DOCTORAL (PhD) DISSERTATION

This is a version of the dissertation prepared for preliminary debate.

ISDS in an Evolving World Order:
The EU and China

by

Thembi Pearl Madalane

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Contents

Abstract

This dissertation addresses the increasing calls for reform in international investment law, particularly focusing on the Investor-State Dispute Settlement (ISDS) mechanism. It examines the evolving global investment treaty network, highlighting changes such as the convergence of trade and investment.

The dissertation provides an analysis of international investment dispute resolution mechanisms amidst significant international developments. The focus is on the specific aspects of ISDS within the context of the evolving world order by highlighting the intersection of international trade and investment law. This dissertation explores the interaction between the EU and China regarding ISDS within the context of a new generation of investment agreements. The dissertation seeks to analyse how the positions of the EU and China contribute to the broader changes in international investment dispute resolution mechanisms. The aim is to evaluate the evolving positions of the EU and China on the ISDS mechanism, as reflected in their new comprehensive Free Trade Agreements (FTAs) and the EU-China Comprehensive Agreement on Investment (CAI). The dissertation focuses on the significance of these developments by providing proposals on ISDS in the EU-China CAI. The dissertation has proposed solutions for the investor-state dispute resolution provisions of the CAI, informed by the positions of the EU and China and principles from international law. The dissertation identifies and analyses emerging principles that shape the evolving landscape of international investment law. It highlights the significance of adaptability, inclusive participation, global governance consistency, and balanced treaty design in ISDS reform.

The dissertation employs a mainstream doctrinal methodology to address the research questions related to the EU and China's positions on ISDS in new investment agreements. It involves a two-part process: locating relevant primary and secondary legal sources and interpreting and analysing these texts. Primary sources include documents from the European Commission, EU and Chinese FTAs, and proposals from UNCITRAL WGIII. Secondary

sources encompass scholarly texts and commentaries. The methodology acknowledges potential biases and categorises sources to ensure comprehensive and balanced analysis. Comparative analysis, though limited to legislative comparison, is also utilised to align the ISDS positions of the EU and China, contributing to the broader discussion on international investment law reform. The study examines reform options, both incremental and systemic, discussed within UNCITRAL Working Group III, as well as potential paradigmatic reforms.

Overall, the findings indicate a preference for ISDS reform that mirrors the WTO's dispute settlement system, emphasising the need to redesign ISDS within the New World Order, where investment and trade converge. Although, the findings of the dissertation also reveal significant divergences and convergences in the EU and China's approaches to ISDS. The EU's new generation of FTAs increasingly replace traditional ISDS mechanisms with bilateral ICS and the proposed multilateral MIC, reflecting a shift towards a dispute resolution framework based on a permanent international institution. In contrast, China's comprehensive FTAs largely retain the traditional ISDS mechanisms, albeit with some reforms. The comparative analysis indicates that while the EU aims for a multilateral and reformed approach, China maintains a more conservative position. This divergence underscores the complexity of establishing a unified new generation of comprehensive investment agreements. The research contributes to current scholarship by extending the discussion to recent developments and offering insights into potential future alignments or conflicts in ISDS reforms.

The conclusion of the dissertation underscores the ongoing nature of research in ISDS and the need for future studies. Despite the contributions made by the dissertation, it acknowledges the complexity and breadth of the issues involved. It suggests that there are still unanswered questions and areas for future exploration. The dissertation identifies specific research gaps and limitations, particularly in its focus on bilateral agreements to the exclusion of regional and plurilateral agreements. It also acknowledges challenges in addressing normative and comparative approaches, emphasising the need for methodologies that incorporate social contexts. It recognises the importance of and suggests various questions for further research,

including exploring contradictory views, incorporating socio-legal methodologies, examining historical context, cultural factors, socio-economic and socio-political aspects of investment treaties that are not fully explored in the dissertation. It emphasises the interdisciplinary nature of future research, which can shed light on nuanced aspects of ISDS and contribute to a deeper understanding.

List of Abbreviations

AB	Appellate Body
ACIIL	Advisory Centre on International Investment Law
ADR	Alternative Dispute Resolution
ARM	Appellate Review Mechanism
ASEAC	Asian European Arbitration Centre
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CAI	Comprehensive Agreement on Investment
CCOIC	China Chamber of International Commerce
CEAC	Chinese European Arbitration Centre
ChAFTA	China–Australia Free Trade Agreement
CSFTA	China-Singapore Free Trade Agreement
CIETAC	China International Economic Trade Arbitration Commission
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CIL	Customary International Law
DCFTA	Deep and Comprehensive Free Trade Agreement
DSB	Dispute Settlement Body
DTA	Deep Trade Agreement
EIC	English East India Company

EPA	Economic Partnership Agreement
EU	European Union
FCN	Friendship Commerce and Navigation
FETAC	Foreign Economic Trade Arbitration Commission
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	The International Centre for Settlement of Investment Disputes
IDF	Investment for Development Framework
IIA	International Investment Agreement
IPA	Investment Protection Agreement
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MFI	Multilateral Framework on Investment
MIA	Multilateral Investment Agreement
MIAM	Multilateral Investment Appellate Mechanism
MIIR	Multilateral Instrument on ISDS Reform
MIF	Multilateral Investment Framework
MIC	Multilateral Investment Court
MTA	Multilateral Trade Agreement
NAFTA	North America Free Trade Agreement

PPI	Promotion and Protection of Investments
PRC	People's Republic of China
REIO	Regional Economic Integration Organisation
ROK	Republic of Korea
RTA	Regional Trade Agreement
PCA	Permanent Court of Arbitration
SSDS	State-State Dispute Settlement
SCIA	Shenzhen Court of International Arbitration
TA	Trade Agreement
TIA	Trade and Investment Agreement
TRIMS	Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL WGIII	The United Nations Commission for International Trade Law Working Group III
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
VOC	Vereenigde Oostindische Compagnie
WTO	The World Trade Organisation
WTO DSB	The World Trade Organisation Dispute Settlement Body

Glossary of Terms[1]

Glossary Term	Glossary Definition
International Order	The body of rules, norms, and institutions that govern relations between its actors on the international stage.
'new generation'	The models of international agreements may be categorised into periods referred to as 'generations. A 'new generation' is that of agreements with a model that differs from its preceding generation.
'New World Order'	A change in the way the international system and international law and institutions operate.
'the West'	Former colonial powers of Western Europe, and North America.

[1] For terms used in the dissertation that may possibly not be immediately obvious.

Acknowledgements

[TO BE ADDED]

CHAPTER ONE

INTRODUCTION

1.1 Introduction

There are growing calls amongst states, to reform international investment law. The calls seek to revise the global investment treaty network, by revisiting the most contentious corner of international economic law concerning Investor-State Dispute Settlement (ISDS). However, in what this dissertation refers to as evolving towards a New World Order, there are elements that reflect there is a change in the way that the international system operates such as the 're-convergence' of trade and investment.[2] In drawing a parallel between the international trade and international investment sub-disciplines of international economic law, scholars write on a new generation of international investment agreements drawing lessons from international trade law. Accordingly, the dissertation aims to evaluate the EU and China's position on ISDS as reflected in their new 'comprehensive' Free Trade Agreements (FTAs), towards the modelling of investment dispute resolution in a new generation of investment agreements such as the EU-China Comprehensive Agreement on Investment (CAI).

[2] Discussed in Chapter Two of the dissertation, although a seemingly new development, the convergence of trade and investment is not a new phenomenon but a reflection of its beginnings.

Chapter One of the dissertation aims to provide a brief introduction of the research by defining the research question, the scope of the study and discussing the objectives and the methodology that will be followed. To that end, I begin with an explanation of the background and reasons for choosing the dissertation topic.

1.1.1 Background

It is common knowledge amongst scholars of international investment law that the ISDS mechanism enables foreign investors to resolve disputes with host states, in a supposedly neutral forum through binding international arbitration. The mechanism is provisioned for in most international investment treaties and many FTAs.[3] However, it has been the subject of critique such as that it undermines national legislation by circumventing the balance between private rights and public interests that has evolved in many national contexts. The ISDS system currently faces a procedural legitimacy crisis related to how the mechanism is administered, as well as substantive legitimacy crisis rooted in the very logic of investment treaty law.[4] In 2017, the United Nations Commission on International Trade Law (UNCITRAL) mandated its Working Group III on how to reform the existing ISDS mechanism, and alternatives.[5] But the question that arises is whether this 8-year reform process will meaningfully address the calls for

[3] See: Barbara Kotschwar and Jo-Ann Crawford, 'Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends' (WTO Staff Working Paper ERSD-2018-14, 14 December 2018), https://www.wto-ilibrary.org/content/papers/25189808/232.Many FTAs include provisions that encourage foreign direct investment by offering certain guarantees that often include the right to resolve disputes between investors and host states through arbitration. See: Kotschwar and Crawford In this paper, the authors refer to PTAs. Whereas there is a difference between the less ambitious PTAs that aim at reducing tariffs (ie. positive list of products on which tariff is to be reduced), compared with FTAs that rather seek to the eliminate the tariffs entirely (ie. negative list of products on which the tariff is not eliminated), the authors referr to the North American Free Trade Agreement (NAFTA) as a PTA. So, the paper moves from a generalisation of FTAs as PTAs.

[4] See: Jonathan Bonnitcha et al., 'Damages and ISDS Reform: Between Procedure and Substance, DRAFT' (UNCITRAL, 7 August 2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/damages_and_isds_-_uncitral_af_paper.pdf.

[5] See: UNCITRAL, 'UNCITRAL Methods of Work', n.d., https://uncitral.un.org/en/content/working-groups.The Commission has established six working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Each of the working groups is composed of all Member States of the Commission.' The Working Group III mandate is to identify concerns on ISDS reform, assessing the desirability of reforms and recommending action and reform options.

reform.[6] Although the mandate of the UNCITRAL Working Group III focuses only on procedural aspects, the counterclaim proposals of states are intertwined with substantive aspects that challenge the existence of the system.[7]

It has been hypothesised that there is a call for a 'New World Order' in dispute resolution.[8] This is particularly pertinent to the ISDS mechanism.[9] It is believed that states such as China "also want a world order", different to the system built by the West.[10]That is, a New World Order with a change in the way that the international system, international law and its institutions operate.[11] In addition to the commitment of states to reform the United Nations (UN), with a reform agenda aimed at ensuring more effective capacities to tackle conflict and sustain peace, we also witness

[6] 'The Workplan proposes an end date of 2025 … which would be approximately 8 years after the ISDS Project begun in 2017.' See: United Nations General Assembly, 'Workplan to Implement Investor-State Dispute Settlement (ISDS) Reform and Resource Requirements', Fortieth Session (Resumed) (Vienna: United Nations Commission on International Trade Law, 4 May 2021), https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_wp_206_adavace_copy.pdf.

[7] Noted as a concern, it is reiterated that 'reiterated that the mandate of the Working Group was to work on the possible reform of ISDS rather than reform of substantive standards in international investment agreements and that the focus of its work should be on the procedural aspects of ISDS, though taking due note of the interaction with underlying substantive standards.' See: 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 (Vienna: United Nations Commission on International Trade Law, 8 July 2019), https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf.

[8] See eg: Ijeoma Ononogbu, 'The New World Order in Dispute Resolution: Brexit and the Trump Presidency', *International Journal of Online Dispute Resolution* 4, no. 1 (2017): 40–47. Ononogbu writes that although possibly more in favour of the ISDS mechanism, the US has identified trade-related dispute resolution mechanisms it intends to change or even eliminate. And that the UK proposed a 'new and unique' dispute resolution mechanism to oversee post-Brexit relations between the United Kingdom and the European Union.

[9] In furthering state interests, the use of international law tools is not new. The use of international trade and investment law has rather been making the rounds in discussions as 'weapons' to achieve a New World Order. See eg.: The American Society of International Law, 'Using Old Tools in New Ways: The New Economic World Order', 114th Annual Meeting (The American Society of International Law, 25 June 2020), https://www.asil.org/events/using-old-tools-new-ways-new-economic-world-order.; The ISDS mechanism is perceived as one such, to some as a 'Trojan horse' enhancing the power of investors such as from the US, at the expense of national sovereignty and interests of host states. See: Gloria Maria Alvarez et al., 'A Response to the Criticism against ISDS by EFILA', *Journal of International Arbitration* 33, no. 1 (2016): 1–36, https://doi.org/10.54648/joia2016001.

[10] For example, although not specifically referring to the ISDS, the U.S. State Department spokesman Ned Price is quoted to report that. "Russia and [China] also want a world order...". See: Charlie Campbell, 'How Russia's Invasion of Ukraine Could Change the Global Order Forever', *Time*, 24 February 2022, https://time.com/6150874/world-order-russia-ukraine/.Also see: Congyan Cai, Huiping Chen, and Yifei Wang (eds.), *The BRICS in the New International Legal Order on Investment*, vol. 4, Silk Road Studies in International Economic Law (Brill | Nijhoff, 2020), https://doi.org/10.1163/9789004376991 Under 'Semantic and terminology' in this Chapter, I discuss the way that I choose to refer to the term 'the West' in the dissertation.

[11] With variant definitions of 'New World Order', I clarify the dissertation's usage of the term in the Methodology sub-chapter under Semantic and terminology.

changes relevant to the ISDS that may be indicating some evolution in the world order.[12] One notable change is an overlap in substantive norms of international investment and international trade law.[13] There is also a trend of parallel proceedings, involving the ISDS mechanism, that points to an overlap in these substantive norms.[14]

The emergence of a paradigm shift 'from a strong emphasis on interests of private property protection towards a more comprehensive approach' is reflected in the EU's position on ISDS in their "new generation" of free trade agreements which are also termed Deep and Comprehensive Free Trade Areas (DCFTAs), although a term less commonly used in scholarship.[15] This new generation of FTAs ,negotiated after 2006, provide for comprehensive chapters on investment including provisions on ISDS.[16] These trade agreements provide the same protection to foreign investors as investment agreements, with the main novelty being dispute resolution.[17] In many regards, the EU-South Korea FTA was considered historic as the

[12] Although, the term 'reform' is considered problematic for 'lack of clarity and the lack of consensus as to execution'. See: European Parliament Think Tank, 'United Nations Reform' (European Parliament, 13 February 2019), https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)635517. Nonetheless, states have expressed their commitment to the reforms proposed by UN, with a mandate on the three key areas: Development, Management, and Peace and Security. The 'reform is also a response to re-emerging skepticism about the value of multilateralism and the relevance of multilateral institutions in today's world.'; See: United Nations, 'UN Development System Reform 101', United to Reform, n.d., https://reform.un.org/content/un-development-system-reform-101.

[13] See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform', *American Society of International Law*, Proceedings of the Annual Meeting, 108 (2014): 255–58, https://doi.org/10.5305/procannmeetasil.108.0255.

[14] An investor may diplomatically espouse a WTO claim while also independently pursuing a BIT claim. Also see: Brooks E. Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration', *Arbitration International* 30, no. 1 (1 March 2014): 1–58, https://doi.org/10.1093/arbitration/30.1.1. The authors cite the Arbitral Tribunal in the Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) that, 'There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.' .

[15] See: European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2017 - 31 December 2017' (Brussels: European Commission, 31 October 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0728. In the Methodology section on 'New definitions, distinctions, or classifications' of the dissertation, I explain through the discussion of the term "Deep", as the attribute that differentiates DCFTAs from "new generation" FTAs. .

[16] The EUs so-called new generation FTAs negotiated after 2006 is the EUs "second generation" FTAs that are described as comprehensive FTA's that go beyond trade in goods, also covering services and potentially other aspects such as investment related issues.

[17] See: Anastasia Makarenko and Lyudmila Chernikova, '"New Generation" EU Free Trade Agreements: A Combination of Traditional and Innovative Mechanisms', in *Julia Kovalchuk (Ed.), Post-Industrial Society* (Palgrave Macmillan, Cham, 2020), 109–22.

first in the series of EUs new generation FTAs.[18] At the time of signing , it was the second largest FTA after the North America Free Trade Agreement (NAFTA).[19] The EU later signed with other states, including Canada.[20] The EU's new approach to investment protection providing for the Investment Court System (ICS), is contained in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to replace the ISDS mechanism.[21] But, controversies about the CETA and the later abandoned Transatlantic Trade and Investment Partnership (TTIP) with the US have put the EU's position on ISDS to the test.

A challenge to the EUs position, China wants a New World Order.[22] China differs from the EU on the view on fundamental values and norms upon which the current post- Cold War international legal order was founded.[23] But, it is noted to have intentions of influencing the international order to its own benefit from within, as opposed to an overhaul of the system.[24] China has also begun entering into 'new generation', rather of investment agreements, that have a comprehensive ISDS as a mechanism to resolve disputes concerning alleged violations.[25] But it is also observed as engaging creatively with international law and transforming salient features of the international legal system, as most recently evidenced in China's engagement with the

[18] Some scholars write that 'it is the most important trade agreement concluded by the European Union (EU) since the conclusion of the Marrakesh Agreement establishing the World Trade Organization (WTO) in 1994.' See: Justyna Lasik and Colin Brown, 'The EU–Korea FTA: The Legal and Policy Framework in the European Union', in *James Harrison (Ed.), The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press, 2013), 21–40, http://www.jstor.org/stable/10.3366/j.ctt3fgqzm.8.

[19] The EU-South Korea, signed on 15 October 2009 (entered into force 2011) was the EU's first FTA in Asia and South Korea's first with one of the current three largest economies (ahead of the US and China).

[20] Ie. 'EU-Canada Comprehensive Economic and Trade Agreement' (2016), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en.

[21] EU-Canada Comprehensive Economic and Trade Agreement, chap. 8.

[22] 'China is calling for the establishment of a New World Order that will ensure a long-term stable and peaceful international environment.' See: Embassy of the People's Republic of China in the United States of America, 'China Wants New World Order', n.d., https://www.mfa.gov.cn/ce/ceus//eng/zmgx/zgwjzc/t35080.htm.

