIT era

Ryan states that the modern international investment agreements are started after the World War II.[260] Miles thinks that taking 1959 as the start of modern international investment agreements without considering its broader historical context is a form of denial and mythmaking. She suggests that instead of viewing the emergence of BITs as a total departure, it should be identified as just one of many splits in the history of international investment law since the 17th Century.[261] Alschner points out that this exclusive focus on

[255] United Nations General Assembly, "Charter of Economic Rights and Duties of States," General Assembly resolution 3082 (XXVIII) of 6 December 1973.
[256] United Nations General Assembly, "Declaration on the Establishment of a New International Economic Order (NIEO)," General Assembly Resolution 3201 (S-VI) of 1974.
[257] United Nations General Assembly, NIEO, Section 2.2
[258] United Nations General Assembly, NIEO, Section 2.2, Subparagraph (a).
[259] UNCTAD Investment Policy Hub, International Investment Agreements Navigator, Accessed November 7, 2024, https://investmentpolicy.unctad.org/international-investment-agreements.
[260] Ryan, "Discerning the Compliance," 67.
[261] Miles, "History and International," 161.

BITs ignores the important role played by FCN treaties in shaping international investment law.[262] Likewise, Vandevelde also notes that the protections offered by BITs closely resemble those found in latter FCN treaties signed by the United States.[263]

Newcombe and Paradell also opine that the unique features of current international investment agreements stem from their historical development. They, however, think that diplomatic protection and claims commissions mainly influenced regulations regarding international investment. Moreover, the shortcomings of diplomatic protection system became visible because of disagreements regarding international minimum standard of treatment.[264] Additionally, core principles have not only resemblance, but are also based on the historical processes. The BIT framework and ICSID protective regime is established in the backdrop of decolonization efforts and to continue previous but stronger protective regime for international investments.[265] Furthermore, they think new approach to the BIT from 1959 onwards was to embolden rule of law and to depoliticize the investment disputes.[266]

Miles further notes that the introduction of new forms of protective regime and investor-State arbitration in international investment law has been taken by many as a substantive departure from the past. In reality, this didn't break away from the achievements of the past centuries and played important role to shape the international investment agreements. It showcases the continuity between past and present.[267] Through the lens of structure, mechanism, concepts, and language she explores the connection between international investment law and imperial influence. She contends that the emphasis on private property and commerce is ingrained in international investment law. Historically, this approach was position of the capital-exporting States. So, by allowing the investors to sue the host States only the reinforcement of that approach. In this case, rights to sue was provided only to investors.[268]

Nobody underestimates the fact that the BIT incorporated some provisions that distinguish it from the previous treaties. However, this wasn't a sudden creation, but informed itself based on previous mechanisms, particularly FCN treaties of the 17th-19th century. It also held

[262] Alschner, "Americanization of the BIT," 456.
[263] Vandevelde, "A brief history," 172.
[264] Newcombe, *Law and Practice*, 2.
[265] Newcombe, *Law and Practice*, 24.
[266] Newcombe, *Law and Practice*, 28, 47.
[267] Miles, "History and International," 144.
[268] Miles, "History and International," 139.

its root on the platform of customary international law principles. It might have a different form but represents the heritage.[269]

Vandevelde examines the influence of the approach of the United Sates in international investment agreements. Particularly, she focused on FCN treaties of post-World War II.[270] She finds that these treaties provide guarantees like that of constitutional safeguard including dealing with trade and maritime affairs.[271] Her scholarship also deals with the origins and purposes of international investment law. She maintains that the approach of the United States was based on so-called 'new deal'. This approach changed the previous position of the United States, as well as influenced the international approaches to treaty.[272] She doesn't agree with the position that modern international investment law was born in 1959 and was influenced by Abs-Shawcross Draft, rather she finds that FCN treaties were the source.[273] After 1960 the United States also changed their approach following the footsteps of BIT experience, however, also informing their new approach from previous FCN treaties. This trait is visible in its NAFTA and some other investment agreements.[274]

3.3 Policy space for developing States

Legal frameworks have been used to realize economic theories of the dominant.[275] This is the case for the BIT framework that is shaped by economic neoliberalism.[276] It is influenced by the works of economist Adam Smith, who maintained laissez-faire economics and free trade. Important to note that this leaves very little or no place for other economic ideologies.

One of the key features of the development of arbitration system in international investment law is that taking away capital entry regulations from national control to the international

[269] Miles, "History and International," 144-45.
[270] Kenneth J. Vandevelde, *The first bilateral investment treaties: US postwar friendship, commerce and navigation treaties* (Oxford University Press, 2017), 179-181.
[271] Vandevelde, *First bilateral investment*, 205.
[272] Vandevelde, *First bilateral investment*, 31-44.
[273] Kenneth J. Vandevelde, "A Brief History of International Investment Agreements," in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, ed. Karl P. Sauvant and Lisa E. Sachs (Oxford University Press, 2009), 16.
[274] Alschner, "Americanization of the BIT," 468.
[275] Ejan Mackaay, "History of law & economics (0200)," In *Encyclopedia of law and economics*, ed. Boudewijn Bouckaert, Gerrit De Geest and Charles F. Nagel (Edward Elgar, 2000), 67-71.
[276] Vandevelde, "The Bilateral Investment Treaty," 223-24. Sornarajah, *Resistance and change*, 9-14. Amr Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism," *Harvard International Law Journal* 41, no. 2 (2000): 420, https://heinonline.org/HOL/P?h=hein.journals/hilj41&i=425.

sphere. This move favors the liberal economic agenda and the capital.[277] Koskenniemi's focus on the overall system rather than individual cases to understand the international investment arbitration. He posits that the mere existence of the international investment arbitration exerts the influence.[278] Likewise, Greeman thinks that the effect of the mixed claims commissions went beyond the immediate outcomes of different cases. She argues that the influence was deeper, leading to the internationalization of the risks linked with foreign investment in Latin America, specifically regarding damage caused by rebels.[279]

3.4 Resistance continues

After the formal start of the BIT era, the capital importing and developing States tried to showcase their views and assert their positions. They adopted several resolutions through the United Nations General Assembly. One of the important resolutions was related to establishing guidelines for nationalization in 1962 on Permanent Sovereignty over Natural Resources.[280] This resolution placed nations' rights to determine compensation under their own laws and international legal principles. However, these resolutions were non-binding and did not create any legal obligation.[281]

Another important resolution was the Charter of Economic Rights and Duties of States[282]. This resolution was adopted in the General Assembly of the United Nations in 1974. It affirmed again the States' rights to sovereignty over their resources. It also recognized States' authority over their resources, including determining compensation domestically.[283]

[277] Shalakany, "Arbitration and the Third World," 424-25. Ntina Tzouvala, "The academic debate about mega-regionals and international lawyers: legalism as critique?." *London Review of International Law* 6, no. 2 (2018): 202. https://doi.org/10.1093/lril/lry019.
[278] Martti Koskenniemi, "It's not the Cases, It's the System," Review of Resistance and Change in the International Law on Foreign Investment, by Muthucumaraswamy Sornarajah (*The Journal of World Investment & Trade*, 2017), 351.
[279] Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, vol. 161 (Cambridge University Press, 2021), 30.
[280] United Nations General Assembly, "Permanent sovereignty over natural resources," General Assembly resolution 1803 (XVII) of 14 December 1962.
[281] Ryan, "Discerning the Compliance," 69.
[282] United Nations General Assembly, "Charter of Economic Rights and Duties of States," General Assembly resolution 3082 (XXVIII) of 6 December 1973.
[283] United Nations General Assembly, "Charter of Economic Rights and Duties of States," General Assembly resolution 3082 (XXVIII) of 6 December 1973, art. 2.

However, no developed State supported the Charter's adoption. This underlined the divide between these States.[284]

In the latter part of the 20th century, efforts were made to adopt multilateral agreements concerning international investment. However, they did not succeed. There was a visible divide between the developed and developing States, it also can be viewed as between capital-exporting and capital-importing States. In other words, disagreements over the important rules lead to the failure of those efforts.[285] Therefore, like FCN treaty provisions, some of the early BIT provisions were vague and largely dependent on the interpretation of the arbitrators.[286] Moreover, these vagueness and lack of explanation of the crucial principles leading to disagreement between the parties.[287] For instance, regarding the compensation for expropriation, there were differences over the principle where customary international law asked for full compensation. The developed States, particularly the United States advocated for Hull formula, while developing States voiced for Calvo doctrine.[288]

Developing States, taking the defense of protecting their sovereignty, resisted the Hull formula.[289] The resolution 3171 was adopted in the United Nations General Assembly to resolve this stand-off. It affirmed that the States must provide compensation under their national laws. [290] However, this resolution has minimal effect as it is non-binding. Furthermore, the tribunal in *Ebrahimi v. Iran* opines that States are responsible for providing compensation for expropriated property. Moreover, while theory and practice of international law do not back 'prompt, adequate and effective' method, customary international law offers 'appropriate' compensation method.[291]

[284] Ryan, "Discerning the Compliance," 70.
[285] Ryan, "Discerning the Compliance," 70.
[286] Sloane, Robert D., and W. Michael Reisman. "Indirect Expropriation and its Valuation in the BIT Generation." *British Yearbook of International Law* 74, no. 1 (2004): 116. https://ssrn.com/abstract=943430.
[287] Ryan, "Discerning the Compliance," 70.
[288] Green H. Hackworth, *Digest of international law* (US Government Printing Office, 1940), 661-62.
[289] Sornarajah, *Resistance and change*, 35-36.
[290] United Nations General Assembly, "Permanent sovereignty over natural resources," General Assembly resolution 1803 (XVII) of 14 December 1962, para.
[291] Shahin Shaine Ebrahimi and others v. The Government of the Islamic Republic of Iran, IUSCT Case Nos. 44, 46 and 47, para. 88.

3.5 International minimum standard and the disagreement

One of the contentious issues in international investment law is related to international minimum standard. The historical development surrounding this standard showcases the complexity and the disagreements. According to western scholars, the host States are responsible to apply this standard under customary international law when dealing with investments.[292] Conversely, many countries disagreed with such position.[293] For instance, Latin American States supported the Calvo doctrine. Under this doctrine, foreign investors are eligible only to the same treatment as domestic investors.[294]

Vandevelde suggests that regardless of the consensus on the presence of international minimum standard, details of the standard were not conveyed. In other words, meaning of the standard left ambiguous.[295] However, it is suggested that the *Neer Case*[296] outlined the details of the standard, although differing positions were taken in different cases afterwards. The *Neer case* held that regarding the breach of the international minimal standard:

> "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[297]

Westen countries tried to insert their position in different ways. Roy thinks that dual strategies were involved on their part. Firstly, by utilizing the tool of diplomatic protection, it internationalizes a host State's obligation by claiming it as a responsibility to the home State rather than to the affected foreign individual. Secondly, it establishes a standard of justice and assumed it as international standard.[298]

Vandevelde further points out that the United States pursued to establish the prompt, adequate, and effective compensation standard as customary international law by actively engaging in a broad network of treaties mentioning this standard.[299] Moreover, the US

[292] Brownlie, *Brownlie's principles*, 429, 433.
[293] Sornarajah, *Resistance and change*, 191.
[294] Sornarajah, *Resistance and change*, 33.
[295] Vandevelde, "A brief history," 159.
[296] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926), 4 R.I.A.A. 60.
[297] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926), 4 R.I.A.A. 60, para. 4.
[298] Roy, "Law of Responsibility," 864.
[299] Kenneth J. Vandevelde, *United States investment treaties: policy and practice* (Kluwer Law and Taxation Publishers, 1992), 21.

insisted on including this standard in every BIT it entered, [300] focusing on its establishment.[301]

Likewise, Bergman noted that addressing the opposition of the Global south, the FCN and the BIT framework of the United States aimed to strengthen and recognize the minimum standards as customary international law.[302] The FCN treaties typically included an FET principle, and 'full protection and security'. This was linked to the international minimum standard of treatment. [303]

Because of the disagreements between the parties, the United States and the European capital-exporting countries were not receiving their desired protection for their investors. Therefore, 'gunboat diplomacy' often were employed by the United States and the European capital-exporting States.[304]

Historical background suggests that international minimum standard is rooted in the idea of Vattel who argued that the injury to an individual amounts to an injury to his home State.[305] Essentially, this position was taken by capital-exporting States as the reason to use military force. In the backdrop of all of this intervention, scholars still argued for the same standard, refuting the alternative attempt, e.g., the Calvo doctrine.[306] They essentially maintain that this standard stands for universality and justice based on the fact that the diplomatic protection is widely used throughout the 20th century.

Roy argues against the assumption that the supposed universality of specific aspects of international law implies automatic binding on all members of the international community. Drawing an analogy to a club, this notion suggests that the international community is merely an extended version of its former self. However, Roy contends that the international community is more correctly described as a collection of diverse communities rather than a singular entity. It consists of various communities with unique characteristics, rather than operating within a larger, homogenous framework.[307]

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[300] Vandevelde, *United States investment*, 25-26.
[301] Vandevelde, *United States investment*, 125.
[302] M. S. Bergman, "Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty," *NYU Journal of International Law and Politics* 16, no. 1 (1983): 34-35, https://heinonline.org/HOL/P?h=hein.journals/nyuilp16&i=14.
[303] Bergman, "Bilateral Investment Protection," 19.
[304] Smith, *United States and Latin America*, 23, 69.
[305] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Company, 1919), 29, 32, 197.
[306] Sornarajah, *International Law on Foreign*, 129.
[307] Roy, "Law of Responsibility," 881.

3.6 Standard of due diligence and the State responsibility for rebels

In the first case of the BIT era, *AAPL v Sri Lanka*,[308] Sri Lanka was held liable for the destruction of a prawn farm amid the civil war, although the cause and the actor behind this remained unconfirmed.[309] The tribunal ruled that Sri Lanka didn't fulfill its due diligence to protect the property of the claimants.[310] It drew on early 20th century awards of the arbitral commissions, e.g. *Kummerow case* (1903) *Sambiaggio* (1903), *Home Insurance Co* (1926), *Spanish Zone of Morocco Claims* (1923), *David Richards case* (1927), *Oriental Navigation Co. case* (1928), and *the F.M. Smith case* (1929) etc. handling State liability for rebels.[311] Moreover, this case was invoked in a 21st century case, *Ampal-American Israel Corporation v Egypt*.[312] The tribunal held the host State liable referring the arguments put forwarded by *AAPL v Sri Lanka* for not conforming to the due diligence in case of damages by armed groups on an oil pipeline.[313]

The debate surrounding State responsibility for rebels spans over a century. It raises questions about the level of due diligence required to prevent rebel-caused harm and whether it should be objective or context-specific.[314] Examining its origins in 19th and early 20th century arbitration with Latin America is crucial for comprehending its impact on contemporary international investment law, particularly regarding State liability for the damages caused by armed groups. This historical perspective sheds light on how international law addresses injuries induced by armed rebels, reflecting a continuity of legacy of the previous centuries.[315]

In "*State responsibility and rebels: the history and legacy of Protecting Investment Against Revolution*",[316] Kathryn Greenman studies the history and implications of States' liability to protect investments from non-State armed groups.[317] She thinks that its origin can be traced back to Latin America's decolonization period.[318] She analyzes legal debates and arbitration

[308] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3.
[309] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, para. 85(d).
[310] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, para. 85(b).
[311] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, paras. 73-75.
[312] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11.
[313] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, para. 243, 290.
[314] Greenman, *State Responsibility and Rebels*, 3.
[315] Greenman, *State Responsibility and Rebels*, 19.
[316] Greenman, *State Responsibility and Rebels*.
[317] Greenman, *State Responsibility and Rebels*, 4.
[318] Greenman, *State Responsibility and Rebels*, 5.

cases from 1839 to 1927, showing the ongoing struggle to determine responsibility. Despite efforts at the League of Nations Codification Conference in 1930, consensus on this matter remained unattained.[319] Moreover, linking the mixed claims commission with intervention practices, she contends that they aimed to shield economic stability from rebellion by taking control out of national laws. Furthermore, many of the case laws produced by the commissions were inconsistent, vague, and based on questionable grounds. Therefore, the scholars also offered differing views on arbitral practice.

She asserts that Latin American and US scholars clashed over the implications, with the former resisting intervention while the latter exploited it. This tension shaped the emergence of State responsibility for rebels as a contested area of international law, focusing on the source and adjudication of protection against rebels for foreigners. The failure at the League of Nations Codification Conference at the Hague in 1930 marked a decline in State responsibility for rebel injuries, but its legacy persisted in international investment and State responsibility laws. Latin American and US scholars differed on the ground of execution, with the former resisting intervention while the latter used the practice to formulate measures that repeatedly defended it.[320] This tension affected the emergence of State responsibility for rebels as a disputed area of international law. Moreover, she thinks that the failure of the codification conference was the formal ending of this rule. However, somehow, it was revived by tribunal decisions.[321]

From the mid-19th century onwards, 40 mixed claims commissions handled claims against States for harm caused to foreigners by rebels.[322] Notable cases include the Mexican-US commissions of 1839, 1849, and 1868,[323] Venezuelan commissions of 1903, and Mexican commissions of the 1920s.

Despite connecting with peace[324], depoliticization[325] and noncoercion[326], arbitration in the late 19th century didn't reduce the intervention or coercion. It coexisted with military

[319] Greenman, *State Responsibility and Rebels*, 3.
[320] Greenman, *State Responsibility and Rebels*, 4.
[321] Greenman, *State Responsibility and Rebels*, 4.
[322] Greenman, *State Responsibility and Rebels*, 6.
[323] Greenman, *State Responsibility and Rebels*, 6.
[324] Christian J. Tams, "Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order," In *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I*, edited by Michel Erpelding, Burkhard Hess, and Helene Ruiz Fabri (Nomos Verlagsgesellschaft Mbh & Co, 2019), 217-219.
[325] Shalakany, "Arbitration and the Third World 460.
[326] James Thuo Gathii, "War's Legacy in International Investment Law," *International Community Law Review* 11, no. 4 (2009): 360, https://doi.org/10.1163/187197409X12525781476088.

intervention that compelled us to opt for settlement or arbitration. For instance, Mexico was forced to opt for arbitration with the United States in 1839 after threats of retaliations.[327] Similarly, in 1902, Venezuela was pressured into arbitration by Britain, Germany, and Italy through a blockade.[328] This shows that while arbitration isn't violence itself, it's part of a range of forceful tactics to protect the interests of foreigners. Regardless of contrasting features, it can be drawn that both frequently took place under duress.[329]

Koskenniemi asserts that Arbitration was a new avenue for imperialism. It allowed the U.S. to maintain its anti-imperialist stance while offering a way of universalization of its positions on different legal matters.[330] The matter was not that simple and counter parties also opted for arbitration from their side,[331] sometimes to avoid interventionist approach.[332] However, they confronted when compelled to choose from options provided by capital-exporting States, often due to unfair management.[333]

Dealing the issue of State responsibility for rebels, Argentine scholar Carlos Calvo[334] reasoned for non-responsibility of the State because of internal disturbances or civil war.[335] This came on the backdrop of a series of European intervention in Latin American from 1830s-60s.

4 Conclusion

International investment law involves various actors pursuing favorable objectives and shaping its norms and principles. A complete evaluation of the system asks considering the

[327] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party: Together with Appendices Containing the Treaties Relating to Such Arbitrations, and Historical Legal Notes*, vol 2 (US Government Printing Office, 1898) 1212-16.
[328] Gathii, "War's Legacy," 355.
[329] Gathii, "War's Legacy," 360.
[330] Martti Koskenniemi, "The Ideology of International Adjudication and the 1907 Hague Conference," in *Topicality of the 1907 Hague Conference, the Second Peace Conference*, ed. Yves Daudet (Martinus Nijhoff, 2008), 135.
[331] Koskenniemi, "Ideology of International," 143.
[332] Gathii, "War's Legacy," 355.
[333] Gathii, "War's Legacy," 356.
[334] Calvo, Carlos. "De la Non-Responsabilitie des Etats a Raison des Pertes et Dommages Eprouves par Etrangers En Temps de Troubles Interieurs Ou de Guerres Civiles" (1869) Revue de Droit International et de Legislation Comparee 1 (417-427): https://heinonline.org/HOL/P?h=hein.journals/intllegcomp1&i=421.
[335] Greenman, *State Responsibility and Rebels*, 11.

contributions of these diverse actors.[336] Moreover, historical exploration is necessary to understand the mass dissatisfaction towards international investment law as a whole and investor-State dispute settlement in specific. The TWAIL approach can be an useful method to understand critical aspects of international investment law from the Global-south. Furthermore, the renewed focus on history has led to discussions on ways to tackle Eurocentrism in narratives of the history of international law.[337]

As international investment law has evolved, arbitration has become politically contentious even in States once supportive of such agreements. While there's agreement on the need for reform, the lack of historical evaluation into the failures of these agreements and how to amend them poses a challenge to reform initiatives. To ensure effective results, it may be necessary to modify laws concerning State interactions to promote greater equality and reduce factors that undermine theoretical State equality.[338]

[336] Sabahi et al., "International investment law and arbitration: History, modern practice, and future prospects," *Brill Research Perspectives in International Investment Law and Arbitration* 1, no. 1 (2018): 2. https://doi.org/10.1163/24055778-12340001.
[337] Koskenniemi, "International Law: Dealing," 152-176. Chimni, "Third world approaches," 3-27.
[338] Roy, "Law of Responsibility," 867.

Chapter III: Analyses of Dispute Settlement Systems of International Investment Law

1 Introduction

Dispute settlement systems of international investment law adjudicate disputes between investors and host States under international investment agreements. Arbitration or alternative methods outside national courts is available as the mechanism for dispute resolution. Moreover, these can be categorized as *ad hoc*, institutional, and treaty-specific mechanisms. Firstly, *Ad hoc* tribunals can be formed by following UNCITRAL rules. There are also other institutional rules available to pick from. This system offers flexibility and customization but may lack consistency and institutional support. Secondly, institutional tribunals can be formed under the ICSID and Permanent Court of Arbitration (PCA) etc. This system provides a structured process with administrative support and detailed rules. Although it has various criticisms, however, it is seen as showing greater sensitivity to the interests of developing countries.[339] Lastly, treaty-specific mechanisms are outlined in agreements like CETA or the Energy Charter Treaty. These mechanisms are designed to the provisions of each treaty. Based on the literature, it can be inferred that these systems have their distinct advantages and drawbacks.

In this chapter, the analyses and criticisms mainly focuses on institutional ISDS system. However, doesn't necessarily applicable to institutional ISDS system only. The chapter scrutinizes the core and important debates of the system. The idea is to provide a sense of the debates, rather than focusing on the comprehensive discussions on the debates surrounding the ISDS system. Furthermore, the issues that are highlighted in this chapter are focus of WGIII reform initiative. This will allow us to understand and evaluate the reform proposals.

Firstly, discussion of the chapter focuses on concerns related to the arbitrators and the appointment of arbitrators. It particularly examines the issues related to lack of expertise, lack diversity, influential arbitrators, presiding arbitrators, appointment and reappointment of arbitrators, double-hatting of arbitrators and conflict of interests and pro-investors favoritism. The chapter explores these issues in depth and evaluates the criticisms and

[339] United Nations, "Dispute Settlement: Investor-State," UNCTAD Series on issues in international investment agreements, IIA issues paper series (2003): 14, UNCTAD/ITE/IIT/30.

defenses of the scholars and stakeholders. Moreover, it considers broader implications for international investment arbitration. These issues raise important questions about impartiality and the integrity of the arbitrators.

Secondly, analysis of the chapter focuses on concerns related to interpretation. It also examines the lack of consistency in the interpretation and application of investment treaty standards. This analysis delves into the opinions for and against consistency. It explores the impact of inconsistent arbitral decisions on the legitimacy and credibility of the ISDS system. Moreover, it evaluates the ongoing reform efforts related to this issue.

Thirdly, evaluation of the chapter focuses on concerns related to Limiting policy space and chilling effect on the regulation of the State. Here, the examination involves the phenomenon of regulatory chill. The chapter investigates how it influences State's behavior regarding regulatory measures. This analysis also considers the role of bureaucratic capacity in shaping responses of the States to ISDS claims. It draws analyses of the work of scholars who have systematically examined the impact of ISDS on regulatory processes. By evaluating these studies, the chapter aims to provide a comprehensive understanding of the impact of ISDS system on State regulation.

Lastly, examination of the chapter focuses on concerns related to lack of appeal mechanism and additional review. The chapter also evaluates ongoing debate over establishing an appellate mechanism in the ISDS system. Moreover, it highlights a complex interplay of interests and concerns.

By evaluating these selected but crucial issues of the ISDS, this chapter seeks to provide a sense of gravity of the criticisms surrounding the system and to highlight the pressing need for reform. Moreover, it emphasizes the key issues at stake.

2 Analyses of the ISDS Dispute Settlement Systems

2.1 Concerns related to the arbitrators and the appointment of arbitrators

2.1.1 Lack of expertise

Maintaining a robust and specialized system depends on the skills and knowledge of professional arbitrators.[340] It is well accepted that tribunals with a mix of legal backgrounds and suited to the specifics of each dispute, are more likely to generate well-founded and sound decisions.[341] Interestingly, the ICSID Convention of 1965 merely stipulates that arbitrators must possess "recognized competence in the fields of law, commerce, industry, or finance."[342]

Another important consideration is whether the focus should be on acquiring specific training in the arbitration process itself rather than merely possessing expertise in a particular legal area, such as public international law or international investment law. Furthermore, only having public law knowledge is not sufficient for ISDS cases, which also require expertise in commercial law, sector-based knowledge, and skills in accounting or mathematics. Many ISDS cases require damage quantification, an area where numerous arbitrators lack formal training. Furthermore, given the frequent involvement of extractive industries in ISDS cases, having arbitrators with specialized knowledge in this field would be highly beneficial.[343]

Flexibility is vital for public international lawyers, who often need to incorporate knowledge from private international law. Similarly, international commercial arbitrators can enhance their practice by integrating some aspects of public international law. The differences in their approaches arise from the varied legal sources they rely on and their unique training and experiences, which impact how they perceive the roles of the parties involved in a dispute.[344]

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[340] Sergio Puig, "Emergence & dynamism in international organizations: ICSID, investor-state arbitration & international investment law," *Georgetown Journal of International Law* 44 (2012): 552, https://heinonline.org/HOL/P?h=hein.journals/geojintl44&i=549.
[341] James Crawford, "The Ideal Arbitrator: Does One Size Fit All?," *American University International Law Review* 32, no. 5 (2018): 1017, https://heinonline.org/HOL/P?h=hein.journals/amuilr32&i=1069.
[342] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 14.
[343] Bjorklund et al., "The diversity deficit in international investment arbitration," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 432, https://doi.org/10.1163/22119000-12340177.
[344] Anthea Roberts, "Clash of paradigms: actors and analogies shaping the investment treaty system," *American journal of international law* 107, no. 1 (2013): 54, https://doi.org/10.5305/amerjintelaw.107.1.0045.

There is considerable debate regarding the specific legal knowledge arbitrators should have,[345] and their technical competence is often questioned.[346] As a result, investment arbitration tribunals are often seen as unsuitable venues to handle independent human rights claims. These tribunals have limited mandates and lack the knowhow and authority of established human rights institutions.[347] Expertise in various area of international law is especially relevant when States file counterclaims against investors related to human rights and environment.[348] Moreover, depending on the nature of the cases, presiding arbitrators need to have expertise relevant to the specific issues at hand, in addition to their expertise in international investment law.

Moreover, the field of investor-State arbitration remains narrow, with a few international lawyers receiving significant appointments.[349] To address this issue, newer international investment treaties have started to prioritize experience in public international law as well as international investment and trade law.[350] Moreover, in UNCITRAL Working Group III, there are discussions about whether every arbitrator presiding over a dispute possesses the required qualifications.[351]

However, Pauwelyn asserts that ICSID arbitrators are typically highly skilled and experienced jurists than the typical WTO panelist.[352] He highlights that these arbitrators typically from private law practice and legal academia, which are more individualistic and reputation-driven and where personal performance, recognition, and legal skill are crucial for career progression.[353]

This dissertation, therefore, contends that the adjudication of ISDS cases demands arbitrators with interdisciplinary expertise. The disciplines such as public international law,

[345] Crawford, "The Ideal Arbitrator," 1013.
[346] Crawford, "The Ideal Arbitrator," 1003.
[347] Vivian Kube, and Ernst-Ulrich Petersmann, "Human rights law in international investment arbitration," In *General principles of law and international investment arbitration*, edited by Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (Brill Nijhoff, 2018) 228.
[348] Burlington Resources v Ecuador (2017), Decision on Counter-Claims, ICSID Case No. ARB/08/5.
[349] Langford et al., "The revolving door in international investment arbitration," *Journal of International Economic Law* 20, no. 2 (2017): 301-332, https://doi.org/10.1093/jiel/jgx018.
[350] The Comprehensive and Economic Trade Agreement (CETA) between Canada and the European Union (2017), art 8.27(4).
[351] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 99.
[352] Joost Pauwelyn, "The rule of law without the rule of lawyers? Why investment arbitrators are from Mars, trade adjudicators from Venus," *American Journal of International Law* 109, no. 4 (2015): 763, https://doi.org/10.5305/amerjintelaw.109.4.0761.
[353] Pauwelyn, "The rule of law," 781.

international investment law, human rights, environmental law, and technical fields related to international investment law should be the priority. ICSID convention's flexible competence criteria may allow tribunals to adapt for various disputes, however, this framework fails to ensure that arbitrators possess interdisciplinary skills for multifaceted cases. For example, cases involving natural resources industries and counterclaims involving environmental issues requires interdisciplinary approaches specifically related to human rights and climate obligations. Solely relying on public international law may not provide satisfactory outcomes. Likewise, technical knowledge to solve damage quantification requires knowledge related to mathematics and accounting. Without these proficiency the reward would be questioned more often than not. Pauwelyn's defense of ICSID arbitrators as "highly skilled jurists" overlooks systemic interdisciplinary deficits by focusing on individual legal skill. For instance, a renowned investment lawyer may have the skill to interpret the treaties, however, they may struggle in solving issues related to econometric. Moreover, narrow prioritization on tradition legal domains engender a cycle. This cycle prioritizes established arbitrators over specialists in emerging fields. Hence, reforms must incorporate interdisciplinary qualifications to solve this problem.

2.1.2 Lack of diversity

The issue of diversity in the investor-State dispute settlement (ISDS) has been a longstanding issue of contention. It has attracted criticisms from various stakeholders for the lack of diversity and equitable representation. Statistics from the International Centre for Settlement of Investment Disputes (ICSID) spanning 1966 to 2022 demonstrate that male adjudicators from Western Europe and North America have predominantly filled roles in investment arbitration.[354] This concern is a key item on the agenda for ongoing ISDS reforms by

[354] International Centre for Settlement of Investment Disputes (ICSID). "The ICSID Caseload—Statistics." Issue 2024 – 2. Accessed November 6, 2024, 17-20. https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf.

UNCITRAL Working Group III.[355] The aim is to ensure diverse tribunal appointments in terms of geography, gender, and legal system representation.[356]

The lack of diversity may be the byproduct of the institutional design of investment arbitration system where very limited effort is provided to ensure diversity among adjudicators. The provisions of the ICSID Convention is one of the contributor to this outcome.[357] Article 14(2) states that the Chairman should consider representing the principal legal systems and major economic activities when designating arbitrators,[358] but no other provisions address diversity in appointments by Contracting States or disputing parties.[359] In addition, Article 14(1) focuses on qualifications such as recognized competence in law, commerce, industry, or finance.[360] Both of these provisions fail to guarantee diversity in the appointment and equitable representation. Moreover, from a practical standpoint, this requirement was included merely as a formality and not anticipated to ensure diversity in every individual dispute.