[23] EPP Group in the European Parliament, 'EU-China Relations- Towards a Fair and Reciprocal Partnership', EPP Group in the European Parliament, 10 March 2021, https://www.eppgroup.eu/newsroom/eu-china-relations-towards-a-fair-and-reciprocal-partnership.

[24] See: Charlie Campbell, 'How Russia's Invasion of Ukraine Could Change the Global Order Forever'.

[25] See: Yuwen Li and Cheng Bian, 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options', *Netherlands International Law Review* 67, no. 3 (2020): 503–51, https://doi.org/DOI:10.1007/s40802-020-00182-3.

WTO dispute settlement system.[26] It has submitted a proposal on reform of the WTO supports efforts to 'respond to the needs of our times'.[27] China has also signed new generation of 'comprehensive' FTAs ' as a 'supplement to the *multilateral* trading system as well as to further opening up to the outside and speeding up domestic reforms''.[28] The first generation FTAs were agreements with relatively small economies, while the more recent comprehensive agreements are with a wider variety of economies.[29]

China and the EU have, in principle, agreed on what is the first international investment agreement concluded between these two most important economies in the world, other than the US.[30] The major negotiating goal of the EU was concluding an investment protection agreement that will replace the Bilateral Investment Treaties (BITs) that China has with most EU Member States.[31] However, at the time of writing the dissertation, the EU-China CAI still has not included the rules on investment protection.[32] Notwithstanding, the EU-China CAI is still

[26] See: Kristie Thomas, 'China and the WTO Dispute Settlement System: From Passive Observer to Active Participant?', *Global Trade and Customs Journal* 6, no. 10 (2011): 481–90.
[27] With a view to facilitate the discussions on WTO reform, China submitted a proposal dated 13 May 2019. See: Kristie Thomas The proposal is prepared on the basis of a position paper on WTO reform released in November 2018. See: Ministry of Commerce People's Republic of China, 'MOFCOM Holds Press Briefing on the Relevant Issues about the Reform of the WTO', Government, Ministry of Commerce People's Republic of China, 24 November 2018, http://english.mofcom.gov.cn/article/newsrelease/press/201811/20181102810628.shtml.
[28] 'The Chinese Government deems Free Trade Agreements (FTAs) as a new platform to further opening up to the outside and speeding up domestic reforms, an effective approach to integrate into global economy and strengthen economic cooperation with other economies, as well as particularly an important supplement to the multilateral trading system. Currently, China has 24 FTAs under construction, among which 16 Agreements have been signed and implemented already.' See: Ministry of Commerce People's Republic of China, 'China FTA Network', n.d., http://fta.mofcom.gov.cn/english/index.shtml.
[29] See: Ministry of Commerce People's Republic of China.
[30] The text of the EU-China CAI still requires technical work (i.e. legal scrubbing) but it was agreed in principle, with no current plan of further negotiations on substantial changes. See: 'EU-China Comprehensive Agreement on Investment' (2020), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement_en disclaimer preceding the Preamble; Notwithstanding the relative GDP size that constantly fluctuates, the two most important economies in the world today, based on nominal GDP, have in the recent years consistently been the US, EU, China. Also see: Kimberly Amadeo, 'Largest Economies in the World Why China Is the Largest, Even Though Some Say It's the U.S', The Balance, 5 May 2021, https://www.thebalance.com/world-s-largest-economy-3306044.
[31] Gisela Grieger, 'EU–China Comprehensive Agreement on Investment Levelling the Playing Field with China' (European Parliamentary Research Service, March 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf.
[32] The EU and China had agreed to continue to negotiate on such rules including the ISDS within two years of the signature of the CAI. See: Gisela Grieger; Also see: EU-China Comprehensive Agreement on Investment, art. 3, 'Negotiations on Investment Protection and Investment Dispute Settlement' ; The Member States' BITS,

officially classified as an investment agreement despite not resembling a classical investment agreement.[33] Neither does the agreement resemble a classical FTA as it lacks the rules on trade in goods. Towards a 'comprehensive approach' , the EU-China CAI includes significant changes to current models for trade and investment agreements.[34] Scholars describe it as an investment agreement that seemingly reiterates and consolidates some of the EU and China's existing commitments under the World Trade Organization (WTO).[35] Some writers perceive it to overlap with other strategies undertaken by China.[36] In this sense, it is argued that the EU-China CAI should be read in conjunction with other initiatives undertaken by China since it is part of a strategy aimed at reshaping the international legal order.[37]

This dissertation on the ISDS mechanism in an evolving world order with a focus on the EU and China, suggests several ways of looking at the topic. The assignment of the dissertation is to analyse international investment dispute resolution mechanisms in consideration of international developments. In avoiding generalities of "international investment dispute

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nonetheless. remain in place, See: EU-China Comprehensive Agreement on Investment, art. 15'Previous agreements between the Member States of the European Union and/or the European Community and/or the European Union and China are not superseded or terminated by this Agreement.'The EU and China had agreed to continue to negotiate on such rules including the ISDS within two years of the signature of the CAI. See: Gisela Grieger; Also see: The Comprehensive Agreement on Investment (CAI), art. 3, 'Negotiations on Investment Protection and Investment Dispute Settlement'; The Member States' BITS, nonetheless. remain in place, See: The Comprehensive Agreement on Investment (CAI), art. 15'Previous agreements between the Member States of the European Union and/or the European Community and/or the European Union and China are not superseded or terminated by this Agreement.'

[33] Sabine Weyand, Director General, DG Trade, European Commission, Understanding the new EU-China investment agreement, CEPS webinar, 27 January 2021, https://www.ceps.eu/ceps-events/understanding-the-new-eu-china-investment-agreement/ Also, interpreted as final (as 'The text will be final upon signature', which although awaiting ratification, is signed), the EU-China CAI does not feature some of the characteristics of a new generation of investment agreements, as described by scholars. For instance, one is that the agreement remains silent on the definition of 'investment' and on 'indirect expropriation' and guiding principles to determine what it would constitute, seemingly contrary to the article's expectation of 'the narrowing down of the definition of "investment" by adding the "characteristics of investment" requirement, establishing certain guiding principles, refining the details of "indirection expropriation" and "fair and equitable treatment" standards…'. Eg. see discussion of Shan & Wang IN: Wenhua Shan and Lu Wang, 'The China-EU BIT: The Emerging "Global BIT 2.0"?', in *Columbia FDI Perspectives*, 2014, https://ssrn.com/abstract=2893107.

[34]This includes changes to dispute-resolution processes, both state-to-state and investor-state.

[35] Giuseppe Martinico, 'The Devil Is in the Details. Five Points on the EU-China Comprehensive Agreement on Investment (CAI)', *Rivista Di Diritti Comparati Comparare I Diritti Fundamental in Europa* (blog), 1 April 2021, https://www.dirittocomparati.it/the-devil-is-in-the-details-five-points-on-the-eu-china-comprehensive-agreement-on-investment-cai/.

[36] Eg. Giuseppe Martinico.

[37] Giuseppe Martinico.

resolution mechanisms" and "international developments", the dissertation addresses the ISDS mechanism (a specific aspect of "international investment dispute resolution mechanism") and an evolving world order with a focus on the EU and China (a specific aspect of "international development").

1.2 The Significance and Aims of the Research

The benefit of achieving the objectives of this dissertation is what ultimately makes the work of this dissertation significant. The research objectives are detailed under 'Aims of the research', a later section of this sub-chapter. Firstly, in the section 'Significance of the research', I outline the purpose of conducting this research which is to be achieved through the specified research objectives.

The main aim is based on the dissertation's overarching research question on the contribution of the EU and China's position on ISDS towards a new generation of investment agreements. In this sub-chapter, I emphasise what needs to be achieved within the scope of the research to provide an answer to the research question. The research aims and objectives determine the scope and depth of the research, which is later detailed in 'Methodology'.

1.2.1 Significance of the research

There is increasing rhetoric to replace the ISDS mechanism. In this realm, criticism against ISDS and the building of stronger state to state and domestic processes are discussed. But there is a tug of war between critics and supporters of ISDS. There is no absolute answer on whether or not ISDS has lost significance. This requests fundamental research on the varying positions of states and the issues for which this reform is required to address. It is particularly significant in a world where there is a change in the way that the international system, international law and its institutions operate.

The EU has contributed to developments with a new generation FTAs. The main novelty of the new generation of EU FTAs is dispute resolution, in response to the criticism of ISDS. China has also begun to enter into what is considered a 'comprehensive' FTAs. Both the EU and China's position on ISDS point towards a 'comprehensive approach' on investment protection and investment dispute settlement. But whereas the EU's new approach to investment protection replaces the old ISDS mechanism, China's recent FTAs generally maintain a commitment to the ISDS mechanism. The China–EU CAI is expected to draw lessons from these new 'comprehensive' FTAs. So, the contrast between the EU and China' position contributes to the uncertainty on establishing a new generation of investment agreements which the China–EU CAI is expected to represent. The significance of this dissertation is that it examines international dispute resolution in consideration of these developments. Particularly, it offers a new perspective on the issue of ISDS which supplements and fills the gaps in current scholarship. Most of the academic scholarship was produced before the EU-China CAI, that was agreed in principle at the end of the year 2020. The contribution of this research to the existing literature is that it extends the discussion to the new developments in international investment law that took place after 2020.

1.2.1.1 Significant shifts

The dissertation focuses on two significant shifts that characterise a new era of international investment dispute resolution. The first is the shift from distinct international economic law sub-disciplines of trade and investment, towards a re-convergence reflecting the beginnings of a single legal order under international economic law. Where trade agreements cover (i) trade in both goods and services and (ii) investment rules and protections, then there must be a dispute resolution mechanism that covers investments. Although ISDS is also provisioned in the trade chapters of FTAs, we assume that it does not deal with trade issues which are typically heard by the World Trade Organisation (WTO) Dispute Settlement Body (DSB).[38] But the trend of

[38] And in recent years, there is an increasing number of cases in which the same dispute is simultaneously dealt by the WTO and by the investor-state dispute settlement (ISDS). In discussing the convergence of trade and investment arbitration, Roger Alford also discusses some examples of parallel proceedings have occurred in the recent years. See: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration' 35, no. 12 (2013), https://scholarship.law.nd.edu/law_faculty_scholarship/1072.

parallel proceedings claiming ISDS protection in investment arbitration tribunals as well as a WTO claim, points to an overlap. Moreover, one of the EU proposals to replace the ISDS mechanism, the MIC, is described as resembling the WTO DSB. This proposal suggests weakened support of the ISDS mechanism in dealing with international investment issues. Broadly, it contributes to discussion on whether international trade law contributes to the development of international investment law.[39] The second focus of the dissertation is on the shift from the ISDS mechanism that is subjected to reform options. In a New World Order, emerging states such as China also propose changes to the ISDS, with the aim of contributing to the change in international law and its institutions, rather than be determined by it.

The timing of this dissertation couldn't be more apt with increasing separate talks on ISDS reform, re-convergence of international trade and international investment law, and a New World Order. Moreover, with global importance placed on the negotiations on the EU–China CAI, it is somewhat expected to be a revolutionary agreement. The dissertation reflects these international developments by conducting research on the EU and China's ISDS reform proposals, an examination of their FTAs to determine their position on ISDS, and contribution to developing a new generation of investment agreements as expected of the EU-China CAI. It is not only a topic of great interest to me as a researcher on the evolution of international law but a relevant and useful study to policy and practice. Particularly also to non-Western states that have historically not been represented in the determination of international law as we know it. So, it will be interesting to see the changes brought by the EU and China.

1.2.2 Aims of the Research

[39] Hoffmeister writes that advocating reforms in ISDS is one of the ways in which EU can contribute to the further development of international investment law. The conclusion follows an analysis of CETA, a trade agreement. The dissertation extends research in consideration of developments such as ratification of the EU FTAs as a precondition noted in the author's conclusion. See: Frank Hoffmeister, 'The Contribution of EU Trade Agreements to the Development of International Investment Law', in *Steffen Hindelang and Markus Krajewski (Eds). Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016), 496.

Given recent international developments, the research wants to know the interaction of the EU and China's position on ISDS in a new generation of investment agreements. In the end, within the scope of the dissertation, the research will respond on whether there is a need to reform ISDS, whether the EU proposes relevant ISDS changes, and whether China proposes substantive changes on ISDS. Most obviously, the ISDS mechanism is important because it is discussed a great deal. As I have alluded in the significance of this dissertation, there seems to be no shortage of academic interest in the ISDS.[40]In international law, in particular, there has been a resurgence of research on international investment law in consideration of global changes.

1.2.2.1 Existing Literature

A review of literature is conducted in this dissertation for the purposes of fully demonstrating a grasp of the major debates and discussions in the field of international investment law, providing an up-to-date account of the current state of knowledge in this discipline and situating the dissertation in the wider academic context. In this dissertation, four common prevalent structures for literature reviews are considered for the various purposes of the research, thematic, chronological, theoretical and methodological literature reviews. I have not dedicated a standalone chapter to the literature review. The choice in this dissertation is in accordance with the varying purposes of a literature review. It forms a part of this Introduction Chapter One as well as embedded in the discussion chapters of the dissertation.

Firstly, a literature review is conducted to identify the research gaps in existing literature on international investment law and ISDS. To provide an overview of the topic, a thematic literature review is conducted to identify the major themes in existing literature. This is supported by a chronological literature review that provides insights into current debates by providing understanding on how the issue on ISDS has evolved over time. Although a theoretical literature

[40] The ISDS mechanism has been studied from the perspective of different academic disciplines.

review may be conducted at any stage in research, in this chapter it is conducted in this dissertation to develop the research question and methodology. A methodological literature review is further conducted to evaluate the strengths and weaknesses of different research methods.

Various tools, such as tables, charts, diagrams, or matrices, may be used to organise and summarise the literature. In this dissertation, I have made use of a 'Literature Review Synthesis Matrix' to provide a visual representation of main ideas found in the literature.[41]

Key debates

There is an increasing proliferation of legal academic work that questions the ISDS mechanism. Questioning its legitimacy, one of the common criticisms is that the ISDS mechanism is incompatible with the core constitutional values within states.[42] This is both between states of the non-West as well as of economies in the West and legal orders. There is consensus amongst the states to reform ISDS. Arguments are valid because the significance of ISDS is also questioned in a New World Order, which is no longer only defined by the West.[43] Scholars have

[41] See: Appendix 0.

[42] Thomas Dietz, Marius Dotzauer, and Edward S. Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System', *Review of International Political Economy* 26, no. 4 (2019): 749–72, https://doi.org/DOI: 10.1080/09692290.2019.1620308.

[43] The term, 'the West' is clarified in the 'Semantics and Terminology' section of the Methodology sub-chapter of the dissertation. Suggesting that the concept of ISDS has been under the direction of the West, Anthea Roberts and Taylor St John write that today, any attempt to develop consensus on ISDS reform debates in UNCITRAL, the West requires new alliances to be formed 'with states formerly excluded from this inner sanctum, including Argentina, Brazil, China, India, Russia and South Africa'. See: Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest', *European Journal of International Law* (blog), 30 April 2019, https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/; So, it is not to say that the ISDS mechanism has only recently become incompatible with constitutional values within some states. But rather, formerly excluded states have more of a voice in today's economical shift. As articulated by Anthea Roberts and Taylor St John, 'The developed world's share of the global economy has been shrinking and that of the developing world has been rising. Some developing economies are now among the largest economies in the world, including China….' This matter of state economic influence or geopolitical power is evidenced by present criticism in ISDS reform initiatives in UNCITRAL. There is tension that some states are excluded from discussions. Anthea Roberts and Taylor St John touch on this. But also see another article that Martin Dietrich Brauch writes on what happened at the UNCITRAL meeting in November 2018 did not make it into the draft official report. For example, South Africa and Indonesia raised "other concerns" that were acknowledged by the chair during in the Vienna session in 2018, but they were not reflected in the draft official report. See: Martin Dietrich Brauch, 'Multilateral ISDS Reform Is Desirable: What Happened at the UNCITRAL Meeting in Vienna and How to Prepare for April 2019 in New York', International

also noted a change pointing to the convergence of international trade and investment, in the area of dispute resolution.

To identify where research may be needed, the literature review focuses on key debates. Captured in the literature review matrix, the literature review identifies the main themes or patterns that have emerged from the literature, towards identifying the research gaps. The sources are synthesised to help identify the status of knowledge on the research of ISDS in the context of the EU-China CAI. Towards identifying the research gaps, I indicate the key debates followed by an indication of scholars making the most significant contribution, what they are saying, their content and methodology, and ultimately identifying areas of limitation within the academic discourse.

As discussed in the section on Methodology, I have drawn the sources from books, peer-reviewed scholarly or scientific journals from reputable publishers. When evaluating sources for the literature review, I have considered factors such as the scholar's expertise and credibility. There is no single prescribed method in which to determine the credibility and trustworthiness of scholars. Trusted scholars may be prominent or also emerging scholars that may not yet have had the opportunity to establish an extensive record of research achievement. However, although the literature of many scholars is reviewed in conducting research for this dissertation, it is of little value to report on all this literature in the form of a summary. Moreso within the limitations of the dissertation, it is an impossible endeavour to write up a review literature of all possible scholars in the field. For the purpose of an academic dissertation, I report a literature review with the works of scholars who have a major impact on the topic of the dissertation. These scholars are also subsequently cited by emerging scholars. Based on recent academic databases for citation counts, *h*-index, and the impact of their work, scholars who have been influential in the field of international investment law and the significance of the ISDS mechanism include:

Institute for Sustainable Development, 21 December 2018, https://www.iisd.org/itn/en/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch/. Argued by Anthea Roberts and Taylor St John, capital exporting states, were those of 'the developed West'. Today, '…when experts-designate from Argentina, Brazil, and India raised concerns during the drafting of the ICSID Convention, those concerns were brushed aside by European and American governments who didn't think they would ever be respondents.' Anthea Roberts and Taylor St John, believe that the views of developing states are more likely to shape the future of investor-state arbitration given the divide between the US and the EU.