Scholars think that today's concept of diversity goes beyond geographical representation. It involves things like gender, ethnicity, age, and language.[361] Sometimes, the term 'equitable representation' is used to describe diversity in the appointment.[362] It involves the inclusion of diverse regions, nationalities, legal systems, and cultures on international adjudication panels.

Within academic discourse, two main reasons exist for requiring more diversity in courts. One focuses on outcomes: diverse judges bring varied perspectives,[363] leading to better

[355] United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session," Fifty-second session (8-26 July 2019): paras 91-98. A/CN.9/964.
[356] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Selection and appointment of ISDS tribunal members." Fortieth session (8-12 February 2021): para. 10, A/CN.9/WG.III/WP.203.
[357] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).
[358] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 14(2).
[359] Zhang, Yanwen. "Equitable representation on international benches and the appointment of tribunal members in investor–State dispute settlement: a historical perspective." *Journal of International Dispute Settlement* 14, no. 4 (2023): 429. https://doi.org/10.1093/jnlids/idad021.
[360] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 14(1).
[361] Freya Baetens, "Identity and diversity on the international bench: implications for the legitimacy of international adjudication," in *Identity and Diversity on the International Bench: Who Is the Judge*, edited by Freya Baetens (Oxford University Press, 2020), 5. Bjorklund et al., "The diversity deficit," 410, 414.
[362] United Nations General Assembly. "Improvement of equitable geographical representation in the United Nations Secretariat." Fifty-ninth session, 13 August 2004. A/59/264.
[363] Baetens, "Identity and diversity," 8-10.

decisions and reducing bias.[364] The other focuses on perception: a mix of judges promotes legitimacy, democratic principles, and fairness.[365]

This dissertation, therefore, argues that lack of diversity in ISDS tribunals are systemic. Current system engenders a homogenous pool of arbitrators and it is dominated by male Western jurists. This trend is exclusionary rather than inclusive in nature. This not only affect the efficacy of the dispute settlement process but also undermines the legitimacy. Defenders of status quo maintain that current system is meritocratic and this should prevail over "identity-based" diversity. However, they overlook how system barriers prevent qualified candidates from underrepresented regions. Moreover, status quo indicates historical power imbalances that garnered such overrepresentation of Western arbitrators. Hence, reform should incorporate mandatory diversity criteria. Emphasize should be given on geographical representation. This would represent the plurality of stakeholders in international investment. Otherwise, ISDS will remain a closed system.

2.1.3 Influential arbitrators

Despite the increase in arbitrators over recent decades, some commentators opine that the international arbitration market continues to be exclusive and difficult for newcomers to enter.[366] Moreover, this 'exclusive club' of arbitrators not only dominates the market,[367] but also influences appointment of others including the presiding arbitrators.[368] In return, they anticipate future appointments.[369] Consequently, these practices may impact behavior of the arbitrators.[370]

Kapeliuk pointed out that elite arbitrators were appointed frequently, so much so that 80.2% of concluded cases featured at least one elite arbitrator.[371] This group consists of arbitrators

[364] Philipp Günther, "Groupthink Bias in International Adjudication," *Journal of International Dispute Settlement* 11, no. 1 (2020): 98, https://doi.org/10.1093/jnlids/idaa001.
[365] Baetens, "Identity and diversity," 8–10.
[366] Yves Dezalay, and Bryant G. Garth, *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order* (University of Chicago Press, 1996), 34-41. Rogers, "The politics of international," 968.
[367] Rogers, "The politics of international," 968.
[368] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 37(2) (b).
[369] Dezalay, *Dealing in virtue*, 50.
[370] Dezalay, *Dealing in virtue*, 49.
[371] Daphna Kapeliuk, "The repeat appointment factor: exploring decision patterns of elite investment arbitrators," *Cornell Law Review* 96, no. 1 (2010): 78, https://heinonline.org/HOL/P?h=hein.journals/clqv96&i=49.

from 16 countries.[372] This data is evident of their repeated and consistent appointments to the ICSID tribunals.[373]

The top 25 arbitrators by appointment numbers reveal a familiar pattern of prominent figures.[374] Puig identified them as 'Grand Old Men' and 'Formidable Women'.[375] Most of them are nationals of Western States.[376] Even the rare non-Western arbitrators have strong educational and professional ties to the West.[377] These arbitrators also frequently hold important presiding positions. Moreover, although they make up only 4% of all investment arbitrators, they were involved in over a third of all arbitral appointments.[378]

Research has identified influential figures in international investment arbitration,[379] building on Dezalay and Garth's analysis.[380] They classified two generations of arbitrators. First, the 'Grand Old Men'[381] of the 1960s who were prominent trade lawyers, professors, diplomats, and judges. They applied their treaty-making expertise in arbitration.[382] Second, the 'young technocrats'[383] of the 1980s and 1990s who specialized in arbitration, promoted competition, expertise, and specialization.[384] They were often favored by Anglo-American law firms. This development exhibits the changing needs and priorities of those appointing arbitrators.

Kapeliuk's research[385] also highlighted another aspect. It found that tribunals featuring elite arbitrators do not exhibit a preference for compromise awards or consistently rule in favor of investors. Moreover, they are more open to extreme outcomes than those appointed by parties. Despite these differences, individual arbitrators don't consistently demonstrate a balanced approach.[386]

This dissertation, therefore, maintains that there is dominance of an exclusive cadre of elite arbitrators in international investment arbitration. They undermines the system's legitimacy

[372] Kapeliuk, "The repeat appointment factor," 79.
[373] Kapeliuk, "The repeat appointment factor," 90.
[374] Langford et al., "The revolving door," 309.
[375] Sergio Puig, "Social capital in the arbitration market," *European Journal of International Law* 25, no. 2 (2014): 407, https://doi.org/10.1093/ejil/chu045.
[376] Langford et al., "The revolving door," 309.
[377] Langford et al., "The revolving door," 309-10.
[378] Langford et al., "The revolving door," 309-10.
[379] Langford et al., "The revolving door," 301. Puig, "Social capital," 387.
[380] Dezalay, *Dealing in virtue*, 34.
[381] Dezalay, *Dealing in virtue*, 32.
[382] Dezalay, *Dealing in virtue*, 34.
[383] Dezalay, *Dealing in virtue*, 38.
[384] Dezalay, *Dealing in virtue*, 48.
[385] Kapeliuk, "The repeat appointment factor," 47.
[386] Kapeliuk, "The repeat appointment factor," 90.

and fairness. Some empirical evidence reveals systemic gatekeeping. For instance, Kapeliuk's found that 80.2% of cases involve at least one elite arbitrator. Moreover, Puig identified that top 4% of the arbitrators handling over a third of appointments. They perpetuates a cycle. This cycle prioritizes reputation and entrenched networks to dictate appointments. By doing so, it sidelines qualified newcomers and diverse perspectives. Kapeliuk asserts that elite arbitrators do not uniformly favor investors or compromise awards. However, their prevalence correlates with extreme outcomes and homogenous decision-making. Consequently, such cycle risks institutionalizing biases. Therefore, reform must break such cycle and introduce term limits, transparent appointment criteria. Moreover, quotas for underrepresented regions should be introduced.

Defenders of such status quo argue that elite dominance is meritocratic necessity. Moreover, expertise and experience justify repeated appointments. However, this type of arguments do not take into account access to privileged networks. They ignore systemic barriers that closed doors for the equally qualified arbitrators from the Global South. The reality is that non-Westerners also gain entry only through Western education or firms. Dezalay and Garth disputed the claim that reputation ensures quality through their generational analysis. It finds that appointments reflect Anglo-American law firms' preferences rather than objective competence. Ultimately, cycle of a club system like appointment mechanism prioritizes maintaining status quo over equity, fairness, and legitimacy. Therefore, reform should change such appointment mechanism.

2.1.4 The presiding arbitrator

Under current framework of the ISA, each party appoints an arbitrator, afterwards these two arbitrators select a presiding arbitrator. In case of disagreement, an authority or arbitration institute appoints one. ICSID has the authority to do so under ICSID convention.[387] However, only party-appointed arbitrators select the presiding arbitrator under UNCITRAL arbitration rules.[388] The presiding arbitrators play a critical role in the arbitration and can influence the arbitration process significantly. They have the power to decide on important procedural decisions and have the decisive vote in the event of differing views by the party-

[387] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), art. 29.
[388] UNCITRAL Arbitration Rules (2021), art. 9.

appointed arbitrators.[389] Some scholars finds them as the ultimate decision-makers in some instances.[390] This makes their appointment especially important.

Some claim a small group of arbitrators dominates the international arbitration market.[391] They can also influence the selection of presiding arbitrators. Moreover, expecting future reciprocation, they frequently select each-other.[392] Some scholars have narrowed down to a group of 25 arbitrators. They are mostly from Western countries. Furthermore, they account for over a third of all appointments even with they are only 4% of all arbitrators.[393] Kapeliuk's research also confirms the existence of a small group of arbitrators who frequently selected as arbitrators.[394] In addition, she maintains that arbitrators' decisions lack a consistent balanced pattern.[395]

Another concern is related to the nomination of presiding arbitrators by developing countries. Rogers highlighted that only a few developing countries have nominated potential presiding arbitrators. This needs to change for better representation in international arbitration.[396] There is a perception of bias concerning presiding arbitrator. It is claimed that they may favor parties from similar development backgrounds.[397] Franck thinks that this perception cannot be taken lightly. This perception can cultivate unfairness.[398] Moreover, a study found that presiding arbitrators with more nominations from investors than States are more likely to favor investors in ISDS cases.[399] However, Kapeliuk disagree with such claim. Her study showcases that presiding arbitrators are less likely to reach extreme decisions or to rule in favor of investors.[400]

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[389] Cox et al., *The anatomy of influence: Decision making in international organization* (Yale University Press, 1973), 13.
[390] Carbonneau, Thomas E. "The Exercise of Contract Freedom in the Making of Arbitration Agreement." *Vanderbilt Journal of Transnational Law* 36, no. 4 (2003): 1211-12. https://heinonline.org/HOL/P?h=hein.journals/vantl36&i=1205.
[391] Rogers, "The politics of international," 968.
[392] Dezalay, *Dealing in virtue*, 50.
[393] Langford et al., "The revolving door," 309-10.
[394] Kapeliuk, "The repeat appointment factor," 90.
[395] Kapeliuk, "The repeat appointment factor," 90.
[396] Rogers, "The politics of international," 223–262.
[397] Susan D. Franck, "Development and outcomes of investment treaty arbitration," *Harvard International Law Journal* 50, no.2 (2009): 451, https://heinonline.org/HOL/P?h=hein.journals/hilj50&i=439.
[398] Franck, "Development and outcomes," 453.
[399] Donaubauer et al. "Winning or losing in investor-to-state dispute resolution: the role of arbitrator bias and experience." *Review of international economics* 26, no. 4 (2018): 892-916. https://doi.org/10.1111/roie.12347.
[400] Kapeliuk, "The repeat appointment factor," 90.

This dissertation, therefore, argues that the current mechanism to appoint presiding arbitrators in international investment arbitration is also structurally flawed. This mechanism perpetuates systemic biases.

The elite club of arbitrators who often gets appointed also engenders reciprocal appointments and they have disproportionate influence over appointments of presiding arbitrators. This mechanism provides a cycle of self-perpetuation and undermines geographic diversity. That means Global South has limited engagement in nominating presiding arbitrators which is identified in Rogers' findings. Although Kapeliuk's study indicates that presiding arbitrators are not overtly investor-biased, however, Franck's position is that such mechanism itself erodes trust in the system. Hence, ICSID's institutional mechanism of *ad hoc* appointment is insufficient and problematic.

Defenders of status quo maintain that ad hoc appointment mechanism provides greater control over appointments to the parties which increases procedural fairness too. However, this argument fails to take into account other important aspects. For example, party-appointed arbitrators inherently prioritize familiarity and reciprocity. Therefore, there is the necessity of such reform that ensures diversity and institutional mechanism rather than relying on *ad hoc* or party-driven selection process. The reform should incorporate such mechanism.

2.1.5 Appointment and reappointment of arbitrators and 'compromised awards' or favoritism

Critics claim that arbitrators favor their appointing party to obtain future appointments.[401] However, defenders of the current appointment system contend that arbitrators are more concerned to build reputations for fairness.[402] Critics also claim that arbitrators issue compromise awards to keep both parties satisfied.[403] Moreover, the goal to satisfy the both parties often leads to 'splitting the difference' method where they try to ensure each party gets some measure of success.[404] This approach reflects a preference for moderate

[401] Rogers, "The politics of international," 226.
[402] Charles N. Brower, and Stephan W. Schill. "Is arbitration a threat or a boom to the legitimacy of international investment law?," *Chicago Journal of International Law* 9, no. 2 (2008): 492, https://heinonline.org/HOL/P?h=hein.journals/cjil9&i=475.
[403] Kapeliuk, "The repeat appointment factor," 61.
[404] Richard A. Posner, *How judges think* (Harvard University Press, 2010), 19-56, 127-29.

decisions,[405] and to find middle-ground for both parties.[406] Nonetheless, defenders insist that this sort of balancing methods do not match with traditional arbitration practices.[407]

Party-led appointment system of arbitrators carries a risk of bias.[408] To avail future appointments, party-appointed arbitrators may favor their appointing parties and increase the scope of interpretations to allow more cases.[409] This in turn, may lead to systematic favoritism.[410] Moreover, this system offers a financial and reputational incentive and enhance the likelihood of bias.[411] Franck maintains that their judicial behavior can be influenced by this.[412] According to a recent study, the more a presiding arbitrator is nominated by investors compared to respondent States, the higher the probability that the investor will win the ISDS case.[413] In addition, currently there is no automatic disqualification for repeat appointments. This also raises concerns about impartiality.[414]

Nunnenkamp's analysis also confirms such criticism and conclusion regarding the appointment and reappointment of the arbitrators and the influence of presiding arbitrators. After evaluating the UNCTAD's ISDS data from the late 1990s, he pointed out that poorer countries are disproportionately vulnerable to unfavorable outcomes in disputes.[415] This disproportionate outcome comes due to favoritism from the tribunal presidents towards the investors over the States.[416]

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[405] Alan Scott Rau, "Integrity in private judging," *South Texas Law Review* 38, no. 2 (1997): 523, https://heinonline.org/HOL/P?h=hein.journals/stexlr38&i=497.
[406] Posner, *How judges think*, 1261.
[407] Alec Stone Sweet, "Arbitration and judicialization," *Oñati Socio-Legal Series* 1, no. 9 (2011): 4, https://opo.iisj.net/index.php/osls/article/view/169/127.
[408] Gus Van Harten, *Investment treaty arbitration and public law* (Oxford University Press, 2008), 35.
[409] Henry S. Farber, and Max H. Bazerman, "The general basis of arbitrator behavior: An empirical analysis of conventional and final-offer arbitration," *Econometrica* 54, no. 4 (1986): 822, https://doi.org/10.2307/1912838.
[410] Will Sheng Wilson Koh, "Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges." *Journal of International Arbitration* 34, no. 4 (2017): 711-740. https://doi.org/10.54648/joia2017033.
[411] Schultz, Thomas, and Robert Kovacs. "The rise of a third generation of arbitrators? Fifteen years after Dezalay and Garth." *Arbitration International* 28, no. 2 (2012): 162. https://doi.org/10.1093/arbitration/28.2.161.
[412] Franck, "Development and outcomes," 499, 509, 516.
[413] Donaubauer et al. "Winning or losing."
[414] Koh, "Think Quality," 711–740.
[415] Peter Nunnenkamp, "Biased arbitrators and tribunal decisions against developing countries: stylized facts on investor-state dispute settlement," *Journal of international development* 29, no. 6 (2017): 853, https://doi.org/10.1002/jid.3279.
[416] Nunnenkamp, "Biased arbitrators," 854.

Rogers characterizes these claims, opinions and views as hypotheses. She, then, opine that these are grounded on assumptions that haven't been thoroughly examined. Moreover, sometimes, these are based on anecdotal accounts, rather than on solid evidence.[417]

In response to criticism of party-appointed arbitrators, many commentators offered their solutions and recommendations. Some commentators proposed to scrap this system. Paulsson suggested that a system can be taken from these three options, for instance, joint selection by parties, selection by a neutral body, selection from pre-approved lists by a reputable institution.[418] However, this recommendation itself has its downside. Arbitrators may become pro-arbitration to secure future appointments from the institution.[419]

Despite ongoing criticisms, this system remains popular to the parties and arbitral institutions.[420] For instance, in spite of the London Court of International Arbitration (LCIA)'s default rule of institutional appointments, parties choose their arbitrators in over 50% of cases. Similarly, ICSID accounts for 71% of appointments.[421]

This dissertation, therefore, claims that the current system of party-led appointment of arbitrators in international investment arbitration is structurally biased. This system provides incentive to prioritize in seeking future appointments. There are also financial and reputational incentives that may involve favoring their appointing parties. Consequently, there are phenomenon like "split the difference" or disproportionately favor repeat users, such as investors. Nunnenkamp's study reveal such trend. Focused on the presiding arbitrators, this study showcase that they were more frequently nominated by investors, and statistically more prone to rule in favor of the investors. This process disproportionately harms developing countries. Moreover, this mechanism perpetuates conflict of interest and undermines legitimacy of the system. Although critics like Rogers dismiss the concerns raised against party-led appointment system as anecdotal or unproven. Moreover, they also argue that arbitrators prioritize building reputations for fairness not for getting repeated appointments. However, these positions does not take into consideration various studies that associated appointment patters to biased outcomes. Furthermore, these positions also ignore

[417] Rogers, "The politics of international," 228.
[418] Jan Paulsson, "Moral hazard in international dispute resolution," *ICSID review* 25, no. 2 (2010): 339-355, https://doi.org/10.1093/icsidreview/25.2.339.
[419] Mala Sharma, "Reforming Investor-State Arbitration" (PhD diss., University of Surrey, 2021), 47, https://doi.org/10.15126/thesis.900158.
[420] Maria Nicole Cleis, *The independence and impartiality of ICSID arbitrators: current case law, alternative approaches, and improvement suggestions*, vol. 8 (Brill, 2017), 55.
[421] Nicole Cleis, *The independence and impartiality*, 55.

pressure for economic survival in a competitive market. Therefore, reform should move beyond such mechanism and eliminate incentives that undermine impartiality. Nonetheless, there should be strict code of conduct for arbitrators to regulate issues related to conflict of interest and biasness.

2.1.6 Double-hatting of arbitrators, conflict of interest and perceived biasness

Scholars have pointed out that double-hatting in international investment arbitration has now been verified empirically.[422] This practice involves individuals serving as arbitrators, counsel, expert witnesses, and tribunal secretaries consecutively or concurrently.[423] Sometimes, it is referred to as the 'revolving door'.[424] This has raised the issue of conflict of interest and garnered substantial criticism.[425]

Buergenthal, a former judge of the International Court of Justice (ICJ), expressed concerns when arbitrators also act as counsel. He linked this issue to violation of due process of law. Moreover, he emphasized that arbitrators and counsel should commit to one role to prevent conflicts of interest and to avoid of favoritism towards clients. Furthermore, he underscored that revolving-door issue shall be prevented. Mutual selection that is analogous to scratching each other's back is inconsistent with the rule of law.[426]

However, IBA Guidelines listed the issue of conflicts as part of the Green List. Moreover, arbitrators are rarely disqualified for such conflicts.[427] Scholars raised questions whether holding dual roles maintain principles of independence and impartiality.[428] Another concern develops as parties started to perceive arbitrators as biased and tend to appoint those they

[422] Langford et al., "The revolving door," 301–332.
[423] Langford et al. "The ethics and empirics of double hatting." *ESIL Reflection* 6, no. 7 (2017): 1-12, http://dx.doi.org/10.2139/ssrn.3008643.
[424] Langford et al., "The revolving door," 301.
[425] Langford et al., "The revolving door," 301–332.
[426] Thomas Buergenthal, "The proliferation of disputes, dispute settlement procedures and respect for the rule of law," *Arbitration International* 22, no. 4 (2006): 495-500, https://doi.org/10.1093/arbitration/22.4.495.
[427] Ina C. Popova, and Jessica L. Polebaum. "Emerging Expectations for Arbitrators: Issue Conflict in Investor-State Arbitration and Beyond." *Fordham International Law Journal* 41, no. 4 (2017): 937-952. https://heinonline.org/HOL/P?h=hein.journals/frdint41&i=959.
[428] Langford et al., "The revolving door," 301–332.

view as sympathetic to their case. Moreover, concern are further heightened because of arbitrators' desire for reappointment and frequent 'changing of hats'.[429]

Ratner mentioned three reasons for the perceived partiality in investor-State arbitration.[430] Firstly, when parties select arbitrators anticipating favorable outcome and arbitrators potentially attaching future appointments to their decisions, that engenders the perception of partiality.[431] Secondly, there is a perceived incentive for arbitrators to rule in favor of investors, even if it is a partial, to ensure a constant stream of cases.[432] Lastly, because of arbitrators' frequent 'changing of hats', the concerns about impartiality increases more.[433]

There are ethical guidelines in place to deal with these issues. However, in response to challenges, it is rare for other arbitrators or appointing institutions to make them resign. The arbitrators might be cautious not to upset the counsel who and his law firm could appoint them in the future.[434] Notably, the arbitral community is quite unconcerned about the issue of 'double-hatting'. A recent joint report by the American Society of International Law and the International Council for Commercial Arbitration were in support of stricter disqualification standards. However, although they characterized double-hatting as problematic, but did not fully address the concerns.[435]

Among the defenders of double-hatting, some scholars defend 'double-hatting' because of the limited pool of qualified arbitrators and the need to maintain the quality of adjudicators.[436] Moreover, a tribunal in a specific case found the concurrent role of arbitrator and counsel inappropriate but acknowledged that holding both roles simultaneously is a generally accepted practice.[437]

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[429] David Gaukrodger, and Kathryn Gordon. "Investor-state dispute settlement: a scoping paper for the investment policy community." *OECD Working Paper No. 2012/3* (2012): 43-51. http://dx.doi.org/10.2139/ssrn.2207366.

[430] Steven R. Ratner, "International investment law through the lens of global justice," *Journal of International Economic Law* 20, no. 4 (2017): 768, https://doi.org/10.1093/jiel/jgx038.

[431] Paulsson, "Moral hazard," 348–55.

[432] Ratner, "International investment law," 769.

[433] Langford et al., "The revolving door," 321–31.

[434] Bernasconi-Osterwalder, Nathalie, and Diana Rosert. *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes* (International Institute for Sustainable Development, 2014), 26.

[435] Boisson de Chazournes, Laurence, and John R. Crook et al. *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration* (International Council for Commercial Arbitration, 2016), paras 128–33, 170–71.

[436] Peterson, Luke Eric. "Arbitrator decries "revolving door" roles of lawyers in investment treaty arbitration." *Investment Arbitration Reporter*, February 25 2010. https://www.iareporter.com/articles/arbitrator-decries-revolving-door-roles-of-lawyers-in-investment-treaty-arbitration/.

[437] Vito G. Gallo v. The Government of Canada (2007), PCA Case No. 2008-03, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009, para. 29.

Sharma considers these opinions as weak arguments.[438] She thinks that there is steady supply of skilled and expert arbitrators.[439] Moreover, in reality, only a small number of arbitrators trying to dominate the field and obstructs diversity.[440]

Langford, Malcolm, Behn and Lie contend that there is presence of double hatting, even though it is practiced by a small group of influential arbitrators. Moreover, although this practice might not be extensive, however, it is practiced quite consistently. Thus, its presence is observable and questionable, despite debates about the extent of its impact on independence.[441]

This dissertation, therefore, asserts that the practice of double-hatting is a systemic and problematic issue in international investment arbitration. This issue not only raises questions of conflicts of interest but also undermines the integrity of the process. Motivations of a counsel and arbitrator are different. An arbitrator inherently prioritize career advancement over neutrality. When a person acts both as a counsel and arbitrator, although in different cases, creates various problems. It engenders a culture of mutual back-scratching for the benefit of everyone involved. Ratner also contends that there are financial incentives to secure future appointments. Consequently, it affects the outcome of cases. Studies of Langford et al. maintain that regardless of the universality of double-hatting issue, its regular practice perpetuates systemic bias and it restrains diversity. Nonetheless, Sharma's position is significant here. She asserts that dominance by a handful of elite arbitrators is a choice, not a necessity. Moreover, diversity of arbitrators can easily be attained. Critics dismiss double-hatting as minor issue. They don't think that this issue has such overwhelming impact. Moreover, they defend it as a pragmatic necessity. They don't try to understand the gravity of the problems caused by such unfair practice. Therefore, there is necessity for strict regulatory reform to eliminate the double-hatting issue. The position of majority of stakeholders also supportive of such reform.

[438] Sharma, "Reforming Investor-State," 50.
[439] Sharma, "Reforming Investor-State," 50.
[440] Sharma, "Reforming Investor-State," 50.
[441] Langford et al., "The revolving door," 328.

2.1.7 Pro-investor favoritism and perceived biasness

Biased arbitrators have a major contribution to the legitimacy crisis in international investment arbitration.[442] Literature review of Franck and Wylie[443] highlights that ISDS courts exhibit bias in favor of investors, lack democratic legitimacy, and produce inconsistent decisions. Likewise, Van Harten called the arbitrators 'private judges' because of their operation in secrecy. He thinks that they favor large corporations, ignore conflicts of interest, and produce unpredictable decisions.[444] Waibel and Wu finds that many arbitrators within ICSID can be levelled as 'pro-investor', and some as 'pro-State'.[445] Similarly Pauwelyn concludes that they receive recurrent appointments based on their reputation.[446]

Sornarajah, on the other hand, critiques the selection of arbitrators biased towards investors which in turn would likely favor developed countries.[447] Highlighting the favoritism towards investors in general and investors of wealthy capital-exporting countries in particular, Van Harten[448] stresses that economically disadvantaged States lose the arbitration cases in higher numbers because of their weak bargaining power.[449] Moreover, critics further pointed out that to maintain their business prospects[450] and/or policy preferences[451], the investment arbitrators consistently prioritize investor interests. Van Harten further contends that ICSID and UNCITRAL are institutionally biased in favor of developed States and corporations. He

[442] Nunnenkamp, "Biased arbitrators," 851.
[443] Susan D. Franck, and Lindsey E. Wylie. "Predicting outcomes in investment treaty arbitration." *Duke Law Journal* 65, no. 3 (2015): 459-526. https://heinonline.org/HOL/P?h=hein.journals/duklr65&i=471.
[444] Gus Van Harten, "Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration," *Osgoode Hall Law Journal* 50, no. 1 (2012): 211-268, https://heinonline.org/HOL/P?h=hein.journals/ohlj50&i=219. Franck, "Development and outcomes," 435.
[445] Michael Waibel, and Yanhui Wu. "Are Arbitrators Political? Evidence from International Investment Arbitration." *ASIL Research Forum Working Draft*, 2017. http://dx.doi.org/10.2139/ssrn.2101186. 7, 21–23.
[446] Pauwelyn, "The rule of law," 787.
[447] Sornarajah, Muthucumaraswamy. "Power and justice: third world resistance in international law." *Singapore Yearbook of International Law* 10 (2006): 32, 33. https://heinonline.org/HOL/P?h=hein.journals/singa10&i=29.
[448] Van Harten, "Arbitrator behaviour," 211–268.
[449] Behn, Daniel, Tarald Laudal Berge, and Malcolm Langford. "Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration." *Northwestern Journal of International Law & Business 38, no. 3* (2018): 333-389. https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss3/1.
[450] Guzman, Andrew T. "Arbitrator liability: Reconciling arbitration and mandatory rules." *Duke Law Journal* 49, no. 5 (1999): 1282. https://heinonline.org/HOL/P?h=hein.journals/duklr49&i=1293.
[451] Schneiderman, David. "Judicial politics and international investment arbitration: seeking an explanation for conflicting outcomes." *Northwestern Journal of International Law & Business* 30, no. 2 (2010): 411-12. https://heinonline.org/HOL/P?h=hein.journals/nwjilb30&i=387.

highlights that the decisions of these institutions often ignore the development concerns of disadvantaged States to prioritize commercial interests.[452]

There are scholars who defends the current system of appointment of arbitrators and their works. Brower and Schill strongly assert that partisan is detrimental to the arbitrator's themselves.[453] Moreover, Sweet maintains that it is suicidal for them.[454] Furthermore, Caruba dismisses the claim that arbitrator's developmental background have any impact on outcomes. She insists that the claim is not backed by data.[455] In addition, Paulsson contends that bias of the arbitrators are no longer prevalent,[456] and that is only a matter of historical concern. He suggests developing countries not to object about the international arbitration but to master it.[457]

Recognizing that outcomes vary depending on arbitrations' political, economic, and legal settings, Shalakany refutes claims of pro-Western bias among arbitrators.[458] He argues that arbitrators' approaches vary because of various factors,[459] for instance, their views on sovereign control levels.[460] Franck adds further that arbitrators' views may be shaped by their background, education, the legal framework, the parties involved, and the nature of each dispute.[461]

Despite all of these arguments and counter-arguments, the claims of systemic bias continues to be raised.

This dissertation, therefore, demonstrates that the perception of systemic pro-investor bias in international investment arbitration is well-founded. This issue engendered widespread dissatisfaction of the States. Moreover, it undermined the legitimacy of the system. The analyses of Van Harten, Franck, and Sornarajah contended that the legitimacy crisis in ISDS

[452] Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law," In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill (Oxford University Press, 2010), 642–43.
[453] Brower, "Is arbitration a threat," 492.
[454] Stone Sweet, "Arbitration and judicialization," 21.
[455] Caruba, Sandra L. "Resolving International Investment Disputes in a Globalised World." *NZ BUS. LQ* 13 (2007): 132.
[456] Jan Paulsson, "Third world participation in international investment arbitration," *ICSID Review* 2, no. 1 (1987): 21, https://doi.org/10.1093/icsidreview/2.1.19.
[457] Paulsson, "Third world participation," 20.
[458] Amr A. Shalakany, "Arbitration and the third world: a plea for reassessing bias under the specter of neoliberalism," *Harvard International Law Journal* 41, no. 2 (2000): 430, https://heinonline.org/HOL/P?h=hein.journals/hilj41&i=425.
[459] Shalakany, "Arbitration and the third world," 429.
[460] Shalakany, "Arbitration and the third world," 467-68.
[461] Franck, "Development and outcomes," 453.

stems from alignment of investor interests by arbitrators. Van Harten views arbitrators a "private judges" and their lack of accountability engenders decisions that prioritize corporate profits over public welfare. These actions disproportionately harm developing countries. Repeated appointments of arbitrators are driven by reputations for investor-friendly rulings. Even if empirical studies regarding this matter is inconclusive or debatable, nonetheless, the widespread perception of biasness is itself damaging. For instance, Waibel and Wu's findings, and Pauwelyn's study showcase how structural incentives undermine neutrality. Critics of such positions, for instance Paulsson, dismiss the issue of bias as a "historical concern." They do not take into consideration the embedded power dynamics that engenders such issues. Brower, Sweet, and Caruba argue that to safeguard reputations, arbitrators themselves avoid partiality. Moreover, they also argue that developmental backgrounds do not influence the outcome of cases. However, they overlook system issues. Furthermore, they assert that developing countries should focus on mastering arbitration. This position ignores the influence of asymmetrical bargaining power that leaves States vulnerable to biased tribunals.

Therefore, there is necessity for structural reforms to eliminate systemic biasness. Addressing the appointment of arbitrators and establishing an institutional arbitration mechanism would impact the system positively.

2.2 Concerns related to the interpretation

A consistent legal system yields coherent decisions and generates predictability.[462] On the contrary, inconsistent decisions in similar cases lead to unpredictability and raise disputes and costs.[463] The issue of inconsistency in investment arbitration decisions is well-known. Many scholars studied its causes and offered solutions.[464] Moreover, both States and

[462] The IBA Arbitration Subcommittee on Investment Treaty Arbitration, "Consistency, efficiency and transparency in investment treaty arbitration," (November, 2018): 6, https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.

[463] Arato et al., "Parsing and managing inconsistency in investor-state dispute settlement," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 337, https://doi.org/10.1163/22119000-12340175.

[464] Tushar Behl, and Abhisar Vidyarthi. "A Granual Look into the Interpretative Inconsistency in Investor-State Dispute Settlement." *Indian Arbitration Law Review* 6 (2024): 44-64. https://heinonline.org/HOL/P?h=hein.journals/inalr6&i=64. Yong Il Kim, and Ji Hyeon Hwang. "Practical Suggestions for Improving Consistency of ICSID Arbitral Awards." *Journal of Arbitration Studies* 34, no. 2 (2024): 27-44. https://doi.org/10.16998/jas.2024.34.2.27. Somesh Dutta, "The Quest for "Consistency" in International Investment Jurisprudence and the Idea of a Multilateral Investment Court," In *Case-Law and the Development of International Law*, ed. Patrícia Galvão Teles and Manuel Almeida Ribeiro . Brill Nijhoff, 2021.

investors face considerable challenges for inconsistency. This issue raises the concern about fairness and efficiency of the system.

Stakeholders have highlighted that different arbitral tribunals in various cases interpret the same standards and treaty terms inconsistently.[465] This differences in interpretation engender contradictory jurisprudence which is harmful for both parties specially the States.[466] Moreover, there is no integrated framework to handle multiple proceedings on the same facts,[467] and existing options like annulment and set-aside are inadequate to resolve these inconsistencies.[468]

Available arbitral decisions showcase inconsistent interpretation. The arbitrators employed different interpretations of the same treaty provisions to assess similar cases. These variations lead to uncertainty about treaty principles and unpredictability in their future application.[469] For instance, after the Argentine financial crisis, tribunals gave different rulings on the non-precluded measures (NPM) clause in the US-Argentina BIT. The *CMS*, *Enron*, and *Sempra* tribunals held the invocation of the clause unjustified. Conversely, the *LG&E* tribunal held the invocation of the clause justified. The *LG&E* tribunal viewed the NPM clause independently of the customary international law (CIL) standard of necessity, while the *CMS*, *Enron*, and *Sempra* tribunals did not. Similarly, in the *Lauder* arbitrations, London and Stockholm tribunals issued conflicting decisions on the same expropriation dispute under similarly worded treaties.[470] The Stockholm tribunal ruled there was expropriation, but the London tribunal did not.

Inconsistency in ISDS exists partly because of the fragmented nature of ISDS tribunals. Each ISDS tribunal is ad hoc and it hears individual disputes under various investment treaties. Tribunals are not required to follow other decisions as there is no formal precedent system

[465] United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session," Fifty-second session (8-26 July 2019): paras 27. A/CN.9/964.
[466] Arato et al., "Parsing and managing inconsistency," 344.
[467] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 41.
[468] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 16(iii).
[469] UN Trade and Development, "Reform of Investor-State Dispute Settlement: in Search of a Roadmap," No. 2 (June, 2013): 3, https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.
[470] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Publlic International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (2004): 1521-1626, https://heinonline.org/HOL/P?h=hein.journals/flr73&i=1537.

in public international law. This makes inconsistency likely.[471] Moreover, two characteristics of investment law, namely the use of broad legal concepts and the decentralized nature of investment law, also provide the scope for inconsistency.[472] The lack of a standing body and an appellate mechanism[473] may also contribute to inconsistency.

Arguments exist both for and against consistency in international investment arbitration. Some commentators criticize the inconsistency of decisions, but others question the need for consistency. However, the stakeholders of the current reform initiative view consistency as desirable.[474] The majority view supports consistency to interpret investment law and efforts should be made to realize it.[475] A tribunal emphasized the duty of arbitral tribunals to ensure consistency.[476] However, in a different case, an arbitrator opined that each case should be decided independently,[477] while another arbitrator advocated for adhering consistent solutions to develop international investment law harmoniously.[478]

Van Harten is of the view that consistency is desirable in international investment arbitration.[479] Arato, Brown, and Ortino contend that inconsistent interpretations of primary and structural rules are problematic.[480] Moreover, they highlight that structural inconsistencies engender greater uncertainty and unpredictability.[481] Furthermore, they emphasize that consistency is crucial for maintaining legitimacy and legality of any legal system.[482] However, they also maintain that some inconsistency is inevitable and can lead to legal development.[483] Moreover, Alschner is of the view that the arbitral tribunal should not

[471] Stephan W. Schill, *The multilateralization of international investment Law* (Cambridge University Press, 2009), 57.
[472] The IBA Arbitration Subcommittee on Investment Treaty Arbitration, "Consistency, efficiency and transparency in investment treaty arbitration," (November, 2018): 6, https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.
[473] Sharma, "Reforming Investor-State," 73.
[474] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 40.
[475] International Centre for Settlement of Investment Disputes (ICSID), "Possible Improvements of the Framework for ICSID Arbitration," (October 2004): 4, https://icsid.worldbank.org/sites/default/files/publications/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.
[476] Saipem S.p.A. v. The People's Republic of Bangladesh (2007), ICSID Case No. ARB/05/07, para. 90.
[477] Burlington Resources v Ecuador (2017), Decision on Counter-Claims, ICSID Case No. ARB/08/5, para. 187.
[478] Burlington Resources v Ecuador (2017), Decision on Counter-Claims, ICSID Case No. ARB/08/5, para. 187.
[479] Van Harten, *Investment treaty arbitration*, 165.
[480] Arato et al., "Parsing and managing inconsistency," 346.
[481] Arato et al., "Parsing and managing inconsistency," 347.
[482] Arato et al., "Parsing and managing inconsistency," 340.
[483] Fuller, Lon L. *The Morality of Law: Revised Edition* (Yale University Press, 1969), 65–70, 75–81.

follow consistent interpretation instead of pursuing the correct one.[484] Similarly, Schultz opine that arbitration's focus should be on rendering the correct decision rather than consistency.[485] Because correct decision are more essential than consistency. Moreover, tribunals have no legal obligation to be consistent. Arato, Brown, and Ortino further note that design of investment treaties allow arbitrators to favor flexibility over predictability. Therefore, high degree of consistency is undesirable.[486]

Schultz also of the view that inconsistency is intrinsic to investment arbitration.[487] Correct and transparent decision-making would be compromised if this attribute is eliminated.[488] Bjorklund and Ratner caution against pursuing consistency or harmonization only for their own sake.[489] Thus, Arato, Brown, and Ortino opine that complete consistency is neither practical nor desirable and the value of consistency should be scrutinized in context.[490]

Franck points out that the contradictory results of the *Lauder cases* indicate an error in at least one award. It highlights the system's unreliability because of its incapability to resolve inconsistencies.[491]

From the perspective of the governments, there is a consensus that the extent of inconsistency must be addressed. Moreover, they are prioritizing the subject of inconsistent interpretations of investment treaty rules in ISDS reform.[492] Reflecting the concerns of the governments, the UNCITRAL Working Group III as the primary forum for ISDS reform focuses on this issue.[493] WGIII highlights the issue of inconsistencies that involve the interpretation of identical treaty standards or customary international law rules without valid

[484] Wolfgang Alschner, "Ensuring Correctness or Promoting Consistency: Tracking Policy Priorities in Investment Arbitration through Large-scale Citation Analysis," In *The Legitimacy of Investment Arbitration: Empirical Perspectives*, ed. Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (Cambridge University Press, 2019), 231.
[485] Thomas Schultz, "The function of investment arbitration," In *The Foundations of International Investment Law Bringing Theory into Practice*, ed. Zachary Douglas, Joost Pauwelyn, and Jorge E. Vinuales (Oxford University Press, 2014), 297.
[486] Arato et al., "Parsing and managing inconsistency," 346.
[487] Schultz, "The function of investment arbitration," 297.
[488] Schultz, "The function of investment arbitration," 297.
[489] Andrea K. Bjorklund, "Practical and Legal Avenues to Make the Substantive Rules and Disciplines of International Investment Agreements Converge," in *Prospects in International Investment Law and Policy: World Trade Forum*, ed. Roberto Echandi and Pierre Sauvé (Cambridge University Press, 2013), 176.
[490] Arato et al., "Parsing and managing inconsistency," 337.
[491] Franck, "The Legitimacy Crisis," 1521.
[492] Arato et al., "Parsing and managing inconsistency," 342-43.
[493] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 30.

reasons.[494] Furthermore, States involved in UNCITRAL and ICSID reforms proposed to develop appellate mechanism to ensure consistent decisions.[495]

This dissertation, therefore, emphasizes that there is systemic inconsistency in the current system. Conflicting rulings in cases like Argentine financial crisis and the Lauder arbitrations is just the tip of the iceberg related to this matter. This issue not only undermines legal certainty, but also creates confusion about applicable legal principles. Moreover, it affects both States and investors. Investors cannot reliably assess risks, while States face unpredictable liabilities. There are several factors that engender such issue, for example, *ad hoc* tribunals, fragmented treaties, and unavailability of appellate mechanism. Critics like Alschner and Schultz maintain that for just outcomes priority shall be given to correctness over consistency. Undoubtedly, correctness is the most important matter, however, they overlook that lack of consistency of the current system undermines both correctness and legitimacy. Conflicting rulings by two tribunals on identical treaty provisions suggest that at least one tribunal made wrong judgment. Bjorklund and Ratner has warned against "consistency for its own sake." This must be take into account, however, the status quo indicates that the system has excessive, and unguided flexibility. Therefore, to resolve the issues related to inconsistency, the factors that serves as the catalyst to engender such outcome have to deal with properly. Establishing an appellate body, and standardizing treaties would be useful to mitigate inconsistencies.

2.3 Limiting policy space and chilling effect on the regulation of the State

2.3.1 Limiting policy space

Maintaining policy autonomy while providing predictability and security for foreign investors is challenging for States when they negotiate IIAs.[496] Sometimes, ISDS enforcement of IIA rules is perceived to limit government policy space. This makes

[494] United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)," Fifty-first session, 25 June-13 July, 2018, UN Doc. A/CN.9/935., para. 21.
[495] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Ecuador," Thirty-eighth session, 14-18 October, 2019, UN Doc. A/CN.9/WG.III/WP.175, para. 5.
[496] Karsten Nowrot, "How to include environmental protection, human rights and sustainability in international investment law?," T*he journal of world investment & trade* 15, no. 3-4 (2014): 612-644, https://doi.org/10.1163/22119000-01504013.

government to avoid regulations that may invite challenges and financial claims from foreign investors.[497] Moreover, it is claimed that, asymmetric nature of ISDS claims, high arbitration costs and the risk of large awards constrain the regulatory space, especially in human rights and environmental law. Furthermore, even this impacts public interest issues related to social and economic rights.[498]

Investment arbitration cases have impacted a wide range of public concerns like environmental regulation, public health, energy policies, cultural heritage, urban policy, and taxation. This matter is analyzed differently by scholars. Schneiderman argues that some tribunals have pressured States to choose, specifically in matters of public health.[499] Conversely, Ratner opines that tribunals typically didn't force States to choose, particularly in matters of human rights.[500] Nonetheless, a key challenge in investment law is balancing investor interests with host States' regulatory space to resolve issues for instance human rights and environmental protection.[501]

In many ISDS cases, tribunals have found host States liable regardless of the claims that their actions were within their regulatory space and served legitimate public interests. For instance, in *SAUR International v Argentina*, the Tribunal recognized States' responsibility to ensure the right to water but stressed that their authority is not unlimited and must be balanced with investor rights.[502] However, in *Methanex v USA*, tribunal have accepted the margin of appreciation for States in matters related to public policy.[503]

Criticism of ISDS includes concerns about undermining democracy. They assert that it can restrict a host State's policy choices.[504] Another concern involves the potential negative

[497] Marco Bronckers, "Is investor–state dispute settlement (ISDS) superior to litigation before domestic courts? An EU view on bilateral trade agreements," *Journal of International Economic Law* 18, no. 3 (2015): 656, https://doi.org/10.1093/jiel/jgv035.
[498] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018. A/CN.9/WG.III/WP.150, para. 97.
[499] David Schneiderman, *Resisting economic globalization: critical theory and international investment law* (Springer, 2013), 64-70, 119-24.
[500] Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015), 327-47, at 353-59.
[501] Nowrot, "How to include environmental," 613-614.
[502] SAUR International SA v. Republic of Argentina (2006), Decision on Jurisdiction and Liability, ICSID Case No. ARB/04/4, para 331.
[503] Methanex Corporation v United States of America (1999), UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, part IV-chapter D, paras 9, 15.
[504] Stephan W. Schill, "Reforming investor–state dispute settlement: a (comparative and international) constitutional law framework," *Journal of International Economic Law* 20, no. 3 (2017): 656, https://doi.org/10.1093/jiel/jgx023.

impact on fundamental or human rights protected by domestic and international laws. This can take place when arbitral tribunals prioritize investor rights over concerns in connection with public health, water rights and indigenous rights. Tribunal may do this through expansive interpretations of investment rules that undermine these contending rights. Moreover, This also can be done by overlooking valid human rights-based defenses.[505]

Regardless of the scholarly debates surrounding the matter, there is a growing agreement on the need to reform the ISDS system. The stakeholders prioritize the protection of policy space and reinforcing State control.[506] Moreover, States are incorporating provisions in IIAs that protect and increase their policy autonomy to regulate foreign investments in line with public policy goals.[507]

This dissertation, therefore, contends that the current system constrains ability of States to regulate in the public interest. For instance, in SAUR International v. Argentina, the tribunal acknowledged State responsibilities but imposed limits on regulatory authority. Such decisions engender "chilling effect." This prevent or discourage government to enact legitimate policies for fear of costly litigation. Critics like Ratner maintain that there is no systemic impact regarding this issue. The tribunals seldom order States to cancel public interest regulations. However, his position overlooks practical reality. The climate of ISDS cases, and high costs engender regulatory self-censorship. Therefore, substantive and procedural reform is necessary. The substantive reform will provide safeguard for regulatory measures and procedural reform will provide better adjudication environment.

2.3.2 Chilling effect on the right to right to regulate or regulation of the State

The ISDS system faces backlash for undermining the right to regulate. In literature, it is referred to as 'regulatory chill'. It takes place when policymakers hesitate or amend regulations due to the threat of lawsuits.[508] Inconsistent and broad ISDS rulings have ignited concerns that such interpretations may prevent governments to pursue its public policy

[505] Schill, "Reforming investor–state," 657.
[506] Schill, "Reforming investor–state," 652.
[507] Footer, Mary E. "Bits and pieces: social and environmental protection in the regulation of foreign investment." *Michigan State University College of Law Journal of International Law* 18, no. 1 (2009): 37-42. https://heinonline.org/HOL/P?h=hein.journals/mistjintl18&i=37.
[508] Magdalena Bas, "Back to sovereignty? Policy space in investor-State dispute settlement," *Revista Brasileira de Política Internacional* 65, no. 2 (2022), https://www.scielo.br/j/rbpi/a/Ybm9CvsRHZ3jMLNZK9Xg4wF/?lang=en.

goals.[509] Tienhaara claimed that developing countries are more vulnerable to regulatory chill due to limited financial resources.[510]

There are differing opinions about the impact of ISDS cases on respondent States.[511] Critics argue that investors file cases to limit domestic regulations. This is a key issue in the ongoing reform initiative under UNCITRAL WGIII.[512]

Critics contend that ISDS's asymmetric claims process and the risk of large sum of awards restricts regulatory space of States and leads to 'regulatory chill'.[513] For instance, in the *Vattenfall v. Germany* case,[514] Germany relaxed environmental requirements from the Elbe river regulations to avoid hefty compensation. Moreover, in *Ethyl v. Canada*, Canada lifted a ban on a toxic additive known to have health risks and paid $13 million to settle the dispute.[515] Furthermore, after a lengthy discussion on plain packaging in Europe and Canada, Eva and Yotova conclude that the threat of expensive international litigation can deter regulation.[516]

There is a lot of anecdotal evidence of ISDS responsible for causing regulatory chill,[517] however, Carolina Moehlecke methodically studied this issue.[518] She examined how ISDS cases related to anti-smoking regulations affect other States' legislation of similar measures. She found that these cases slightly deterred other States. Moreover, developing countries deterred from adopting similar measures although the defending State of a case won the

[509] Lorenzo Cotula, "Do investment treaties unduly constrain regulatory space?." *Questions of international law* 9 (2014): 20, https://www.qil-qdi.org/wp-content/uploads/2014/11/03_Regulatory-Powers-IEL_COTULA.pdf.
[510] Kyla Tienhaara, "Mineral investment and the regulation of the environment in developing countries: lessons from Ghana," *International Environmental Agreements: Politics, Law and Economics* 6 (2006): 388, https://doi.org/10.1007/s10784-006-9010-6.
[511] Gus Van Harten, *The trouble with foreign investor protection* (Oxford University Press, 2020), 99.
[512] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa." Thirty-eighth session (14-18 October, 2019): para. 2. A/CN.9/WG.III/WP.176.
[513] United Nations General Assembly, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session," Fifty-second session, 8-26 July, 2019. A/CN.9/970, para 36.
[514] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (2009). ICSID Case No. ARB/09/6.
[515] Gus Van Harten, *Sold Down the Yangtze: Canada's lopsided investment deal with China* (James Lorimer & Company, 2015), 107-109.
[516] Eva Nanopoulos, and Rumiana Yotova, "'Repackaging' Plain Packaging in Europe: Strategic Litigation and Public Interest Considerations," *Journal of International Economic Law* 19, no. 1 (2016): 177, https://doi.org/10.1093/jiel/jgw007.
[517] Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science," In *Evolution in Investment Treaty Law and Arbitration*, ed. Chester Brown and Kate Miles (Cambridge University Press, 2011), 47.
[518] Carolina Moehlecke, "The chilling effect of international investment disputes: limited challenges to state sovereignty," *International Studies Quarterly* 64, no. 1 (2020): 1-12, https://doi.org/10.1093/isq/sqz077.

case.[519] However, other case studies and qualitative research also show how ISDS threats lead States to alter or abandon regulatory proposals.[520]

Various studies on ISDS's impact on domestic regulation reveal mixed results.[521] A Canadian study finds no consistent evidence of regulatory chill.[522] However, another Canadian study from Ontario discloses that ISDS concerns can lead to changes in environmental regulations.[523] Moreover, studies on prominent cases[524] related to plain tobacco packaging show that these cases have caused other countries, e.g. New Zealand,[525] to delay similar measures due to fear of litigation.[526] Confirming this claim, Moehlecke's research maintains that countries generally were more watchful to incorporate regulations related to anti-smoking that challenged under ISDS. Likewise, fear of ISDS cases have triggered governments in Ghana[527] and Indonesia[528] to drop environmental regulations. Overall, case-based studies support a connection between ISDS and cautious regulatory behavior.

Developing a typology to demonstrate the variability of regulatory responses to ISDS cases,[529] Berge and Berger found that States with greater bureaucratic capacity usually reduces regulatory activity in response to pending ISDS cases compared to those who has lower capacity.[530] They used data from 146 ISDS cases related to environmental regulations

[519] Moehlecke, "The chilling effect," 2.
[520] Gábor Hajdu, A beruházó és az állam közötti vitarendezési (ISDS) eljárás és annak aktuális kritikái, PhD diss., University of Szeged, 2021, https://doktori.bibl.u-szeged.hu/id/eprint/11037/1/HG_PhD_%C3%89rtekez%C3%A9s.pdf. Stuart G. Gross, "Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom-An Indonesian Case Study," *Michigan Journal of International Law* 24, no. 3 (2002): 893-960, https://heinonline.org/HOL/P?h=hein.journals/mjil24&i=909.
[521] Van Harten, *The trouble with foreign*, 99.
[522] Christine Côté, "A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment," PhD diss., London School of Economics and Political Science, 2014, 187.
[523] Gus Van Harten, and Dayna Nadine Scott. "Investment treaties and the internal vetting of regulatory proposals: a case study from Canada," *Journal of International Dispute Settlement* 7, no. 1 (2016): 92-116, https://doi.org/10.1093/jnlids/idv031.
[524] Philip Morris Asia Limited v. The Commonwealth of Australia (2011), UNCITRAL, PCA Case No. 2012-12. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (2010), ICSID Case No. ARB/10/7.
[525] Kyla Tienhaara, "Regulatory chill in a warming world: the threat to climate policy posed by investor-state dispute settlement," Transnational environmental law 7, no. 2 (2018): 229-250, https://doi.org/10.1017/S2047102517000309.
[526] Tienhaara, "Regulatory chill," 230.
[527] Tienhaara, "Mineral investment," 388.
[528] Gross, "Inordinate Chill," 895.
[529] Tarald Laudal Berge, and Axel Berger. "Do investor-state dispute settlement cases influence domestic environmental regulation? The role of respondent state bureaucratic capacity," *Journal of International Dispute Settlement* 12, no. 1 (2021): 2, https://doi.org/10.1093/jnlids/idaa027.
[530] Berge et al. "Do investor-state dispute," 3.

and global data on domestic environmental policies.[531] Overall, their findings indicate that high-capacity States initially decrease regulation due to ISDS cases. However, this response usually is temporary.[532]

This dissertation, therefore, posits that the ISDS contributes to regulatory chill. It deters governments, mostly in developing countries, from passing regulations for public interests. Due to the threat of costly litigation and large some of awards involved, the governments avoid passing consequential regulations that might end up in litigation. A few empirical evidence demonstrates how ISDS litigations deter States to avoid pursuing regulations for public welfare. For instance, Germany's relaxation of environmental safeguards in Vatenfall and Canada's reversal of a public health ban in Ethyl are two such examples in this matter. Moehlecke's research on anti-smoking regulations further demonstrates that the developing countries remain hesitant to adopt similar measures even when a respondent State of developed in economic capacity win the case.

Critics who dismiss regulatory chill assert that there is no consistent evidence, and the evidence is anecdotal in nature that makes it unreliable. However, they overlook context-specific issues. For example, New Zealand's delayed tobacco plain packaging policy or Ghana and Indonesia's abandonment of specific environmental regulations. Moreover, they fail to account for indirect chilling effects. For instance, in some situations, States preemptively self-censor their policies to avoid litigation risks altogether. Furthermore, from Berge and Berger's study, we find that there is a period that can critically delay urgent public interest measures.

Therefore, substantive reform is necessary to preserve regulatory autonomy of States. For instance, explicit provisions should be adopted for public interest measures. Moreover, procedural safeguards like transparency regarding tribunal reasoning is also important.

2.4 Lack of appeal mechanism and additional review

The investor-State dispute settlement system is often criticized for the absence of an appellate mechanism.[533] Without a couple of exceptions, the system only has court of first

[531] Berge et al. "Do investor-state dispute," 23.
[532] Berge et al. "Do investor-state dispute," 25.
[533] United Nations Trade and Development (UNCTAD), "Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II," (2014): 25, UNCTAD/DIAE/IA/2013/2.

instance and its awards are generally final. However, under the ICSID convention, only annulment procedure is available and this is the only review process.[534] This mechanism only provides review of arbitral awards for a narrow set of conditions, and focuses only on jurisdictional errors and serious procedural violations.[535] In non-ICSID cases, only 'non-arbitrability of the subject-matter of the dispute or violation of public policy' can be tried.[536] Moreover, this does not offer the mechanism for errors in fact or law. This means that significant factual or legal mistakes cannot be corrected through this process. In other words, annulment examines the fairness of the process rather than the correctness of the decision itself.[537] Besides, the basis for annulment are narrowly specified and limit the discretion available to annulment committees.[538] For falling outside its scope, a party cannot get remedy, [539] although the claim may ask to correct 'manifest errors of law'.[540] Furthermore, the annulment committee is formed on an ad hoc basis and has limited oversight over them. Therefore, it has been argued that, this process sometimes invalidate tribunals' decisions based on a narrow set of criteria. In addition, it engenders inconsistent decisions and weakens the credibility of the system itself.[541]

The finality of ISDS decisions is often cost-effective and time-saving. However, this can lead to inconsistent or flawed rulings on similar issues.[542] Unlike any adjudicatory system that has built-in review system or legislative oversight, ISDS lacks such mechanisms which could correct judicial errors and assure consistency.[543] Thus, there is mounting support for creating a standing appellate mechanism akin to the WTO Appellate Body.[544]

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[534] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Art. 52.
[535] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Art. 52.
[536] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Art. 46.
[537] David D. Caron, "Reputation and reality in the ICSID annulment process: understanding the distinction between annulment and appeal," *ICSID Review* 7, no. 1 (1992): 24, https://doi.org/10.1093/icsidreview/7.1.21.
[538] Ngangjoh-Hodu et al., "ICSID annulment procedure and the WTO appellate system: the case for an appellate system for investment arbitration," *Journal of International Dispute Settlement* 6, no. 2 (2015): 314, https://doi.org/10.1093/jnlids/idv010.
[539] Ngangjoh-Hodu et al., "ICSID annulment procedure," 314.
[540] CMS Gas Transmission Company v. The Republic of Argentina (2003), Decision of the ad hoc Committee on the application for annulment, ICSID Case No. ARB/01/8, paras. 97, 127, 136, 150, 157-159.
[541] UN Trade and Development, "Reform of Investor-State Dispute Settlement: in Search of a Roadmap," No. 2 (June, 2013): 3-4, https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.
[542] Choi, Won-Mog. "The present and future of the investor-state dispute settlement paradigm." *Journal of International Economic Law* 10, no. 3 (2007): 741. https://doi.org/10.1093/jiel/jgm024.
[543] Schill, "Reforming investor–state," 654-55.
[544] Jeffrey Kucik, and Sergio Puig, "Towards an Effective Appellate Mechanism for ISDS Tribunals," *World Trade Review* 22, no. 5 (2023): 562-583, https://doi.org/10.1017/S1474745623000253. Niclas Landmann, "Appeal Mechanism and the Issue of Consistency in International Investment Arbitration," In Creation and

The idea of establishing an appellate mechanism also suggested in an ICSID paper published in 2004.[545] The ICSID report of 2011 also mentioned the need for an appellate mechanism,[546] however, no further action is taken so far and other reports remained silent about it.[547] Later, the note of the ICSID Secretariat deemed it premature difficult to achieve consensus of the stakeholders.[548]

There have been numerous attempts to introduce appellate mechanism for ISDS. However, those attempts repeatedly failed.[549] In recent years, there are increased demands for establishing an appellate system similar to the WTO model.[550] Appeals generally examine both the legitimacy and correctness of decisions.[551] However, the key issues not only include getting support for an appellate mechanism, but also include choosing the preferred structure, standards of review and overcoming practical challenges related to the establishment.[552]

Dimitropoulos thinks that introducing an appellate mechanism in ISDS could address the issue related to accommodation of alternative perspectives by adjudicators in their decisions. It would facilitate the adjudicators to take another perspective from the appellate adjudicators.[553] Although it might increase the costs and make process lengthy,[554] however,

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Implementation of a Multilateral Investment Court, ed. Julian Scheu (Nomos Verlagsgesellschaft mbH & Co. KG, 2022). Seung-Woon Lee, "ISDS reform: analysis on establishing a multilateral investment court system," Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 87, no. 4 (2021), https://doi.org/10.54648/amdm2021041.

[545] International Centre for Settlement of Investment Disputes (ICSID), "Possible Improvements of the Framework for ICSID Arbitration," (October 2004): 14-15, https://icsid.worldbank.org/sites/default/files/publications/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.

[546] International Centre for Settlement of Investment Disputes (ICSID), "ICSID 2011 Annual Report," (September 9, 2011): 39, https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/2011-annual-report-english.pdf.

[547] None of the ICSID annual reports including ICSID annual reports of 2023 deal with the issue of appellate mechanism.

[548] Christoph H. Schreuer, "Revising the System of Review for Investment Awards," *University of Vienna* (2009), 2, https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A032.pdf.

[549] Chester Brown, , "Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court," *ICSID Review - Foreign Investment Law Journal* 32, no. 3 (2017): 595–610, https://doi.org/10.1093/icsidreview/six021.

[550] Franck, "The Legitimacy Crisis," 1521. Ngangjoh-Hodu et al., "ICSID annulment procedure," 309.

[551] Caron, "Reputation and reality," 24.

[552] David Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges," *Vanderbilt Journal of Transnational Law* 39 (2006): 45, https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss1/2.

[553] Georgios Dimitropoulos, "Investor–State Dispute Settlement Reform and Theory of Institutional Design," *Journal of International Dispute Settlement* 9, no. 4 (2018): 27, https://doi.org/10.1093/jnlids/idy025.

[554] UN Trade and Development, "Reform of Investor-State Dispute Settlement: in Search of a Roadmap," No. 2 (June, 2013): 8, https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.

it would increase transparency,[555] consistency,[556] predictability and accuracy of the decisions[557] and accountability of the process.[558] Sheppard and Warner is of the opinion that additional review mechanism would increase the authority of ISDS awards.[559] Moreover, Tams maintains that it would enhance the quality of decisions.[560]

Kalb thinks that an appellate mechanism would boost efficiency. Through its consistent and predictable interpretation pattern, it would discourage the prospective litigants to file similar cases that have already been resolved.[561] She further maintains that unlike annulment proceedings which has a history of extremely lengthy cases, it would offer a faster and final review.[562] Born, on the other hand, insists that it would enhance the quality of decisions as well as legitimacy and coherence of the system by following strict facts and law with the help of further review mechanism.[563]

Some scholars, however, establishing an appellate mechanism in ISDS. They assert that it would undermine the finality of awards,[564] make the process lengthy,[565] raise costs,[566] and reduce party autonomy to choose arbitrators of their choice.[567]

[555] Dimitropoulos, "Investor–State Dispute," 5.
[556] Christian J. Tams, "An Appealing Option? The Debate About an ICSID Appellate Structure." *Essays in Transnational Economic Law Working*, Paper No. 57 (2006): 17. http://dx.doi.org/10.2139/ssrn.1413694.
[557] Tams, "An Appealing Option?," 27.
[558] United Nations Trade and Development (UNCTAD), "World Investment Report 2015: Reforming International Investment Governance," (2015): 150. https://unctad.org/system/files/official-document/wir2015_en.pdf.
[559] Audley Sheppard, and Hugo Warner, "Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?-Editorial Note," *Transnational Dispute Management (TDM)* 2, no. 2 (2005), https://www.transnational-dispute-management.com/article.asp?key=399.
[560] Tams, "An Appealing Option?," 37.
[561] Johanna Kalb, "Creating an ICSID Appellate Body." *UCLA Journal of International Law and Foreign Affairs* 10, no. 1 (2005): 205-206. https://heinonline.org/HOL/P?h=hein.journals/jilfa10&i=183.
[562] Kalb, "Creating an ICSID," 206.
[563] Gary B. Born, *International arbitration: cases and materials* (Aspen Publishing, 2021), 1363.
[564] Kristina Anđeli, "Why ICSID doesn't need an appellate procedure, and what to do instead," in *Reshaping the Investor-State Dispute Settlement System–Journeys for the 21st Century*, ed. Jean E. Kalicki and Anna Joubin-Bret (Brill Nijhoff, 2015), 497, https://doi.org/10.1163/9789004291102_023.
[565] Tams, "An Appealing Option?," 37.
[566] Christoph H.Schreuer, and A. De La Brena. "Does ISDS Need an Appeals Mechanism?," Transnational Dispute Management (TDM) 17, no. 2 (2020), https://www.transnational-dispute-management.com/article.asp?key=2719.
[567] Eric Van Ginkel, "Reframing the dilemma of contractually expanded judicial review: Arbitral appeal vs. Vacatur," *Pepperdine Dispute Resolution Law Journal* 3, no. 2 (2002): 201-02, https://heinonline.org/HOL/P?h=hein.journals/pepds3&i=165.