Jeswald W. Salacuse, Christoph Schreuer, Rudolf Dolzer, and George A. Bermann.[44] Reviewing relevant academic journals and publications in international law as well as on their historical contributions and influence in the field, these scholars have played crucial roles in shaping the discourse on international investment law through their extensive contributions to the field. Their collective work likely covers a broad spectrum of topics related to international investment, offering valuable insights into investment law, arbitration, and dispute resolution.

Salacuse is known for his analysis of investment treaties, their negotiation, interpretation, and enforcement.[45] Schreuer and Dolzer are also leading scholars that have contributed extensively to the development of international arbitration and investment law.[46] Their work is a widely used reference on the principles governing international investment law.[47] Berman is recognised for his notable work examining the constitutional implications of arbitration and its interaction with legal systems.[48] The contributions of scholars such as Jeswald W. Salacuse, Christoph Schreuer,

[44] There is no single perfect bibliometric index that accurately describes the impact of a researcher. The focus of this dissertation is not to argue on bibliometric metrics.' Rather, I simply follow popularity in academic research and declare the acceptance of limitations. In this dissertation, I have relied on the h-index which is one of the most popular. It is calculated by counting the number of publications for which an author has been cited by other authors. It is a citation metric that measures the bibliometric impact of individual authors. Despite its limitations, the h-index is the best-known author-level metric. It measures the impact of a particular author rather than a journal. See: Jorge E. Hirsch, 'An Index to Quantify an Individual's Scientific Research Output', *Proc Natl Acad Sci USA* 102, no. 46 (7 November 2005), https://doi.org/10.1073/pnas.0507655102; Also see: Jorge E. Hirsch and Gualberto Buela-Casal, 'The Meaning of the H-Index', *International Journal of Clinical and Health Psychology* 14, no. 2 (May 2014): 161–64, https://doi.org/DOI:10.1016/S1697-2600(14)70050-X. It is also essential to note that citation counts can vary, and the influence of scholars may be measured differently across databases. Databases index different journals and cover different years. I considered the h-index in Google Scholar and Elsevier' Scopus which are verified databases for researchers. Google Scholar usually brings more coverage compared to other databases such as Scopus. Scopus usually has less coverage and citation count compared to google scholar. However, Scopus is considered to have higher quality and accuracy of citation data. Hence, I consider both the databases to give support to some of their weaknesses. Additionally, emerging scholars and new research may continually shape discussions on ISDS reform in international law. However, the h-index is known to penalise early career researchers and does not take into account the number of authors on a paper. It also considers the cumulative citation count throughout a researcher's career, which can disadvantage early-career researchers with substantial recent impact may not be accurately represented by their h-index. Nonetheless, notwithstanding its limitations and available bibliometric metrics', relying on the h-index is a supposedly unbiased scientifically justified choice in literature.

[45] See eg.: Jeswald W. Salacuse, *The Law of Investment Treaties*, 3rd ed. (Oxford University Press, 2021).

[46] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law*, 3rd ed. (Oxford University Press, 2022).

[47] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer.

[48] More relevant to this dissertation, Berman has also written on the tension of investment law and EU law regarding the intra-EU BITs and the Achmea judgment of the CJEU. The ruling concluded that investor-state arbitration clauses in bilateral investment treaties (BITs) between European Union (EU) member states

Rudolf Dolzer, and George A. Bermann also encompass various aspects of critique. In relation to the works of these scholars, I will discuss the key debates as critiques related to various aspects of international investment law and ISDS, in the form of research gaps.

1.2.2.2 Research Gaps

The research gaps are identified to bridge the gap in existing literature and provide direction for the research work of this dissertation. I consider the research gaps from the thematic and chronological review of literature for the research of this dissertation. Addressing these types of research gaps can contribute by adding to the existing body of knowledge.

Identified Research Gaps

In identifying research gaps, I have identified the following as key critiques and perspectives related to the above-mentioned scholars and their contributions to the broader field of international investment law; A focus on BITs, The emphasis on other dispute resolution methods over Arbitration, Institutional Bias, Normative Approach & the Lack of Comparative law Approach. The critiques will discuss the critical evaluations or analysis that involves an examination of the strengths and weaknesses to provide insights for improvement or further understanding by drawing on the works of other scholars. The perspectives will refer to points of view or approaches that extend from the evaluations and analysis.

Research Gap 1: A Focus BITs

undermine the autonomy of EU law and the authority of the CJEU, as they allow private arbitral tribunals to interpret and apply EU law. See: George A. Bermann, 'General Aspects of Investor-State Dispute Settlement', in *Chapter 12: International Arbitration and EU Law* (Cheltenham, UK: Edward Elgar Publishing, 2021), 242–90.

Critique 1: Scholars, including Karl P. Sauvant, have raised concerns about the main focus on BITs, as typical in the work of scholars such as Salacuse.[49] The argument on the main focus on BITs submits that such a narrow emphasis may result in an incomplete understanding of the broader dynamics within international investment law. Especially given the evolving landscape of investment treaties. In an era marked by the growth of diverse investment agreements and the emergence of regional and multilateral frameworks, an exclusive focus on BITs may not fully capture the evolving landscape of international investment treaties.

Perspective 1: The argument is that a more comprehensive analysis should encompass a broader array of agreements, considering the complexities introduced by regional initiatives and the changing nature of state-investor relations globally. This advocates for examining a wide range of international investment agreements, such as including regional and plurilateral agreements.

Research Gap 2: ISDS Mechanisms in FTAs

Critique 2: While prominent scholars such as Salacuse, Schreuer, Dolzer, and Bermann have made significant contributions to the broader field of international investment law and ISDS, their works do not concentrate on ISDS within FTAs. Tomer Broude supposes that "had the need (or opportunity) emerged today, to draw an international system of international economic law from scratch, it is unlikely that trade and investment would have been treated so separately".[50] Scholars such as Gus Van Harten and Joost Pauwelyn have offered various critiques of ISDS mechanisms provided for in FTAs.[51] These critiques often highlight concerns about the potential impact of ISDS on the overall effectiveness and legitimacy of the dispute resolution process.

[49] Karl P. Sauvant's scholarly work often advocates for a comprehensive examination of various international investment agreements (IIAs). While the work of Sauvant focuses on BITs, he also discusses the broader context of investment treaties such as their implications for investment flows and policymaking. Also see: Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, 1st ed. (New York: Oxford University Press, 2009).
[50] Tomer Broude, 'Investment and Trade: The 'Lottie and Lisa" of International Economic Law?', *Cambridge University Press, 2012, Hebrew University of Jerusalem Legal Studies Research Paper* 10–11 (10 November 2011).
[51] See eg.: Gus Van Harten, 'A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA', no. 16 (10 April 2015), https://ssrn.com/abstract=2595189 or http://dx.doi.org/10.2139/ssrn.2595189; Also see: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.

Van Harten often emphasises issues that include the potential limitations of the ISDS process.[52] Although the EU-China CAI is not an FTA but a new generation agreement that shares similar attributes with new generation FTAs, it is also worth noting the works of Gisela Grieger which identify challenges because of shortcomings in EU-China CAI. The EU-China CAI although officially a 'comprehensive' agreement, it currently stands as a 'partial' agreement that does not cover investment protection and the related investment dispute settlement mechanism.[53]

Perspective 2: The perspectives delve into the complexities of ISDS mechanisms in new generation FTAs. They address concerns about the potential impact of ISDS on the effectiveness of the dispute resolution process, such as to consider the evolving landscape of international investment law re-converging with international trade law.

Research Gap 3: The Emphasis on other dispute resolution methods over Arbitration

Critique 3: Other alternative dispute resolution methods such as conciliation and mediation are proposed as reform options for ISDS, to address concerns and improve the dispute resolution process. However, the preference for methods such as conciliation and mediation over arbitration in resolving investment disputes such as in the work of scholars such as Salacuse, is questioned by the works of scholars like Catherine A. Rogers, Jan Paulsson and Emmanuel Gaillard.[54] The critique suggests that the preference may overlook certain scenarios where

[52] Gus Van Harten, ed., *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008). Van Harten explores the intersection of investment law with public law. He analyses how investment treaties impact democratic processes and a state's capacity to regulate in the public interest. The work adds valuable insights to discussions on the overall effectiveness and legitimacy of ISDS mechanisms.

[53] Gisela Grieger, *EU–China Comprehensive Agreement on Investment Levelling the playing field with China*, European Parliament BRIEFING, European Parliamentary Research Service, March 2021.

[54] Rogers discusses various ethical issues in the field and outline concrete reforms for implementing those proposals of conceptual and theoretical frameworks for addressing these problems. See: Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014); Referring to a symbiotic relationship of international arbitration and local legal institutions, Rogers argues that international arbitration provides "a readymade tool kit to implement local rule of law reforms and incentives to pursue them." Rogers also notes that international arbitration is a "better test case" for various legal theories. See: Catherine A. Rogers, Does International Arbitration Enfeeble or Enhance Local Legal Institutions?, Delos Dispute Resolution, TagTime S01 E11, 1 July 2020, https://member-delosdr.org/video-tagtime-prof-catherine-rogers-on-does-international-arbitration-enfeeble-or-enhance-local-legal-institutions/; Also see: Catherine A. Rogers and Christopher R.Drahozal, 'Does International Arbitration Enfeeble or Enhance Local Legal Institutions?', *Forthcoming*

arbitration might be more suitable.[55] While there might not be specific works solely dedicated to criticising the preference for other alternative dispute resolution methods such as conciliation and mediation over arbitration, the works of these scholars analyse the advantages and limitations of different approaches highlighting scenarios where arbitration might be more appropriate than other alternative dispute resolution methods such as conciliation and mediation.[56] Particularly when adversarial procedures may be necessary.[57]

Perspective 3: The perspective highlights the complexities of dispute resolution mechanisms. While their works may not explicitly advocate for the combined approach, they provide foundational insights into the theory and practice of arbitration. Highlighting the potential limitations, the works advocate for a pragmatic and flexible approach that considers both conciliation and arbitration.

Research Gap 4: Institutional Bias

Critique 4: Scholars, including Salacuse, Schreuer, Dolzer, and Bermann, have paid attention to the legitimacy crisis associated with ISDS. On the legitimacy crisis, much has been written on

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Cambridge University Press, Legitimacy in Investment Arbitration, 15 June 2019, https://ssrn.com/abstract=3404615; Paulsson explores the theoretical foundations of arbitration as a method of dispute resolution. See: Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013); Gaillard examines the legal principles underlying international arbitration. See: Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010).

[55] This is also the case in practice. For example, the submission of Thailand in UNCITRAL WGIII proposes a an approach, which I refer to in Chapter Five of this dissertation as incorporating ADR into ISDS, where adjudicative (arbitration or judicial settlement) and non-adjudicative (e.g., mediation and conciliation) methods can operate side by side. See: United Nations General Assembly, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Thailand', United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-Seventh Session New York, 1–5 April 2019 (United Nations General Assembly, 8 March 2019), https://documents.un.org/doc/undoc/gen/v19/013/91/pdf/v1901391.pdf?token=b0jdGnNByfWVBQJv7a&fe=true .

[56] United Nations General Assembly.

[57] For instance, when there is a significant power imbalance between the parties involved in the investment dispute. In some cases, one party, typically the host state or a powerful multinational corporation, may have a disproportionate advantage in resources, access to legal expertise, or influence over the proceedings. In such situations, conciliation or mediation, which often emphasise cooperation and compromise, may not adequately address the underlying power dynamics or protect the interests of the weaker party. Adversarial procedures, such as arbitration, allow for a more structured and formal process where each party has the opportunity to present their case, challenge evidence, and advocate for their interests in a supposedly balanced and neutral forum.

the affiliation bias of international investment arbitrators.[58] I extend on this critique with a supposition that the critique also suggests institutional bias among scholars associated with the existing ISDS framework. It is suggested by scholars such as Van Harten that, those closely associated with the existing ISDS framework, may have an institutional bias that potentially influences their perspectives on reform.[59] Van Harten has written extensively on the impact of investment treaties and ISDS. His work includes critiques of the system, raising questions about potential biases and imbalances that may affect the perspectives of those closely associated with ISDS. It is contended that those deeply embedded in the ISDS framework could be inclined to propose reforms that preserve certain features of the current system. This critique might question the degree to which proposed reforms challenge the status quo. Thus, inferring from the critique, I add that scholars closely affiliated with ISDS might also exhibit an institutional bias. Likewise, I logically expect those closely associated with the existing ISDS framework to potentially influence their perspectives on the reform of ISDS.

Perspective 4: The perspective is that areas where institutional bias may be present, which may affect perspectives of those closely associated with ISDS, should be pinpointed and addressed.

Research Gap 5: Diversity of ISDS Reform Proposals

Critique 5: Although scholars such as Jeswald W. Salacuse, Christoph Schreuer, Rudolf Dolzer, and George A. Bermann have made significant contributions to international investment law and the significance of the ISDS mechanism, their focus is not on ISDS reform. Several scholars have made significant contributions to this discourse on ISDS reform. Prominent scholars such as José E. Alvarez, Stephan W. Schill, August Reinisch, Gabrielle Kaufmann-Kohler and Michele Potestà acknowledge concerns and critique surrounding traditional ISDS.[60] These

[58] See eg.: Gus Van Harten, *Investment Treaty Arbitration and Public Law*.
[59] Gus Van Harten, 'Chapter 20, Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', in *International Investment Law and Comparative Public Law, Schill (Ed.), Oxford University Press* (Forthcoming in Oxford University Press, 2010).
[60] The diversity also emanates from the emergence of various questions such as whether ISDS is 'public' or 'private'. Alvarez also summarises the current views on ISDS reform. He outlines five possible ways that the existing ISDS may be reformed. See eg: José E. Alvarez, 'Is Investor-State Arbitration "Public"?', *Journal of*

scholars have explored diverse potential reforms to address issues related to the overall effectiveness of ISDS mechanism. Scholars like Alvarez, Schill, Reinisch, Kaufmann-Kohler and Potestà actively engage with concerns and propose reforms to enhance the overall effectiveness of ISDS. There is diversity on the nature and extent of these proposed reforms. Some argue for more incremental changes to the existing system, preserving certain features, while others advocate for more radical transformations that challenge the status quo. Li, Qi and Bian note the lack of comprehensive analysis of new generation agreement provisions of different countries.[61] The work of Gisela Grieger identifies challenges such as such as the lack of a comprehensive framework for the EU-China CAI.[62] In the lack of a framework, the challenges as a result of the diversity of the EU and China on ISDS reform, become more prevalent. In cognisance of increasing diversity in international investment law, Cai, Chen and Wang add with a suggestion for scholarship to address the New International Legal Order.[63]

International Dispute Settlement 7, no. 3 (November 2016): 534–76, https://doi.org/10.1093/jnlids/idw019; Also see: José E. Alvarez, 'ISDS Reform: The Long View', *ICSID Review - Foreign Investment Law Journal* 36, no. 2 (n.d.): 253–77, https://doi.org/10.1093/icsidreview/siab036; Schill also writes that reform proposals do not proceed on the basis of a normative framework that is globally consented. In consideration of the origins of the criticism of ISDS, Schill suggests that reform proposals should be 'developed by reference to principles of (comparative and international) constitutional law'. See: Stephan W. Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework', *Journal of International Economic Law* 20, no. 3 (September 2017): 649–72, https://doi.org/10.1093/jiel/jgx023; Despite discussing the Multilateral Investment Court (MIC) proposal, Reinisch acknowledges the divergent views and conflicting demands. See: August Reinisch, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court', Centre for International Governance Innovation (CIGI), InvestorState Arbitration 2, 2016, https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlementinvestor-state-arbitration-permane; In response to the lack of comprehensive and in-depth analyses in academic literature on the option of a two-tiered Multilateral Investment Court MIC and of a Standalone Multilateral Investment Appellate Mechanism (MIAM), Reinisch along with Marc Bungenberg provide a feasibility study that assesses both proposed models. See: 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*, 2nd ed. (Berlin, Heidelberg: Springer Nature, 2020); Gabrielle Kaufmann-Kohler and Michele Potestà note that the interplay between ISDS and national courts has not attracted much scholarly attention. They thus provide a comprehensive treatment of the role of national courts in ISDS reform, which they identify as one of the very few monographs that provide a comprehensive treatment of this topic. See: Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer, 2020).

[61] Yuwen Li, Tong Qi, and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*, 1st ed. (Routledge, 2019).

[62] Gisela Grieger, 'EU–China Comprehensive Agreement on Investment Levelling the Playing Field with China'.

[63] Congyan Cai, Huiping Chen, and Yifei Wang (eds.), *The BRICS in the New International Legal Order on Investment*.

Perspective 5: The diversity of perspectives on ISDS reform proposals underscores the requirement for ongoing debate within the scholarly community, regarding the direction and magnitude of changes needed in the international investment dispute resolution mechanism.