In recent years, various models for an appellate mechanism in ISDS have been proposed. For instance, ad hoc tribunals,[568] a WTO-like body,[569] a multilateral tribunal[570] and the EU's investment court [571] captured substantial attention. However, Appleton opine that the establishment of a standing appellate mechanism within current international investment agreements is slim. Moreover, substantive reforms within institutions like ICSID are unlikely to incorporate appellate mechanism.[572]

Many stakeholders at UNCITRAL Working Group III has identified several concerns related to the current ISDS system. These include but are not limited to consistency, coherence, predictability, correctness of arbitral decisions and legitimacy issue.[573] Moreover, it noted that existing annulment mechanisms may ensure procedural fairness but don't sufficiently deal with incorrect decisions.[574] Furthermore, it is currently considering a multilateral appeal mechanism. [575] Many stakeholders think that it would address issues of inconsistent interpretations and incorrect decisions.[576] Generally, the idea of an appellate mechanism is mostly supported by States than by private investors and arbitrator community.[577]

This dissertation, therefore, underlines that establishing a standing mechanism in ISDS is crucial to address systemic flaws. This is important not only to ensure legal correctness, but also to uphold the legitimacy of the investment arbitration regime. The current ad hoc system

[568] Dohyun Kim, "The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment-based system," *New York University Law Review* 86, no. 1 (2011): 276, https://heinonline.org/HOL/P?h=hein.journals/nylr86&i=244.
[569] Donald McRae, "The WTO appellate body: a model for an ICSID appeals facility?," *Journal of International Dispute Settlement* 1, no. 2 (2010): 372, https://doi.org/10.1093/jnlids/idq003.
[570] Marc Bungenberg, and August Reinisch. *From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement* (Springer Nature, 2020), 3.
[571] The Comprehensive and Economic Trade Agreement (CETA) between Canada and the European Union (2017), Chapter 8 (Section F).
[572] Appleton, Barry. "The song is over: why it's time to stop talking about an International Investment Arbitration Appellate Body." In *Proceedings of the ASIL Annual Meeting*, edited by Erin Lovall (Cambridge University Press, 2013), 26.
[573] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session (29 October-2 November 2018): paras. 14-18. A/CN.9/WG.III/WP.150.
[574] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters." Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150, para. 16(iii).
[575] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS)." Thirty-eighth session, 14-18 October, 2019. A/CN.9/WG.III/WP.166, paras. 17-23.
[576] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS)," Thirty-eighth session (14-18 October, 2019): 2-3. A/CN.9/WG.III/WP.166/Add.1.
[577] Gantz, "An Appellate Mechanism," 73.

does not have the scope to correct substantive errors in fact or law through review process. Clearly there is lack of oversight mechanism to correct the mistakes of first instance mechanism. This not only perpetuates unpredictability, but also undermines the rule of law, and reduces trust in the system.

Critics argue that standing system with appellate mechanism would prolong proceedings, increase costs, and diminish party autonomy. However, these concerns overlook serious problems of the current system where there is scope for final judgments with legal errors, and inconsistency. Regulatory chill is another serious matter that is associated with the current system.

Therefore, an appellate body is necessary to resolve all these issues. It can be modeled after the WTO Appellate Body. This standing system with appellate mechanism could correct manifest errors, engender consistency, and ensure public interest considerations in decisions. Through this system, the jurisprudence of the arbitration would be much more predictable, and threat of costly litigation would be greatly reduced.

3 Conclusion

There are debates surrounding a wide range of issues of ISDS. Although there are arguments on both sides, however, the magnitude of criticisms against the ISDS are overwhelming and significant.

The system faces major concerns over impartiality, conflict of interest, and the integrity of arbitrators and their appointments. The issues of double-hatting and party-appointment are considered incompatible with the principles of independence and fairness. Moreover, all of the current appointment mechanisms produces lack of diversity. Overall, these issues incentivizes pro-investor favor of some sorts and legitimacy of the system becomes questioned.

There are recurring issues of inconsistency in interpretation of important treaty provisions and legal principles. This issue produces unpredictability which in turn encourages more cases to be filed against the States. For stakeholders, this is a matter of grave concern. That’s why reform initiatives at the UNCITRAL WGIII focuses to deal with this issue.

The fear of regulatory chill is real and it has some implications on State regulatory behavior. Studies found that it has influenced regulations related to public policies such as environmental protection, public health and human rights. However, the level of effect varies among States. Thus, UNCITRAL WGIII reform initiatives emphasis on protecting legitimate public policy objectives.

The current review mechanism of ICSID is inadequate and appellate mechanism can be a positive addition to the ISDS. It has the potential to mitigate some of the criticisms of the critics and can enhance consistency and predictability.[578] However, this is just one part of a solution and this not a panacea as there are many more issues to be resolved.[579] It may not decrease the cost substantially.[580]

Overall, issues discussed above need to be resolved carefully. Thoughtful reform proposals are required to prevent negative outcomes from returning in the ISDS all over again.

[578] Gantz, "An Appellate Mechanism," 74.
[579] Elsa Sardinha, "The Impetus for the creation of an appellate mechanism," *ICSID Review-Foreign Investment Law Journal* 32, no. 3 (2017): 527, https://doi.org/10.1093/icsidreview/six016.
[580] Gantz, "An Appellate Mechanism," 74.

Chapter IV: Lessons for multilateral investment dispute settlement mechanism from the WTO dispute settlement system

1 Introduction

UNCITRAL WGIII is preparing drafts on various legal instruments associated with international investment dispute settlement. It is working to form multilateral investment dispute settlement mechanism that involves preparing legal instruments for multilateral investment courts (MIC), appointment of arbitrators and code of conduct, advisory centre among other things.

This chapter studies the extent to which the multilateral investment dispute settlement mechanism follows the WTO dispute settlement system. Moreover, it evaluates the scope and extent to which this mechanism can learn from the WTO dispute settlement system. For doing so, this chapter examines the strengths and weaknesses of the WTO dispute settlement system. Afterwards, it suggests the lessons for the multilateral investment dispute settlement mechanism to establish a robust, efficient and effective mechanism.

This chapter selects some important matters related to multilateral dispute settlement for this purpose. Its analysis includes multilateralism, two-tier system, plenary body and decision-making, appointment mechanism and code of conduct for adjudicators or judges, secretariat, cost reduction and advisory centre.

2 Multilateralism

The WTO has unified and multilateral legal framework involving all the members. This legal framework provides advantage for the dispute settlement system of the WTO. Moreover, arguably this feature has been instrumental to the success of the WTO.[581] However, different scenario exists in international investment law. It is made up of thousands of BITs and investment provisions in trade agreements.[582] These agreements share some similar standards but these also have different protection standard specifications specially when it comes to States' right to regulate. That's why, Hufbauer maintains this as a key weakness of

[581] Mike Moore, "Ten Years of the WTO: A success story of global governance," *Internationale Politik und Gesellschaft* 2 (2005): 19, https://library.fes.de/pdf-files/id/ipg/02857.pdf.
[582] UNCTAD Investment Policy Hub. International Investment Agreements Navigator. Accessed November 7, 2024. https://investmentpolicy.unctad.org/international-investment-agreements.

the international investment law framework.[583] Opting for a harmonized and multilateral system is vital to address this problem. Such solution would enable governments to preserve public policy space and better manage the relationship between IIAs and other areas of international law.[584]

The Dispute Settlement Understanding (DSU) is particularly relevant for improving dispute settlement system of international investment law. In this regard, UNCITRAL WGIII may offer an international treaty to sign by the member States to establish international investment court. The DSU can serve as a useful model for such instrument.[585] However, Important matter is that multilateral treaty should be detailed and clear. Otherwise, this might create a lot of problems. Confirming this assumption, Zimmermann contends that vague treaty provisions engenders political tensions as well.[586] Scholars indicate that during the DSU negotiations, little attention was given to the structural aspects of adjudication. Thus, it has some issues related to that.[587]

Regarding international investment treaties, the UNCITRAL WGIII do not have any agenda to work for a multilateral investment agreement.[588] That means effect of the reform may not be lasting and meaningful. Because, the success of the multilateral investment court relies on the establishment of a multilateral framework of investment rules.[589]

Lack of efforts for a multilateral investment treaty may be based on the historical experience. In the past there were couple of attempts for a multilateral treaty.[590] However, all of these initiatives failed because of the diverging positions on different issues.[591] Nonetheless, there

[583] Gary Clyde Hufbauer, "Rules of the international trade, investment, and financial systems: What they deliver, how they differ, the way forward," *Journal of International Economic Law* 17, no. 4 (2014): 845, https://doi.org/10.1093/jiel/jgu040.
[584] United Nations Trade and Development (UNCTAD), "World Investment Report 2017: Investment and the Digital Economy," (2017): 129, https://unctad.org/system/files/official-document/wir2017_en.pdf.
[585] Rebecca Lee Katz, "Modeling an international investment court after the World Trade Organization dispute settlement body," *Harvard Negotiation Law Review* 22, no. 1 (2016): 165, https://heinonline.org/HOL/P?h=hein.journals/haneg22&i=169.
[586] Thomas Alexander Zimmermann, *Negotiating the review of the WTO Dispute Settlement Understanding* (Cameron May, 2006), 229.
[587] Bernard Hoekman, and Petros C. Mavroidis, "Burning down the house? The Appellate Body in the centre of the WTO crisis," *The Appellate Body in the Centre of the WTO Crisis*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 56 (2019): 1-17, http://dx.doi.org/10.2139/ssrn.3424856.
[588] Tania Singla, "A Multilateral Framework for Investment Protection: The Missing Piece in the Puzzle of ISDS Reform?," *NLUD Journal of Legal Studies*, 2, no. 1 (2020): 133, https://heinonline.org/HOL/P?h=hein.journals/nludjls2&i=131.
[589] Singla, "A Multilateral Framework," 133.
[590] Supnik, "Making amends," 357.
[591] Efraim Chalamish, "The future of bilateral investment treaties: a de facto multilateral agreement?," *Brooklyn Journal of International Law* 34, no. 2 (2009): 334, https://heinonline.org/HOL/P?h=hein.journals/bjil34&i=297.

might be a change of States' attitude regarding this matter. Still, this isn't an assurance for a successful multilateral agreement.[592]

This dissertation, therefore, hightlights that the current fragmented nature of international investment treaties not only undermines its effectiveness, but also complicates its dispute settlement system. Although there are benefits to multilateral investment agreement, for instance, it may address systemic weaknesses; however, it is highly unlikely that States will come up with such agreement any time soon because of political and structural barriers. Hence, absence of a multilateral investment agreement like that of a WTO agreement would definitely be consequential for multilateral investment court framework.

This dissertation further argues that the success of the WTO stems from its binding and unified rules. This feature contrasts with the fragmented character of bilateral investment treaties governing investment law. However, even if States come up with a multilateral agreement, divergences on the some key issues may persist. In other words, multilateral agreement is not a panacea for every issues. There would be some vagueness left in the agreement for the tribunals to decide.

This dissertation further points out that proposed standing multilateral framework for investment dispute settlement may mitigate procedural fragmentation, however, its effectiveness would be reduced because of the absence of a multilateral investment agreement. In other words, without harmonizing substantive standards, procedural reforms alone would not be able to solve some of the core issues.

3 Two-tier system

The WTO has two-tier adjudicative system.[593] The Appellate Body is the cornerstone of its dispute settlement system and panels works as the first instance adjudication. Moreover, the creation of the Appellate Body has been vital to the WTO's success.[594] It provides additional safeguard to minimize the errors of law made by the first instance adjudication body.

[592] Wouters et al., "The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries," *Human Rights & International Legal Discourse* 3, no. 2 (2009): 288, https://heinonline.org/HOL/P?h=hein.journals/hurandi3&i=263.
[593] World Trade Organization (WTO), "WTO Bodies involved in the dispute settlement process," accessed November 10, 2024, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm.
[594] Hufbauer, "Rules of the international trade," 835.

There is a concern regarding the dispute settlement system of the WTO. It's first instance adjudication is ad hoc in nature. This engenders range of issues including the issue of impartiality and qualification of panel members etc. Therefore, Davey contends that the Appellate Body's judicial nature requires a similar permanent lower instance.[595] However, Wasescha argues that two permanent body may create redundancy issue as the two bodies would be similar in nature and practice.[596]

Nature of disputes under WTO and international investment agreements are different. Moreover, remedies provided by these two systems are quite different too. One the one hand, WTO dispute settlement system usually asks for compliance. On the other hand, ISDS system usually hand over compensation to the defending State. Therefore, the thesis contends that keeping the ad hoc first instance adjudication would not be a wise choice. Rather, permanent bodies for both bodies would be beneficial in the context of international investment law.

Sholars argue that many ISDS cases involve public international law issues. Thus, these cases should be heard by public international law court instead of private arbitration.[597] Moreover, ISDS cases involve public policy related issues. There, these cases should be heard by public judges in public courts instead of private arbitrators in restricted proceedings.[598]

Reform initiative under the UNCITRAL WGIII are working towards a multilateral investment court with a possibility of two-tier system.[599] Although there are different proposals and options to choose for the stakeholders. Moreover, there is a proposal for one instance permanent body. However, scholars assert that reformed system should include appellate mechanism.[600] Important feature is that these proposals mirror the WTO framework with some variances.

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[595] William J. Davey, "The case for a WTO permanent panel body," *Journal of International Economic Law* 6, no. 1 (2003): 183, https://heinonline.org/HOL/P?h=hein.journals/jiel6&i=181.
[596] Luzius Wasescha, "Comment on a WTO Permanent Panel Body," Journal of International Economic Law 6, no. 1 (2003): 226, https://heinonline.org/HOL/P?h=hein.journals/jiel6&i=228.
[597] Katz, "Modeling an international investment," 180.
[598] Katz, "Modeling an international investment," 180.
[599] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," para. 17.
[600] Marc Bungenberg, and August Reinisch, *From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement* (Springer Nature, 2020), 61.

Furthermore, the WTO operates as a permanent global institution funded by its members according to a quota system.[601] Following these footsteps, multilateral investment court or similar mechanism can adopt such rules. In addition, the WTO's experience is indicative of the positive outcomes of similar mechanisms.[602] However, significant success depends on how its decisions influence State sovereignty and public policy space.[603]

This dissertation, therefore, contends that the establishment of a two-tier standing dispute settlement system for international investment law is necessary and feasible. It can be modeled on the framework of the WTO but should be refined to address its deficiencies. The Appellate Body of the WTO demonstrates the importance of a standing body. It not only reduces the legal errors but also enhances the predictability. These are definitely crucial advantages over the *ad hoc* mechanism available in the international investment dispute settlement system. Moreover, the standing mechanism would strengthen transparency and legitimacy, particularly in cases related to public policy.

Critics like Wasescha cautioned that two-tier standing mechanisms may engender redundancy. However, this can be avoided by clearly outlining and assigning roles to each court. For example, first-instance court may focus on fact-finding and initial legal analysis, but appellate mechanism may focus on legal coherence and systemic consistency. Furthermore, opponents of standing appellate mechanism overlook the systemic flaws of *ad hoc* arbitration where there is conflicts of interest, and lack of appellate review perpetuates inconsistent decisions.

4 Plenary body or appointing authority and decision-making

4.1 Plenary body or appointing authority

Many international dispute settlement mechanisms have a general Plenary Body. In the case of WTO, it has the Dispute Settlement Body (DSB).[604] This body typically makes all key

[601] World Trade Organization (WTO), "Members' contributions to the WTO budget and the budget of the Appellate Body for the year 2015," accessed November 10, 2024, https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.
[602] Joubin-Bret, Anna. *Why we need a global appellate mechanism for international investment law*. No. 146. Columbia FDI Perspectives (2015): 1. https://www.econstor.eu/bitstream/10419/253980/1/fdi-perspectives-no146.pdf.
[603] Faith Abel Abraham, "The Establishment of a Multilateral Investment Court: Lessons Learned from the WTO," PhD diss., World Trade Institute, Universität Bern, 2023, 82.
[604] Ruffert M, Walter C (2009) Institutionalisiertes Völkerrecht. C.H. Beck, München, para. 296.

decisions within the organization. Moreover, it has broader mandate to deal with. For instance, it may handle appointment of judges, allocation of cases and establishment of internal procedural rules.[605] Furthermore, this body has power to form internal subdivisions for drafting codes of conduct and evaluating judicial candidates, among other things. In addition, this body has the power to issue general interpretative statements as corrective step for multilateral instruments within its authority.[606] Generally, this body is consist of representatives from all its members.[607]

Plenary body's meeting place should be decided carefully. The WTO has the seat of its Dispute Settlement Body in Geneva. To make it convenient and cost effective, ideally the seat of the plenary body of multilateral investment dispute settlement can be in or around Geneva. Understandably, the States has concentrated their resources in this place which might be useful for other multilateral mechanisms. Moreover, plenary body should meet as frequently as possible to oversee and examine the processes of the multilateral dispute settlement mechanism.

This dissertation, therefore, stresses that a plenary body should be established for a multilateral investment dispute settlement mechanism. It can be modeled on the Dispute Settlement Body (DSB) of the WTO. Moreover, choosing Geneva as the place of seat of this body is a pragmatic and efficient choice. Existing concentration of resources by countries for other multilateral forums would enhance operational efficiency, reduce cost, and make it more accessible. Furthermore, it would foster collaboration with other multilateral bodies.

Alternative locations as the place of seat of this risk fragmenting current international governance infrastructure, and would increase costs of the process. Nonetheless, concerns about Eurocentrism are valid. It is a fact that Eurocentrism marginalizes non-European States. However, choosing Geneva outweighs some of the concerns as this may reduce costs and make the system more accessible compared to current places of seat of international investment arbitration.

[605] Bungenberg et al., *From bilateral arbitral tribunals*, 32.
[606] Bungenberg et al., *From bilateral arbitral tribunals*, 33.
[607] Bungenberg et al., *From bilateral arbitral tribunals*, 33.

4.2 Decision-making

Decision-making process of the WTO involves two key concepts. One is consensus and another is reverse consensus. Under Article 2.4 of the DSU, the DSB makes decisions by consensus.[608] That means the appointment of the AB members is based on consensus of the DSB members. If only one member objects, the decision would not be finalized on the specific matters. This effectively grants veto power to each member.[609] There is an exception to this rule. In specific situations, reverse consensus is used. For example, in establishing panels, adopting the panel and AB reports etc.[610] This method resolved issues of blockage of adopting panel and AB reports. However, it also raised concerns about the automatic adoption of faulty panel reports and making it binding. Moreover, this method facilitated the legalization of dispute settlement in the WTO.[611]

Furthermore, there are flaws to this consensus decision-making process. It enable members to block the appointment and reappointment of judges. Which can make the AB unworkable.[612] Consensus process might have introduced to make the system inclusive and to enfranchise everyone. However, it has instead led to issues of paralysis and disenfranchisement on a broader perspective. In addition, Guan argues that this system disproportionately favors powerful members and undermines fairness.[613] Thus, he calls for reform of such process.[614] The thesis contends that this process also undermines democratic decision-making.

Given the critical issues related to decision-making under the WTO, the multilateral investment dispute settlement mechanism should incorporate different method for decision-making than the WTO decision-making method. There are three options, e.g. simple majority, qualified majority and two-thirds majority, which can be incorporated into such mechanism. Initial draft on standing multilateral mechanism prepared by the WGIII, incorporates all of these options. For amending the number of representatives in the

[608] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 2.4.
[609] Wenwei Guan, "Consensus yet not consented: A critique of the WTO decision-making by consensus," *Journal of International Economic Law* 17, no. 1 (2014): 88, https://doi.org/10.1093/jiel/jgu004.
[610] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 6.1, 16.4, 17.14, and 22.6.
[611] Peter Van den Bossche, "The Making of the 'World Trade Court': The Origins and Development of the Appellate Body of the World Trade Organization," In *Key Issues in WTO Dispute Settlement: The First Ten Years*, ed. Rufus Yerxa and Bruce Wilson (Cambridge University Press, 2005), 64.
[612] Guan, "Consensus yet not consented," 81.
[613] Guan, "Consensus yet not consented," 79.
[614] Guan, "Consensus yet not consented," 79.

committee of the parties, it requires two-thirds majority.[615] Moreover, for appointing members to the selection panel, it requires qualified (three out of five) or simple majority.[616] Furthermore, for granting exemption regarding engagement in any other occupation, it requires simple majority.[617]

This dissertation, therefore, infers that the multilateral investment dispute settlement mechanism should adopt a two-thirds majority decision-making for critical decisions. It is a balanced approach that stabilizes inclusivity and efficiency. By requiring two-thirds majority decision the system can avoid paralysis of the WTO's consensus model. Moreover, it can mitigate the risks of marginalization inherent in simple majority voting. Requiring simple majority would be a very low threshold which might create dissatisfaction among a large number of members because of the feeling of being left out in critical decisions.

Reliance of the WTO on consensus model has proven dysfunctional. It enables individual members to block appointments and paralyze dispute resolution. This evident in the recent crisis of the Appellate Body appointments. Although consensus method is seen as enfranchising all members, however, it disproportionately empowers powerful States to weaponize vetoes. It not only undermine democratic decision-making and fairness, but also undermines legitimacy of the system.

Critics argue that two-thirds threshold may still slow decision-making, but this overlooks the urgency of avoiding stagnation as evident in the WTO. Moreover, some of the critics who defend consensus prioritize sovereignty over functionality, however, this ignores the reality that without functionality, the survival of the system would be highly in trouble.

[615] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," Accessed November 10, 2024, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf, draft provision 4.

[616] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 7.

[617] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 10.

5 Adjudicators or judges

5.1 Appointment process

The Dispute Settlement Body (DSB) has the authority to appoint judges in the WTO. It handles the appointment of panels[618] as well as AB members.[619] The appointment takes place through a structured process for the AB. First step is the nomination of qualified individuals by WTO members. Then, these nominees are then reviewed by the DSB of the WTO. After that the DSB appoints Appellate Body members through a consensus-based process. However, appointment of panelists takes place on an ad hoc basis for specific disputes.

Following the footsteps of the WTO, the multilateral investment dispute settlement mechanism also on the way to adopt similar processes. However, as the thesis has mentioned in the previous section, the only difference between the WTO and the multilateral investment dispute settlement mechanism is the decision-making method. While the WTO requires consensus, initial draft on standing multilateral mechanism does not specify about this matter.[620] From the incorporation of three methods for decision-making, it can be inferred that WGIII may incorporate from one of these three methods. Although incorporating a simple majority might be a positive development, however, the thesis contends that incorporating two-thirds majority would be better choice. Moreover, important to note that the multilateral investment dispute settlement mechanism is moving away from the current ad hoc system of appointment which is one of the contentious issues in the ISDS mechanism. Furthermore, there are also proposals for the diversification of appointments. The thesis discusses this issue in the pertinent section.

Regarding the nomination process, following the WTO, the governments may directly nominate candidates in the multilateral investment dispute settlement mechanism. Then, the plenary body may confirm or disqualify the nomination based on the requirements. After that the plenary body can arrange the voting. This process has criticisms for transparency and biasness issue. Another option is to choose from a larger pool of candidates proposed by

[618] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 2.1.
[619] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.1.
[620] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 8.

members following specific guidelines.[621] The thesis contends that the application for the position can be a mixed method. It may involve nomination of candidates by the members as well as application for the posts by the qualified individuals meeting the specific criteria. Important to note that the individual applications will be considered under a quota set for a member State. In this case, there is a need for separate body under the plenary body to process such applications and nominations.

The thesis contends that the success of this framework depends on the transparency and thoroughness of the screening process. Moreover, broader pool of candidates increases transparency and fairness. Thus, by choosing from broader pool of nominees, the multilateral investment dispute settlement can appoint qualified individuals as the judges.

5.2 Qualification requirements

The WTO sets specific qualifications for panelists and appellate body (AB) members. For AB members, it requires that members must have expertise in international law and international trade agreements. This requirement seeks to ensure that the judges have the necessary knowledge to make informed decisions on disputed matters. For panelists, it requires that they would be well-qualified individuals from governmental or non-governmental backgrounds. However, it excludes nationals of disputing parties to prevent bias and encourage diversity.[622]

Pauwelyn's study highlights that panelists are usually diplomats from developing countries who lack legal expertise.[623] However, more qualified members are appointed to the AB. This somehow fills the gaps created by the panels formation.[624] The AB consists of seven members with required expertise.[625]

The thesis contends the qualification requirements for the AB members of the WTO dispute settlement set a useful precedent. Requiring similar but modified standards in the context of

[621] Bungenberg et al., *From bilateral arbitral tribunals*, 35.
[622] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 8.
[623] Pauwelyn, Joost. "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus." *American Journal of International Law* 109, no. 4 (2015): 761–805. https://doi.org/10.5305/amerjintelaw.109.4.0761.
[624] Marcus Weiler, "Is One Permanent Instance Enough?: A Comparison between the WTO Appellate Body and the Proposed Investment Court System," In *International Challenges in Investment Arbitration*, ed. Mesut Akbaba, Giancarlo Capurro (Routledge, 2018), 168.
[625] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.2.

multilateral investment dispute settlement mechanism could be a good solution. Different qualifications requirements in the context of WTO dispute settlement for panels and the AB members also provides a valuable experience. Considering the criticisms, this underscores the importance of having a permanent body with highly qualified members.

Multilateral investment dispute settlement mechanism consists of permanent judges. Moreover, it requires similar qualifications for both bodies, e.g., first instance and appellate mechanism. This feature is distinct from the WTO.[626]

This dissertation, therefore, supports the view that the requirement should be similar to both first-instance and appellate bodies of a permanent multilateral investment dispute settlement mechanism. Moreover, qualification requirements should reflect the need of the international investment law where it warrants specific qualifications to hear specific litigations such as human rights, environmental law etc. Panel structure of the WTO as its first-instance mechanism allows non-experts such as diplomats to serve as adjudicators. This process creates gaps in legal reasoning. Therefore, reliance on the Appellate Body expectedly higher. Consequently, opting for two mechanisms increases the cost of the overall process. Therefore, mandating same qualifications for both bodies will reduce over reliance the appellate mechanism, and would reduce the overall cost of a litigation.

5.3 Number of judges

The appellate body (AB) of the WTO is composed of seven judges and the panels are formed on ad hoc basis as it requires.[627] So far, this formation worked well for the WTO. However, as the caseload of the WTO dispute settlement increased over the years, it may need appoint more judges to the appellate body. May be two more judges would serve the purpose for now.

Considering the experience of the WTO, the multilateral investment dispute settlement mechanism may need to appoint fewer judges to the appellate mechanism depending on the caseload. Understandably, there would be fewer cases at the beginning. However, the caseload may increase after several years. In this case, more judges can be appointed depending on the necessity. Like the WTO, the multilateral investment dispute settlement

[626] Weiler, "Is One Permanent Instance," 165.
[627] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.1.

mechanism may start with seven judges. For first instance, it may start with eleven or fifteen judges. The number of judges should remain limited for cost-efficiency and should be based on caseload instead of number of signatory States.[628] However, this might impact on the diversity and representation from the member States as the appointment would be limited in number. Still, efforts should be made to insure diversity as much as possible and the plenary body can adjust the formation when they appoint more judges later on.

This dissertation, therefore, reasons that multilateral investment dispute settlement mechanism should take a flexible and caseload focused approach to judicial appointments. That means, it should start with a smaller cohort of judges, for example, seven for appellate mechanism, and eleven to fifteen for first-instance mechanism. This approach would be cost-efficient because of avoiding over appointment keeping in mind the caseloads in its early years. This approach prioritizes appointment numbers based on actual demand rather than the number of signatory States. However, this approach may pose challenges to geographic diversity which is a key issue for representation of the global south. The plenary body should deal with this matter carefully and systematically.

5.4 Term limits

In the appellate body (AB) of the WTO, members serve a term of four years.[629] Moreover, there is option for reappointment.[630] However, it is limited to one additional term. This kind of term limit is incorporated to promote rotation and to prevent overpowering the judges. This approach ensures fresh perspective as well as maintain check and balance. Moreover, this also controls biases that may happen from long tenure.

Scholars also criticize the term limits of the WTO dispute settlement. They find it detrimental and argue that it undermines the dispute settlement and judicial independence.[631] Maintaining the insufficiency of the four-year term to ensure independence, Ehlermann proposed non-renewable term of eight years.[632] Moreover, Lockhart and Voon maintain that

[628] Bungenberg et al., *From bilateral arbitral tribunals*, 34.
[629] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.4.
[630] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.2.
[631] Abraham, "The Establishment of a Multilateral," 108. Bungenberg et al., *From bilateral arbitral tribunals*, 56.
[632] Claus-Dieter Ehlermann, "Some Personal Experiences as Member of the Appellate Body of the World Trade Organization," in *The WTO Dispute Settlement System 1995–2003*, ed. Frederico Ortino and Ernst-Ulrich Petersmann (Kluwer Law, 2004), 502.

although reappointments are generally granted, this dependency on member States for a second term affects independence.[633] They suggest automatic extension of second term.[634] The thesis contends that although short limits has some drawbacks and in the context of the WTO, certain judges didn't able to be reappointed for that. However, it may not have affected independence of those judges. Therefore, short term limits does not prove to be a bigger issue in the context of the WTO. Furthermore, the issue of control over the judges through the reappointment is a crucial tool for States and to make the multilateral dispute settlement more sustainable.

The initial draft on standing multilateral mechanism incorporated nine years as term limits.[635] This would be a departure from the WTO if it is finalized.

This dissertation, therefore, deduces that multilateral investment dispute settlement mechanism should adopt term limits similar to the WTO system. It has four-year terms with a single reappointment opportunity. It balances judicial independence with institutional accountability. Moreover, it ensures offering the place for fresh perspectives while allowing experienced judges to continue through reappointment. That means, although it limits tenure, but it permits merit-based reappointment. Through this process, the system avoids stagnation risks of long but non-renewable terms. It also mitigates concerns related to arbitrariness and overreach.

Proposals for non-renewable eight-year terms or automatic reappointments fail to address the core tension between independence and accountability. These proposals risks isolating judges from meaningful oversight. This may potentially lead to judicial overreach. Moreover, this undermines the critical role of performance review. Consequently, this may allow underqualified or biased judges to continue without scrutiny.

[633] John Lockhart, and Tania Voon, "Reviewing appellate review in the WTO dispute settlement system," *Melbourne Journal of International Law* 6, no. 2 (2005): 479, https://search.informit.org/doi/epdf/10.3316/agis_archive.20072905.
[634] Lockhart et al., "Reviewing appellate review," 479.
[635] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 9.

5.5 Code of conduct and independence of judges

It is perceived that the WTO dispute settlement enjoys a strong level of judicial independence. Pauwelyn and Pelc asserts that, unlike other courts, the WTO is associated with only rare instances of bias based on nationality. This bias is often comes through dissenting opinions.[636] This means it does not impact the dispute settlement in granting fair judgement.[637] The AB members of the WTO are required to be unaffiliated with any government. Moreover, they must not receive instructions from other entities or individuals.[638] However, For some professionals, e.g., domestic judges or university professors, this affiliation rule does not apply as they are considered to be independent.

The multilateral investment dispute settlement mechanism incorporated code of conduct for adjudicators. It can be opine that it learned from the WTO experience and followed its rules in this matter. Moreover, like WTO, they would receive salaries from MIC member States.[639] Furthermore, during their tenure, they are prohibited from acting as counsel or party-appointed experts in any investment dispute.

This dissertation, therefore, outlines that code of conduct for multilateral investment dispute settlement mechanism is essential to ensure judicial impartiality and fairness. Moreover, modeling the code of conduct after the WTO dispute settlement system is a prudent strategy. The final version of the code of conduct for arbitrators rightly prohibits adjudicators from acting as counsel of a party during their tenure. Providing salaries to the adjudicators, and restricting government affiliations is crucial for ensuring judicial impartiality. However, allowing judges and academics without applying such restrictions is a flexibility that would be beneficial for the system.

Critics who advocate for stricter bans on all professional affiliations overlook the practical necessity of getting expertise from various fields. On the other hand, proposals to remove affiliation rules completely risk normalizing conflicts of interest or double-hatting issue.

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[636] Joost Pauwelyn, Krzysztof J. Pelc, *Are WTO Rulings Biased?: The Role of Institutional Design in Protecting Judicial Autonomy* (Geneva Graduate Institute, 2023).
[637] Helene Ruiz Fabri, Gabrielle Marceau and Wolfgang Alschner. Rethinking WTO Dispute Settlement (2023): 24. http://dx.doi.org/10.2139/ssrn.4536513.
[638] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.3.
[639] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 10.

5.6 Diversity and representation among judges

In the appointment of the appellate body (AB) members of the WTO, consideration is given to diversity and representation.[640] However, the studies have shown that diversity and representation issue is still problematic and not up to the level of expectations.[641] Therefore, the thesis contends that although the WTO can be an example for learning diversity of adjudicators, however, this cannot be a model to copycat entirely. Consequently, the multilateral investment dispute settlement mechanism needs to be cautious in choosing its approach.

Moreover, the thesis contends that the diversity and geographical representation issue should be a key priority in the multilateral investment dispute settlement mechanism. Geographical or regional representation is the one that is most consequential in multilateral dispute settlement. However, this should not come at a cost of disregarding qualifications.

Commendable thing is that multilateral investment dispute settlement is considering all these aspects for the appointment of judges. Even it considered representation of principal legal systems.[642] This representation can be realized through regional quotas.[643] Moreover, it considered gender balance and linguistic diversity.[644]

This dissertation, therefore, contends that multilateral investment dispute settlement mechanism must prioritize geographical or regional diversity as the foundation of its adjudicator appointment process. Focusing on a long list of diversity criteria may actually hamper the core diversity issue that geographical or regional representation. This core criteria is not devoid from all other criteria, but connected to representation of principal legal system and linguistic diversity. In this context, the failure of the WTO to achieve expected regional representation offers lessons. It highlights the need for more focused approach. Regional diversity not only ensures equitable participation of States, but also address

[640] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.3.
[641] Khalique, Muhammad Abdul, "The WTO Regime: Critical Analyses of Existing Hegemony and Rule-making," Jog-Állam-Politika 9, no. 2 (2024) (Forthcoming).
[642] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 11.
[643] Ruth Mackenzie, "The Selection of International Judges," in *The Oxford Handbook of International Adjudication*, ed. Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (Oxford University Press, 2013), 744.
[644] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 11.

historical power imbalances in international investment dispute settlement. Nonetheless, fulfillment of qualification requirements must remain non-negotiable.

Proposals to prioritize gender, linguistic or legal system diversity above regional representation risk undermining the trust of the stakeholders and overlooking the concerns related to underrepresentation. For example, focusing on gender representation may not address the systemic inequities faced by regions like Africa or Asia. By contrast, regional representation focus compels the system to engage this issue meaningfully. Moreover, prioritizing geographical representation does not negate other forms of diversity.

6 Secretariat

Like other international courts and tribunals, the dispute settlement mechanism of the WTO also has secretariat. Responsibilities of the secretariat include providing administrative and technical support. Under panel members' authority and guidance, the secretariat assists in drafting reports as well as manages the panel processes.[645] However, there are criticisms regarding activities of the WTO which suggest that it asserts some sort of influence on the panel proceedings.[646] Nonetheless, secretariat plays significant role to function the dispute settlement body. It helps to build a reliable and cohesive dispute settlement mechanism.

Considering the experience of the dispute settlement mechanism of the WTO, similar mechanism should be incorporated in the multilateral investment dispute settlement mechanism. Mark and Tereposky asserts that the WTO experience itself suggests such model to be adopted.[647] Specifically, to run the day to day affairs of the dispute settlement mechanism there is a need for secretariat. Moreover, as the dispute settlement bodies would be smaller in size, they require assistance in various matters. Giorgio maintains that ad hoc arbitrators don't have such mechanism to rely on. Thus, the time frame of the dispute becomes lengthened and which in turn increases the cost.[648]

[645] McRae, "The WTO appellate body," 387.
[646] Khalique, Muhammad Abdul, "The WTO Regime: Critical Analyses of Existing Hegemony and Rule-making," Jog-Állam-Politika 9, no. 2 (2024) (Forthcoming). Ruiz Fabri et al., "Rethinking WTO Dispute," 23.
[647] Huber et al., "The WTO Appellate Body," 592.
[648] Giorgio Sacerdoti, "From Law Professor to International Adjudicator: The WTO Appellate Body and ICSID Arbitration Compared, a Personal Account," In *Practising Virtue: Inside International Arbitration*, ed. David D. Caron et al. (Oxford University Press, 2015), 207.

This dissertation, therefore, articulates that multilateral investment dispute settlement mechanism should establish a secretariat to offer administrative and technical support. A secretariat is essential for ensuring efficiency. However, there should be clearly defined boundaries to prevent undue influence on judicial decision-making. In other words, role of the secretariat should be limited to procedural and logistical support. For example, it can assist with case management, legal research, and proofreading etc. However, it cannot be involved in substantive matters, for instance, in drafting awards. Such involvement would compromise judicial independence and accountability.

In the context of the two-tier multilateral standing mechanisms, secretariat's involvement with substantive matters would not arise as the judges or adjudicators would be solely responsible and capable for the decision-making.

Critics might argue that not requiring assistance from the secretariat to draft awards could reduce efficiency, but this is necessary to maintain impartiality and public trust. Mark and Tereposky's endorsement for WTO-like secretariat model overlooks unique challenges of investment disputes. It is often involve sensitive public policy issues that require decision-making from competent authorities with accountability. By carefully dealing with this matter, international investment dispute settlement mechanism can achieve both efficiency and legitimacy.

7 Cost reduction

Although cost of the disputes is a troubling issue for both the WTO dispute and investment disputes, however, it is particularly too costly in case of investment disputes. The thesis contends that the structured format of the WTO dispute settlement provides some level of control mechanism on managing the cost. For example, it has full-time and readily available judges.[649] It has support mechanism like secretariat. Conversely, investment disputes do not have any of these facilities.[650] Moreover, there is no time limits on disputes and the record of granting awards in disputes is more-time consuming than the WTO disputes. This also increases the cost of investment disputes.

[649] Understanding on rules and procedures governing the settlement of disputes (DSU), art. 17.3.
[650] Sacerdoti, "From Law Professor," 207.

To solve the cost concerns, some features of the WTO dispute settlement can be adopted. For example, standing judges, time limits etc. Moreover, establishing an advisory center can be helpful to reduce costs by providing valuable legal support to respondent States and small and medium enterprises.[651] Rules to handle frivolous claims would also be useful in this regard.[652]

This dissertation, therefore, elucidates that multilateral investment dispute settlement mechanism must adopt structural reforms to reduce costs of investment disputes. Incorporating standing mechanisms, better appointment process, and advisory support would engender positive impact to reduce costs.

Investment disputes are comparatively costlier than the WTO dispute settlement system due to their reliance on *ad hoc* mechanism. Standing mechanism with permanent secretariat would significantly reduce delays and unpredictability of investment disputes.

Critics of institutionalization argue that standing mechanism with permanent secretariat risks bureaucratizing dispute settlement. This argument overlooks flexibility it provides, and impact it has on maintaining timelines to make adjudication more affordable.

8 Advisory centre

The Advisory Centre on WTO Law (ACWL) is an independent organization. It is formed by the Agreement Establishing the Advisory Centre on WTO Law which was finalized in 1999.[653] The objective of this organization include offering legal assistance and training for the disadvantaged countries. It offers free legal advice and training, however, assistance in dispute resolution comes at a discounted price. So far, it has assisted 39 developing countries and 43 least developed countries.[654] Its services are useful to ensure effective and participation. Moreover, it makes the dispute settlement mechanism of the WTO more accessible specifically for the disadvantaged countries. The thesis contends that although the ACWL plays a crucial role to increase level playing field, however, regardless of their

[651] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 3.

[652] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Multiple proceedings and counterclaims," Thirty-ninth session, 30 March-3 April, 2020, UN Doc. A/CN.9/WG.III/WP.193.

[653] The Agreement establishing the Advisory Centre on WTO Law (1999).

[654] The Advisory Centre on WTO Law (ACWL), "Advisory Centre." accessed November 10, 2024, https://www.acwl.ch/#tab-1448019391-1-67.

success, the capacity discrepancy is still present in the WTO dispute settlement. Sauvant contends that many developing countries do not have in-house legal counsel, although it is common for developed countries.[655] This reality plays a negative role in terms of access to justice and is not helpful to present their case effectively. This reduces their chances of win in the dispute settlement. The bottom line is that ACWL plays a positive role in assisting the disadvantaged countries.[656] Thus, it is important to incorporate this in international dispute settlement mechanism. However, there is lacking in terms of effective participation of disadvantaged countries with resources constrain.

In the context of multilateral investment dispute settlement mechanism, founding an Advisory Centre on International Investment Law (ACIIL) would be very useful. It can be modelled on ACWL.[657] Moreover, it may include other necessary features for its distinctive working area.

The positive development is that UNCITRAL WGIII is working towards establishing an advisory centre.[658] So far, it has adopted in principle Statute of the Advisory Centre on International Investment Dispute Resolution.[659] It aims to offer legal assistance to small and medium enterprises (SMEs) and developing countries in investment disputes. Moreover, it would offer other services like the ACWL.[660]

Sauvant proposes forming mixed teams with government lawyers and lawyers from the ACIIL to defend for a country. He thinks it this will enhance the capacity of defending

[655] Karl P. Sauvant, "An advisory centre on international investment law: key features," *University of St. Thomas Law Journal* 17, no. 2 (2020): 359-360, https://heinonline.org/HOL/P?h=hein.journals/usthomlj17&i=354.
[656] Ransdell, James. "Financial and Technical Support for Litigants in Inter-State Disputes: The Example of the WTO and the Advisory Centre for WTO Law." (2017): 2-21. http://dx.doi.org/10.2139/ssrn.2957476.
[657] Sauvant, "An advisory centre," 359.
[658] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Advisory Centre," Thirty-eighth session, 14-18 October, 2019, UN doc. A/CN.9/WG.III/WP.168.
[659] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Statute of the Advisory Centre on International Investment Dispute Resolution (adopted in principle)," accessed November 10, 2024, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2413025e.pdf.
[660] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Statute of the Advisory Centre on International Investment Dispute Resolution (adopted in principle)," accessed November 10, 2024, art. 7. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2413025e.pdf. United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," draft provision 3.

party.[661] Ubilava recommends that the ACIIL should play significant part for settling disputes amicably.[662]

This dissertation, therefore, illustrates that establishment of an Advisory Centre on International Investment Law (ACIIL) is a significant step for tackling systemic inequities in international investment dispute settlement. The ACWL's success underscores the value of such initiative for leveling the playing field for many developing and least developed countries. However, the ACIIL should adapt to the needs of investment law's complexities to offer expected services, and to engender better outcomes.

Sauvant's proposal for mixed teams comprising government lawyers and ACIIL attorneys may risk undermining efficacy of the ACIIL. ACIIL attorneys will likely face high caseloads. Moreover, investment dispute requires rigorous efforts and high level of concentration which the ACIIL lawyers might not have because of many pending duties. In other words, their attention would be divided to multiple duties.

The ACIIL should prioritize on developing long-term legal capacity through training and continuous support. These efforts would enable States to advocate for their interests independently. Moreover, the ACIIL must secure stable funding to avoid resource constraints that limits ACWL's impact in practice. Nonetheless, the ACWL's framework provides a useful mechanism, hence, the ACIIL should incorporate the best practices of the ACWL.

9 Conclusion

The stakeholders of the UNCITRAL WGIII has rightly taken the WTO dispute settlement system as its model. Although the two fields are different, but there things that can be effective for the new mechanism. Considering the experience of the WTO is quite mixed as it has its merits and drawbacks, the UNCITRAL WGIII should cautiously incorporate the provisions of the WTO.

[661] Sauvant, "An advisory centre," 368.
[662] Ana Ubilava, "Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems," *The Journal of World Investment & Trade* 21, no. 4 (2020): 528-557, https://doi.org/10.1163/22119000-12340183.

For brand-new restart, it can incorporate two-tier standing mechanism with standing judges for both instances. Incorporation of the two-tier standing mechanism is important considering the drawbacks of the first instance of the WTO dispute settlement and existing ad hoc ISDS mechanism. Keeping existing ad hoc ISDS mechanism means keeping the problem intact while trying to solve it by appellate mechanism. This might be ineffective or costly venture.

Adopting plenary body and unlearning the voting system of the WTO is essential as consensus mechanism engenders less result and time consuming. Thus, two-thirds majority voting system should be incorporated. This voting method should be applied in all deciding every matters of the multilateral investment dispute settlement mechanism including amendments to the multilateral legal instruments, appointment of adjudicators etc.

Incorporating advisory centre is a necessary adoption in the context of the accessibility issues to investment disputes. The centre can include some novel tasks into its work which may include hosting and assisting in mediation and conciliation process.

Chapter V: Analyses of the Different Reform Proposals and Views

1 Introduction

The reform of ISDS has become a vital issue in international investment law due to various concerns. The thesis has discussed some of the crucial concerns in previous chapter III. Most stakeholders, if not all, agree on the need for reform. However, they differ on how extensive those reforms should be. Moreover, there are couple of platforms or initiatives to host the organized reforms. The focus of the thesis is UNCITRAL WGIII's reform initiative. This platform covers a broad reform agenda, although related to procedural matters. Moreover, it is the central focus for both stakeholders and scholars. In this chapter, the thesis provides critical analyses of the ongoing reform efforts within ISDS. Furthermore, he studies the multifaceted nature of the debate. The thesis also scrutinizes the broader implications of various reform proposals and views.

One of the section of this chapter examines the positions of different stakeholders on reform. Firstly, based on the approach towards reform. To better realize the positions of the stakeholders, the thesis categorizes this as idealist approach and realist approach. Secondly, based on the positions on reform. To better understand the positions of the stakeholders, the thesis categorizes them as status quo maintainers, major reform backers and anti-status quo maintainers.

Another section of this chapter deals with the focus of reform initiatives. It discusses the focus of the reform initiatives of ICSID, UNCITRAL and UNCTAD. First of all, the thesis identifies the focus of reform initiatives and then critique the focus of reform initiatives.

Another the section of this chapter examines the nature of reform under WGIII. The thesis considers approach, method and characteristics of the UNCITRAL reform initiative to examine its nature.

One of the section of this chapter analyses the different reform proposals and views. It selected Multilateral Investment Court (MIC) and appellate mechanism, and appointment of arbitrators and code of conduct from the various reform agenda. These are most consequential reform options. Regarding MIC proposal, the thesis finds that European Union and its member States's proposal is at the core of this reform effort. It is a standing or permanent two-tier adjudication mechanism and intended to replace ad-hoc arbitration. This

section discusses the arguments for and against such reform. Moreover, it will scrutinize the extent to which the MIC might address the concerns associated with current *ad hoc* ISDS system. Furthermore, it examines the alternative view held by some stakeholders and scholars. Basically, this section illustrates the complexities involved to shape international investment law through a permanent court.

Regarding the appointment of arbitrators and code of conduct, the thesis discusses UNCITRAL WGIII's drafts, proposals to WGIII and views of various stakeholders. Moreover, the thesis points out the risks of politicizing judicial appointments.

2 Analyses of the nature and characteristics of reform proposals and views

2.1 Evaluating the positions of various stakeholders on reform

The thesis offers several categorization to understand positions of various stakeholders in relation to reform of the ISDS. This division is analytically significant for several reasons. Firstly, it clarifies reform visions of various stakeholders. It shows why consensus on reform is difficult as different actors are motivated by different perspectives.

Moreover, it explains political dynamics in UNCITRAL WGIII. It helps to clarify why most reforms under UNCITRAL WGIII are procedural rather than substantive. It indicates that realist positions and major reform backers dominate the negotiations.

Furthermore, it highlights power imbalance of stakeholders. It points to the structural disadvantage of idealist stakeholders and anti-status quo maintainers who mainly represent developing countries. They often get marginalized in drafting treaties, conventions, and reform documents.

In addition, it supports critical evaluation of adequacy of reform. By detecting which proposal represents which approach and position, the thesis can more successfully critique the depth and scope of ongoing reforms.

2.1.1 Based on the approaches toward reform

Based on the approaches toward reform, the thesis broadly categorizes into idealist approach, and realist approach in relation to reform of the ISDS. This categorization of stakeholders' approaches plays an important role to understand their approach, position, and the outcomes they try to achieve from reform initiatives. Moreover, this categorization helps to make sense of different normative and strategic positions that actors hold in the ongoing reform debate. Furthermore, this helps to clarify divergent expectations and goals of different actors.

2.1.1.1 Idealist approach

The stakeholders who take the idealist approach advocate for comprehensive and transformative changes. They propose creating a more equitable and just system, and focus on fairness and transparency. Moreover, they back proposals protecting public policy and public interests. However, the positions of the stakeholders and scholars that may be identifiable as idealist approach do not always focus or emphasize on same things. Furthermore, on some of the issues, a stakeholder may take idealist approach, but on some other issues, may take realist approach. Regardless, a couple of stakeholders overall have idealist approach towards reforming the international investment dispute settlement system.

Scholars think that the major focus of the current reform initiatives are ISDS-centric.[663] This trend showcases the extension of existing objective of preservation of investor rights by these reform initiatives.[664] Moreover, scholars think that the focus of the current reform initiatives are procedural matters.[665] However, substantive reform of international investment law is repeatedly raised by stakeholders including in the WGIII reform initiatives.[666] Dimitropoulos contends that reform initiatives need to go beyond ISDS. Moreover, substantive law and the administrative procedures of both domestic and international treaties

[663] Muhammad Abdul Khalique, "Identifying Problems of International Investment Law (IIL) and Evaluating the Focus of Reform Initiatives," *Acta Humana-Human Rights Publication* 12, no. 2 (2024): 112, https://doi.org/10.32566/ah.2024.2.7. James Thuo Gathii, and Harrison Otieno Mbori, "Reform and Retrenchment in International Investment Law: Introduction to a Special Issue," *The Journal of World Investment & Trade* 24, no. 4-5 (2023): 559, https://doi.org/10.1163/22119000-12340302.
[664] Gathii et al., "Reform and Retrenchment," 559.
[665] Khalique, "Identifying Problems," 112.
[666] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.176.

need to be included.[667] Furthermore, he stresses that inclusion of the domestic investment law and policy issues should be emphasized in the reform discussions.[668]

South Africa asserts that prioritization of human rights may serve as a key issue for evaluating system's legitimacy.[669] Mala opine that rights of investors should be reconciled with standards of human rights to handle legitimacy issue.[670] She argues that success of the MIC to be able to meet human rights standards depends on its structure. She further maintains that true reform requires reconciliation of human rights, environmental concerns and indigenous rights into its procedural reforms.[671]

Odumosu-Ayanu contends that reforms mainly uphold the existing framework without solving its rationale and structure, even though some may resolve certain problems in international investment law. It means that the root of legitimacy issues continues to exist.[672] Thus, she suggests to move beyond modest reforms to address these issues. She advocates for approaches that redefine the system. For instance, it can be done through reconsideration of international investment law's impact on indigenous peoples and local communities.

To address the absence of human rights issues in investment disputes and recover the legitimacy of ISDS system, some reform proposals focus on greater incorporation of human rights considerations. These reform proposals identify constitutional challenges to the international investment law.[673] They argue that this challenges can be solved by aligning with democratic values, fundamental rights and the rule of law.[674] Besides, enhancing transparency in arbitral proceedings would increase wider public participation. Furthermore,

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[667] Georgios Dimitropoulos, "The conditions for reform: a typology of "backlash" and lessons for reform in international investment law and arbitration," *The Law & Practice of International Courts and Tribunals* 18, no. 3 (2020): 432, https://doi.org/10.1163/15718034-12341411.
[668] Dimitropoulos, "The conditions for reform," 434-35.
[669] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.176.
[670] Mala Sharma, "Reforming Investor-State Arbitration," PhD diss., University of Surrey, 2021, 160.
[671] Sharma, "Reforming Investor-State," 162.
[672] Ibironke T. Odumosu-Ayanu, "Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law," *The Journal of World Investment & Trade* 24, no. 4-5 (2023): 792-837, https://doi.org/10.1163/22119000-12340311.
[673] Stephan W. Schill, "Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?: 2017 Roll of Honors–Changes to the Masthead," *The Journal of World Investment & Trade* 19, no. 1 (2018): 1, https://doi.org/10.1163/22119000-12340087.
[674] Stephan W. Schill, "Reforming investor–state dispute settlement: a (comparative and international) constitutional law framework," *Journal of International Economic Law* 20, no. 3 (2017): 653-654, at 661, https://doi.org/10.1093/jiel/jgx023.

appointing human rights experts to arbitration panels[675] or permitting *amicus curiae* briefs could improve expertise in these matters.[676]

There are active efforts to bring significant changes to investor protection by incorporating new substantive standards.[677] Obligations for investors and their investments are added through these new changes.[678]

Odumosu-Ayanu also asserts that reforms are ISDS-focused. She further contends that these are disconnected from struggles of locals against investment related projects.[679] Perrone adds that involvement of local communities isn't just a procedural issue. It cannot be fixed by granting amicus curiae submissions or enhancing community involvement. He opines that ISDS processes shape the livelihoods of communities.[680] Thus, he maintains that it requires embedding local values and structures into the investment related projects.

Many stakeholders and scholars advocate to address various important issues under UNCITRAL WGIII. For instance, third-party standing, exhaustion of local remedies, the rule of law, ISDS's chilling effect, sustainable development and impact on developing countries.[681] They further maintain that the current system fail to address critical concerns like local community displacement, environmental damage and inequality etc.

Perrone criticizes that rights of local communities and others can not be guaranteed under the current system. Even they are unable to bring claims in investment dispute settlement.[682] He further contends that ongoing reforms are unlikely to grant these actors the same status

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[675] Efraim Chalamish, "The future of bilateral investment treaties: A de facto multilateral agreement," *Brooklyn Journal of International Law* 34, no. 2 (2008): 352, https://heinonline.org/HOL/P?h=hein.journals/bjil34&i=297.
[676] Megan Wells Sheffer, "Bilateral investment treaties: a friend or foe to human rights," *Denver Journal of International Law and Policy* 39, no. 3 (2010): 506, https://heinonline.org/HOL/P?h=hein.journals/denilp39&i=493.
[677] Agreement for Cooperation and Investment Facilitation between the Government of the Federal Republic of Brazil and the Government of the Republic of Mozambique (2015), art. 1(1).
[678] Agreement for Cooperation and Investment Facilitation between the Government of the Federal Republic of Brazil and the Government of the Republic of Mozambique (2015).
[679] Odumosu-Ayanu, 'Local Communities," 792.
[680] Nicolás M. Perrone, "Investment Treaty Law and matters of recognition: Locating the concerns of local communities," *The Journal of World Investment & Trade* 24, no. 3 (2023): 437-460, https://doi.org/10.1163/22119000-12340293.
[681] Kelsey, Jane, David Schneiderman, and Gus Van Harten. "Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter." *Osgoode Legal Studies Research Paper* (2019): 1-15. http://dx.doi.org/10.2139/ssrn.3329332.
[682] Nicolás M. Perrone, "The international investment regime and local populations: are the weakest voices unheard?," Transnational Legal Theory 7, no. 3 (2016): 383-405, https://doi.org/10.1080/20414005.2016.1242249.

as foreign investors. Even, he asserts, the urgent need for change does not seem to sway reformers to consider more radical solutions.

Shan points to five key developments for qualifying as a balanced approach such as detailing treaty scope, incorporation of general and security exceptions in the treaty, specifying obligations, adding environmental safeguards and corporate social responsibility provisions.[683]

Some leading countries like South Africa, Brazil and India emphasize the need to safeguard their right to regulate so that they can keep environmental and other standards.[684] Moreover, understanding their political and socio-economic conditions and geographical priorities is becoming very essential.[685]

Dimitropoulos suggests that reform should be guided by international investment and economic law's historical context and struggle. He maintains that recent changes in domestic legal systems and investment governance also need to be acknowledged. Moreover, He asserts that recognizing domestic resistance and solutions is vital for international investment law reform.[686]

Domestic judicial system also supported as the option to overcome the problems associated with current system. It has been argued that if domestic system is strong and efficient, then ISDS becomes unnecessary.[687] Tang asserts that, under independent and transparent domestic mechanism, foreign investors can file for resolving disputes effectively through domestic processes.[688]

Alvarez asserts that focusing only the flaws in investment arbitration without addressing substantive issues will deter reform goals. Acknowledging that many believe the system should not exist, he further maintains that merely enhancing procedural issues cannot

[683] Wenhua Shan, "Towards a balanced liberal investment regime: General report on the protection of foreign investment," *ICSID review* 25, no. 2 (2010): 471, https://doi.org/10.1093/icsidreview/25.2.421.
[684] Protection of Investment Act 22 of 2015, section 12.
[685] Dimitropoulos, "The conditions for reform," 426.
[686] Dimitropoulos, "The conditions for reform," 429.
[687] United Nations Trade and Development, "Improving Investment Dispute Settlement: UNCTAD Policy Tools," IIA Issues Note, issue 4 (November, 2017): 9, https://unctad.org/system/files/official-document/diaepcb2017d8_en.pdf.
[688] Yanyan Tang, "Investment Facilitation for Development and the Reform of International Investment Dispute Settlement Mechanism: The Choice of Developing Countries," Journal of International Dispute Settlement 13, no. 4 (2022): 663, https://doi.org/10.1093/jnlids/idac023.

stabilize or legitimize this regime.[689] Sornarajah, on the other hand, advocates starting anew.[690] Similarly, Boué supports leaving the system altogether as sensible option.[691]

Deva and Van Ho examines interaction of investment arbitration and international human rights law. They critique the typical approach of incorporating human rights into existing arbitration frameworks. Moreover, they suggest in its place a human rights-centered model that investment arbitration should conform to.[692] Their examination finds a fundamental conflict between core human rights and investment arbitration. They contends that current reforms fail to resolve this conflict. Thus, they recommend replacement of the current arbitration system with a new one that upholds human rights principles.

Some States are taking alternative approaches that may seem radical comparing to the current system. For instance, Bolivia and Ecuador have terminated multiple BITs. By doing this they moved investment dispute resolution to the ambit of domestic system. Likewise, South Africa has introduced the Protection of Investment Act (PIA), 2015.[693] This statute offers same treatment to both of its national as well as foreign investors. Similarly, Brazil has come up with new international investment treaties. These treaties incorporate both protection standards and dispute resolution provisions.

A key challenge in the current reform initiatives is its implicit presumption that investment arbitration is intrinsically legitimate and desirable. This position ignores critical flaws in the system. Polonskaya asserts that UNCITRAL WGIII reform avoids addressing major issues. Moreover, this reform focuses narrowly on procedural aspects.[694] He further maintains that recent reforms have failed to achieve significant change, although they adopted substantive and procedural changes. On the other hand, Alschner maintains that new treaty provisions often produce similar outcomes like the current system, although the aim was to safeguard

[689] José E. Alvarez, "ISDS reform: the long view," *ICSID Review-Foreign Investment Law Journal* 36, no. 2 (2021): 254, https://doi.org/10.1093/icsidreview/siab036.
[690] Muthucumaraswamy Sornarajah, *Starting anew in international investment law*, no. 74. (Columbia FDI Perspectives, 2012), 4.
[691] Boué, Juan Carlos. "The Investor-State Dispute Settlement Damages Playbook: To Infinity and Beyond." *The Journal of World Investment & Trade* 24, no. 3 (2023): 372-397. https://doi.org/10.1163/22119000-12340291.
[692] Surya Deva, and Tara Van Ho, "Addressing (in) equality in redress: human rights-led reform of the investor-state dispute settlement mechanism," *The Journal of World Investment & Trade* 24, no. 3 (2023): 398-436, https://doi.org/10.1163/22119000-12340292.
[693] supra note .
[694] Ksenia Polonskaya, "Metanarratives as a Trap: Critique of Investor–State Arbitration Reform," *Journal of International Economic Law* 23, no. 4 (2020): 949-971, https://doi.org/10.1093/jiel/jgaa038.

regulatory space.[695] Moreover, efforts were largely unsuccessful to enhance transparency and third-party participation, since local communities' concerns through amicus curiae submissions are frequently denied by arbitration.

A proposal in the UNCITRAL WGIII suggests that third parties to raise their issues in the arbitration could enhance the system's legitimacy.[696] Moreover, WGIII has taken third-party funding as an area of great importance. There are differing propositions regarding this matter. Proposed regulations include prohibition or disclosure of third-party funding following certain conditions.[697]

Schill contends that reforms should be guided by shared constitutional principles like democracy, the rule of law and human rights. A framework can be developed considering the related aspects and can be utilized to articulate some proposals. This approach would focus on greater institutionalization and methods to ensure that it is democratic, adheres human rights and the rule of law.[698]

This dissertation, therefore, observes that idealist approach seeks radical departure from the current system. In other words, it falls in anti-status quo maintainers group. This approach not only seeks procedural adjustments, but also advocates for substantive reforms. It can be considered as ideal solution to resolve the problems related to ISDS. However, it is not backed by a large number of States. Only a handful of States would pursues such approach in practice. Nonetheless, this approach has the potential to tackle structural power imbalances, and to prioritize public interest. South Africa's domesticated dispute resolution demonstrates that radical departure is both feasible and necessary if States are willing to pursue such option.

[695] Wolfgang Alschner, *Investment arbitration and state-driven reform: new treaties, old outcomes* (Oxford University Press, 2022), 7.
[696] United Nations General Assembly, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session," Fifty-second session, 8-26 July, 2019, A/CN.9/970, paras. 31-33.
[697] Davitti, Daria, and Paolo Vargiu. "Litigation Finance and the Assetization of International Investment Arbitration." *The Journal of World Investment & Trade* 24, no. 3 (2023): 487-500. https://doi.org/10.1163/22119000-12340295.
[698] Schill, "Reforming investor–state," 652.

2.1.1.2 Realist approach

The stakeholders who take realist approach are pragmatic in nature. They advocate for incremental and systemic changes depending on the stakeholders. Moreover, they support the core features of the ISDS, and emphasize on economic stability and investor confidence. The realist approach seeks to enhance accountability, efficiency and predictability. However, it does not aim to change the system fundamentally. However, the positions of the stakeholders and scholars that may be identifiable as realist approach do not always focus or emphasize on same things. Furthermore, on some of the issues, a stakeholder may take realist approach, but on some other issues, may take idealist approach. Regardless, many stakeholders overall have realist approach towards reforming the international investment dispute settlement system.