Research Gap 6: Non-Normative Approach

Critique 6: The works of influential scholars such a Salacuse, Schreuer, Dolzer, and Bermann often focus on evaluating legal norms, principles, and standards to make prescriptive arguments about what the law should be. These scholars generally use normative approaches in international legal research. Scholars like José E. Alvarez, Susan D. Franck, Stephan W. Schill, and Muthucumaraswamy Sornarajah critique normative approaches, emphasising the need for a nuanced understanding.[64] Normative legal research removes non-legal material from the scope of this research. The critique of a normative approach argues that it tends to overlook practical complexities and may not adequately consider the diverse realities of international relations and legal implementation. The suggestion of Cai, Chen and Wang is for scholarship to address the New International Legal Order.[65] Referring to an international legal order refers to the set of

[64] For example, José E. Alvarez has addressed that international legal regimes originate and evolve over time. Referring to the McDougal-Lasswell-Reisman approach to international law, Alvarez which emphasise normative values, he examined 'the rise and evolution of the contemporary international legal regime governing international investment'.See: José E. Alvarez, 'The Once and Future Foreign Investment Regime', in *Looking to the Future* (Leiden, The Netherlands: Brill | Nijhoff, 2011), 607–48; Alvarez has also referred to the work of Schill as normative. See: José E. Alvarez, 'The Multilateralization of International Investment Law. By Stephan W. Schill. Cambridge, New York: Cambridge University Press, 2009. Pp. Xxxvii, 451. Index.$99', *American Journal of International Law* 105, no. 2 (n.d.): 377–84, https://doi.org/10.5305/amerjintelaw.105.2.0377; However, Stephan Schill also notes the value of a comparative approach and that attention needs to be paid in particular to the choice of comparative legal orders, in order to avoid selectiveness and Euro-centric bias. See: Stephan W. Schill, 'Comparative Public Law Methodology in International Investment Law', *The European Journal of International Law* (blog), 3 January 2014, https://www.ejiltalk.org/comparative-public-law-methodology-in-international-investment-law/; Schill hopes to develop the 'bridge' between treaty-based international investment arbitration and comparative administrative law, that will help enhance its political acceptance. See: Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010); It is understood that comparative legal methodology has normative elements. However,comparative law investigates legal norms in their environment which includes not only legal, but also extra-legal and cultural factors. See discussion on methodology in this dissertation. Franck is known for her empirical analysis of international law, including international investment dispute settlement. See eg: Susan D. Franck, 'Between Myth and Reality: The 9th John E.C. Brierly Memorial Lecture (July 6, 2018)', *McGill Journal of Dispute Resolution* 5, no. 1 (2019 2018), https://ssrn.com/abstract=3222792.; And see: Muthucumaraswamy Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness', in *C. Brown and K. Miles (Eds.), Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011).

[65] Congyan Cai, Huiping Chen, Yifei Wang(ed.), The BRICS in the New International Legal Order on Investment: Reformers or Disruptors, BRILL, Mar 31, 2020.

rules, principles, and institutions that govern the behaviour of states and other international actors in their relations with one another. Some scholars write that while legal material form the core of the international legal order, it is also shaped by a variety of non-legal factors. For example, the contribution of scholars such as Sornarajah, a Third World Approaches to International Law ("TWAIL") scholar and mostly recently Mbengue, involve a critical examination of the historical and structural aspects of the international investment regime.[66]

Perspective 6: The perspective of scholars that critique a normative approach, is a more comprehensive analysis. A nuanced understanding of the pragmatic dynamics at play should be integrated, ensuring that theoretical propositions align with the practical intricacies of international investment law.

Research Gap 7: Lack of Comparative Approach:

Many authors on comparative law also emphasise the importance of taking into account the elements such as the cultural, socio-economic, socio-political and historical context of the law when carrying out comparative legal research.[67] I also indicate, in this dissertation, that although I do not claim to be a comparativist, all scholarly research implies comparisons.[68] It has also long been observed by Zweigert and Kötz that the methods of private international law today are those of comparative law.[69] Although, some scholars also add that, with a focus on legal

[66]Sornarajah, M. *The International Law on Foreign Investment*. 5th ed. Cambridge: Cambridge University Press, 2021. And see: Sornarajah, Muthucumaraswamy, *Evolution or revolution in international investment arbitration? The descent into normlessness*, IN: C. Brown and K. Miles (eds.), Evolution in Investment Treaty Law and Arbitration. Cambridge: Cambridge University Press (2011). TWAIL rejects Eurocentric perspectives of international law that overlook the history of subordinated groups within it and its impactss such as those related to climate change, poverty and other forms of violence. See: Gathii JT. The Agenda of Third World Approaches to International Law (TWAIL). In: Dunoff JL, Pollack MA, eds. International Legal Theory: Foundations and Frontiers. Cambridge University Press; 2022:153-173. Also see: Makane Moïse Mbengue, *Somethin' ELSE': African Discourses on ICSID and on ISDS—An Introduction* , ICSID Review - Foreign Investment Law Journal, Volume 34, Issue 2, Spring 2019, Pages 259–269 and Makane Moı¨se Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, ICSID Review,Vol.34,No.2(2019),pp.455–481 doi:10.1093/icsidreview/siz029.

[67] Eg.: Muthucumaraswamy Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness'.

[68] See discussion on methodology, in this dissertation.

[69] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3 trad.par Tony Weir (Oxford: Oxford University Press, 1998).

education, it does not fully explore its practical applications in legal practice and international relations.[70]

a. Limited Attention to Cultural Factors:

Critique 7a: The works of Rudolf B. Schlesinger are primarily known for their contribution to comparative law and international business law rather than international investment law specifically.[71] Notwithstanding, his expertise and scholarship is often focused on broader aspects of private international law which encompasses international investment law. Drawing on his expertise in comparative law, Schlesinger calls for more attention to cultural and contextual factors, to better understand the nuances influencing international investment dispute settlement.

Perspective 7a: The consideration of cultural impacts on investment treaties, emphasises the need for a comprehensive examination.

b. Lack of Sufficient Attention to Socio-Economic Impacts

Critique 7b: Scholars such as Sornarajah and Franck have raised concerns about the socio-economic implications of investment treaties.[72] While the works of scholars such as Schreuer

[70] See review of Rudolf B. Schlesinger by Albert A. Ehrenzweig at: Albert A. Ehrenzweig, 'Review of Comparative Law: Cases-Text-Materials, by R. B. Schlesinger', *The Yale Law Journal* 69, no. 2 (1959): 360–63.
[71] See: Rudolf B. Schlesinger, 'The Past and Future of Comparative Law, The American Journal of Comparative Law' 43, no. 3 (Summer 1995): 477–81, https://doi.org/10.2307/840650; Schlesinger examines how legal concepts and institutions are transferred from one legal system to another, taking into account the cultural, social, and historical contexts of both the donor and recipient legal systems. He emphasises the importance of understanding cultural factors in assessing the success and effectiveness of legal transplants. See: Rudolf B. Schlesinger, *Comparative Law: Cases, Text, Materials*, 2nd ed. (Brooklyn: Foundation Press, 1959); The latest work of Schlesinger has been updated to enlarge the perspective of comparative law to include the experiences of the non-Western world. It has been updated to incorporate diverse legal materials from Asia, Africa, and Latin America. It includes an enhanced methodological discussion that brings the book up-to-date with the latest debates in the field. See: Ugo Mattei, Teemu Ruskola, and Antonio Gidi, *Schlesinger's Comparative Law: Cases, Text, Materials*, 7th ed. (New York: Foundation Press, 2009).
[72] The works of Sornarajah provide an analysis of the law in historical, political and economic contexts. See eg.: Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 5th ed. (Cambridge: Cambridge University Press, 2021); With other scholars, Sornarajah also explores underlying terms of socio-economic immiseration of international law. See: John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah,

and Dolzer may be comprehensive in detailing the legal principles of international investment law, they might not adequately address the broader socio-economic impacts of investment treaties. The argument is that a more in-depth exploration of the practical consequences, such influence of socio-economic factors, could enhance the overall understanding of the field.

Perspective 7b: Scholars contribute with perspectives on the socio-economic aspects of investment treaties. Emphasis is on the importance of considering socio-economic impacts to achieve a more comprehensive understanding of the implications of investment treaties.

c. Limited Emphasis on Socio-Political Dimensions

Critique 7c: Sornarajah might also argue that while the work of scholars such as Bermann is commendable in examining the constitutional implications of arbitration and its interaction with legal systems, there might be a limited emphasis on socio-political dimensions.[73]

Perspective 7c: The contention may be for more exploration of the broader societal and political impacts of arbitration, particularly in the context of diverse legal cultures and systems. The perspective is a comprehensive analysis, that emphasises the importance of a socio-political context in which arbitration operates.

Research Gaps to be Addressed

In the literature review, I have thus far summarised and synthesised the arguments and ideas of existing knowledge in the field of international investment law, without adding any new contributions. In this section, I discuss how the dissertation aims to fill the research 'gaps'. As

The Misery of International Law: Confrontations with Injustice in the Global Economy (Oxford University Press, 2018); Franck, has long linked that there will be political and economic elements to investment treaty arbitration. See eg.: Susan D. Franck, 'Development and Outcomes of Investment Treaty Arbitration', *Harvard International Law Journal* 50, no. 2 (2009): 435.

[73] See: Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*.

per research gaps discussed in this dissertation, sometimes a research gap is identified if all the existing research is outdated and in need of new or updated research. Sometimes, a research gap exists when there is a concept or new idea that hasn't been studied at all. I must also bring to attention that the identified research gaps in the dissertation are also subject to limitations which the dissertation outlines in this chapter under the discussion of the Scope of the Research.

Within the scope outlined in the dissertation, I will address Research Gaps 1-5 as identified; A focus on BITs, ISDS Mechanisms in FTAs, The Emphasis on Conciliation over Arbitration, Institutional Bias and ISDS Reform Proposals. Due to limitations set out under the 'Scope of Research', the dissertation is not able to sufficiently fill Research Gap 6 and 7; A Normative Approach and the Lack of a Comparative Approach.[74] Although, the dissertation includes the identification of differences and similarities of the EU and China through the implication of comparisons, it does not research the social context. I declare this limitation under the Scope of Research of the dissertation.

Synthesising Research Gaps 1-5 in the Dissertation

As introduced early in the dissertation, the provision for investment dispute settlement in the EU-China CAI has still not yet been concluded. This represents a notable research gap due to its current status as an ongoing and unresolved matter. This presents an opportunity for research on into the evolving developments of investment dispute resolution as the negotiations and agreements progress. The dissertation thus takes the opportunity to undertake research on proposals for the EU-China CAI, in cognisance and with the aim to make a contribution to the scientific Research Gaps 1-5.

[74] For instance, in a separate work, I take cognisance of the role of history on diversity in international arbitration. See: Thembi Pearl Madalane, 'Western Europe Immigration Laws on Diversity in International Arbitration A Historical Perspective on Africa and the Influence of English Law', *Journal on European History of Law* 14, no. 2 (2023): 128–36.

Today, the works of scholars that I have referred to above in existing literature, tend to either provide an analysis of the reform options or more specifically on the EU's bilateral Investment Court System proposal or the Multilateral Investment Court (MIC) proposal.[75] The works tend to not address that ,in a New World Order, there is a change in the way the international system and international law and institutions operate. In the negotiations of the EU-China CAI, it is observed that China seeks to contribute to international law rather than simply be determined by the EU's proposal.[76] The dissertation adds to research on this interaction of the EU with China with an outlook on investment protection or ISDS reform that may possibly differ from reform reflected in the new generation of EU FTAs or China's comprehensive FTAs. The dissertation adds with a different approach than considered in respective positions on ISDS illustrated by FTAs. The aim is to consider the positions separately [ie. EU position on ISDS, China's position on ISDS][77] and their interaction in the new generation of international agreements. More specifically, their interaction on international dispute resolution in the New World Order [ie. resembled by the EU-China CAI as a new model of investment agreements].[78]

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[75] See eg.: Yuwen Li, Tong Qi, and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*; The book is a contribution by various international legal scholars, written for scholars and practitioners in the field of international investment and trade law, particularly investment dispute settlement. It is reviewed as one amongst little scholarship available specific to EU-China investment law. See: Xiaoyu Fan, 'Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI): Negotiation and the ISDS Reform', *The Chinese Journal of Comparative Law* 8, no. 3 (December 2020): 635–38, https://doi.org/10.1093/cjcl/cxaa003. The book analyses the EU-China CAI with a focus on reforming ISDS. A part of the book 'concentrates on the institutional reform of investor-state arbitration with an extensive analysis of the EU's approach to replacing the private nature of investment arbitration with the public nature of an investment court.' Another part 'addresses the core substantive and procedural issues concerning ISDS'. The work does not address the re-convergence of international investment and international trade law. This dissertation contributes with a different approach that acknowledges the re-convergence as an element in the New World Order that contributes to ISDS reform initiatives.

[76] Some scholars are of the view that the EU's insistence to replace ISDS with an Investment Court System, as well as the ongoing multilateral discussions on a reform of ISDS, could explain the omission of sections on investment protection and ISDS in the EU-China CAI. See: Axel Berger and Manjiao Chi, 'The EU-China Comprehensive Agreement on Investment: Stuck Half-Way', Columbia FDI Perspectives, 8 March 2021, https://academiccommons.columbia.edu/doi/10.7916/d8-821b-mg03/download. More explicitly, articulates this as China standing its ground to contribute to reform of ISDS. Rather than be determined the EUs proposal.

[77] I elaborate on the specific statements that define measurable outcomes under research objectives.

[78] I elaborate on the specific statements that define measurable outcomes under research objectives. But generally, on the research gap on the interaction of the EU and China, there are few works on 'core issues of the CAI negotiation process and its potential impact on ISDS reform' as also agreed by Xiaoyu Fan in reviewing Yuwen Li, Tong Qi, and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*; See: Xiaoyu Fan, 'Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI): Negotiation and the ISDS Reform'; Wenhua Shan and Lu Wang have flagged market access and dispute resolution as the most challenging and promising issues expected to be involved in the

The EUs position on international investment dispute resolution can be viewed in light of its new generation of FTAs or IPAs [ie. EU-Republic of Korea free trade agreement (EU-ROK FTA), EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Mexico Trade Agreement (EU-Mexico TA), EU-Singapore Investment Protection Agreement (EU-Singapore IPA), EU-Japan Economic Partnership Agreement (EU-Japan EPA), EU-Vietnam Investment Protection Agreement (EU-Vietnam IPA), EU-New Zealand Free Trade Agreement (EU-New Zealand FTA)]. Similarly, China's position on international investment dispute resolution in light of its comprehensive FTAs and IPAs [ie. China-New Zealand Free Trade Agreement (China-New Zealand FTA), China-Singapore Free Trade Agreement (CSFTA), China-Peru Free Trade Agreement (China-Peru FTA), China-Costa Free Trade Agreement (China-Costa Rica FTA), China-Iceland Free Trade Agreement (China-Iceland FTA), Canada-China Promotion and Reciprocal Protection of Investments Agreement (China-Canada FIPA), Free Trade Agreement between the People's Republic of China and the Swiss Confederation (China-Switzerland FTA), China-Korea Free Trade Agreement (China-ROK FTA), China-Korea, China-Australia Free Trade Agreement (ChAFTA), China-Mauritius Free Trade Agreement (China – Mauritius FTA), China-Cambodia Free Trade Agreement (China -Cambodia FTA)].

Although, the EU-China CAI contains commitments on market access, a trade liberalisation principle, it is not a trade agreement but an investment agreement.[79] There is a significant difference in the dispute settlement procedures employed in international investment agreements from the dispute settlement procedures in trade agreements.[80] But whereas the assumption is that trade issues are heard by the WTO Dispute Settlement Body and international investment agreements typically make provision for the ISDS, the 'modern era' reflects a

negotiations of the EU-China agreement and its global implications. See: Wenhua Shan and Lu Wang, 'The China–EU BIT and the Emerging "Global BIT 2.0"', *ICSID Review - Foreign Investment Law Journal* 30, no. 1 (Winter 2015): 260–67.

[79] The dissertation explains this in Chapter Five on the EU-China Comprehensive Agreement on Investment (CAI).

[80] This is discussed in Chapter Two on The Significance of ISDS, with sub-chapter addressing the re-convergence of Trade and Investment.

convergence of international trade and international investment law.[81] There are different areas where a convergence of the two sub-disciplines is emerging. This dissertation addresses the point of convergence that relies on international dispute resolution. In recent years, most FTAs have comprehensive provisions of dispute settlement for both of trade and investment.[82] On convergence, ISDS is relied on to enforce international trade rights. So, the dissertation's work on whether the dispute resolution mechanisms in EU-FTAs influence the development of the dispute resolution mechanisms in EU-China CAI also adds to scholarship on whether international trade law contributes to the development of international investment law. In this dissertation, an element of a 'New World Order'.

To ensure the reliability of the findings in this dissertation, in the Methodology sub-chapter, I discuss the research approach to gathering and analysing the scientific sources. This also includes the acknowledgement of potential biases. In contributing to the credibility of research work of the dissertation, I emphasise transparency of the research process by articulating the research questions, methodologies as well as potential limitations.

1.2.2.3 Research Objectives

In the following paragraphs, I define the measurable steps that will be taken to achieve the aims of the dissertation.

[81] Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'; Also see: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'. Although, the 'modern era' referred to by Alford is one of globalized chains of supply. The new era in this dissertation, is rather a 'New World Order' of a 'change in the way the international system and international law and institutions operate'. I explain this choice of terminology under 'Semantic and terminology' in the Methodology section of this dissertation Chapter.
[82] See: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.

Tailed by a critique of the ISDS in the present day [ie. New World Order], the starting point of the research is a revisit of early investment protection mechanisms to revise the reasons that underpin the development of the ISDS mechanism. The discussion on the significance ISDS in the present day is constructed on the validity of the reasons upon which the mechanism was developed. In this dissertation, the synthesis of trade and investment acknowledges the changes in the present day. The arguments in support and against the ISDS mechanism are also collected in attempt to collate points on the significance of ISDS or lack thereof in the present day.

The dissertation develops the EU's position, considering the ISDS, on the arguments in support and against the mechanism. Evidence on EU's perspective on ISDS reform is collected [ie. reform proposals] as an indication of the EU's position on the ISDS mechanism. Unlike previous legal scholarship, this research does not aim to give a response to the question of which reform options of ISDS are better. Rather, the objective of this dissertation is to peripherally touch on the issue of 'ISDS reform', by addressing the broader question on the EU's position on ISDS. Rather than which option is 'better', it is whether the EU proposes changes that are 'relevant' to the New World Order. The examination of the EU's position on ISDS cannot be conceptualised in isolation from the current proposed Investment Court System (ICS), the Multilateral Investment Court (MIC) and the EU's proposed amendments to the International Centre for Settlement of Investment Disputes (ICSID) Rules. To answer the aforementioned question on whether changes are relevant to the New World Order, research will focus on analysing the EU's recently signed new generation of FTAs, as evidence.