After analyzing EU's MIC proposal against procedural justice principles,[699] Garcia and Guven asserts that it offers a stronger institutional substitution than UNCITRAL and ICSID's reforms.[700] However, it still fails to address key flaws in investment arbitration.[701] They maintain that would not be able to solve the systemic problems fully. However, this may bring some significant changes. They suggest that States may support a MIC based on their specified limit. Moreover, to enhance third-party participation and error correction, they suggest the exhaustion of local remedies. They also recommend a single-tier court system and deeper involvement of third-parties beyond amicus curiae.

Ziadé asserts that it would be hasty and counterproductive if States give up ISDS before experiencing the reformed framework.[702] Some of the stakeholders maintain that incremental and specifically aimed reform can be more effective. Moreover, UNCITRAL WGIII has specifically targeted prevention mechanisms like negotiation, conciliation and mediation.[703] These would add value to the system.

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[699] Frank J. Garcia, , and Brooke S. Guven, "Designing a Multilateral Investment Court for Procedural Justice," *The Journal of World Investment & Trade* 24, no. 3 (2023): 461-486, https://doi.org/10.1163/22119000-12340294.

[700] Garcia et al., "Designing a Multilateral Investment," 462.

[701] Yilmaz Vastardis, Anil. "Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements." London Review of International Law 6, no. 2 (2018): 279-297. https://doi.org/10.1093/lril/lry020.

[702] Nassib G. Ziadé, "Do we need a permanent investment court?," *Global Arbitration Review*, February 13, 2019, https://globalarbitrationreview.com/article/1180209/do-we-need-a-permanent-investment-court.

[703] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Draft guidelines on prevention and mitigation of

Kumm maintains that international investment dispute systems must meet constitutional standards. He argues for a court with impartial and independent judges. Moreover, they must be qualified for judicial appointments in the highest court. Furthermore, he thinks that arbitration must meet constitutional conditions otherwise private players shouldn't be allowed to try public authorities.[704]

Kaufmann-Kohler and Potestà opine that WGIII has solid working plan to make ISDS reform more practical. This framework wouldn't require States to renegotiate each IIA separately. Moreover, couple of models can be applied to implement ISDS reforms to existing IIAs in one step. In this context, some propose using frameworks like the Mauritius Convention on Transparency in Treaty-based Investor–State Arbitration or the Organisation for Economic Co-operation and Development's (OECD's) Multilateral Tax instrument.[705]

This dissertation, therefore, contends that realist approach seeks incremental or major reforms to the existing system. This approach mainly offers procedural adjustments. It can be considered as pragmatic solutions to improve the functionality of ISDS. However, it remain insufficient to address the systemic legitimacy crisis as it does not seek to resolve substantive issues. A truly effective reform should go beyond procedural changes to the mechanisms. Moreover, it should tackle structural power imbalances to prioritize public interest instead of investor privileges.

2.1.2 Based on the positions on reform

Based on the positions on reform, the thesis broadly categorizes into status quo maintainers, major reform backers, anti-status quo maintainers in relation to reform of the ISDS. This categorization of stakeholders' positions helps to comprehend the outcomes they try to

international investment disputes," Forty-seventh session, 22-26 January, 2024, A/CN.9/WG.III/WP.235, para. 5.

[704] Mattias Kumm, "An Empire of Capital?: Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege." *Verfassungsblog: On Matters Constitutional*, May 27, 2015. https://verfassungsblog.de/an-empire-of-capital-transatlantic-investment-protection-as-the-institutionalization-of-unjustified-privilege/.

[705] Michele Potesta, and Gabrielle Kaufmann-Kohler, "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?–Analysis and Roadmap," Analysis and Roadmap (2016): 1-115, http://dx.doi.org/10.2139/ssrn.3455511.

achieve from reform initiatives. Moreover, this categorization helps to make sense of different normative and strategic positions that actors hold in the ongoing reform debate.

2.1.2.1 Status quo maintainers

Status quo maintainers usually advocates for preserving or improving the use of current arbitration mechanism to resolve international investment disputes. They maintain that current system provides a neutral, efficient and effective means of settling disputes between investors and States. Moreover, it keeps balance between protecting investor rights and respecting State sovereignty. Furthermore, they like party autonomy feature in the current framework. There are diverse kinds of stakeholders who continue the position as status quo maintainers such as multinational corporations, legal professionals and certain governments.[706] Additionally, the term "incrementalists", coined by Roberts,[707] can be used to describe this group of stakeholders.

Scholars contend that incremental reforms to the current system can address many issues including third-party funding disclosure, regulation of double-hatting and speeding up tribunal formation.[708] Questioning the basis of drastic reforms of ISDS,[709] Japan supports incremental reforms. Moreover, the United States also supports this reform to a certain degree.[710] This group of stakeholders consider criticisms of the system as perception rather than reality.[711] Morevoer, they assert that MIC proposal is not reflective of reality and they view the proposal as an attempt to discredit arbitration.[712] Furthermore, they favor moderate

[706] Anthea Roberts, "Incremental, systemic, and paradigmatic reform of investor-state arbitration," *American Journal of International Law* 112, no. 3 (2018): 418, https://doi.org/10.1017/ajil.2018.69.
[707] Roberts, "Incremental, systemic, and paradigmatic," 410.
[708] Brekoulakis, Stavros, and Catherine Rogers. "Third-party financing in ISDS: a framework for understanding practice and policy." *Academic Forum on ISDS Concept Paper 2019/11* (2019): 1-33. https://www.jus.uio.no/ior/english/research/projects/copiid/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-isds-af-13-2019-version-2.pdf.
[709] Nikos Lavranos, "The first steps towards a Multilateral Investment Court (MIC)," *EFILA Blog: Blog of the European Federation for Investment Law and Arbitration*, July 19, 2017, https://efilablog.org/2017/07/19/the-first-steps-towards-a-multilateral-investment-court-mic/.
[710] Fukunaga, Yuka. "ISDS under the CPTPP and Beyond: Japanese Perspectives." *Kluwer Arbitration Blog*, May 30, 2018. https://arbitrationblog.kluwerarbitration.com/2018/05/30/isds-cptpp-beyond-japanese-perspectives/.
[711] Anthea Roberts, and Zeineb Bouraoui. "UNCITRAL and ISDS Reforms: What are States' Concerns?." *EJIL:Talk!: Blog of the European Journal of International Law*, June 5, 2018. https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/.
[712] Grill, Anne-Karin. "Mind the label: loyalists and reformists and ISDS." *Kluwer Arbitration Blog*, December 29, 2017. https://arbitrationblog.kluwerarbitration.com/2017/12/29/uncitral-isds-working-group-vienna-11-12-2017/.

adjustments rather than sweeping reforms. They also propose exhaustive treaty language to resolve inconsistencies in awards.[713]

The ICSID and other arbitral institutions often support both incremental and systemic reforms. They want to continue to function as the principal institution hosting investment related disputes. Thus, ICSID has undertaken its own reform initiative. Moreover, it remains open to work with systemic reformers to host future investment courts.[714]

Although some incrementalists prefer arbitration over a permanent court, they may change their stance if systemic reform becomes apparent.[715] Otherwise, incrementalists may weaken the existing ISDS system by resisting systemic reform in the face of widespread discontent. This could lead States to abandon the system completely.

Although the outcome of UNCITRAL reforms is uncertain, gradual reforms tend to favor resourceful States who has resources for long-term engagement and can influence long-term processes.[716] That means, developing States would be in a disadvantageous position.

This dissertation, therefore, confirms that status quo maintainers prioritize preserving the status quo with minor procedural adjustments. This is inadequate to address the systemic inequities and legitimacy crisis. Couple of reforms backed by them may improve efficiency, however, their positions fail to resolve structural power imbalances that prioritize corporate interests over public interests. The position of ICSID, in this regard, focuses on institutional survival, and it opposes transformative changes. Hence, without addressing foundational flaws, status quo maintainers merely would delay inevitable collapse of the current system. It is increasingly viewed as illegitimate or very problematic by States and civil society.

2.1.2.2 Major reform backers

Major reform backers are stakeholders who support fundamental and comprehensive changes to the ISDS system. These reformers push for the establishment of a Multilateral

[713] Roberts et al. "UNCITRAL and ISDS Reforms."
[714] Everett M. Rogers, Arvind Singhal, and Margaret M. Quinlan, "Diffusion of innovations," In *An integrated approach to communication theory and research*, edited by Don W. Stacks, Michael B. Salwen, Routledge, 2014), 433.
[715] Roberts, "Incremental, systemic, and paradigmatic," 419.
[716] Hacker et al., "Drift and Conversion: Hidden Faces of Institutional Change," In Advances in Comparative-Historical Analysis, ed. James Mahoney and Kathleen Thelen (Cambridge University Press, 2015), 181.

Investment Court (MIC) and State-led appointment and accountability mechanisms for arbitrators etc. The goal is to ensure that investment law serves broader public interests, not just investor protection. Moreover, they argue that incremental reforms are insufficient to address the underlying flaws of the current system. Additionally, the term "systemic reformers", coined by Roberts,[717] can be used to describe this group of stakeholders.

Recognizing complexity of the ISDS system, The UNCITRAL members engaged to redesign the system knowing the limits of their control over it or the ability to predict the full impact of reforms.[718] Systemic reformers view their approach as a balanced solution. However, it may appear excessive to some and inadequate to others.[719] Scholars opine that solutions have to be searched from both ends, for instance, States can address specific norms in treaties and systemic ISDS reforms can enhance consistency.[720] Moreover, Schill argues that reform proposals need to be grounded in accepted normative framework. [721] Additionally, systemic reform is resource-intensive. Nevertheless, this reform is crucial for coherent IIA reform.[722]

The European Union, Canada and Mauritius are key proponents of systemic ISDS reform. They propose a multilateral investment court (MIC) with an appellate mechanism to replace ad hoc arbitration. The EU maintains that investment disputes concern public law matters and require permanent bodies. Moreover, they have emphasized this as the viable solution.[723] The EU believes this court system will enhance consistency, predictability and accountability in investment dispute resolution.[724] The EU has integrated the MIC model

[717] Roberts, "Incremental, systemic, and paradigmatic," 410.
[718] Anthea Roberts, and Taylor St John, "Complex designers and emergent design: reforming the investment treaty system," *American Journal of International Law* 116, no. 1 (2022): 99, https://doi.org/10.1017/ajil.2021.57.
[719] Roberts, "Incremental, systemic, and paradigmatic," 420.
[720] Langford et al., "UNCITRAL and investment arbitration reform: matching concerns and solutions: an introduction," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 181, https://doi.org/10.1163/22119000-12340171.
[721] Schill, "Reforming investor–state," 652.
[722] United Nations Trade and Development (UNCTAD), "World Investment Report 2015: Reforming International Investment Governance," (2015): 131, https://unctad.org/system/files/official-document/wir2015_en.pdf.
[723] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union," Thirty-fifth session, 23-27 April, 2018, A/CN.9/WG.III/WP.145, para. 3, 7.
[724] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union," Thirty-fifth session, 23-27 April, 2018, A/CN.9/WG.III/WP.145, para. 7.

into agreements like CETA[725] and the EU-Vietnam FTA[726]. Regardless of the non-existence of consensus on systemic reform, there proposals entertain center-stage of the UNCITRAL WGIII reform initiative.[727]

Several other States expressed their position regarding reform. For instance, Argentia called for systemic and multilateral reform, China voiced for comprehensive reform, Kenya called for complete reform, Algeria advocated in-depth reform, and Morocco also supported multilateral reform.[728]

China's stance on ISDS reform appeared uncertain for a period of time.[729] However, recently it became clear that China supports ISDS but acknowledges its flaws. Moreover, it proposes various reforms including appellate mechanism, code of conduct for arbitrators.[730] However, its stance diverges from the EU. It reflected in the 2020 EU-China Comprehensive Agreement on Investment (CAI) that lacks ISDS provisions.[731] Furthermore, China has shown interest in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This is an indication of its preference for incremental ISDS changes.[732] However, the submission of China's submission to UNCITRAL WGIII indicates that it does not firmly align with either the incremental or systemic reform camps.[733] Moreover, unlike India and Brazil, China seems to be open towards possible outcomes from reform initiatives.[734]

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[725] The Comprehensive and Economic Trade Agreement (CETA) between Canada and the European Union (2017).
[726] The EU-Vietnam Free Trade Agreement (EVFTA) (2019).
[727] Fahira Brodlija, "The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?," *Arbitration Law Review* 15, no. 1 (2024): 2, https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1325&context=arbitrationlawreview.
[728] Anthea Roberts, and Zeineb Bouraoui, UNCITRAL and ISDS Reforms: Concerns About Consistency, Predictability and Correctness, *EJIL:Talk! Blog of the European Journal of International Law*, June 5, 2018, https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/.
[729] Li, Yuwen, and Cheng Bian. "China's stance on investor-state dispute settlement: evolution, challenges, and reform options." *Netherlands International Law Review* 67, no. 3 (2020): 530-31. https://doi.org/10.1007/s40802-020-00182-3.
[730] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.177.
[731] EU-China Comprehensive Agreement on Investment (CAI) (2020), the EU and China concluded in principle on December 30, 2020.
[732] Eleanor Olcott, "China seeks to join transpacific trade pact," *Financial Times*, September 16, 2021, https://www.ft.com/content/df94b345-8fb9-473f-8e58-0cb230c0a1fa.
[733] Roberts, "Incremental, systemic, and paradigmatic," 410.
[734] Ming Du, "Explaining China's approach to investor-state dispute settlement reform: A contextual perspective," *European Law Journal* 28, no. 4-6 (2022): 300, https://doi.org/10.1111/eulj.12468.

Although some States haven't supported any type of reforms, they remain critical of incrementalist positions. Moreover, they align more with systemic reformers. Australia, for instance, stressed that maintaining public trust in ISDS is vital.[735]

Stakeholders who supports MIC think that it could decrease tribunal costs and improve consistency through procedural efficiencies and fewer adjudicators. However, without strong case management, proceedings could become longer.[736] Critics argue that inconsistent rulings may still continue owing to the complexity of international investment law and the huge number of treaties.[737] Moreover, the issue of diversification could be addressed through this mechanism.[738]

To solve the complexity of jurisdictional issue, opt-in mechanism would allow existing treaties to be covered by a single international instrument. It takes effect only when both parties to a treaty have ratified it. This approach is already used in international law for the Multilateral Convention on Tax Treaty Measures[739] and the Mauritius Convention on Transparency.[740]

This dissertation, therefore, submits that positions and proposals of the major reform backers would be quite successful in addressing structural issues of the current system. Status quo maintainers essentially offer short-term improvements. On the other hand, major reform backers essentially offer comprehensive procedural reforms. The MIC mechanisms, which is institutionalized, embodies crucial step toward engendering transparency, accountability, consistency, and predictability in the system. This position is realistic in nature although some idealistic positions are integral to it as well. Moreover, this position seems a viable path that may receive crucial support from a large number of stakeholders.

[735] Roberts et al. "UNCITRAL and ISDS Reforms."
[736] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session," Resumed thirty-eighth session, 20-24 January, 2020, A/CN.9/1004/Add.1, para. 26, 29, 30.
[737] Luis González García, "Making Impossible Investor-State Reform Possible," In *Reshaping the Investor-State Dispute Settlement System*, ed. Jean E. Kalicki and Anna Joubin-Bret (Brill Nijhoff, 2015), 432.
[738] Larsson et al., "Selection and appointment in international adjudication: insights from political science," *Journal of International Dispute Settlement* 14, no. 2 (2023): 134-148, https://doi.org/10.1093/jnlids/idac014.
[739] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2016).
[740] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014) (the Mauritius Convention on Transparency).

2.1.2.3 Anti-status quo maintainers

Anti-status quo maintainers are stakeholders who advocate for radical overhaul of the current ISDS system. They reject incremental or systemic reforms. They view the existing frameworks as fundamentally flawed and propose replacing them with completely different mechanisms. This approach includes options like State-to-State dispute resolution or domestic courts. Additionally, the term "paradigmatic reformers", coined by Roberts,[741] can be used to describe this group of stakeholders.

These stakeholders are not bound by status quo bias nor they need consensus of the stakeholders to pursue their desired options. Thus, they push for greater degree of change.[742] South Africa[743] and various NGOs argue that both procedural and substantive flaws of the ISDS require complete reform.[744] This approach rejects ISDS and proposes other mechanisms. However, according to scholars, this approach also has merits and demerits. For instance, domestic courts option may reduce geographic diversity. Moreover, inconsistency of decisions and lack of expertise of adjudicators in domestic courts might be increased. However, this approach could solve problems like party bias.[745]

The stakeholders who support replacement of ISDS with domestic courts, they want to ensure that foreign and domestic investors receive equal treatment.[746] Proponents of domestic or State-to-State adjudication argue that these systems offer more transparency, accountability and sovereignty. Moreover, these systems are better to address public interest issues like human rights and environmental protection.

Some of the anti-status quo maintainers also advocate for the termination or renegotiation of existing IIAs to enhance the effectiveness of the system.[747] They aim to increase domestic control and handle disputes in national courts. However, Schill opines that this approach

[741] Roberts, "Incremental, systemic, and paradigmatic," 410.
[742] Roberts, "Incremental, systemic, and paradigmatic," 421.
[743] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.176, para. 19.
[744] Roberts, "Incremental, systemic, and paradigmatic," 422.
[745] Langford et al., "UNCITRAL and investment arbitration," 167–87.
[746] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008), 59.
[747] Schill, "Reforming investor–state," 662.

doesn't allow comprehensive ISDS reform.[748] Furthermore, it may undermine the rule of law by relying on domestic courts as it may lack independence and impartiality.[749]

Brazil and South Africa questions the legitimacy of letting foreign investors to bring direct international claims against States through arbitration or courts. Thus, Brazil has never ratified investment treaties. It argues that ISDS discriminates against national investors whose only recourse is domestic courts.[750] Both countries perceive the current system as beyond repair an call for complete overhaul. Moreover, Brazil emphasize that none of the current reforms can fix the system. Furthermore, it advocates for State-to-State dispute settlement (SSDS) to replace ISDS. [751] Similarly, South Africa cautioned against legitimization and continuation of the current system through reforms without offering internationally consented framework.[752]

South Africa legislated the Protection of Investment Act, 2015.[753] This legislation replaced its BITs after their termination. This legislation offers domestic resolution by domestic courts.[754] Moreover, after the exhaustion of local remedies, the host may agree to submit the dispute before inter-State dispute resolution.[755]

Brazil, on the other hand, has been negotiating the Agreement on Cooperation and Facilitation of Investments (ACFIs) since 2015.[756] The core focus of this legislation is to enhance dialogue and dispute prevention through mechanisms like Joint Committees and Ombudspersons.[757] These agreements aim to address disputes through mediation and if these processes fail then the governments may submit to inter-State arbitration. The goal is to

[748] Schill, "Reforming investor–state," 662.
[749] Schill, "Reforming investor–state," 661.
[750] Roberts et al. "UNCITRAL and ISDS Reforms."
[751] Roberts et al. "UNCITRAL and ISDS Reforms."
[752] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.176, para. 28.
[753] Protection of Investment Act 22 of 2015.
[754] Protection of Investment Act 22 of 2015, art. 13(1).
[755] Protection of Investment Act 22 of 2015, art. 13(5).
[756] Agreement for Cooperation and Investment Facilitation between the Government of the Federal Republic of Brazil and the Government of the Republic of Mozambique (2015).
[757] Nitish Monebhurrun, "Novelty in international investment law: the Brazilian agreement on cooperation and facilitation of investments as a different international investment agreement model," *Journal of International Dispute Settlement* 8, no. 1 (2017): 79, https://doi.org/10.1093/jnlids/idv028.

emphasize investment facilitation and to prevent disputes by improving transparency and communication.[758]

Likewise, Ecuador, Bolivia,[759] and Venezuela[760] have withdrawn from ICSID, citing concerns over sovereignty and international dispute mechanisms.

This dissertation, therefore, purports that anti-status quo maintainers seek radical departure from the ISDS system. They also advocate replacing ISDS with domestic courts or State-State dispute settlement. It is the most coherent response to the systemic inequities and legitimacy crisis entrenched in international investment law and international investment dispute settlement. Status quo maintainers and major reform backers fail to address the structural bias of ISDS because of their narrow focus on procedural reforms. However, anti-status quo maintainers back paradigm shift toward domestic adjudication or State-State dispute settlement that has the potential to tackle prioritizing investor interests over State sovereignty or public interests. Countries like South Africa and Brazil demonstrate the viability of such radical reforms.

2.2 Evaluating the focus of reform initiatives

2.2.1 Identifying the focus of reform initiatives

2.2.1.1 The focus of the UNCITRAL Working Group (WGIII)

United Nations Commission on International Trade Law (UNCITRAL) delegated the following broad mandate on the WGIII:

> To work on the possible reform of investor-State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based

[758] Tang, "Investment Facilitation," 647.
[759] Clint Peinhardt, and Rachel L. Wellhausen, "Withdrawing from investment treaties but protecting investment," *Global Policy* 7, no. 4 (2016): 571-576, https://doi.org/10.1111/1758-5899.12355.
[760] Tarald Laudal Berge, "Dispute by design? Legalization, backlash, and the drafting of investment agreements," *International Studies Quarterly* 64, no. 4 (2020): 921, https://doi.org/10.1093/isq/sqaa053.

> and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[761]

It can be observed that the very mandate to the WGIII limited its scope to issues related to the ISDS mechanism. At the 34th Session of the WGIII, it was again reiterated that 'the mandate given to the working group focused on the procedural aspects of dispute settlement rather than on the substantive provisions.'[762] Moreover, it was also mentioned that the recommendations of WGIII would also consider relevant works from other international organizations. Furthermore, each State would have the opportunity to select from a range of solutions.[763] Therefore, Diamond and Duggal thinks that this reform initiative has shifted its focus away from the substantive aspects of IIL.[764] The WGIII's preliminary focus was on evaluating the consistency, coherence, predictability, and accuracy of arbitral decisions.[765] Additionally, they examined the costs and duration of arbitration proceedings,[766] along with the independence and impartiality of arbitrators.[767]

The WGIII currently preparing and receiving comments on drafts related to various important issues. So far, there are draft proposals on procedural and cross-cutting issues,[768]

[761] United Nations General Assembly, "Report of the United Nations Commission on International Trade Law," Forty-ninth session, 27 June-15 July, 2016. UN Doc. A/71/17, para. 264.
[762] United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017)," Fifty-first session, 25 June–13 July, 2018, UN Doc. A/CN.9/930/Rev.1, para. 20.
[763] United Nations General Assembly, "Report of the United Nations Commission on International Trade Law," Forty-ninth session, 27 June-15 July, 2016. UN Doc. A/71/17, para. 264.
[764] Nicholas J. Diamond, and Kabir A.N. Duggal, "Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?," *Case Western Reserve Journal of International Law* 53, no. 1 (2021): 141, https://heinonline.org/HOL/P?h=hein.journals/cwrint53&i=125.
[765] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters," Thirty-sixth session, 29 October-2 November 2018, A/CN.9/WG.III/WP.150.
[766] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS) – cost and duration," Thirty-sixth session, 29 October-2 November, 2018, UN Doc. A/CN.9/WG.III/WP.153.
[767] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS," Thirty-sixth session, 29 October–2 November, 2018, UN Doc. A/CN.9/WG.III/WP.151.
[768] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural and cross-cutting issues," Forty-sixth session, 9-13 October, 2023, UN Doc. A/CN.9/WG.III/WP.231.

draft guidelines on prevention and mitigation of international investment disputes,[769] draft statute of an advisory centre,[770] Draft provisions on mediation,[771] Draft code of conduct for arbitrators in international investment dispute resolution,[772] Draft code of conduct for judges in international investment dispute resolution,[773] selection and appointment of ISDS tribunal members and related matters,[774] Appellate mechanism[775].

A close observation to these drafts showcases that the focus of the WGIII is on procedural aspects. Currently, with a deadline of 2026 in mind, the focus is on drafting legal text, and securing political consensus with an urgency. The WGIII could complete anywhere from six to twelve legal instruments intended for inclusion in a multilateral convention focused on procedural reform.[776]

2.2.1.2 The focus of the ICSID

ICSID has initiated its rules amendment process in October 2016.[777] It has invited proposals from all member States regarding potential amendments to the rules.[778] Between 2017 and

[769] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Draft guidelines on prevention and mitigation of international investment disputes," Forty-seventh session, 22-26 January 2024, UN Doc. A/CN.9/WG.III/WP.235.
[770] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Draft statute of an advisory centre," Forty-seventh session, 22-26 January, 2024, UN Doc. A/CN.9/WG.III/WP.236.
[771] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Draft provisions on mediation," Forty-fifth session, 27-31 March, 2023, UN Doc. A/CN.9/WG.III/WP.226.
[772] United Nations Commission on International Trade Law (UNCITRAL), "Draft code of conduct for arbitrators in international investment dispute resolution and commentary," Fifty-sixth session, 3-21 July, 2023, UN Doc. A/CN.9/1148.
[773] United Nations Commission on International Trade Law (UNCITRAL), "Draft code of conduct for judges in international investment dispute resolution and commentary," Fifty-sixth session, 3-21 July, 2023, UN Doc. A/CN.9/1149.
[774] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters," Forty-second session, 14-18 February, 2022, UN Doc. A/CN.9/WG.III/WP.213.
[775] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism," Forty-fourth session, 23-27 January, 2023, UN Doc. A/CN.9/WG.III/WP.224.
[776] Roberts et al., "Complex designers."
[777] International Centre for Settlement of Investment Disputes (ICSID), "ICSID 2017 Annual Report," (September, 2017): 4, https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/2017_ICSID_AnnualReport_English_LowRes.pdf.
[778] International Centre for Settlement of Investment Disputes (ICSID), "ICSID 2017 Annual Report," (September, 2017): 4, https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/2017_ICSID_AnnualReport_English_LowRes.pdf.

2018, ICSID opened the floor to wide-ranging discussions about possible changes to its rules for handling investment disputes through conciliation, arbitration, and fact-finding.[779] In August 2018, ICSID proposed major amendments to its rules in a working paper.[780] The consultation found 16 areas for amending ICSID rules, echoing concerns raised by UNCITRAL WGIII about inconsistent awards, limited transparency, potential conflicts of interest, and high costs and delays.[781]

Proposed changes to the ICSID rules include improving drafting and language,[782] reducing time and cost, clearer instructions for filing a case,[783] obligation to disclose third-party funding,[784] enhancing transparency,[785] new rule on security for costs,[786] disqualification of arbitrators,[787] timing of awards,[788] expedited proceedings[789]. After reviewing proposed changes submitted in January 2022, ICSID member States endorsed amended rules in March 2022 and became effective on July 1st of the same year.[790]

Upon closer scrutiny, it becomes apparent that the amendments made by ICSID focused on procedural matters, reinforcing its role as an institution of arbitration facilities. Moreover, these amendments didn't deal with any substantive matters related to international investment agreements.

[779] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS)," Thirty-fourth session, 27 November-1 December, 2017, UN Doc. A/CN.9/WG.III/WP.142, para. 3.
[780] ICSID 2018b.
[781] Moritz Keller, "Introduction: An Overview of Institutional Efforts," in *Evolution, Evaluation and Future Developments in International Investment Law*, ed. Stephan Hobe, Julian Scheu (Nomos Verlagsgesellschaft mbH & Co. KG, 2021), 152.
[782] International Centre for Settlement of Investment Disputes (ICSID), "Updated Backgrounder on Proposals for Amendment of the ICSID Rules," (November 12, 2021): 1-2, https://icsid.worldbank.org/sites/default/files/publications/Backgrounder_WP.pdf.
[783] ICSID, "Updated Backgrounder on Proposals," 1-2.
[784] ICSID, "Updated Backgrounder on Proposals," 1-2.
[785] ICSID, "Updated Backgrounder on Proposals," 1-2.
[786] ICSID, "Updated Backgrounder on Proposals," 1-2.
[787] ICSID, "Updated Backgrounder on Proposals," 1-2.
[788] ICSID, "Updated Backgrounder on Proposals," 1-2.
[789] ICSID, "Updated Backgrounder on Proposals," 1-2.
[790] International Centre for Settlement of Investment Disputes (ICSID). "Proposed Amendments to the ICSID Regulations and Rules." July 1, 2022. https://icsid.worldbank.org/resources/rules-amendments.

2.2.1.3 The focus of the UNCTAD

UNCTAD did not initiate any reform process, however, it contributes to the ISDS reform debate by offering comprehensive guidelines, prioritizing areas, and suggesting phases for IIA reform. In its 2018 reform package,[791] key recommendations include reviewing BITs, promoting responsible investment, addressing procedural aspects, and safeguarding consistency across agreements and policies. Moreover, it advocates for a transparent, inclusive reform process to improve the multilateral support structure for ISDS. UNCTAD's investment reform suggestions focuses on modernizing outdated treaties. It assists States in changing investor-friendly BITs with more balanced ones.[792] It recommends updating treaty provisions with global standards, maintaining similar treaty standards, reinterpreting treaty provisions where necessary.[793] It also supplies essential database of modern IIAs.[794]

UNCTAD's recognizes broader critiques of IIAs, however, it addresses them incrementally rather than through a unified approach.[795] Moreover, UNCTAD aims to balance States' regulatory rights with safeguarding FDI.[796] Although multilateral engagement remains a possibility, UNCTAD isn't leading any efforts for a multilateral investment agreement. Alvarez thinks that UNCTAD promotes a liberal structure for foreign investment. Moreover, it maintains the current framework of protecting foreign investment.[797]

2.2.2 Critique of the focus of reform initiatives

There's agreement on the need for comprehensive reform of IIL to make ISDS effective.[798] Yet, issues with ISDS go beyond systemic flaws, also entrenched in substantive deficiencies

[791] United Nations Trade and Development (UNCTAD), "UNCTAD's Reform Package for the International Investment Regime (2018 Edition)," https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf.
[792] Alvarez, "ISDS reform," 262.
[793] United Nations General Assembly, "Report of the United Nations Commission on International Trade Law," Forty-ninth session, 27 June-15 July, 2016. UN Doc. A/71/17.
[794] United Nations Trade and Development (UNCTAD), "Investment Policy Framework for Sustainable Development (2015 Edition)," 73-88, https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf.
[795] Alvarez, "ISDS reform," 262.
[796] UNCTAD), "Investment Policy Framework for Sustainable Development (2015 Edition)," 73-88.
[797] Alvarez, "ISDS reform," 262.
[798] UNCTAD, "UNCTAD's Reform Package for the International Investment Regime (2018 Edition)."

in existing IIAs.[799] Indonesia contends that both the substantive and procedural aspects of IIAs are interconnected and require same attention.[800] However, South Africa questions the rationale behind granting businesses the ability to initiate legal action against governments.[801] Singla argues that achieving effective and sustained ISDS reform needs substantive changes to existing IIAs within a multilateral framework.[802] She stresses that problems related to ISDS derive from the language and provisions of IIAs.[803] Moreover, Alvarez warns against only tackling procedural issues in investment arbitration reform. He thinks that overlooking substantive concerns weakens not only immediate but also long-term reform objectives. Simply improving arbitration and enforcement mechanism without addressing fundamental legitimacy issues won't stabilize or legitimize the legal regime.[804] Furthermore, Shan thinks that the current legitimacy crisis provides a unique chance to amend the international IIAs comprehensively.[805] A multilateral investment law framework would be coherent and would provide the legal clarity.[806] In addition, this would end fragmented nature of current IIL.[807]

In the approach of the investment arbitration, there is considerable conflict when it comes to deal with other fields of international law.[808] This aspect is crucial for international community. Without harmonization, this aspect cannot be properly dealt with.[809]

[799] Tania Singla, "A Multilateral Framework for Investment Protection: The Missing Piece in the Puzzle of ISDS Reform?," *NLUD Journal of Legal Studies,* 2, no. 1 (2020): 134, https://heinonline.org/HOL/P?h=hein.journals/nludjls2&i=131.
[800] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Indonesia," Thirty-seventh session, 1-5 April, 2019, UN Doc. A/CN.9/WG.III/WP.156, para. 1.
[801] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, A/CN.9/WG.III/WP.176, para. 37.
[802] Singla, "A Multilateral Framework," 133.
[803] Singla, "A Multilateral Framework," 133.
[804] Alvarez, "ISDS reform," 254.
[805] Wenhua Shan, "The Case for a Multilateral or Plurilateral Framework on Investment," *Columbia Center on Sustainable Investment (CCSI),* Columbia FDI Perspectives, No 161 (2015): 1, https://www.econstor.eu/bitstream/10419/253995/1/fdi-perspectives-no161.pdf.
[806] Shan, "The Case for a Multilateral," 2.
[807] Karl P. Sauvant, "The evolving international investment law and policy regime: ways forward," *E15 Task Force on Investment Policy, E15Initiative* (2016): 34, http://dx.doi.org/10.2139/ssrn.2721465.
[808] United Nations Trade and Development (UNCTAD), "World Investment Report 2017: Investment and the Digital Economy," (2017): 129, https://unctad.org/system/files/official-document/wir2017_en.pdf.
[809] UNCTAD, "World Investment Report 2017," 130.