Another objective of this dissertation is assessing China's position on the ISDS mechanism. Evidence on China's perspective on ISDS is examined to reveal China's position on the mechanism. The dissertation explores China's approaches on innovating the ISDS mechanism [ie. UNCITRAL Working Group III submission, China's domestic arbitral institutions and courts, and building joint arbitration centres] as a determinant of its position. China's new 'Comprehensive' FTAs are inspected for evidence thereof.

The dissertation decides the relevance of the respective positions on the ISDS mechanism in a New World Order, on the interaction of the respective positions towards the EU-China CAI. The EU and China's perspective on ISDS is used to make an ideal proposition for the EU-China CAI. The objective is to take stock of the proposals and initiatives put forward by the EU and China, as well as the implementation in their 'new comprehensive' FTAs and assesses how the EU-China CAI could meaningfully address them.

1.3 Research Questions

Overarching Research Question

The overarching research question is what the effect of EU and China's position on ISDS has on their interaction in a new generation of investment agreements. The overarching research question of the dissertation is informed by and connected to existing research. The research question has the potential to make an original contribution or to fill a gap on the development of international law as a result of recent changes.

Specific Research Questions

To answer the overarching research question, I examine and answer the following specific research questions:[83]

1. In the New World Order, what are the reasons that ISDS is provided for in international agreements?
2. Is there a need to reform ISDS in the New World Order?
3. Does the EU propose changes relevant to the New World Order?

[83] These questions have developed with the progression of the research...

4. Does China propose substantive changes on ISDS, for a New World Order?

I compiled a list of questions about the topic of the dissertation followed by further research. These specific questions have not already been answered satisfactorily. They support the identified research gaps as questions that are still to answered.

It may seem rhetorical what the point of the ISDS mechanism is today. It is expected common knowledge amongst scholars in international investment law that ISDS was originally created to protect investors.[84] But state criticism of the ISDS mechanism to serve the needs of the present day and some rejection of provisions on ISDS, challenges this supposed obviousness. The consensus amongst states on the need for reform may mislead one to believe there is consensus on the reasons for reform. But in truth, there is a split on criticism. The reasons are very much linked to the initial needs served by ISDS and their relevance in the present day. Some critics question the relevance of the procedures concerning ISDS (ie. procedural legitimacy) while other critics question the entire existence of the ISDS system itself (ie. substantive legitimacy). This tug of war on its existence makes the relevance of ISDS in international agreements unclear.

Notwithstanding difference, in light of criticism of the ISDS mechanism, there is a call to reform it. 'That has led the EU to 'propose some innovative provisions in the framework of negotiations on EU trade and investment agreements, but without calling into question the ISDS system itself.' [85] The EU's approach is to replace the ISDS mechanism. In recent international developments, this approach also instructs the dispute settlement mechanism for the EU-China CAI. China does not indicate a definite position on the ISDS as it reaffirms its commitment to ISDS in its FTAs. This lack of consistency adds to the indefiniteness on whether there is even a

[84] European Parliament Think Tank, 'Investor-State Dispute Settlement (ISDS) - State of Play and Prospects for Reform' (European Parliament, 26 January 2015), https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2015)545736#:~:text=International%20investment%20agreements%2C%20and%20the,investments%2C%20in%20countries%20considered%20risky.
[85] European Parliament Think Tank.

need to reform the ISDS mechanism if it can possibly also still be considered as significant or relevant.

The EU-China CAI is expected to be a representative of international investment agreements. Following on the trend of a comprehensive approach of international investment and trade agreements, it is a relevant agreement in what I refer in this dissertation as a New World Order, reflecting a change in the way the international system, international law and its institutions work. The question on whether the EU propose changes, is whether it is feasible for the EU-China CAI to adopt the EU's position on ISDS and resembling that provisioned in the new generation of EU FTAs.

It is said that the EU is an international regulatory power, driving the proposals to reform the ISDS mechanism. While China's comprehensive FTAs contain the ISDS mechanism. But, in looking to contribute to international law, the question is on whether China's comprehensive approach in its agreements, proposes substantial changes on the ISDS mechanism towards a comprehensive EU-China investment agreement.

1.4 Methodology

As a general step in international law research, the research questions of the dissertation are framed in light of general reference work and thereafter an identification of the issues.[86] Once the legal issues have been framed or identified, the challenge to legal research is that of identifying available legal resources best in addressing these issues. To this end I have chosen to apply the mainstream doctrinal methodology. It usually follows the normal two-part process:

[86] The George Washington University Law School Jacob Burns Law Library, 'An Introduction to International Legal Research', Legal Research Guide Series, Specialized Research Guide #7, n.d., www.law.gwu.edu/.../Research/.../Guides/International%20Law.

i) locating the sources of law and ii) interpreting and analysing texts.[87] This approach identifies, analyses and synthesises the content of the law.

1.4.1 Locating the Sources of Law

The dissertation relies on both primary and secondary sources. Primary sources for this dissertation include documents from the European Commission about ISDS reform, the establishment of the bilateral ICSs, the negotiation of a Multilateral ICS under the auspices of the United Nations Commission for International Trade Law Working Group III ('UNCITRAL WGIII') and proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States. Other primary sources used in the analysis of the ISDS include what is considered the new generation of EU FTAs and IPAs; ie. EU-Republic of Korea free trade agreement (EU-ROK FTA), EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Mexico Trade Agreement (EU-Mexico TA), EU-Singapore Investment Protection Agreement (EU-Singapore IPA), EU-Japan Economic Partnership Agreement (EU-Japan EPA), EU-Vietnam Investment Protection Agreement (EU-Vietnam IPA), EU-New Zealand Free Trade Agreement (EU-New Zealand FTA), and the EU-China Comprehensive Agreement on investment (EU-China CAI) and China's new comprehensive FTAs and IPAs; China-New Zealand Free Trade Agreement (China-New Zealand FTA), China-Singapore Free Trade Agreement (CSFTA), China-Peru Free Trade Agreement (China-Peru FTA), China-Costa Free Trade Agreement (China-Costa Rica FTA), China-Iceland Free Trade Agreement (China-Iceland FTA), Canada-China Promotion and Reciprocal Protection of Investments Agreement (China-Canada FIPA), Free Trade Agreement between the People's Republic of China and the Swiss Confederation (China-Switzerland FTA), China-Korea Free Trade Agreement (China-ROK FTA), China-Korea, China-Australia Free Trade Agreement (ChAFTA), China-Mauritius Free Trade Agreement (China – Mauritius FTA), China-Cambodia Free Trade Agreement (China -Cambodia FTA). These agreements are agreed in principle while some are already enforced. The investment provision of the EU-China CAI is still not yet concluded so the study

[87] Terry Hutchinson and Nigel J.Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review* 17, no. 1 (2012): 83–119, https://doi.org/DOI:10.21153/dlr2012vol17no1art70.

is feasible and given the agreement in principle and the resources available through proposals and discussions awaiting ratification. A review of literature research has revealed that there is an adequate knowledge base on the topic to successfully undertake this study. This is evident from the availability of various secondary sources on the topic.

Secondary sources in the form of general texts (including books, journal articles, treatises, directories, blogs etc.) from reputable publishers are also consulted in this dissertation, to provide useful background, comment, and refer to relevant primary sources.

The classifications of these primary and secondary sources described above, is based on the originality of the material and the proximity of the source or origin. Although, there are differences between academic disciplines in the ways that source types are defined.[88] I acknowledge that categorisation of sources within each discipline may also be tricky and not always clear cut.[89] While it may seem generally clear that the categorisation of primary sources refers to 'first-hand' knowledge that a researcher has gathered, material may be considered as a primary source in one context and a secondary source in another.[90] In legal research, the law itself is the primary source and the materials that analyse and interpret the law are considered as secondary sources.[91] Although, sometimes a material may seemingly reflect both descriptions.[92] Acknowledging the frequent ambiguity of categorising sources, in this dissertation, any material as evidence and a mandatory authority of the EU and China's position on ISDS in the present day, without commentary or analysis, is considered to be a primary source. I have categorised material of persuasive value that reports with commentary and analysis thereof as secondary

[88] Library University of Toronto, 'Primary and Secondary Sources in the Sciences', Library University of Toronto, FSC100 The Real CSI, n.d., https://guides.library.utoronto.ca/FSC100UTM/scholarly#:~:text=Scholarly%20peer%2Dreviewed%20journal%20articles,to%20the%20the%20scholarly%20community.

[89] University of Minnesota Crookston Library, 'Primary, Secondary, and Tertiary Sources', University of Minnesota Crookston, n.d., https://crk.umn.edu/library/primary-secondary-and-tertiary-sources#:~:text=Sources%20of%20information%20or%20evidence,of%20the%20source%20or%20origin.

[90] For instance, websites and newspapers may be considered to be primary or secondary sources depending on how the material is used.

[91] NYU Law Library, 'Law Library Basics: Legal Research - Secondary Sources', NYU Law, n.d., https://nyulaw.libguides.com/c.php?g=773842&p=5551762.

[92] For example, newspaper articles and opinion pieces. See: University Libraries-University of Washington, 'Integrated Social Sciences Program: Primary and Secondary Sources-Guide for the Online Integrated Social Sciences Program', University Libraries-University of Washington, n.d., https://guides.lib.uw.edu/research/iss/sourcetypes.

sources.[93] In other words, I have referenced the material that I have analysed directly for evidence as primary sources and I referenced the material that I have used to test it's arguments against this evidence as secondary sources.

The distinction between secondary and tertiary sources can also get tricky.[94] In accordance with the explanation above, secondary sources are categorised by many legal researchers as 'second-hand' interpretation of knowledge that has been acquired from primary sources. I have followed this distinction in the dissertation.[95] Although, I am aware that some secondary sources may also be considered as tertiary sources when their main purpose is to list, summarise or a restatement of facts and research interpretations rather than mostly conducting an analysis and interpretation of the original primary source.[96]

As the purpose of a dissertation is the contribution of new knowledge, it is not considered scholarly acceptable to cite tertiary sources as evidence.[97] Tertiary sources, as defined, lack original ideas. I have classified tertiary sources as material that reports 'third hand' knowledge, such as fact books, encyclopaedias, dictionaries and user-contributed online resources.[98] Acceptable in academia, in addition to secondary sources, I only use tertiary sources in the early stages of the research process such as to establish background information, identify relevant keywords and terms and reference tools to help find the law and research methods, as well as familiarise myself with current debates pertaining to ISDS in the present day. These tertiary

[93] With persuasive authority use to support the arguments of the dissertation.
[94] University of Minnesota Crookston Library, 'Primary, Secondary, and Tertiary Sources'.
[95] NYU Law Library, 'Law Library Basics: Legal Research - Secondary Sources'.
[96] University of Minnesota Crookston Library, 'Primary, Secondary, and Tertiary Sources'.
[97] Ohio State University Libraries, '4. Primary, Secondary & Tertiary Sources', Pressbooks, Choosing & Using Sources: A Guide to Academic Research, n.d., https://ohiostate.pressbooks.pub/choosingsources/chapter/primary-secondary-tertiary-sources/.
[98] Admitting to using user-contributed online resources such as Wikipedia brings shame as it may be viewed as lacking academic rigour. However, 'it has become the most popular encyclopedia worldwide'. With the changes of our time, it has become less unusual and more acceptable as way to find academic information and confirm sources, if used correctly and wisely. The problem is when a researcher stops there without verifying its sources. Professors of the world's leading universities also admit to using it themselves as it has more information than academically-sanctioned databases. See eg: Melissa C. Rodman, 'Professors See Shift in Academic Attitudes on Wikipedia', *The Harvard Crimson*, 2 April 2015, https://www.thecrimson.com/article/2015/4/2/changing-wikipedia-attitudes-professors/; Also see: Paul Börsting and Maximilian Heimstädt, 'A Step-by-Step Guide for Using Wikipedia for Research Communication', *London School of Economics* (blog), 22 October 2021, https://blogs.lse.ac.uk/impactofsocialsciences/2021/10/22/a-step-by-step-guide-for-using-wikipedia-for-research-communication/.

sources are used to facilitate quick access to information and usually not credited to a particular author.[99]

Potential Bias

I have identified some potential biases relevant to this dissertation, and acknowledge the associated risks in the dissertation research, which can impact the validity and reliability of the research findings.[100]

'Bias' may be explained as a strong feeling in favour of or against one group of people, or one side in an argument, often not based on fair judgement.[101] Generally, it may be described as a tendency to prefer one thing over another. In academic research, bias may occur when the researcher conducting the study is in favour of a certain result. This may introduce inaccuracies, distortions or unfairness in the research process that potentially compromise the validity and reliability of the research findings.[102] It is important for researchers to take accountability for choices throughout the research process. This includes acknowledging bias in the choices to ensure transparency and integrity of the research. Addressing bias in research is crucial for maintaining the credibility of the scientific process and in ensuring that the research provides a meaningful contribution.

No researcher wants to be biased. However, I acknowledge that bias exists in all research, across research designs.[103] It is difficult to eliminate and can occur at each stage of the research process,

[99] Ohio State University Libraries, '4. Primary, Secondary & Tertiary Sources'.
[100] Elizabeth Cook, 'We All Do It: How Bias Informs Legal Research and Teaching' (2016), https://digitalcommons.law.uw.edu/law-lib_borgeson/12.
[101] See: Oxford Learner's Dictionaries, 'Definition of Bias Noun from the Oxford Advanced Learner's Dictionary', in *Oxford Learner's Dictionaries*, n.d., https://www.oxfordlearnersdictionaries.com/definition/english/bias_1; Also see: Elizabeth Cook, 'We All Do It: How Bias Informs Legal Research and Teaching'.
[102] Joanna Smith and Helen Noble, 'Bias in Research', *Evidence-Based Nursing* 17, no. 4 (2014): 100–101, https://doi.org/10.1136/eb-2014-101946.
[103] Joanna Smith and Helen Noble.

including study design or data collection, as well as in the process of data analysis and reporting. Although, as researchers, we should attempt to minimise bias by acknowledging potential sources of bias to enable a more objective evaluation of the research findings and conclusions. This also provides an opportunity for further research; to learn from these biases by refining methodologies to design a more unbiased research.

Institutional Bias

Institutional bias may occur if the focus of the research is on findings that support the ISDS system. This typically occurs with those closely associated with the ISDS framework. In contribution to the identified research gaps in the dissertation, no institutional bias should be suspected. As a doctoral researcher, committed to conducting independent and objective research, the dissertation is driven by the pursuit of knowledge. I am not closely associated with the ISDS framework. In the review of literature, I have considered the considered the works of scholars with different affiliations and opinions. In cognisance of the diverse academic perspectives on ISDS, I aim to provide a comprehensive analysis that considers multiple angles.

Legal Discipline Bias

Legal Discipline bias refers to prejudice toward ideas and perspectives in the legal discipline. I have discussed the methodology of the dissertation with reference to the primary, secondary and tertiary sources in legal research. Acknowledging the differences in the categorisation of sources within the varying academic disciplines, might introduce the bias specific to legal research methods. This choice potentially narrows the scope of research that might not fully address the interdisciplinary nature of ISDS.

Mainstream Doctrinal Methodology Bias

Mainstream doctrinal methodology bias favours research into the law and legal concepts. It is discussed that the choice of mainstream doctrinal methodology in the dissertation locates and interprets texts. This may introduce a bias towards legal positivism. This method might prioritise

formal legal sources, potentially overlooking the broader socio-economic or socio-political aspects related to ISDS.

Research Gap Rationale Bias

Research gap rationale bias refers to the potential for bias in how the need for the dissertation research is framing the existing literature and identifying gaps. As discussed, the main rationale for choosing the investment provision of the EU-China CAI as a research gap is mainly based on its status that it is "not yet concluded". This might overlook ongoing developments and opportunities to engage with new or evolving perspectives. The implication is potentially limiting the timeliness and relevance of the dissertation research once the EU-CAI is concluded.

1.4.2 Analysing and Interpreting Texts

In this dissertation, the direction and trend of the information provided by the sources will be assisted by the analysis and interpretation of the sources.

1.4.2.1 Analysis

Following the collection of sources, I will embark on the task of classifying information according to affinity. This classification will be based on the research questions and objectives of the dissertation, as discussed earlier in this chapter. I will determine exhaustive categories that will be able to cater to possible responses to the research questions.