Previous efforts to create a multilateral investment treaty were not fruitful.[810] Despite shifting attitudes backing a unified approach, reaching consensus at the multilateral level remains uncertain.[811] Singla sees incremental routes to multilateral consensus,[812] while Sauvant highlights challenges due to opposing views on multilateral framework.[813]

This dissertation, therefore, reinforces the argument that reform of international investment law must address both procedural and substantive issues of ISDS. Procedural improvements are insufficient to resolve all of these issues of ISDS as these require substantive reforms. In other words, a comprehensive and unified multilateral framework is essential to harmonize international investment law incorporating procedural and substantive changes to the current legal framework. This legal framework must provide safeguards to human rights, environmental protection, and State sovereignty among other things.

2.3 Understanding the nature of reform under WGIII

UNCITRAL became the prominent venue for comprehensive ISDS reform discussions. In April 2019, WGIII recognized the need for reform.[814] Nevertheless, States remained divided on how to address different critiques. Moreover, the WGIII categorized proposals into structural and non-structural reforms. Structural reforms include creating new institutions like a court or appellate mechanism and non-structural reforms involve changes to legal texts such as code of conduct for arbitrators or regulating third-party funding etc.[815] Furthermore, the WGIII covered multiple concerns simultaneously.[816]

[810] Kate M. Supnik, "Making amends: Amending the ICSID convention to reconcile competing interests in international investment law," *Duke Law Journal* 59, no. 2 (2009): 357, https://www.jstor.org/stable/20684807.
[811] Jan Wouters et al., "International investment law: the perpetual search for consensus," in *Foreign direct investment and human development*, ed. Olivier De Schutter, Johan Swinnen and Jan Wouters (Routledge, 2013), 28.
[812] Singla, "A Multilateral Framework," 162.
[813] Sauvant, "The evolving international investment," 33.
[814] United Nations General Assembly. "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session." Fifty-second session, 8-26 July, 2019. A/CN.9/970.
[815] UN General Assembly, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session," para 82.
[816] UN General Assembly, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session," paras 81–82.

WGIII's reform efforts focus on addressing common criticisms of ISDS without tackling the larger issue of IIAs.[817] Its focus is on improving the system's efficiency while preserving its key characteristics.[818] Moreover, critics argue that this approach overlooks substantive flaws in the system by mainly focusing on procedural changes.[819] Alvarez contends that this approach is essentially portraying it as "adjudication in rule of law States."[820] Thus, scholars confer that the deliberations began from a faulty promise and WGIII has limited scope of work.[821] However, some believe it could pave the way for significant reforms over time.[822]

Like other multilateral negotiations, power imbalance exists in UNCITRAL WGIII negotiations. Nonetheless, negotiators focus on attaining their objectives regardless of this asymmetry.[823] Roberts point out that in spite of the aims of the discussions and negotiations, no single solution would prevail in the UNCITRAL WGIII. Since, States agreed on the need for reform but differed on the approach.[824]

ISDS is inherently imbalanced. Thus, to achieve symmetry in ISDS is challenging.[825] One of the reason of this problem is substantive asymmetry in international investment law. However, to achieve substantive symmetry in international investment law is also difficult. It requires redefining the system's focus. To do that, focus need to be on regulating foreign investment rather than simply promoting and protecting them.[826] Moreover, procedural remedies for host States needs to be incorporated.[827]

UNCITRAL WGIII's reform approach offers flexibility because stakeholders advocate for a diverse set of dispute resolution options and flexibility.[828] This allows States to select reforms convenient to their unique needs and revise their decisions over time. Nonetheless, there are differing views about UNCITRAL's approach and where it might lead. Critics

[817] Alvarez, "ISDS reform," 257.
[818] Jane Kelsey, and Kinda Mohamadieh. "UNCITRAL Fiddles While Countries Burn," *Friedrich-Ebert-Stiftung*, 2021, 23, https://media.business-humanrights.org/media/documents/2021_09_UNCITRAL.pdf.
[819] Gathii et al., "Reform and Retrenchment," 536.
[820] Alvarez, "ISDS reform," 254.
[821] Roberts et al., "Complex designers," 107.
[822] Roberts et al., "Complex designers," 107.
[823] Roberts et al., "Complex designers," 107.
[824] Roberts, "Incremental, systemic, and paradigmatic," 410.
[825] Crina Baltag, "Reforming the ISDS System: In Search of a Balanced Approach." *Contemporary Asia Arbitration Journal* 12, no. 2 (2019): 291. https://heinonline.org/HOL/P?h=hein.journals/caaj12&i=283.
[826] Baltag, "Reforming the ISDS System," 300.
[827] Baltag, "Reforming the ISDS System," 302.
[828] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Submission from the Government of Costa Rica," Thirty-seventh session, 1-5 April, 2019, UN Doc. A/CN.9/WG.III/WP.164, para. 3, 5.

worry it may only reinforce existing ISDS system[829] without addressing central flaws.[830] Moreover, This approach may overlook crucial social, economic and environmental challenges.[831] However, others think that approach could be transformative. Moreover, this may lead to substantive reforms.[832]

UNCITRAL WGIII's reform processes are government-led.[833] That means only government officials are representatives of these processes and others are either observers or have advisory roles. Nonetheless, it allows input from various stakeholders including academia and civil society and investor organizations. This approach aims to strengthen the legitimacy of arbitration as the primary dispute resolution method.[834]

This dissertation, therefore, contends that approach of the UNCITRAL WGIII is ambiguous in scope, however, it remains confined by its narrow focus on procedural changes. Hence, it would fail to address the substantive asymmetries entrenched in international investment law. Moreover, although it is pursuing major reforms, but the process risks legitimizing the system that intrinsically privileges investor rights over public interest. Thereby, it would perpetuate structural inequities. Nonetheless, the reforms would bring forth qualitative changes to the current system.

The working group itself is government-led and consensus-driven model. It might seem inclusive in nature, but it is dominated by capital-exporting States. The reforms initiative of UNCITRAL WGIII is led by the European Union and Canada, two major capital exporting entities. Capital exporting States are known to be resistive of substantive changes that seeks paradigm shift.

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[829] Polonskaya, "Metanarratives as a Trap," 949.
[830] Bart-Jaap Verbeek, "The limitations of the UNCITRAL process on ISDS reform," *The Centre for Research on Multinational Corporations*, October 30, 2018, https://www.somo.nl/the-limitations-of-the-uncitral-process-on-isds-reform/.
[831] Lise Johnson, and Lorenzo Cotula, "Guest Post: Pragmatism and flexibility in UNCITRAL Working Group III: Too much of a good thing?," *International Economic Law and Policy Blog*, February 05, 2020, https://ielp.worldtradelaw.net/2020/02/guest-post-pragmatism-and-flexibility-in-uncitral-working-group-iii-too-much-of-a-good-thing.html.
[832] Susan Block-Lieb, and Terence C. Halliday, *Global lawmakers: International organizations in the crafting of world markets* (Cambridge University Press, 2017), 9.
[833] United Nations General Assembly. "Report of the United Nations Commission on International Trade Law." Fiftieth session, 3-21 July 2017. UN Doc. A/72/17,, paras. 251, 264.
[834] Gus Van Harten, and Anil Yilmaz Vastardis, "Critiques of Investment Arbitration Reform: An Introduction," *The Journal of World Investment & Trade* 24, no. 3 (2023): 364, https://doi.org/10.1163/22119000-12340290.

3 Analyses of the different reform proposals and views

3.1 Multilateral Investment Court (MIC)

3.1.1 Standalone appellate mechanism

A proposed reform suggests establishing a separate appellate body to review decisions from current arbitral tribunals while keeping most features of the ICSID system intact. This standing or semi-permanent body would aim to improve coherence and consistency across investment treaties. The approach blends elements of ISDS and the MIC by adding a standing tribunal for appeals, primarily focused on legal issues and significant factual errors, though consistency might be less assured in first-instance rulings still made by party-appointed arbitrators.

One reform option proposed in the Secretariat Note is the creation of a standalone appellate body to review appeals from current arbitral tribunal decisions, while retaining the core features of the ICSID system. This semi-permanent appellate mechanism would promote coherence and consistency across investment treaties. It strikes a middle ground between ISDS and the MIC by supplementing traditional ad hoc ISDS with a standing tribunal for appeals. It may enhance consistency, especially in legal questions. However, its impact may be weaker on initial ISDS decisions as the case would still be handled by party-appointed arbitrators.

This dissertation, therefore, advances the proposition that standalone appellate mechanism wouldn’t be enough to resolve the structural asymmetries embedded in international investment law. Although this reform might add some quality to the existing system, but it would legitimize the existing model that prioritize corporate interests over public welfare. Moreover, it would even keep the existing procedural problems in place, and would try to put some make up in form of standalone appellate mechanism.

3.1.2 First instance and appellate mechanism

The Multilateral Investment Court (MIC) is one of the most significant initiative to replace current ISDS system.[835] Kułaga asserts that this is quite new idea.[836] This would be a permanent court dedicated to settling investment disputes. Moreover, this would be similar to other international courts like the International Court of Justice (ICJ).[837] Furthermore, this court would be formed through a multilateral instrument under UNCITRAL WGIII.[838] In addition, this court might be two-tier or standalone and with or without appellate mechanism.

The EU has emerged as a leading advocate for the creation of Multilateral Investment Court (MIC).[839] They already have the experience of negotiating such mechanism bilaterally under agreements like the Comprehensive Economic and Trade Agreement (CETA)[840] and the EU-Vietnam FTA.[841] The EU envisions that this court would promote consistency, transparency and fairness in resolving investment disputes.[842]

China supports forming a permanent multilateral appellate mechanism modeled after the WTO dispute system. This position can be inferred from the inclusion of ISDS appeal mechanism by China in its 2015 FTA with Australia.[843] However, it hasn't clarified whether this would serve as a standalone body or act as part of a Multilateral Investment Court (MIC).[844]

Another issue is related to jurisdiction of the MIC. It is highlighted that it should align with that of arbitral tribunals under individual BITs. Moreover, it should encompass both ISDS

[835] Prado, Mariana Mota, and Steven J. Hoffman. "The Concept of an International Institutional Bypass." *AJIL Unbound* 111 (2017): 231–35. https://doi.org/10.1017/aju.2017.61.
[836] Łukasz Kułaga, "A Brave, New, International Investment Court in Context. Towards a Paradigm Shift of the ISDS," *Polish Yearbook of International Law* 38 (2018): 118, https://doi.org/10.24425/pyil.2019.129609.
[837] United Nations General Assembly, "Report of the United Nations Commission on International Trade Law," Forty-ninth session, 27 June-15 July, 2016, UN Doc. A/71/17, para. 189.
[838] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform," Forty-third session, 5-16 September, 2022, UN Doc. A/CN.9/WG.III/WP.221, paras. 1-4.
[839] United Nations Commission on International Trade Law (UNCITRAL) Working Group III. "Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union." Thirty-fifth session, 23-27 April, 2018. UN Doc. A/CN.9/WG.III/WP.145.
[840] The Comprehensive and Economic Trade Agreement (CETA) between Canada and the European Union (2017).
[841] The EU-Vietnam Free Trade Agreement (EVFTA) (2019).
[842] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States," Thirty-seventh session, 1-5 April, 2019, A/CN.9/WG.III/WP.159/Add.1, para 39.
[843] China-Australia Free Trade Agreement (2015), art. 9.23.
[844] Alvarez, "ISDS reform," 267.

and State-to-State disputes. Only offering ISDS option could lead to same typical situations.[845]

The MIC has not gained consensus so far. There is no consensus on the scope, enforcement, or structure of such a mechanism.[846] Many raised concerns about its practical ramifications.[847] Although the EU and member States back the proposal,[848] however, there is limited backing from outside the EU.[849] Considering all of the factors, therefore, it appears that achieving consensus for the MIC might be elusive. Moreover, several stakeholders, e.g. Russia, China, Singapore, South Korea and Vietnam, highlighted that the reform process should avoid any bias toward the MIC.[850]

The solution to jurisdiction issue can be based on Mauritius-type model.[851] Under this model, States would agree to refer disputes under their existing IIAs to the MIC. This approach emphasizes procedural rather than substantive reforms.[852] Moreover, open-ended structure of the MIC would allow non-signatory States of the convention to file appeal.[853] Furthermore, scholars[854] propose a model to integrate provisions into the existing treaty regime without amending numerous IIAs.[855] This model is based on the Mauritius Convention.[856] However, higher number of ratifications should be mandatory for the

[845] Kułaga, "A Brave, New, International," 127.
[846] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Appellate mechanism and enforcement issues," Fortieth session, 8-12 February, 2021, UN Doc. A/CN.9/WG.III/WP.202.
[847] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of Bahrain," Thirty-eighth session, 14-18 October, 2019, UN Doc. A/CN.9/WG.III/WP.180.
[848] European Commission, "Multilateral Investment Court project," accessed November 10, 2024, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en.
[849] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Colombia's Comments on the Draft Provisions on a Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters," November 15, 2021, para. 2, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/colombia.pdf.
[850] Lavranos, "The first steps towards."
[851] Arato et al., "Parsing and managing inconsistency in investor-state dispute settlement," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 337, https://doi.org/10.1163/22119000-12340175.
[852] Kułaga, "A Brave, New, International," 117.
[853] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters," Forty-second session, 14-18 February, 2022, UN Doc. A/CN.9/WG.III/WP.213, para. 30.
[854] Potesta, and Gabrielle Kaufmann-Kohler, "Can the Mauritius Convention," 43.
[855] Potesta, and Gabrielle Kaufmann-Kohler, "Can the Mauritius Convention," 68.
[856] Bungenberg, Marc, and August Reinisch. *From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement* (Springer Nature, 2020), 202.

Convention to take effect.[857] In addition, incorporating elements like confirmation of the right to regulate should be taken into consideration.[858]

Permanent court has its limitations and it is not panacea for all issues related to ISDS. Moreover, it may engender problems of its own.[859] Critics raised several issues in relation to appellate mechanism and ISDS. They directed skepticism regarding appellate mechanism's success in curbing inconsistency and incoherence. Because, investment protection standards vary across IIAs and domestic laws. These variances could still lead to differing views, even with an appellate body.[860] Moreover, some stakeholders directed skepticism regarding appellate mechanism's success in curbing costs and longer proceedings. However, other stakeholders believe that by enhancing predictability, it would reduce costs over time.[861] Russia strongly opposed the MIC. It highlighted the following concerns:

> (1) Uniformity of judicial practice would not be guaranteed, (2) increasing fragmentation of the existing investment protection regime, (3) The diversity of decision makers would not be ensured, (4) Costs would continue to be high, (5) The caseload of the system would determine the duration of the proceedings and (6) The budget and allocation of the costs of the MIC.[862]

There are other drawbacks associated with appellate mechanism. According to some scholars, designing balanced and effective appellate system will be challenging work.[863] Moreover, such a mechanism might not be able to produce expected outcomes if it lack solid foundation in public international law and ensure safeguard for State regulation.

[857] Kułaga, "A Brave, New, International," 126.
[858] United Nations Trade and Development (UNCTAD), "World Investment Report 2017: Investment and the Digital Economy," (2017): 118, 141-42. https://unctad.org/system/files/official-document/wir2017_en.pdf.
[859] Kułaga, "A Brave, New, International," 139.
[860] Arato et al., "Parsing and managing inconsistency," 338.
[861] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session," Resumed thirty-eighth session, 20-24 January, 2020, UN Doc. A/CN.9/1004/Add.1, para. 23.
[862] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of the Russian Federation," Thirty-eighth session (resumed), 20-24 January, 2020, UN Doc. A/CN.9/WG.III/WP.188/Add.1, pp. 3-7.
[863] Barton Legum, "Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?," In *Reshaping the Investor-State Dispute Settlement System,* ed. Jean E. Kalicki and Anna Joubin-Bret (Brill Nijhoff, 2015), 438.

Furthermore, over-emphasis on consistency may lead to incorrect decisions.[864] However, stakeholders maintained that they prioritize avoiding consistently incorrect decisions.[865]

There are couple of uncertainties surrounding the establishment of MIC. Firstly, whether it is truly beneficial or should UNCITRAL concentrate on refining existing procedural tools. Secondly, there is uncertainty related to striking an agreement on MIC.[866]

Scholars contend that stripping ability of the parties to choose arbitrators would be a major setback. This may lead to less expertise in complex and industry-specific cases. Moreover, party autonomy of the current system helps balance interests between investors and States.[867] According to Giorgetti, view the power to select their arbitrators as a primary advantage of ISDS.[868]

Raising several concerns, some States criticized the MIC proposal. They asserted that potential politicization of judge appointments might take place under this mechanism.[869] Moreover, lack of geographical and overall diversity might take place. Furthermore, cost distribution issue might arise. In addition, they also warned that it could exacerbate fragmentation in international investment law.[870]

There are strong reasons for establishing MIC because of the weaknesses in the current ISDS system. Certainly, such mechanism would significantly affect ISDS mechanism and its parties. Importantly, this is not merely a pro-State reform. This mechanism can still safeguard individual rights. Kułaga contends that the proposed appellate mechanism is

[864] Langford et al., "The quadrilemma: appointing adjudicators in future investor–state dispute settlement," *Journal of International Dispute Settlement* 14, no. 2 (2023): 168, https://doi.org/10.1093/jnlids/idad006.
[865] De Luca et al., "Responding to incorrect decision-making in investor-state dispute settlement: policy options," *The Journal of World Investment & Trade* 21, no. 2-3 (2020): 374-409, https://doi.org/10.1163/22119000-12340176.
[866] Anthea Roberts, "A Turning of the Tide against ISDS?," *EJIL:Talk! Blog of the European Journal of International Law*, May 19, 2017, https://www.ejiltalk.org/a-turning-of-the-tide-against-isds/.
[867] Fahira Brodlija, and Lidija Šimunović, "The Path of (R) Evolution of the International Investor State Dispute Settlement Regime," *EU and comparative law issues and challenges series (ECLIC)* 4 (2020): 834-35, https://doi.org/10.25234/eclic/11929.
[868] Chiara Giorgetti, "The Transformation of International Organizations—Specialization, New Initiatives, and Working Methods—Some Observations on the Work of UNCITRAL Working Group III," *Journal of International Economic Law* 26, no. 1 (2023): 47, https://doi.org/10.1093/jiel/jgad004.
[869] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa," Thirty-eighth session, 14-18 October, 2019, UN Doc. A/CN.9/WG.III/WP.176, para. 90.
[870] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of the Russian Federation," Thirty-eighth session (resumed), 20-24 January, 2020, UN Doc. A/CN.9/WG.III/WP.188/Add.1, p. 4.

useful for all parties.[871] However, whether procedural changes alone can bring greater coherence to rulings remains an open question.

This reform may offer predictability by decreasing inconsistency. Moreover, it would subject democratic oversight of lawmaking activities by ISDS bodies. Furthermore, adjudicators of the MIC would be appointed by a democratic process. This can be modeled after other international courts.[872] WTO's dispute settlement could be a useful model for this reform which is more cost-effective than current ISDS system.[873] Besides, such a system is more cost-effective compared to ad-hoc arbitration because of faster proceedings,[874] reduced selection costs and reduction in experimentative legal arguments due to predictable legal decisions.[875] Likewise, Giorgetti contends that standing body would provide solution to impartiality issue of the current *ad hoc* system.[876] In addition, this system may permit third parties to intervene by allowing joinder.[877] This would be an important step to reduce repetitive claims and setting clear jurisprudence.

This dissertation, therefore, takes the position that multilateral investment court proposal with first instance and appellate mechanism offers significant solution in addressing procedural flaws of the ISDS system. It proposes standing bodies of judges who would selected based on high standards and would be required to follow the code of conducts. This would be qualitatively better solution compared to the existing *ad hoc* mechanisms. However, it remains insufficient to resolve the systemic issues of the international investment law that require substantive reforms.

[871] Kułaga, "A Brave, New, International," 139.
[872] Schill, "Reforming investor–state," 667.
[873] Schill, "Reforming investor–state," 667.
[874] Anthea Roberts, and Zeineb Bouraoui, UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counter claims, *EJIL:Talk! Blog of the European Journal of International Law*, June 6 2018, https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/.
[875] Taylor St John, and Yuliya Chernykh, "Déjà Vu? Investment court proposals from 1960 and today," *EJIL:Talk! Blog of the European Journal of International Law*, May 15, 2018, https://www.ejiltalk.org/deja-vu-investment-court-proposals-from-1960-and-today/.
[876] Giorgetti, "The Transformation of International Organizations," 47.
[877] Papazoglou, Stephanie. "The good, the bad and the ugly of ISDS reforms': rebalancing the system." *King's College London Student Law Review* (2019): 52. https://blogs.kcl.ac.uk/kslr/files/2019/10/Stephanie-P-.pdf.

3.2 Appointment of arbitrators

3.2.1 Selective representation and number of tribunal members

3.2.1.1 Number of tribunal members and adjustments

The WGIII has expressed a preference for selective representation on the international investment tribunal, instead of having a full representation. This is because a high number of members could be expensive and complex to manage. The approach they suggest is to have a broad geographical representation and a balance of genders, levels of development, and legal systems. The agreement establishing the tribunal should be flexible enough to adjust the number of tribunal members as the number of participating States and caseload changes over time. To ensure balanced representation over time, draft provision 8 will address the necessary considerations. Draft provision 4 reads as follows:

> "1. The Tribunal shall be composed of a body of [--] independent members in [full][part] time office, [elected regardless of their nationality][nationals of Parties to this Agreement, elected] [...]
>
> 2. Option 1: The number of members of the Tribunal may be amended by a [two-thirds] majority of the representatives in the Committee of the Parties[.]
>
> Variant 1:[, based on the case load of the Tribunal as follows: (to be completed)]
>
> Variant 2: [, based on the increase or decrease of the Parties to this Agreement, as follows: (to be completed)]
>
> Variant 3: [, based on the evolution of case load and of the Parties to this Agreement, as follows: (to be completed)
>
> Option 2: The Presidency of the Committee of the Parties, […] may propose an increase in the number of members of the Tribunal indicated in paragraph 1, [...] The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties.

3. No two members of the Tribunal shall be nationals of the same State [...]"[878]

The question of whether tribunal members should work full-time or part-time depends on the number of members and the tribunal's workload. If there are many members to increase diversity, part-time employment may be considered, which could require rules prohibiting parallel activities.

Paragraph 2 addresses the matter of adjusting the number of tribunal members over time. The Working Group recommends determining the number of members based on a projected caseload, and then making changes as the number of States parties changes. If there is a two-tier mechanism, it is anticipated that fewer cases will be heard in the second tier, and thus fewer tribunal members may be required there than in the first tier. Paragraph 2 presents two alternatives for modifying the number of tribunal members. The first option entails having fewer members that correspond to the projected caseload, with the possibility of adjusting the number as needed. The second option involves having a greater number of members, including some who may work part-time, in order to promote greater diversity.[879]

In paragraph 3, it is suggested that the Working Group should deliberate on whether nationality should be a factor in determining the makeup of the tribunal. Additionally, the possibility of implementing a provision that would prohibit two tribunal members from sharing the same nationality is suggested. This provision is reminiscent of some court statutes that permit the selection of judges without regard to nationality but prohibit two judges from the same State from serving simultaneously. If the composition of the tribunal were to be influenced by nationality, it could be guaranteed that each member State has the chance to have one of its own nationals appointed to the tribunal by instituting a system of rotation among the member States.[880]

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[878] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," Accessed November 10, 2024, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf, p. 5.

[879] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

[880] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

According to the European Union and its Member States, the impartiality and independence of tribunal members can only be ensured through full-time employment.[881] Canada also supports appointment on a full-time basis.[882] However, according to the EU, they may allow part-time employment as a transitional measure initially. The adjudicators' nationality is not a determining factor; instead, their competence and independence should be the primary consideration, following the ICJ Statute's Article 2. The qualifications required for the highest judicial positions in their respective countries and expertise in international law should both be considered when selecting potential adjudicators, expanding the pool and enhancing diversity.[883] On the other hand, Colombia suggested that the parties without a representative judge in the Tribunal may be able to appoint an ad hoc judge in cases where they are involved in order to ensure that all parties' legal systems are comprehended. However, the EU do not support appointing ad hoc judges.[884] The thesis contends that tribunal members should be primarily full-time employed based on geographical diversity.

The European Union and its Member States recommend selecting option 2 due to its clear procedural framework, and variant 3 of option 1 regarding its substance. As a result, they propose the following provision:

> "2. The Presidency of the Committee of the Parties, acting on behalf of the Tribunal, may propose an amendment in the number of members of the Tribunal indicated in paragraph 1 based on the evolution of case load and of the Parties to this Agreement, giving the reasons why this is considered

[881] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," Accessed November 10, 2024, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20211125_wp_selection_eums_comments.pdf.

[882] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible Reform of Investor-State Dispute Settlement (ISDS): Initial draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters - Submission of the Government of Canada," Accessed November 10, 2024, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/canada.pdf.

[883] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

[884] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Colombia's Comments on the Draft Provisions on a Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters," November 15, 2021, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/colombia.pdf.

necessary and appropriate. The Secretariat shall promptly circulate any such proposal to all Parties. The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties."[885]

The European Union and its Member States have concerns that the provision outlined in paragraph 3 of the draft provision may be inflexible if there is a need to adjust the number of adjudicators, such as due to an increase in caseload or the need for additional adjudicators.[886]

This dissertation, therefore, frames the argument that focus of the WGIII on balancing diversity and efficiency is a pragmatic approach. Ensuring broader representation is essential for alleviating dissatisfaction among the developing and least developed countries. Moreover, for caseload management, and appointing tribunal members it can follow the WTO formula and other recommendations suggested by the thesis in the previous chapter. The recommendations do incorporate the EU's proposal emphasizing on "competence and independence" of tribunal members, while prioritizing geographical representation.

3.2.1.2 Ad hoc tribunal members

Draft provision 5 addresses the need to propose options for the participation of ad hoc tribunal members with some flexibility in forming chambers for specific cases with parties' consent. This flexibility is present in the statutes of international courts, for instance, the International Court of Justice. Different methods for appointing ad hoc tribunal members are also suggested, including direct appointment by parties or selection from a defined roster.[887] The draft provision 5 reads as follows:

[885] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 8.
[886] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[887] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

> "1. The parties to a dispute may choose a person to sit as Tribunal member, […] composed of three or more members as the Tribunal may determine, for dealing with particular categories of cases in accordance with article (--); for example, (to be completed).
>
> 2. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in article 6."[888]

It is important to note that the WGIII needs to consider whether to retain paragraph 2 and should note that the ad hoc judge system may have disadvantages in the inter-State context, and it may not be suitable for the investor-State context. Draft provision 5 brings up the matter of nationality, and it is important to note that in some court statutes, a State involved in a case can appoint an ad hoc judge, even if they do not have a judge of their own nationality on the tribunal. An ad hoc judge can be chosen from any country, and they are usually not a national of the State that appoints them.[889]

The Working Group could explore the possibility of involving a less senior person in the ISDS tribunal or as an observer to promote competence and inclusivity over time. However, as this role is not currently provided for in existing mechanisms, it would need to be created specifically for this purpose.

The European Union and its Member States hold reservations about the appointment of ad hoc judges and are considering alternative options to ensure that adjudicators have a comprehensive understanding of respondents' legal systems. These alternatives include appointing experts and translators, as well as gathering evidence on domestic law's interpretation. In addition, legal counsel representing the case could provide further assurance in this regard. Moreover, enabling only the host State to appoint an ad hoc adjudicator may raise concerns about due process. This may prompt the investor to also request the appointment of an ad hoc adjudicator, resulting in the presence of two ad hoc adjudicators alongside the permanent body. This would be counterproductive and could compromise the permanent body's efforts to establish consistency, predictability, and

[888] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 5.
[889] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

legitimacy. Ad hoc adjudicators are more prone to ethical issues than permanently appointed adjudicators.[890] However, Colombia suggested appointment of ad hoc judges to ensure that the laws and legal system are understood.[891]

This dissertation, therefore, seeks to establish that inclusion of *ad hoc* tribunal members would not be useful for the multilateral investment court. It would be just the continuation of the status quo that is engenders problems in the first place. Although the proponents claim that this would provide flexibility and party autonomy, but this would jeopardizes accountability and trust in the system. Moreover, this would not be helpful to create a coherent, consistent, and predictable dispute settlement regime.

3.2.2 Nomination, selection and appointment of candidates

3.2.2.1 Nomination of candidates

The Working Group has emphasized that the appointment methods of tribunal members in ISDS should prioritize fairness, quality, transparency, neutrality, accountability, and high ethical standards. The diversity in gender, geographic, linguistic, and legal systems is essential in the ISDS system, as it can ensure a more balanced decision-making process and enhance the quality of justice. The Working Group has highlighted that lack of diversity can threaten the legitimacy of the ISDS regime.

To prioritize expertise and integrity over political considerations in ISDS tribunal member appointments, the Working Group recommended a multi-layered, transparent, and stakeholder-inclusive selection process. They suggested that selection panels and consultative committees should conduct candidate screenings before the appointment is made by the States Parties to the agreement establishing the tribunal.

[890] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[891] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Colombia's Comments on the Draft Provisions on a Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters."

The Working Group should take note that draft provisions 6 to 8 propose the common method of selecting tribunal members by an intergovernmental body from a list of nominated candidates. The group should explore if draft provision 8, which proposes seat allocation to geographically defined groups of States, can create a selective representation tribunal that ensures fair regional and legal system representation. This approach may be an effective means of achieving representation in the tribunal.