I will record the classification through the use of tabulation that will also assist in making comparisons between the categories. I do not claim to be a comparatist. However, all scholarly research implies comparisons.[104] Legal research on any legal system or legal traditions is either explicitly or implicitly comparative, to identify and measure the similarities and differences and

[104] Also see: Mark Van Hoecke, 'Methodology of Comparative Legal Research', *Boom Juridische Uitgevers*, 2015, 1–35, https://doi.org/10.5553/REM/.000010.

what they reveal.[105] The aim of the dissertation is to fill several gaps pertaining to ISDS in the present day. However, as the dissertation intends to make a feasible proposal for the EU-China CAI based on where the EU's and China's position on ISDS may be best aligned, implies some comparison. This should be of no surprise as 'the methods of private international law today are those of comparative Law'.[106]

Historically, not recognised as a separate branch, comparative law was not a distinct body of law in itself but a technique of legal science occasionally used to compare laws.[107] Today, described by some scholars as the 'Cinderella of the legal sciences 'or 'Sleeping Beauty ', to avoid the rags-to-riches association, modern comparative law is a distinct discipline that recognises and understands the function of comparing foreign law.[108] The aim of this dissertation undeniably mostly aligns with comparing international investment rules of China and the EU, towards the 'harmonisation of law' that is listed by Patrick Glenn as one of the 'Aims of Comparative Law '.[109] However, to date, there is no agreement on the kind of methodology nor methods to be followed.[110] A "good" method is generally left to the researcher to decide based on the aims of the research.[111] This endeavour is not advised for a legal scholar that is not a specialist in comparative law. Described by Van Hoecke as tourists lacking a general framework, comparative researchers should become professionals rather than tourists. In accepting my limitations as a legal researcher, I thus embrace the advice to describe the

[105] 'All scholarly research implies comparisons.' See: Mark Van Hoecke.
[106] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*.
[107] Walther Hug, 'The History of Comparative Law', *Harvard Law Review* 45, no. 6 (1932): 1027–70, https://doi.org/10.2307/1332143.
[108] Günter Frankenberg, 'Comparative Law as a Discipline- From Cinderella to Queen', in *Günter Frankenberg, Comparative Law as Critique* (Edward Elgar Publishing, 2016); And see: Günter Frankenberg, 'Comparing Constitutions: Ideas, Ideals, and Ideology-Toward a Layered Narrative', *International Journal of Constitutional Law* 4, no. 3 (2006): 439–59, https://doi.org/10.1093/icon/mol012; In an interview, Heinz Mohnhaupt justifies that " this view is corroborated by the fact that there are congresses, faculties and dedicated publications for comparative law Max Planck Institute for Legal History and Legal Theory, Comparative Law as a Method of Knowledge Production- Interview with Heinz Mohnhaupt, 7 April 2022, https://www.lhlt.mpg.de/2728173/notice22-04-07-Interview-Mohnhaupt.
[109] Mark Van Hoecke, 'Methodology of Comparative Legal Research'; Although comparing international investment rules of China and the EU, towards the 'harmonisation of law', may seem unthinkable, the consideration of political influence provides interesting insights. For instance, notwithstanding diversity between the different systems as also noted by Bádo, although Hungary is a member of the EU, Márton Sulyok suggests that a comparative study may prove that Hungary is moving in the same direction as less obvious countries such as China. Thus, it is perhaps also worth comparing China with the EU, which Hungary is a member state. See: Attila Badó (ed), *Fair Trial and Judicial Independence – Hungarian Perspectives* (Switzerland: Springer Cham, 2014).
[110] Mark Van Hoecke, 'Methodology of Comparative Legal Research'.
[111] Mark Van Hoecke.

comparative analysis in this dissertation, merely as ‘comparing’ which is a method in its own right and called ‘the comparative method'. Van Hoecke, a widely cited scholar of comparative law, informs that this declaration requires no further explanation or concrete guidelines.[112]

It would be dishonest to conclude without declaring the challenges of comparing legal systems. Firstly, the advantage of comparing the legal systems of China and the EU is that they share common characteristics and similar legal practices of the civil law legal system.[113] The language and cultural difference should not be a deterring factor as a network of colleagues in the area of both EU and Chinese legal systems, may play a role in this regard.[114] Rather, the challenge of comparing legal systems in this dissertation is that it stops at the level of legislation. The criticism is that the social reality may not be reflected by suggested rules.[115] Explanations may be from factors beyond legal texts, which this dissertation does not factor in the research. However, the dissertation is subject to limitations as discussed under the section on the Scope of research.

1.4.2.2 Interpretation

In the process of conducting research, the task of interpretation is expected to systematically follow with the analysis. However, the tasks of analysis and interpretation are interdependent.

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[112] Mark Van Hoecke.
[113] Legal families, which is also argued to be obsolete and suggested to be replaced with the term ‘legal traditions’, has despite recent arguments to be a Western notion, been one of the challenges of comparative law. See: Patrick H. Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’, in *Mathias Reimann, and Reinhard Zimmermann (Eds), The Oxford Handbook of Comparative Law*, 2nd ed., 2019; In this dissertation, the comparison is of systems considered to share a legal family, which spares a comparison from being caught up in these developing debates. The EU is a product of civil law countries. Although, a ‘unique supranational law system’, it is described as one that merges civil law and common law elements. The legal system of China is classified by some as one that is ‘traditional’ but it is based on Germanic Civil law and France Civil law, also with influences from the Soviet Socialist law from Soviet Union. See: Central Intelligence Agency (CIA), ‘Field Listing-Legal System’, in *The World Factbook (2021 Archive)*, 2021, https://www.cia.gov/the-world-factbook/about/archives/2021/field/legal-system/; Also see: The World Bank Public-Private Partnership Legal Resource Center (PPPLRC), ‘Key Features of Common Law or Civil Law Systems’, The World Bank IBRD-IDA, The World Bank Group, n.d., https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law.
[114] Mark Van Hoecke, ‘Methodology of Comparative Legal Research’.
[115] Mark Van Hoecke.

The analysis is not complete without interpretation and the interpretation depends on some analysis.[116] Thus, I have not committed to a particular order of the tasks of analysis and interpretation in the dissertation. Rather, the order is led by how the respective sources respond to the objectives of the dissertation and the research questions. I analyse or interpret the sources as needed.

As the dissertation does not begin with a theory but with questions that need answers, I adopt the inductive epistemological research method, to reach conclusions on the effect that the EU and China's position on ISDS has on their interaction in a new generation of investment agreements. To achieve the purpose of the dissertation, I conduct the analysis and interpretation to generalise on ISDS in an Evolving World Order.

1.4.3 Scope of research

As pointed out earlier in the chapter, the research aims and objectives determine the scope and depth of this research. In this section, I clarify the boundaries.

1.4.3.1 Scope

The dissertation focuses on the ISDS mechanism which is provisioned for in the majority of international investment treaties and increasingly in FTAs. Accused as a mechanism that undermines national legislation, ISDS circumvents the balance between private rights and public interests that has evolved in many national contexts. The focus of the dissertation, though, is on ISDS mechanism itself and the capability to evolve. Particularly in the call for a New World Order in Dispute Resolution. The dissertation should not be understood as a declaration in favour of the reform of international trade and investment law. It seeks to research the

[116] 'Legal interpretation involves scrutinizing legal texts'. See: Mark Greenberg, 'Legal Interpretation', in *Stanford Encyclopedia of Philosophy*, 7 July 2021, https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/.

implications of the current reform efforts on the new generation on investment agreements rather than argue whether it is better or not to reform ISDS.

The dissertation is centred on the FTAs that the EU and China has entered with individual states. Thus, the analysis excludes FTAs that the EU and China has entered into with associations or multiple states as co-signatory in a single EU FTAs.[117] It is more feasible for the study to determine the ISD outlook of individual states that EU and China has entered that that of the associations that the EU has entered into partnership in the FTAs. It is even more difficult , and perhaps less reliable, to determine a joint outlook on ISDS, of separate individual states without a joint mandate that officially consolidates their position.[118] But also, the EU DCFTAs are in pursuance of EU's deep trade agenda and thus excluded from the study of the dissertation.[119] Although distinct for each country's case, the general rules of the DCFTAs are similar, to gradually integrate these countries in the EU's Internal Market.[120] While the EU-China CAI is expected to strengthen regional economic integration, it is not with the intention to integrate China in the EU's Internal Market.[121] Thus, a study of EU DCFTAs would not support the research objectives of the dissertation based on the relevance and interaction of EU and China's position towards the EU-China CAI.[122]

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[117] Thus, the dissertation excludes an examination of the EU-Central America Association Agreement applied since 1 August 2013 (trade pillar applies with Honduras, Nicaragua and Panama), 1 October 2013 (Costa Rica and El Salvador); 1 December 2013 (Guatemala. and the EU-Colombia-Peru-Ecuador FTA) applied since 1 March 2013 for Peru; 1August 2013 for Colombia; since 1 January 2017 for Ecuador.

[118] The EU-Colombia-Peru-Ecuador FTA, the European Union (EU) has had the agreement with Colombia and Peru since 2013, which Ecuador joined in 2017.

[119] Also see the discussion on the term "deep" in the 'New definitions, distinctions, or classifications' section of this sub-chapter on Methodology,

[120] European Commission, 'The EU's Association Agreements with Georgia, the Republic of Moldova and Ukraine' (European Commission, 23 June 2014), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_430.

[121] See: Agatha Kratz and Janka Oertel, 'Home Advantage: How China's Protected Market Threatens Europe's Economic Power', Policy Brief (European Council on Foreign Relations, 15 April 2021), https://ecfr.eu/publication/home-advantage-how-chinas-protected-market-threatens-europes-economic-power/. The authors are of the view that the EU should adopt 'an integrated policy approach, … and even prising open closed parts of China's domestic market'.

[122] The exclusion of DCFTAs in the study of the dissertation is also supported by discussions towards the propositions of the title 'Comprehensive Agreement on Investment and Trade (CAIT)' to describe the EU-China CAI. In the 'New definitions, distinctions, or classifications' section of the Methodology sub-chapter, I discuss that the EU-China CAI may be titled "Comprehensive" in providing for trade liberalisation principles such as market access but not necessarily "deep" in providing for those rules.

Observing a possible spillover of aspects in the new generation of EU FTAs in the EU-China CAI calls for a study on the trade-investment relationship. And, indeed, ISDS in a New World Order is not a legal issue without social context. However, it is reasonable to admit that it may be overly ambitious to study both aspects of trade-investment as well as to study both the legal issues and their social context in a single PhD dissertation. Thus, I have chosen to focus on international investment dispute resolution, and legal issues despite social context.

I also acknowledge that, relevant to dispute settlement, there may be many changes in the international system, law and its institutions that resemble a 'New World Order'. The focus of this dissertation on the re-convergence of international investment and international trade law, should not be interpreted as a negation of other changes.

1.4.3.2 Limitations

Mentioned in the first paragraphs of this sub-chapter, the dissertation adopts the doctrinal legal research methodology. I acknowledge that it is a method that is criticised as being too descriptive, technical, and uncritical. Its limitation is that it is isolated from social context, devoid of reality. Nonetheless, doctrinal research methodology has been the dominant research mechanism in the legal discipline as far back as the 19th Century.[123] And although not time-feasible to for this dissertation, it would be dishonest to pretend that this study is isolated from the society in which it operates. So, I acknowledge that further research is needed to observe international agreements and proposals of China and the EU within their social context, such as through the adoption of Socio-Legal methodology.[124]

[123] Terry Hutchinson and Nigel J.Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research'.
[124] There is no agreed definition of Socio-Legal research, a subject of continuing debates. See eg.: Donald R. Harris, 'The Development of Socio-Legal Studies in the United Kingdom', *Legal Studies* 3, no. 3 (1983): 315–33, https://doi.org/doi:10.1111/j.1748-121X.1983.tb00427.x; Some scholars suggest that using words such as 'reform' in the discussion or an analysis drawing on interdisciplinary concepts, permits legal researchers to identify the possibility of Socio-Legal research methods. See: Darren O'Donovan, 'Chapter 7: Socio-Legal

1.4.4 Semantic and terminology

The way that I refer to some of the key terms and expressions in the dissertation, needs to be briefly clarified.

'New World Order'

There are various interpretations of the term 'New World Order'. Outside of the academic sphere, understanding a 'New World Order' has been subject to conspiracy theories such as that the United Nations plans to create a *global* government.[125] Rather, notwithstanding the many different versions of a 'New World Order',[126] the supposed academic fact is that the term was thrown around in the period after World War I towards the' vision for a new peaceful post-war world order that fostered global collaboration and free trade among nations.'[127] However that may be perceived to have been achieved. Academically, whether through 'one rule for all' or as

Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls', in *Laura Cahillane and Jennifer Schweppe (Eds.), Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016); We make usage of the word 'reform' in our discussion, but this is not simply what would justify the socio-legal research methodology. Rather, the idea does not solely look at legal instruments in a vaccuum but goes beyond the traditional black-letter approach to build a more contextual analysis. And although with a history that emanates from Europe and the US, scholars have also recognised the emergence of socio-legal approaches to international law in other parts of the world- for instance in China. See eg.: Jiang, Shisong, 'Charting Socio-Legal Approaches to International Law in China: Taking the Interdisciplinary Study of International Law and History As an Example', *Academic Journal of Interdisciplinary Studies* 9, no. 1 (2020), https://doi.org/10.36941/ajis-2020-0001.

[125] One may even think of the fake UN Agenda 21/2030. See: Israel's government services and information website, Ministry of Health, 'The U.N. Agenda 21/2030 "New World Order" Is Not a Real Document', 10 February 2021, https://www.gov.il/en/departments/news/fake-new-world-order.

[126] Ie. Version 1.0,2.0,3.0. See: Mark P. Thirlwell, 'A New, New World Order? Challenges for International Economic Policy in the New Millenium' (The Lowy Institute for International Policy, March 2005), https://www.files.ethz.ch/isn/58658/2005-03-03_A%20New,%20NEw%20World%20Order.pdf.

[127] It was used by US President Woodrow Wilson during the creation of the League of Nations. See: Library of Congress, 'Peace and a New World Order?', n.d., https://www.loc.gov/exhibitions/world-war-i-american-experiences/about-this-exhibition/world-overturned/peace-and-a-new-world-order/.

Slaughter has written on a 'Real New World Order', that world order with a centralised rule making authority is alerted to be an illusion.[128]

In this dissertation, I have chosen to align with international legal scholarship broadly referring to a New World Order as 'a change in the way the international system and international law and institutions operate'.[129] Scholars write that a New World Order was *ideally* thought to have been resulted in the founding of the United Nations (UN), aimed at maintaining international peace.[130] And, in a New World order, proponents of a global rule of law most frequently envision a unified legal system under the authority of a world court.[131] Unable to deny, this is a thought not far from the ongoing negotiations on establishing the Investment Court System (ICS) to replace the ISDS mechanism. But rather, I must clarify that I refer to the 'New World Order' in this dissertation, as a change in whatever form without necessarily implying one of a 'central authority.'[132]

'The West'

Reference to the 'the West', in this dissertation, should not be should not be understood as a dichotomous category but a term to refer to the former colonial powers of Western Europe' and North America. The most common language which emerged and seemingly 'won' was the 'developed' and 'developing' dichotomy.[133] However, I accept that its relevance is also

[128] See eg.: Anne-Marie Slaughter, 'The Real New World Order', *Foreign Affairs* 76, no. 5 (1997): 183–97, https://doi.org/10.2307/20048208.
[129] Richard Bilder, 'International Law in the New World Order: Some Preliminary Reflection', *Florida State University of Transnational Law and Policy*, Univ. of Wisconsin Legal Studies Research Archival Collection, 1 (1992): 1–21.
[130] See eg.: George A. Obiozor, 'The United Nations and the New World Order: Role of Regional Organisations', *India Quarterly* 50, no. 3 (1994): 43–60.
[131] Anne-Marie Slaughter, 'The Real New World Order'.
[132] And, in any case, today there is an agenda to reform the United Nations that was thought to have produced the New World Order at that time. See: European Parliament Think Tank, 'United Nations Reform'.
[133] Dan Harris, Mick Moore, and Hubert Schmitz, 'Country Classifications for a Changing World', Working Paper (Institute of Development Studies, 2009), https://assets.publishing.service.gov.uk/media/57a08b65ed915d3cfd000cc4/Wp326.pdf.

questioned.[134] More so, the World Bank has phased it out from its data vocabulary.[135] In contrast to the historical classification of states based on geographical location, today's categorisation considers the hybrid nature of today's global order, beyond geographical location. But fundamentally, criticism is rooted on the implications of an 'us' and 'them' dichotomy. Yet, there has still not been a complete agreement around the labelling of country classifications or its boundaries.[136] For instance, is China a developed or developing country?[137] We now also see the 'North-South' divide which is similarly problematic.[138] To avoid misunderstanding or

[134] Vittorio Hösle notes that in as much as the usage of "Third World" is problematic, "developed" and "developing" also implies the hierarchical problem. See: Vittorio Hösle, 'The Third World as a Philosophical Problem', *Social Research* 59, no. 2 (1992): 227-62.; In questioning the relevance of the terms, Khokhar and Serajuddin also declare that "the terms 'developing world' and 'developing country' are tricky: even we use them cautiously, trying to make it clear that we're not judging the development status of any country." See: Tariq Khokhar and Umar Serajuddin, 'Should We Continue to Use the Term "Developing World"?', *World Bank* (blog), 16 November 2015, https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world.

[135] The World Bank announced, 'We're no longer distinguishing between "developing" and "developed" countries' and curtsied in the 2016 edition of World Development Indicators (WDI). See: Neil Fantom, Tariq Khokhar, and Edie Purdie, 'The 2016 Edition of World Development Indicators Is out: Three Features You Won't Want to Miss', *World Bank* (blog), 15 April 2016, https://blogs.worldbank.org/opendata/2016-edition-world-development-indicators-out-three-features-you-won-t-want-miss.

[136] Dan Harris, Mick Moore, and Hubert Schmitz, 'Country Classifications for a Changing World'.

[137] United Nations, 'World Economic Situation and Prospects' (New York: United Nations, 2020), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf, China as the world's second-largest economy, is considered to be hiding behind the veil of development. It is also predicted to overtake the US by 2028 due to Covid-19, but Chinese authorities still assert that it is still a developing country. See eg.: Consulate-General of The People's Republic of China in Auckland, 'China's Developing-Country Identity Remains Unchanged', 13 August 2010, https://www.mfa.gov.cn/ce/cgak//eng/zlgxw/t726471.htm; Also see: Philippe Benoit and Kevin J.Tu, 'Is China Still a Developing Country? And Why It Matters for Energy and Climate' (Columbia SIPA Centre on Global Energy Policy, 23 July 2020), https://www.energypolicy.columbia.edu/research/report/china-still-developing-country-and-why-it-matters-energy-and-climate; Accordingly, it will be given 'high-income country' responsibilities by 2023. The World Bank classifies countries by dividing economies into low, medium and high-income groups. A high-income economy is defined by the World Bank as a country with a gross national income per capita of US$12,696 or more in 2020. See: World bank, 'World Bank Country and Lending Groups', n.d., https://datahelpdesk.worldbank.org/knowledgebase/articles/906519#High_income; According to China's 14th Five-Year Plan (2021-2025), it could become a high income economy – per capita Gross National Income of $12,376 or more by 2023-24. See: 中华人民共和国中人民, '中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要', 13 March 2021, http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm; See full English translation at: Center for Security and Emerging Technology (CEST), 'Translation Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035 中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要' (Center for Security and Emerging Technology (CEST), 13 May 2021), https://cset.georgetown.edu/publication/china-14th-five-year-plan/.

[138] The Global South is a term often used to identify lower-income countries on one side of the so-called divide, the other side being the countries of the Global North (often equated with developed countries). This similarly resembles the 'us and them' dichotomy.

possible critique of offence that may derail the focus of this dissertation, I endeavour to avoid the popular 'meta categorisation'. In avoidance, if I mean capital-exporting, former colonial powers, I have chosen to communicate this. Which I have chosen to shorten as 'the West' in that context.[139]

If one would argue that 'the West' is still a categorisation, it would be an inconclusive categorisation of the world.[140] Furthermore, it is also articulated by some scholars that what 'the West' means in a given context depends entirely upon who is invoking the term and for what purpose.[141] Of course the use of popular 'meta categorisation' should also be "attuned to the likely concerns of particular users" in mind.[142] But usage of 'the West' seemingly faces less retaliation.

'International law'

In acknowledgement that 'International law' has had many diverse definitions, [143] the dissertation uses the term 'International law' in alignment with that which replaces the concept

[139] Written to have originated in the Greco-Roman Civilisations of ancient times, I did not coin the concept of the Western world, also known as 'the West'. It is from the Romans that the geographical context of the West that the concept is believed to have come about, considering themselves to be of the "sunset" or "west", as opposed to the "orient", which means "rise" or "east". But as it has evolved, what was generally thought of as the West is different from today. Today, it is agreed that 'the West' or Western World can be defined differently, depending on the context. See: William H. McNeill, 'What We Mean by the West', *Orbis* 41, no. 4 (1997), https://doi.org/10.1016/S0030-4387(97)90002-8. In the context of the influence of states on ISDS, I refer to the West as the former colonial powers of Western Europe and North America.

[140] For instance, the East is never understood to include Africa. And nor is the African continent considered to be of the West.

[141] William H. McNeill, 'What We Mean by the West'.

[142] Dan Harris, Mick Moore, and Hubert Schmitz, 'Country Classifications for a Changing World'.

[143]The term 'International law' has been defined in various ways by scholars. For example, L.Oppenheim, considered by many as the father of modern international law, expanding on the classical use of the term 'International law' that was provided by Bentham. Oppenheim defined International law as "The Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other". Later, this definition has been revised by scholars such as Sir Robert Jennings and Sir Arthur Watts as "the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relation of States, but States are not the only subject of International Law. International organisations, and to some extent, also individuals may be subjects of rights conferred and duties imposed by international law." Many other scholars have provided

of the law *'of'* nations with the concept of the law *'between'* nations.[144] In other words, a definition acknowledging the cooperation between states. Extending on this usage, I accept that 'International Law' is that legal order which regulates the relations between states. I take cognisance of 'International law' framed as that which 'consists of a body of rules governing the relations between states."[145]

'Customary International Law'

It is accepted Customary International Law (CIL) is a body of legal rules that are not written down or codified in any particular source.[146] In this dissertation, I acknowledge that it is not a formal "source of international law" but that defined by the ICJ as "evidence of a general practice accepted as law".[147] In my arguments, I do not deny the existence of debates on the subjectivity of this definition. The legal obligation of the observed state practice is determined by the "subjective" element of a custom under International Law, *Opinio* juris, rather than from formal agreements such as treaties.[148] It is for this lack of formality that *Opinio juris* is debated. Thus, what is considered CIL is debated.

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revisions expanding on the "legally binging" nature, using similar words. In consideration of the various definitions, I also acknowledge the arguments around the 'binding vs. non-binding' nature of international law. It is not within the interest of the dissertation. Rather, interest is on international law as a body of rules. Whether these rules are binding or non-binding is not of interest in the dissertation research questions.

[144] Here, I align the term 'International law' with that which was coined by Jeremy Bentham in 1789 to replace the concept of the law of nations with the concept of the law between nations. See: Carolina Kenny, 'Jeremy Bentham, Principles of International Law (1786-1789/1843)', Classics of Strategy and Diplomacy, 20 August 2015, https://classicsofstrategy.com/2015/08/20/principles-of-international-law-bentham/.

[145] Later, a new definition of International law was framed by Hackworth that, "International Law consists of a body of rules governing the relations between States."

[146] See: 'Draft Conclusions on Identification of Customary International Law and Commentaries', Report of the International Law Commission, Seventieth Session (30 April-1 June and 2 July-10 August 2018), 2018, https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf; Also see: United Nations General Assembly, 'Identification of Customary International Law', Resolution adopted by the General Assembly on 20 December 2018, Seventy-Third Session Agenda Item 82, 11 January 2019, https://documents.un.org/doc/undoc/gen/n18/457/41/pdf/n1845741.pdf?token=tACqqoxnUXl4adB9Pw&fe=true.

[147] Permanent Court of International Justice, 'Statute of the International Court of Justice' (1946), https://www.icj-cij.org/statute.

[148] Customary international law arises when a significant number of states consistently engage in a pattern of behaviour and the conviction has developed among states that this behaviour is required by international law (I.e**.** *opinio juris*).

The debates are on the number of states required to demonstrate a norm, whether the states must be representative of the community of states, and how long consistent practice must occur before CIL is formed. The perspective of some scholars is that former colonies were not able to object during the formation of existing CIL rules because they were not considered "sovereign states."[149] The question that arises is whether states that gain independence after a CIL rule is established consent to the norm, and thus bound by that rule.[150] The argument is that CIL was used to control the colonies who since their independence are still under that power.[151] In the dissertation, I do not partake in this argument. For the sake of maintaining focus on the scope of the dissertation, I do not consider the socio-legal discussion on the relationship of law and power in determining CIL.[152] My arguments depart from a doctrinal based assumption that states which gain independence after a CIL rule is established are still bound by that rule, if the former government was not a persistent objector.

'The EU'

The EU is a partnership between European countries, known as EU Member States, or EU countries.[153] In this dissertation, I refer to 'the EU' with the understanding that it would not exist without its Member States.[154] I do indeed consider the inclination of some scholars to refer to 'the EU and it's member states '. However, without the intention to negate such disposition but

[149] Kathleen Barrett, 'Customary International Law', in *Oxford Research Encyclopedia of International Studies*, 17 December 2020, https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-531. International law deals with sovereign states. The basic principle is that no sovereign state can be bound by any rule to which it has not given consent; Also see: 'Montevideo Convention on the Rights and Duties of States' (1933).
[150] See: Kathleen Barrett, 'Customary International Law'. To avoid being bound by a rule of CIL, a state must persistently object to the rule during and after its formation.
[151] Generally, sources of international law have been influenced by a range of political and legal theories.
[152] See the scope and limitations of this dissertation under subchapter, '1.4 Methodology.
[153] 'The European Union (EU) is a partnership between 27 European countries' EU & Me, 'What Is the European Union', EU & Me, n.d., https://op.europa.eu/webpub/com/eu-and-me/en/WHAT_IS_THE_EUROPEAN_UNION.html#:~:text=The%20European%20Union%20is%20a,countries%20are%20also%20EU%20citizens.
[154] 'The EU would not exist without its Member States and its people.' See: EU & Me.

for the sake of a neat text and ease of readability of the dissertation, I have considered any sense of tautologies as unnecessary. More so without official restrictions on the legal manner in which to refer to ‘the EU’.

Legally, the European Parliament takes decisions on EU laws together in agreement with the Council of the EU as one of the EU’s two law-making bodies. The Council is represented by the governments of the EU member states. Guiding the work of the EU, members sign up to EU treaties and take on board the full body of EU law.[155] In other words, without the EU member states, nothing can get done in the EU. As such, reference to ‘the EU’ in this dissertation is done so with assumed knowledge of the fundamental premise that its member states form part of the work of the EU. Hence, I find no need in this dissertation to extend with the reference to ‘and it’s member states ‘.

‘China'

China is officially known as the People's Republic of China.[156] Due to the "one-China” principle, I acknowledge that the meaning may also be interpreted to possibly include Hong Kong, Macau, Tibet and Taiwan in addition to ‘mainland China’.[157] However, in this dissertation, I mean China as only ‘mainland China’. This choice is with no intention to engage in the debates on the one-China principle. Nor is this choice of the dissertation to reference China as mainland China with the intention to add preconditions and provisos to this principle. Rather, the intention is simply to limit the scope of the dissertation.

[155] They are amended from time to time, for example when new countries join or when there are changes to how the EU works. The most recent treaty is the Lisbon Treaty,

[156] Also known as P.R.C. Simplified Chinese: 中华人民共和国.

[157] Ministry of Foreign Affairs of the People’s Republic of China, ‘Statement by the Ministry of Foreign Affairs of the People’s Republic of China’ (Ministry of Foreign Affairs of the People’s Republic of China, 2 August 2022), https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/202208/t20220802_10732293.html. The EU commits to maintaining strong links with Hong Kong and Macao and supports the continued implementation of the “One Country, Two Systems” principle.

The one-China principle is viewed to be confirmed by the UN GA Resolution 2758 recognition that the representatives of the People's Republic of China are "the only legitimate representatives of China to the UN". The "central government" is deemed to be the sole legal government representing the whole of China.[158] Accordingly, reference to China in this dissertation is to the "central Government" of the People's Republic of China and any other governmental entity, including any provincial, prefectural, or local entity and any enterprise that is controlled by the "central Government". The dissertation has limited the scope to the "central government" in mainland China to preclude the requirement of additional research that considers the possible positions of other legal governments outside of the mainland. As mentioned, the limitation to 'mainland China ', is not with the intention to negate nor support the principle but simply to cap the scope of the dissertation. The choice to cap on mainland China is related to the term "Government of the People's Republic of China" meaning the central Government of the People's Republic of China on mainland China.[159]

'FTAs'

Some new generation FTAs include investment chapters that incorporate Foreign Investment Protection Agreement (FIPAs), also referred to interchangeably as Investment Protection Agreement (IPAs), or reference FIPA-like provisions. These new generation FTAs include investment chapters that cover many of the protections found in standalone FIPAs. The first widely known FIPA was a single chapter, Chapter 11, of the North American FTA (NAFTA).[160] The FIPA in the FTA between Canada and the EU CETA, also through an

[158] Mission of the People's Republic of China to the EU, 'Questions and Answers Concerning the Taiwan Question (2):What Is the One-China Principle? What Is the Basis of the One-China Principle?', Mission of the People's Republic of China to the EU, 15 August 2022, http://eu.china-mission.gov.cn/eng/more/20220812Taiwan/202208/t20220815_10743591.htm.

[159] And any other governmental entity, including any provincial, prefectural, or local entity and any enterprise that is controlled by the central Government or any such governmental entity or as to which the central Government or any such governmental entity is entitled to receive a majority of the profits. In researching the EU-China CAI, limiting the scope of the dissertation to mainland China is more reasons and less likely to be disputed. Researching the EU-China CAI with a scope on Hong Kong, Macau, Tibet and Taiwan is irrational. Ideally one could research China to include all possibilities. However, as also discussed in Chapter One, a PhD dissertation also has a timeframe which limits what is practically possible within its timeframe.

[160] 'North American Free Trade Agreement' (1992), https://www.cbp.gov/trade/north-american-free-trade-agreement#:~:text=North%20American%20Free%20Trade%20Agreement%20(NAFTA)%20established%20a%20free%2D,produced%20by%20the%20signatory%20nations; Also see: The Council of Canadians, 'Canada-China Free Trade Agreements', n.d., https://canadians.org/tag/canada-china-free-trade-agreements/.

incorporated chapter, sought to modernise the investment dispute resolution process with the introduction of an ICS.[161] As the FIPAs in these agreements are not standalone agreements but chapters incorporated into the FTAs, I will academically make reference to the IPAs as the relevant chapters and the respective FTAs in which they are provided for therein.

'FIPAs' and 'IPAs'

Although, other new generation FTAs, such as the EU-Vietnam FTA (EUVFTA) and the EU-Singapore FTA (EUSFTA) may have been influenced by CETA, they are coupled with respective standalone FIPAs rather than incorporating chapters in the FTAs. As they are not incorporated in the FTAs as chapters but standalones, I will make reference to the relevant chapters and the respective FIPAs in which the investment chapters are provided for therein. As the difference that lies in the terminology and specific usage of FIPA and IPA by different countries are used interchangeably, I refer to the terms in the names of these agreements in this dissertation as used by the respective countries.

1.4.5 New definitions, distinctions, or classifications

This chapter of the dissertation began with a background on the research and noted the re-integration of investment and trade, in both interpretation as well as in negotiation, as expected in the EU-China CAI. The dissertation notes significant changes to traditional models of investment and trade agreements. While Chapter Five of the dissertation places specific focus on proposals for the contents of the EU-China CAI, this section focuses on the proposition for the usage of terms in the titles of such agreements.[162]

[161] EU-Canada Comprehensive Economic and Trade Agreement, chap. 8.
[162] Although it may seem overly ambitious to propose new instruments in international law or even less gutsy, proposing new titles for existing agreements, this is seemingly of interest to scholars in the present day. I may not

1.4.5.1 ‘Comprehensive Agreement on Investment and Trade (CAIT)’

Debra Steger argues that the re-integration of the investment and trade demonstrates that we need to develop a new term for international economic law, more generally.[163] In the dissertation I agree with Steger in relation to the titles of the new generation of international trade and investment agreements. Although, the titles assigned to international agreements normally have no overriding legal effects, they are descriptors that allow us to make quick judgements and assumptions of their categories and contents.[164] However, trade and investment agreements have

be the only scholar that recognises the need for such novelties. For example, Gary Born proposes the development of a "Bilateral Arbitration Treaty (BAT)" that argues that international commercial arbitration can learn from investment arbitration by granting the international arbitration mechanism on a default basis. A Model Text of the BAT that incorporates the best practices and experiences gained from the ISDS regime is released. The contents of this proposal are not relevant to this dissertation. What is of relevance is the idea of developing new instruments or new titles for international agreements. See: WilmerHale, ‘Model Bilateral Arbitration Treaty Released for Public Comment’, WilmerHale, 13 March 2015, https://www.wilmerhale.com/insights/news/2015-03-13-model-bilateral-arbitration-treaty-released-for-public-comment; Also see: Gary Born, ‘BITS, BATS and Buts: Reflections on International Dispute Resolution’, *Young Arbitration Review*, April 2011, 6–14; And see: Gary Born and Petra Butler, ‘Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution’, *Efila* (blog), n.d., at https://efilablog.org/wp-content/uploads/2019/02/461da-uncitraborn26butlerbat.pdf. In this chapter I discuss the proposed title of the EU-China CAIT. In Chapter Five, I will propose the contents of this agreement, within scope of the dissertation. That is, with a focus on investor-state dispute resolution.

[163] Debra Steger made remarks as part of a panel (International Trade Law and International Investment Law: Complexity and Coherence) to ‘consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.’ See: *The Effectiveness of International Law,* 108th Annual Meeting, 2014, https://www.youtube.com/watch?v=g7J7RnQJxM0&list=PL0KFz82Oj8Rbiyr5o8RzJ3pDw9YK9jW8d&index=1&t=3904s; The introductory remarks by its moderator, Andrew Mitchell, are available written form at: Andrew Mitchell, ‘Introductory Remarks by Andrew Mitchell’, in *Proceedings of The American Society of International Law (ASIL) Annual Meeting*, vol. 108, 2014, 251–51, https://doi.org/doi:10.5305/procannmeetasil.108.0251.

[164] It is the content of an instrument not its name, which makes it an “agreement” or “treaty”. But with the purpose is to facilitate a general understanding of their scope and function, an overview of the key terms employed in the United Nations Treaty Collection to refer to international instruments, notes that although the titles of international instruments ‘may follow habitual uses or may relate to the particular character or importance sought to be attributed to the instrument by its parties’ (that normally have no legal effects), they may legally ‘suggest the objective of the legal instrument, or of the accepted limitations of action of the parties to the arrangement’. Indeed, the actual intent of the parties can often be derived from the clauses of the instrument itself or from its preamble, but the name of the instrument ‘might give a general indication of such intent’. See: United Nations Treaty Collection, ‘Definition of Key Terms Used in the UN Treaty Collection’, United Nations Treaty Collection, n.d., https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

brought significant changes to the traditional models that are not quite reflected in their titles, as their distinctive names.[165]

Reflecting the impact of these changes, there are scholars who have chosen to collectively refer to BITs and FTAs with investment chapters as 'investment treaties'.[166] There has been an endeavour across scholarship to slot these agreements with overlapping features as either investment or trade agreements. The 'new generation' of comprehensive agreements such as the EU-China CAI continue to sound the alarm on the matter concerning the titles of 'new generation' international trade and investment agreements. The EU-China CAI, a *sui generis* agreement which containing elements of both trade and investment, has the term 'investment' in its title and yet thought to also be a trade agreement.[167] This is still so ,even after public clarification by the Director General of the Trade of the European Commission and publication of the agreement text as an 'investment agreement'.[168] It is not clear whether this continued reference to the EU-China CAI as a 'trade deal' is an honest mistake by some legal scholars or a tacit suggestion on the interpretation of the agreement's objective to reaffirm 'commitments under the WTO Agreement and their commitment to create a better climate to facilitate and develop trade and investment between the Parties".[169]

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[165] The Comprehensive approach on trade and investment agreements has brought significant changes to the traditional models, including the investor-state dispute resolution processes.