To avoid the selection process from becoming blocked, it is preferred to conduct elections through voting rather than consensus. States can cast their vote for multiple candidates to ensure diversity and balance. Generally, a qualified majority rule is applied to ensure that the appointed tribunal members are acceptable to most States. If no qualified majority is reached, less demanding majorities are often provided to avoid a deadlock in the election. Some courts use a system where tribunal members are chosen by treaty parties or a collective body of States, even if the membership is greater than the group of States that accept the court's jurisdiction.[892] The draft provision 6 reads as follows:

> "Option 1:
>
> 1. Nomination of candidates for election to the Tribunal may be made by any Party to the Agreement establishing the Tribunal. […] The Tribunal members shall be elected from the list of persons thus nominated.
>
> 2. Before making these nominations, each Party shall encourage the participation of, and is recommended to consult […] in the process of selection of nominees.
>
> Option 2:
>
> Any person who possesses the qualifications required under article 4, paragraph 1 may apply to the selection process following an open call for

[892] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

candidacies to be issued in accordance with a decision of the Committee of the Parties."[893]

Option 1 for choosing tribunal members involves the Parties nominating individuals, like in some courts. However, this approach has been criticized for its uneven national processes, lack of transparency in selecting candidates, and political influence in nominations. The WGIII thinks that this option might ensure gender balance in the makeup of the tribunal. Under this option each party would be asked to propose submit two nominations. Option 2 proposes to remove the nomination process from the parties. Instead, it suggests self-nomination by any eligible individual after an open call. However, it is necessary to have a separate body for screening and filtering candidates to ensure fairness of the selection process.[894]

The European Union and its Member States oppose the selection of tribunal members by States that do not accept the tribunal's jurisdiction. Such a scenario could cause issues if those States were allowed to influence the tribunal's operations.[895] Canada is also has similar views.[896] The thesis contends that all States should be given power to participate in all of the matters as the system will likely influence all and the stakeholders will ensure that their positions are counted through the process.

The European Union and its Member States advocate for a robust nomination and appointment system that prioritizes qualified and independent candidates and ensures diversity in geography and gender. Their proposal involves a combination of open calls for direct applications and a transparent nomination process that involves stakeholders. This approach combines the first two options of draft provision 6. Direct application appointments

[893] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 9.
[894] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[895] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[896] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible Reform of Investor-State Dispute Settlement (ISDS): Initial draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters - Submission of the Government of Canada."

would prevent political nominations. To ensure gender balance in the tribunal's composition, the EU suggests each party should nominate more than just one or two candidates.[897]

This dissertation, therefore, forwards the argument that proposed appointment process for tribunal members by the WGIII is a progress toward building institutional credibility. It focuses on diversity and multi-layered vetting. These would be quite useful for creating trustworthy mechanisms. However, the EU's hybrid model that combines State nominations with open applications can be difficult to implement because of resource constraints. Moreover, it may bypass ensuring geographical representation requirements. However, prioritizing geographical representation, self-nomination can be a better arrangement to find competent candidates. In this case, candidates should be selected against the quota preserved for a specific geography or region.

3.2.2.2 Selection process

The guidelines for the use of selection panels or committees in the appointment process is provided in the draft provision 7. The provision outlines the establishment and function of a selection panel based on a submission received.[898] It is noteworthy that some international courts have utilized screening committees, consultative appointment committees, and appointment committees.[899] The draft provision 7 reads as follows:

> "Draft provision 7 - Selection Panel
>
> a. Mandate

[897] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[898] United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021)," Fifty-fourth session, 28 June-16 July, 2021, https://documents.un.org/doc/undoc/gen/v21/016/78/pdf/v2101678.pdf, para. 33.
[899] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session," Resumed thirty-eighth session, 20-24 January, 2020, UN Doc. A/CN.9/1004/Add.1, para. 118. United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

A selection panel (hereinafter referred to as “Panel”) is hereby established. Its function is to give an opinion on whether the candidates meet the eligibility criteria stipulated in this Agreement…

b. Composition

1. The Panel shall comprise [five] persons chosen from among former members of the Tribunal, current or former members of international or national supreme courts and lawyers or academics of high standing and recognised competence. […] The composition of the Panel shall reflect in a balanced manner the geographical diversity, gender and [the different legal systems of the Parties] [the regional groups referred to in article 8].

2. The members of the Panel shall be appointed by the Committee of the Parties by [qualified][simple] majority from applications [submitted by a Party][received through the open call referred to in paragraph 3].

3. Vacancies for members of the Panel shall be advertised through an open call for applications published by the Tribunal.

4. Applicants shall disclose any circumstances that could give rise to a conflict of interest...

5. Members of the Panel shall not participate as candidates in any selection procedure to become members of the Tribunal during their membership of the panel and for a period of three years thereafter.

6. The composition of the Panel shall be made public by the Tribunal.

[…]

f. Tasks

1. The Panel shall act at the request of the secretariat, once candidates have been nominated by the Parties pursuant to article 6, paragraph 1 or have applied pursuant to article 6, paragraph 2.

2. The Panel shall: (i) review the nominations or applications received […] (ii) verify that the candidates meet the requirements for appointment as members of the Tribunal; […] and, on that basis, establish a list of candidates meeting the requirements.

3. The Panel shall complete its work in a timely fashion.

4. The chair of the Panel may present the opinion of the Panel to the Committee of the Parties.

5. The list of candidates meeting the requirements shall be made public.

6. The Panel shall publish regular reports of its activities."[900]

Screening committees evaluate potential tribunal members before their selection to confirm their qualifications, expertise, and eligibility. They are responsible for eliminating candidates who do not meet the requirements, resulting in the appointment of more qualified and independent tribunal members, even if the States are responsible for appointing them. Generally, screening committees do not consult with non-State entities.[901]

The European Union and its member States strongly advocate for a screening process to select qualified and independent adjudicators to prevent the politicization of State nominations. The selection panel should consist of independent individuals, including former tribunal judges, current or former members of supreme courts, and highly competent lawyers or academics who can apply directly through an open call. The panel's independence should be ensured by an external entity, like the President of the International Court of Justice, who confirms that the members meet necessary requirements. The committee of the parties must guarantee geographical diversity, gender balance, and different legal systems when appointing members to the selection panel. The panel's appointment should be by a qualified majority to prevent politicization but should remain independent from the committee. The panel must screen all candidacies to ensure only vetted and approved adjudicators are appointed. The thesis contends that chairman of the committee of parties

[900] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 10.
[901] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

should oversee the activities of the panel and handing responsibility to other international body will complicate the matter.[902]

3.2.2.3 Appointment process

The appointment process is provided in the draft provision 8, which reads as follows:

> "Draft provision 8 - Appointment (election)
>
> 1. The Panel shall publish the names of the candidates who are eligible for election […] based on the nationality of the country which nominated them for the election: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe.
>
> 2. The Panel shall recommend [--]members to serve on the appellate level of the Tribunal based on the extensive adjudicatory experience of such candidates.
>
> 3. The Members of a particular regional group in the Committee of the Parties will vote on the candidates eligible for election from their regional […]
>
> 4. The Committee of the Parties shall only appoint members of the first instance and appellate level Tribunal […]
>
> 5. At every election, the Committee of the Parties shall ensure the representation of the principal legal systems of the world, and equitable geographical distribution as well as equal gender representation in the Tribunal as a whole.
>
> 6. The members shall elect a President of the Tribunal by a confidential internal voting procedure with each member having one vote. The President

[902] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

shall be elected for a term of three years with the possibility of one re-election."[903]

Paragraph 1 outlines a strategy for promoting diversity in the selection of tribunal. The proposition is that each regional group would exclusively vote for their regional candidates to appointment the candidates against their regional quota but not for the candidates from other regions.[904]

The WGIII should clarify the election or allocation of tribunal members to the first-instance and appellate level. If necessary, the WGIII can choose from three options: (i) establish a common pool of nominees who are qualified for both levels and hold a single election, (ii) conduct a separate election for the first-instance and appellate members, or (iii) have the Committee of the Parties elect all judges without distinction, and then let the tribunal organize itself based on the recommendation of the selection panel into first-tier and appellate levels.

The European Union and its Member States support the goal of achieving equitable geographical and gender representation in the tribunal. However, they suggest that the specific details regarding this matter, such as formulas, should be determined by the Committee of the Parties rather than included in the statute, allowing for more flexibility. They also propose separate tracks for nomination, selection, and appointment of members for the first instance and appellate level, with the committee deciding on appointments for each level through separate elections. In addition, they suggest that the qualification criteria for appellate-level adjudicators should be expanded beyond adjudicatory experience to include seniority in other relevant areas.[905] Finally, they recommend some clarifications to the draft text:

"The Panel shall publish the list of candidates established pursuant to [Article 7(f)(2)(iii)] who are eligible for election as members of the

[903] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 12.
[904] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[905] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

> Tribunal by classifying them in one of the following regional groups based on the nationality of the country which nominated them for the election or, in case of direct applications, based on the nationality of the candidates: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe."[906]

The thesis contends that primary and only concern of the tribunal should be to ensure geographical diversity, other type of representation should be left to the stakeholders to keep in mind. Because, not every stakeholder is in the same developmental stage to nominate as such.

3.2.3 Terms of office, renewal and removal

3.2.3.1 Terms of office and renewal

The Working Group should take into account that longer terms for tribunal members that are non-renewable may prevent them from being influenced unduly. However, not having reappointment opportunity, may result in a loss of valuable experience. This might be mitigated by appointing for longer and staggered judicial terms. The draft provision 9(a) discusses about terms of office and renewal. It reads as follows:

> "a. Terms of office and renewal
>
> 1. The Tribunal members shall be elected for a period of [nine years] [without the possibility of re-election][and may be re-elected to serve a maximum of one additional term].
>
> 2. Of the members elected at the first election, the terms of [--] members shall expire at the end of [three] years and the terms of [--] more members shall expire at the end of [six] years…

[906] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 17.

> They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with section (b) below."[907]

The WGIII was advised to consider the duration of resolving ISDS cases and balancing the workload among tribunal members when deciding on appropriate term lengths. Some proposed a term of 6 to 9 years with staggered replacements to ensure stability and jurisprudential continuity. Other international courts have set terms from 4 to 9 years, with one court having no term limit. A gradual turnover of new members could be achieved by staggering appointments at three-year intervals.[908]

The European Union and its Member States support the idea of appointing adjudicators for long, non-renewable, and staggered terms of office. They favor the option of "without the possibility of re-election" and support the current drafting of paragraphs 1 and 2 of draft provision 9(a). Non-renewable terms of office protect adjudicators from pressure to secure re-election, thereby enhancing their independence and impartiality. Longer terms of office decrease worries about job security and foster independence. Finally, long and staggered terms help establish institutional memory, expertise, and collegiality, leading to a more consistent development of case law.[909] The thesis contends that the terms of office should be renewable and it is up to the stakeholders to decide if the adjudicators are independent or not. All the members should trust the democratic nature of the selection process.

3.2.3.2 Resignation, removal, and replacement

The draft provision 9(b) discusses about resignation, removal and replacement. It reads as follows:

[907] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 14.
[908] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[909] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

"b. Resignation, removal, and replacement

1. A member may be removed from office in case of substantial misconduct or failure to perform his or her duties by a unanimous decision of all members except the member under scrutiny. A member may resign from his or her position through a letter addressed to the President of the Tribunal. The resignation shall become effective upon acceptance by the President […]

2. A member who has been appointed as a replacement of another member under this article shall remain in office for a duration of [nine] years except for members who are appointed as replacements for members elected with a shorter period of [three] years or [six] years after the first election. Members who are appointed as a replacement for a member with a shorter-term period will be eligible for reelection for a full term."[910]

Majority of international court statutes establish misconduct and inability to perform duties as the grounds for removal of tribunal members. These provisions are intended to maintain the independence of tribunal members by preventing States Parties from interfering with the removal process. The suggestion was made that the president of the tribunal, with the involvement of other members, should be responsible for making decisions regarding removal. It was also recommended that the threshold for removal should be high. This was discussed in paragraphs 41 and 42 of document A/CN.9/1050.[911]

The European Union and its member States' proposal is to add more details about the removal process of permanent adjudicators in paragraph 1 of draft provision 9(b). The suggestion is that other adjudicators can remove them based on a recommendation from the President, or the Vice President if the President is the one being scrutinized. It is suggested that a qualified majority (e.g., three-fourths) should be required instead of unanimous agreement for the decision to remove a permanent adjudicator. This change would prevent a single adjudicator from blocking removal in cases where it is necessary. The thesis

[910] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 14.
[911] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

contends that stakeholders also should be able to recommend for removal. The requirement might be getting signature of one-tenth of the members States.[912]

3.2.3.3 Appointing authority or dispute settlement body

The WGIII must take into account fundamental issues regarding the creation of a multilateral investment tribunal and its governing system. The draft provisions 1 to 3 related to "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters" provide a basic structure for establishing the tribunal and governance, there are other matters that the WGIII must address in the future.[913] The draft provisions 1 to 3 read as follows:

> "Draft provision 1 – Establishment of the Tribunal
>
> A Multilateral Investment Tribunal is hereby established […] It shall function on a permanent basis.
>
> Draft provision 2 – Jurisdiction
>
> The Tribunal shall exercise jurisdiction over any dispute arising out of an investment […], which the parties consent to submit to the Tribunal.
>
> Draft provision 3 – Governance structure
>
> 1. There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal...
>
> 2. The Committee of the Parties […] establish its own rules of procedure and adopt or modify the rules of procedure for the first instance and the appellate level, [the Advisory Centre], and the Secretariat.

[912] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[913] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

3. The Tribunal shall determine the relevant rules for carrying out its functions. In particular it shall lay down regulations necessary for its routine functioning."[914]

Draft provision 1 establishes the tribunal as a permanent institution, while draft provision 2 specifies that it will exercise jurisdiction over any investment dispute between contracting States and nationals of other contracting States, subject to consent. Future investment treaties could contain provisions related to consenting to the jurisdiction of the multilateral investment tribunal. The WGIII could also explore incorporating a mechanism in the multilateral instrument on ISDS reform that would facilitate the inclusion of consent-related provisions related to the tribunal in current investment treaties. The Committee of the Parties, composed of representatives of all parties to the agreement, is introduced in draft provision 3 as the governing body responsible for carrying out various functions, including establishing rules of procedure for the tribunal. The tribunal itself will develop rules for its routine functioning. The provisions may be further clarified in future investment treaties, and the term 'parties' may refer to either States or disputing parties depending on the situation.[915]

The WGIII needs to work on the matters associated with the procedural framework of a permanent multilateral body. Although the agreement creating the tribunal could set out general procedural rules, the group should also consider whether detailed procedures should be defined in secondary legislation. This secondary legislation could be developed and amended by the Committee of the Parties and, when necessary, the tribunal itself. By defining procedures in secondary legislation, it will allow for future modifications and updates to the procedural rules.[916]

The European Union (EU) and its member States as active participants in UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform, have been working on developing a multilateral reform of ISDS. The EU has been advocating for the

[914] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 3.
[915] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[916] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

establishment of a multilateral investment court, which would replace the existing ISDS system with a permanent court to resolve investment disputes (European Commission 2019). In March 2020, the EU and its member States submitted a joint paper to UNCITRAL Working Group III outlining their proposal for a multilateral investment court. The paper emphasized the need for a court system that is independent, impartial, and of high quality, and suggested several mechanisms to enhance the accountability and transparency of the court. The EU and its member States have argued that a multilateral investment court would provide greater transparency, accountability, and consistency in resolving investment disputes, and would also address some of the concerns raised by civil society groups and trade unions regarding the potential for ISDS to undermine the ability of governments to regulate in the public interest.[917]

The European Union and its Member States have expressed their preference for a modified version of provision 2. They prefer covering State-to-State disputes.[918] This might be a unique and useful innovation to the investment-related arbitration. Several countries are not interested in an investor-State dispute settlement system. This might create an acceptable option for them to mitigate their dispute through State-to-State dispute settlement system.

Moreover, the EU suggested avoiding the term 'investment' to prevent probable double "investment test" under the relevant agreements. They maintain that the focus should be on the element of consent to jurisdiction, regardless of the type of consent instrument used.[919] They propose the following text for provision 2:

> "The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal."[920]

Regarding draft provision 3, The EU and its member States support the creation of a Committee of the Parties and suggest that decisions should be made by qualified majority,

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[917] European Parliament, "Multilateral Investment Court," (January, 2020): 6, https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf.

[918] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

[919] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."

[920] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters," 4.

e.g. the specific nature of a decision may determine the required majority, which could be a 3/4 majority or distinct majority.[921] Canada also supported the proposal for a governance structure composed of a Committee of the Contracting Parties but suggested further guidance on its role and relationship with the Tribunal.[922] Colombia thinks that the decision-making process should strike a balance between requiring consensus for critical matters and allowing for decisions to be made by a simple majority vote for less significant issues.[923] The thesis contends that requiring consensus should be avoided as it created difficulties in the WTO system, rather two-third majority should be required for critical matters and simple majority on others. Moreover, regarding the selection of arbitrators, simple majority should be the decider to fasten the process.

4 Conclusion

Both within and outside the UNCITRAL WGIII, various stakeholders contributed divergent perspectives on how to address the deep-rooted issues of current ISDS system. To work on these perspectives, WGIII based its reforms on some approaches. On the one hand, Sate-driven approach taken by UNCITRAL has arranged a pluralistic reform process. On the other hand, flexible approach allowed States to select from a menu of options that best suit their individual policy objectives. These approaches, to some extent, promotes flexibility and reflects the diversity of State interests. However, it is going to institutionalize the current system by concentrating largely on reforming procedural issues. Therefore, it would sideline those States who emphasizes on reforming substantive issues. This is became a point of great divide between stakeholders. Thus, the path forward for ISDS reform must work on both procedural and substantive issues that continue to undermine the legitimacy of the system. Nonetheless, UNCITRAL WGIII's reforms, if put into practice, may provide significant

[921] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Comments from the European Union and its Member States on: Initial draft on standing multilateral mechanism: the selection and appointment of ISDS tribunal members and related matters."
[922] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible Reform of Investor-State Dispute Settlement (ISDS): Initial draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters - Submission of the Government of Canada."
[923] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, "Possible reform of investor-State dispute settlement (ISDS): Colombia's Comments on the Draft Provisions on a Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters."

changes compared to the current ISDS system. However, even these changes going to have drawbacks and would face criticisms.

Ultimately, the future of ISDS reform will be shaped by two, if not more, competing positions. One focused on pragmatic but major reforms to enhance efficiency and maintain the status quo to some extent. Another calling for paradigm-shifting reforms that addresses substantive issues and moving out of the current ISDS mechanism. Observation of the thesis reveals that this difference will sustain long period of time, even after the UNCITRAL WGIII's successful reforms.

The creation of appellate mechanisms or multilateral courts might resolve issues of coherence and consistency to some extent. However, these mechanisms might continue inherent power imbalances that have long been criticized.

The UNCITRAL's draft on the appointment of adjudicators incorporated some significant improvements. However, still it needs to be worked on, especially regarding appointment authority, representation and diversity issues.

Chapter VI: Concluding remarks

Regardless of numerous problems associated with the ISDS mechanism, so many States have been incorporating this mechanism into their BITs, FTAs etc. It appears that this would stay in the international arena as the principal mode of dispute settlement. Moreover, many States would continue to use ISDS mechanism and some of them may opt for multilateral investment dispute settlement mechanisms developed by the UNCITRAL WGIII when it comes to existence. There are many problems which are involved in the international investment dispute settlement in general and investor-State dispute settlement in particular. The thesis explores these issues to understand the nature and extent of such problems so that the quality of reform proposals can be evaluated and recommended.

Firstly, the thesis examines the historical evolution of international investment law. It evaluates this through the lens of the Third World Approaches to International Law (TWAIL). It seeks to understand the origins of its current challenges. Moreover, it attempts to extract valuable insights for its future.

The thesis offers some important insights after evaluating the evolution of international investment law. It demonstrates that there is consistent emphasis to protect the rights and interests of foreign investors. In such a way that this can be characterized as investor-centric approach. This approach is evident in different historical periods, from the early FCN treaties to the modern BITs. Although many treaty provisions evolved or added over time, the underlying approach and objective has remained same. Thus, BITs did not embody a radical departure from the past but rather a continuation.

Moreover, the thesis founds that there is substantial power imbalance between capital-exporting and capital-importing States. This influenced the development of international investment law in a significant way. Often at the expense of developing countries and through military intervention and diplomatic pressure, powerful States received favorable treaty terms and enforced their investors' claim during the pre-BIT era. This historical legacy of power imbalance continues to exist to some extent that engenders unfavorable outcomes for capital-importing States.

Furthermore, the thesis also highlights differing positions and causes of resistance of capital-importing States. Particularly, Latin American States expressed their position in the form of the Calvo doctrine. This position challenged international minimum standard of treatment

championed by European capital-exporting States and the United States. Moreover, they passed various resolutions by the UN General Assembly. For instance, the 1962 Resolution on Permanent Sovereignty over Natural Resources and the 1974 Charter of Economic Rights and Duties of States etc. This positions and efforts highlighted their willingness to maintain greater regulatory control over foreign investments. Although their efforts can be labeled as unsuccessful to alter the fundamental nature of the system, however, brought qualitative change over time. Nonetheless, these contentions showcase the persistent tension between the interests of investors and host States.

The thesis attempts to uncover historical roots of the current challenges in the system. It finds the persistent influence of international investment law's imperial roots. The analyses reveal a continuity of certain themes and power dynamics. It maintains that these factors influenced the field. Moreover, it highlights that this legacy poses challenges for developing countries even in the contemporary era.

Moreover, in search of historical roots, the thesis looks for the evolution of some concepts such as the international minimum standard of treatment and State responsibility for rebels. It maintains that these principles also have been influenced by the interests of powerful States. This examination highlights inherent ambiguities of these concepts. Besides, it points out disagreements over their interpretation and application.

Furthermore, the thesis highlights that certain historical tensions persists still today. For instance, the debate regarding appropriate compensation for expropriation. That means there is no consensus on these issues. This issue has contributed to the ongoing instability and uncertainty.

Based on these observations and findings, therefore, the thesis argues that current problems and challenges of international investment law are deep-rooted in its evolution. The thesis further argues that to address these issues effectively historical legacy of the system must be dealt with properly. Moreover, to develop informed solutions comprehensive understanding of historical roots of the problems is essential for policymakers and scholars. Furthermore, reforms should resolve power imbalances. In addition, voices and interests of developing countries should be meaningfully incorporated to build a just and balanced global economic order.

Secondly, The thesis analyzes Investor-State Dispute Settlement (ISDS) system, which is the prevalent system of international investment dispute resolution. The thesis focuses on

significant issues that have been raised by scholars and stakeholders. For example, concerns related to the arbitrators and the appointment of arbitrators, interpretation, chilling effect on the regulation of the State and lack of appeal mechanism are discussed in the thesis.

The thesis scrutinizes the concerns regarding arbitrators and appointment of arbitrators. The examination reveals deeply rooted concerns about the presiding arbitrators. The thesis points out that there is lack of diversity among arbitrators and majority of the arbitrators belong to the Western countries. It highlights that there is limited pool of arbitrators who are appointed repeatedly. Moreover, there is lack of expertise in specific fields, for instance, in human rights and environmental law. Furthermore, there is double-hatting problem where one individual can serve as arbitrators and legal counsel in separate disputes. Considering all of these factors, the thesis contends that issues related to the arbitrators and their appointments are deeply problematic. It raises concerns not only about diversity and representation but also potential biases and conflict of interest. Moreover, it raises concerns about giving equal consideration to the perspectives and interests of developing countries.

The thesis dissects concerns regarding interpretation. It finds persistent problem of inconsistent interpretation when it comes to the application of investment treaty standards. Because of *ad hoc* arbitration mechanism there is no requirement of following precedents. Moreover, *ad hoc* nature of the tribunals make them disconnected with each other. Furthermore, fragmented nature of the treaties and broadly defined treaty standards make it quite inevitable that there would be some inconsistency regardless of types of tribunals or any other factors. Considering all of these issues, the thesis argues that multiple systemic factors engender inconsistencies and which in turn leads to unpredictability. Therefore, the system becomes complicated for both parties to the dispute and generates other side effects like increasing more cases, costs for parties and perception of unfairness etc. Although some scholars and stakeholders want to maintain the status quo maintaining flexibility regarding interpretation, however, the thesis opposes this position as the problem is too big to ignore.

The thesis analyzes concerns related to limited policy space and chilling effect on State regulation. Supporting the studies and claims of chilling effect of ISDS, the thesis contends that potential costly arbitration case can affect States decision-making and delay implementation of regulations. These regulations include environmental protection, public health and human rights. Therefore, the thesis argues that although there is debate about extent of chilling effect, however, there are persuasive evidence including case studies and

empirical research. This factor underscores that this is not merely a claim or perception. Consequently, there is question of balancing rights of investors and protecting regulatory space for States.

The thesis then addresses the issue of lack of appellate mechanism. It stresses that this is a fundamental shortcoming of the current system. This mainly because of *ad hoc* nature of the tribunals. Moreover, it is a barrier for correcting errors in law and ensuring that there is consistency in decisions. Although there is annulment mechanism available in the current, however, it has limited scope because of narrow focus on procedural irregularities. Therefore, the thesis argues for an appellate mechanism. It not only would have positive effect to engender consistency and predictability but also would enhance fairness and legitimacy.

Based on these analyses, the thesis emphasizes that current ISDS system need to be reformed. The concerns are too many and sometimes deeply-rooted problems are involved. Therefore, these necessitate a complete reconsideration of the ISDS system and examination of possible alternatives. Inaction from the stakeholders would further undermine the system's acceptance and may fall out as a result.

Thirdly, the thesis evaluates the World Trade Organization (WTO) dispute settlement system to find pertinent lessons for the current ISDS reforms. The thesis examines the WTO dispute settlement system to extract lessons for multilateral investment dispute settlement mechanism. It acknowledges the benefits of taking lessons from experiences of the WTO. However, it suggests incorporating from the WTO's strengths and caution against adopting its weaknesses.

The thesis argues for a two-tier system with permanent bodies for both the first instance and appellate levels instead of ad hoc panels for first instance and standing body for appellate level. This mechanism would be more beneficial in the context of international investment law as its disputes involve complex public international law and constitutional law issues. Moreover, its disputes potentially involve reward of a large sum of monetary remedy against the host States instead of compliance requirements by the WTO dispute settlement.

The thesis suggests incorporating two-thirds majority vote for both instances instead of the WTO's consensus-based selection for the appellate body. The thesis argues that consensus-based voting method may lead to paralysis and disenfranchisement. Moreover, the thesis suggests selecting the judges from a broader pool of candidates for ensuring quality

candidates, transparency and fairness. The thesis argues for ensuring diversity and geographical representation to make it representative of broader membership. Furthermore, the thesis highlights the importance of term limits for ensuring accountability and prevention of biasness. It acknowledges that this might have a concern of judicial independence. However, as the experience of the WTO suggests, this would not be a matter of great concern as getting two-thirds majority support to influence such decision is not an easy task. Besides, a comprehensive code of conduct is necessary and it can be similar to the WTO's.

The thesis recognizes the importance of a secretariat for effective functioning of the dispute settlement mechanism. It maintains that secretariat can be modeled after the secretariat of the WTO dispute settlement. However, it warns against possible influence of the secretariat in adjudication proceedings.

The thesis emphasizes the high costs associated with investment disputes needs to be addressed. It maintains that this impacts access to justice for some developing countries. Therefore, it suggests that some features of the WTO could reduce this issue, for instance, standing judges, time limits etc.

The thesis recommends establishing an Advisory Centre on International Investment Law (ACIIL) after recognizing the positive impact of the Advisory Centre on WTO Law (ACWL) in assisting developing countries. However, it also highlights capacity shortage of the ACWL which would be a major concern for ACIIL too. Therefore, participation of the disadvantaged countries would still be challenging.

The thesis raised the issue that the success of a multilateral court also relies on a clear and comprehensive substantive treaty that is nonexistent in the case of international investment law. However, based on the historical experiences, the thesis expresses that this might not take place in near future.

Fourthly, the thesis deals with ongoing debates concerning reform of the Investor-State Dispute Settlement (ISDS) system and the drafts of the UNCITRAL Working Group III (WGIII). In this regard, it examines positions of different stakeholders on reform, analyzes various reform proposals and evaluates the focus of reform initiatives by UNCITRAL, ICSID and UNCTAD. It specifically focuses on the work of the WGIII as it is the focal point of stakeholders.

The thesis points out that there is common ground among stakeholders regarding the need to reform the ISDS system. However, there are different approaches and positions on how to reform the ISDS system. The thesis explains these divergent approaches by categorizing as idealist and realist approaches. Moreover, it discusses different positions by classifying as status quo maintainers, major reform backers, and anti-status quo maintainers. The thesis finds that there are two strong and influential positions, e.g., some stakeholders favor major reforms preferably under UNCITRAL WGIII and others advocate for replacing it by domestic courts or State-State dispute settlement.

After scrutinizing the nature of reform under the UNCITRAL WGIII, the thesis concludes that it is primarily and largely focus on procedural aspects rather than substantive issues. That means it is working toward enhancing efficiency, consistency, transparency and accountability. Based on this factor, the thesis argues that this would not be able to solve the root causes of the problems linked to ISDS. Because, many problems are associated with substantive issues of international investment law. Therefore, the thesis emphasizes incorporating provisions to safeguard the right to regulate, sustainable development and human rights by adopting a multilateral investment treaty. However, the thesis recognizes that this would not be an easy task particularly because of negative historical experience.

Afterwards, the thesis delves into some key reform proposals. It evaluates Multilateral Investment Court (MIC). In another words, it can be identified as multilateral investment dispute settlement mechanism. Although WGIII proposes two options, for instance, two-tier or just standing appellate mechanism, however, the two-tier system is prominent on the agenda. The thesis argues for a two-tier MIC. It stresses that this mechanism would enhance consistency, predictability and accountability which are the drawbacks of the current system. There are several counterarguments and challenges of this system. For instance, it might politicize the judicial appointments and it might not be able to solve lack of diversity and cost reduction issues. The thesis, therefore, emphasizes incorporating proper method of appointment and incorporating lessons learned from the WTO regarding time limits and regulating frivolous claims etc. Moreover, the thesis raises warning sign because of fragmented treaties in international investment law. This would continue to raise issues for the system.

The thesis then assesses the appellate mechanism. Supporting and stressing on the establishment of an appellate mechanism, the thesis underscores that this would enhance the

consistency and coherence of ISDS standards compared to the current system. Still, the appellate mechanism will face difficulty mainly because of fragmented treaties.

After that the thesis scrutinizes appointment of arbitrators and code of conduct. WGIII incorporates some good proposals for reform, however, the thesis argues that there are need for changes. For example, regarding any decision-making, instead of consensus method or simple majority voting method, two-thirds majority voting should be adopted. Moreover, regarding diversity and representation, geographical representation should be the priority as it is one of the core issue in the eyes of the stakeholders. However, this should not compromise minimum quality requirements from the candidates. Furthermore, the thesis argues for a plenary body of all interested States instead of the States who are signing the multilateral instrument at the beginning. Because, this would create an imbalance and dissatisfaction in the system as a small group of States will decide on many things for future prospective members.

Overall, the thesis concludes that there are grave problems in the current ISDS mechanism. Moreover, some of the problems has historical roots and accompanied by longstanding resistance by capital-importing States. Furthermore, UNCITRAL WGIII reform initiative can take important lessons from the WTO experience. It can adopt some rules of the WTO while it has to avoid some rules. In addition, reform of the UNCITRAL WGIII is fundamentally flawed as it is mainly focused on procedural matters. Therefore, it would not be able to solve all the deep-rooted problems. Nonetheless, reform proposals and drafts of the UNCITRAL WGIII offer qualitatively improved system compared to the current system and some potential benefits. However, adopting the recommendations of the thesis would make their reform more comprehensive, reliable and sustainable. The thesis recommends adopting more comprehensive approach that addresses both procedural and substantive issues to deal with critical problems of the ISDS system.

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