[166] For example, Michael Ewing-Chow writes that '…potentially different regimes are created governing the protection afforded to foreign investors in a state which is a Member of the WTO but which has also entered into an investment treaty, whether in the form of a BIT or a FTA. [Emphasis added]' See: Michael Ewing-Chow, 'Thesis, Antithesis and Synthesis: Investor Protection in BITs, the WTO and FTAs', *University of New South Wales Law Journal 33* 30, no. 2 (2007): 548.

[167] Guillaume Van der Loo, 'Lost in Translation? The Comprehensive Agreement on Investment and EU–China Trade Relations', *Royal Institute for International Relations*, 3 June 2021, https://www.egmontinstitute.be/lost-in-translation-the-comprehensive-agreement-on-investment-and-eu-china-trade-relations/.

[168] See: Sabine Weyand, Director General, DG Trade, European Commission, Understanding the new EU-China investment agreement; Also, China called for talks of a Free Trade Agreement with the EU, in parallel with ongoing negotiations on the EU-China CAI. From this, it should clarify to the public that the EU-China CAI is classified by its officials as an "investment agreement" rather than a "trade agreement". See: Jorge Valero, 'China Calls for Opening Free Trade Talks with the EU', EURACTIV, 17 December 2019, https://www.euractiv.com/section/economy-jobs/news/china-calls-for-opening-free-trade-talks-with-the-eu/.

[169] Guillaume Van der Loo, 'Lost in Translation? The Comprehensive Agreement on Investment and EU–China Trade Relations'; As a 'trade lawyer', Van der Loo has conducted research on EU's new generation of Deep and Comprehensive Free Trade Agreements to which he probably identifies similarity with the EU-China CAI. Also see: EU-China Comprehensive Agreement on Investment, art. 1(1), Objectives, Section I: Objectives and General Definitions.

In cognisance of the disciplinary overlap, the dissertation proposes to refer to such agreements as Trade and investment agreements (TIAs) which some scholars have already defined as 'those agreements relevant to trade and international investment'.[170] I propose, specifically to the 'new generation' of agreements as Comprehensive Agreements on Investment and Trade (CAITs).[171] In the following paragraphs, I explain this proposition in the separate terms; 'Comprehensive', 'Agreement', and the proposed title identifying the terms of both disciplines 'Investment and Trade'.

i) "Comprehensive"[172]

Although, international trade and investment instruments now refer to the term "comprehensive" in their titles, there seems to be no particular legal definition of the term in the agreements. Seemingly, a general, not necessarily legal understanding of the word 'Comprehensive' is followed, in that it is 'including or dealing with all or nearly all elements or

[170] This abbreviation should not be confused with the Trilateral Investment Agreement (TIA). See eg.: 'Investment Promotion and Protection Agreement between Japan, Republic of Korea and China' (2012), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3302/china---japan---korea-republic-of-trilateral-investment-agreement-2012-; Also see: Louise Delany, Louise Signal, and George Thomson, 'International Trade and Investment Law: A New Framework for Public Health and the Common Good', *BMC Public Health Volume 18* 602 (2018), https://doi.org/10.1186/s12889-018-5486-6; Although, as also indicated in the article by Delany et al. the definition is not limited to trade and investment but extending to international intellectual property as well. The important point for this dissertation is the scholars' argument that "The character of TIAs has become more comprehensive…". These agreements are also referred to by some scholars as 'Free Trade Agreement TIAs'. See: August Reinisch, Mary E. Footer, and Christina Binder (eds), *Select Proceedings of the European Society of International Law: 2014: Volume 5* (Hart Publishing, 2016); Also, Armand de Mestral and Alireza Falsafi refer to NAFTA as a TIA. The scholars note that TIA models are particularly suited to promoting policy objectives beyond pure trade or pure investment. See: Armand de Mestral and Alireza Falsafi, '8. Increasing Use of Alternative Dispute Resolution in IIAs', in *Improving International Investment Agreements* (Routledge, 2013).

[171] Also see: Thembi Pearl Madalane, 'Reconceptualising International Economic Law: Towards Comprehensive Agreements on Investment and Trade (CAITs)', in *International Doctoral and Postdoctoral Conference in the Law and Law Related Fields - Splitlaw 2024, Book of Proceedings* (International Doctoral and Postdoctoral Conference in the Law and Law Related Fields - Splitlaw 2024, Split: Faculty of Law, University of Split, 2024).

[172] Chapter Two discusses comprehensive agreements in the context of dispute resolution, within the scope of the dissertation. In this section of Chapter One, I briefly discuss comprehensive agreements for the purpose of explaining the choice of the term 'Comprehensive' in support of the proposition of the title Comprehensive Agreements on Investment and Trade (CAITs).

aspects of something',[173] or 'covering completely or broadly'.[174] In cognisance that there are broader areas restricting trade and investment beyond the traditional, we have seen new generation trade agreements such as EU FTAs seek to substantially liberalises all trade by addressing trade and investment in a "comprehensive" manner.[175] Considered a new generation investment agreement, the EU-China CAI, also takes a "comprehensive" approach on investment as well as trade by addressing market access.[176] But, before I conclude the proposition on the term "comprehensive", in the next paragraph it is important to discuss the flinch of the dissertation from the term "deep" that some writers have seemingly used synonymously with "comprehensive".[177]

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[173] 'Comprehensive', in *Oxford Languages* (Languages.oup.com, 1 April 2022), https://www.oxfordlearnersdictionaries.com/definition/english/comprehensive_1; 'Google's English dictionary is provided by Oxford Languages, widely regarded as the world's most authoritative sources on current English'. See: Oxford Languages, 'Oxford Languages and Google', n.d., https://languages.oup.com/google-dictionary-en/.

[174] 'Comprehensive', in *Merriam-Webster* (Merriam-Webster.com, 1 April 2022), https://www.merriam-webster.com/dictionary/comprehensive#:~:text=%3A%20covering%20completely%20or%20broadly%20%3A%20inclusive,or%20exhibiting%20wide%20mental%20grasp; Merriam-Webster is the oldest dictionary publisher in the United States. It is 'America's most trusted online dictionary for English word definitions, meanings, and pronunciation.' See: Merriam-Webster, 'Merriam-Webster's Ongoing Commitment', in *Merriam-Webster About Us*, n.d., https://www.merriam-webster.com/about-us/ongoing-commitment.

[175] The new generation of EU FTAs provide for 'comprehensive' chapters on investment.

[176] The EU-China is spoken of as a new generation BIT. In the subsequent section, I discuss the choice in the dissertation to refer to the instrument as an "agreement" than a "treaty".

[177] For instance, Annette Bongardt and Francisco Torres write that 'in most cases the EU negotiates comprehensive (i.e. deep) free trade agreements with third countries'. See: Annette Bongardt and Francisco Torres, 'Comprehensive Trade Agreements: Conditioning Globalisation or Eroding the European Model?', *Intereconomics* 52, no. 3 (June 2017): 165–70; The abbreviation i.e. is short for the Latin phrase id est, meaning 'that is' or "that is to say" or "in other words." It is 'used to explain exactly what the previous thing that you have mentioned means' in order to clarify its meaning. See: 'I.e.', in *Oxford Learner's Dictionaries*, 1 April 2022, https://www.oxfordlearnersdictionaries.com/definition/english/i-e; Also see: 'I.e.', in *Merriam-Webster* (Merriam-Webster.com, 1 April 2022), https://www.merriam-webster.com/dictionary/i.e.; So, it may be interpreted that the scholars mean that 'the EU negotiates comprehensive free trade agreements with third countries. In other words, that the EU negotiates deep free trade agreements with third countries.' But the EU has made a separation of its FTAs including a group of those titled "deep". See Overview of the trade Agreements covered by European Commission in: European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2017 - 31 December 2017'; Some scholars have also noted that the EU's FTAs vary substantially, classified into four groups: " 'First Generation' Free Trade Agreements negotiated before 2006; 'New Generation' "Second generation" Free Trade Agreements, i.e. comprehensive FTA's negotiated after 2006; Economic Partnership Agreements (EPAs) with Africa, Caribbean and Pacific countries; Deep and Comprehensive Free Trade Areas (DCFTAs) deepening political association and preparing for economic integration. See: Patricia Wruuck, 'What Future for EU Trade Policy and Free Trade Agreements?' (European Investment Bank, 2019), http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter4_Wruuck_Future_EU_Trade_Agreements.pdf. The writers of the paper that I refer to are not legal scholars but scholars in the field of economics, so the weight of my point may seem like there's nothing to it. However, in the same paper, the scholars have also written that 'the European Commission has embarked on a new generation of international agreements that also aim at abolishing non-tariff

As mentioned in Background of this Chapter, some of the new generation of EU FTAs are known as 'Deep and Comprehensive Free Trade Areas (DCFTAs)".[178] The DCFTAs are reported to be prompted by the failure of the WTO member countries to reach a 'comprehensive' agreement on trade liberalisation that would include the 'behind the border' issues such as regulatory issues, rules on foreign investment and investment protection, government procurement.[179] In response to whether deep and comprehensive trade agreements would violate WTO obligations, Lydgate and Winters also make the distinction between "deep" and "comprehensive".[180] As also Van der Loo, in a study comparing DCFTAs, writes of the "comprehensive" dimension in reference to broad coverage and "deep" dimension mainly related to the approximation clauses of the DCFTAs.[181] While it may seem that the terms "Comprehensive" and "Deep" are synonymous or that the joint reference to "Deep and

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barriers to trade.' This indicates the understanding that the new generation agreements may not necessarily provide for the 'behind the border' rules (ie. deep) but rather also aim for such rules. From this, the understanding is that the agreements may be 'comprehensive' addressing 'behind the border' issues with commitments but not necessarily with 'deep integration' through rules. I also discuss this further in the subsequential paragraphs.

[178] The EU proposed to use the DCFTAs as cornerstones of their future relationship with the Eastern Partnership, at the 2009 Prague summit. See: Wolfgang Koeth, 'The "Deep and Comprehensive Free Trade Agreements": An Appropriate Response by the EU to the Challenges in Its Neighbourhood?', *EIPASCOPE*, 2014, https://www.eipa.eu/wp-content/uploads/2022/01/EIPASCOPE_2014_WKO.pdf. The DCFTAs are more "deep" than new generations FTAs. In this paragraph, I also explain the term "Deep".

[179] Wolfgang Koeth; Prior to the Uruguay Round negotiations spanning from 1986 to 1993, the linkage between trade and investment received little attention in the framework of the General Agreement on Tariffs and Trade (GATTs). The original GATT had reached 'behind the border', although the extent of the prohibitions was not clear. The GATT prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions, obligations which the Agreement on Trade-Related Investment Measures (TRIMs) negotiated during the Uruguay Round intended to clarify. In this sense, there was a call for a widening of GATT and the deepening in the context of behind-the-border disputes by going beyond traditional trade liberalisation in talking of the rules and disciplines of the trading system. See: Martin Daunton, Amrita Narlikar, and Robert M. Stern (eds), *The Oxford Handbook on The World Trade Organization* (Oxford University Press, 2012); For its effectiveness as 'the foundation of the trading system ', it is believed that the WTO needs to negotiate new rules and adopt reforms. However, WTO members have not reached consensus for a new comprehensive agreement on trade liberalisation and rules, which supports the impetus of member states concluding comprehensive' agreements to include the 'behind the border' issues that the WTO has failed to address. See: Cathleen D. Cimino-Isaacs and Rachel F. Fefer, 'World Trade Organization: Overview and Future Direction' (Congressional Research Service, 18 October 2021), https://crsreports.congress.gov/product/pdf/R/R45417/12.

[180] The scholars argue that deep but not comprehensive trade agreements would not necessarily violate WTO obligations. See: Emily Lydgate and L Alan Winters, 'Deep and Not Comprehensive? What the WTO Rules Permit for a UK–EU FTA', *World Trade Review* 18, no. 3 (2019): 451–79, https://doi.org/doi:10.1017/S1474745618000186; Also, The EU and NAFTA are described as "deep" and both compatible with the rules of the WTO. See: Nicole Anne Stubbs, 'Chapter 4 Regional Economic Integration: A Comparison of NAFTA and the EU' (University of Washington, n.d.), https://depts.washington.edu/canada/nafta/98chapters/4stubbsnafta98.htm.

[181] Guillaume Van der Loo, 'The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study', Policy Brief (CEPS, 24 June 2017), https://www.ceps.eu/ceps-publications/the-eus-association-agreements-and-dcftas-with-ukraine-moldova-and-georgia-a-comparative-study/.

Comprehensive" sounds tautological in that "comprehensive" agreements are a call for "deep" integration,[182] Mattoo et al. write that Deep Trade agreements (DTAs) aim at establishing "economic integration" rights as well as include enforcement provisions that limit the discretion of importing governments in these areas, as well as provisions that regulate the behaviour of exporters.[183] And thus, not just liberalisation but the meaningful liberalisation of trade.[184] "Deep" agreements 'provide far-reaching and progressive regulatory approximation' to the laws of the parties, going beyond the 'new generation' FTAs, that are merely "comprehensive".[185] Compromising at a "deeper level" requires countries to fulfill their negotiated commitments, by making the necessary legal, regulatory, and administrative changes.[186] DTAs support the rights of the parties to the agreements by setting the rules through regulation, as economic integration has become 'deeper', tackling measures 'behind the border'.[187] These agreements are deepening, in the sense that they cover rules on an expanding set of policy areas, such as investment, that goes well beyond the traditional focus of preferential trade agreements such as tariffs.[188] While these agreements are still referred to as trade agreements, their goal is

[182] Nicole Anne Stubbs, 'Chapter 4 Regional Economic Integration: A Comparison of NAFTA and the EU'. For example, Stubbs writes that 'Through widening there was a further call for deepening of the EU.' .
[183] Mattoo et al. write that DTAs aim at establishing five "economic integration" rights: free (or freer) movement of goods, services, capital, people, and ideas. See: Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.), 'Handbook of Deep Trade Agreements' (The World Bank, 2020), https://openknowledge.worldbank.org/bitstream/handle/10986/34055/9781464815393.pdf.
[184] In its position paper on the Trade Sustainability Impact Assessment in support of negotiations of DCFTAs, the EC describes DCFTAs as intended to provide for substantial liberalisation of trade and investment conditions'. See: European Commission, 'Commission Services Position Paper on the Trade Sustainability Impact Assessment in Support of Negotiations of a Deep and Comprehensive Free Trade Area between the European Union and Respectively Georgia and the Republic of Moldova', n.d., https://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152461.pdf.
[185] To achieve the objective of deepening political association and economic integration between the EU and its associated partners, 'the DCFTAs provide far-reaching and progressive regulatory approximation to EU law in trade-related areas and foresee gradual reciprocal market opening. With these distinctive components they go beyond the "new generation" FTAs and represent "a unique type of trade agreements".' See: 'About the Deep and Comprehensive Free Trade Areas (DCFTAs) between the European Union, Georgia and Moldova', Deep and Comprehensive Free Trade Areas (DCFTAs) EU, Georgia and Moldova, n.d., https://www.dcfta-evaluation.eu/; Also, towards 'predictable and enforceable trade rules'. See: European Commission, 'Deep and Comprehensive Free Trade Areas (DCFTA) of the EU-Ukraine Association Agreement', European Commission, n.d., https://ec.europa.eu/chafea/agri/en/content/deep-and-comprehensive-free-trade-areas-dcfta-eu-ukraine-association-agreement.
[186] J.F. Hornbeck, 'Free Trade Agreements: U.S. Promotion and Oversight of Latin American Implementation', Policy Brief (Inter-American Development Bank, December 2009), https://publications.iadb.org/publications/english/document/Free-Trade-Agreements-US-Promotion-and-Oversight-of-Latin-American-Implementation.pdf.
[187] See: Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.), 'Handbook of Deep Trade Agreements'.
[188] Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.). Mattoo et al. write that Deep Trade Agreements are about 'moving from the administration of protection – quotas, tariffs, and subsidies – to the administration of precaution – security, safety, health, and environmental sustainability'.

integration beyond trade or deep integration.[189] Whereas trade agreements that are not 'deep' are defined as 'shallow', focussed on tariffs and other at-the-border measures that directly affect market access, as opposed to behind-the-border.[190]

The corollary is thus that "deep" investment agreements should go beyond their traditional focus to cover rules at-the-border measures that directly affect market access.[191] But as "deep" agreements are about codifying regulatory alignment through binding commitments and a dispute settlement mechanism, the dissertation accepts that not all trade and investment agreements are necessarily "deep".[192] As enlightened in the Background of the dissertation, the EU-China CAI does not include rules on investment protection nor rules on trade in goods. The proposition is thus that agreements such as the EU-China CAI may be titled "Comprehensive" in providing for trade liberalisation principles such as market access but not necessarily "deep" in providing for those rules.[193] Rather, I propose the concept of "deep" as perhaps a more a relative than an absolute term, in relation to a certain level of economic integration.[194]

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[189] See: Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.); Also see: The World Bank, 'About Deep Trade Agreements-What Are Deep Trade Agreements', Deep Trade Agreements: Data, Tools and Analysis, n.d., https://datatopics.worldbank.org/dta/about-the-project.html.

[190] Emily O'Brien and Richard Gowan, 'What Makes International Agreements Work: Defining Factors for Success' (New York University, Center on International Cooperation (CIC), September 2012), https://cic.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf.; Also, Roger Alford responds to 'Why would countries sign deep PTAs with investment chapters instead of simply relying on shallow PTAs, the WTO, or BITs?' See: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.

[191] As perhaps, would be expected of the EU-China CAI intended to rebalance the asymmetry between the EU and China in terms of investment as well as providing that the agreement would liberalise market access. See: European Commission, 'Commission Publishes Market Access Offers of the EU-China Investment Agreement', 12 March 2021, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2253.

[192] For instance, Great Britain was considered to be opposed to deepening by accepting market integration but with behind the border issues remaining autonomous. See: Nicole Anne Stubbs, 'Chapter 4 Regional Economic Integration: A Comparison of NAFTA and the EU'; Although, in 2018 was reported to be headed towards the model of a Deep and Comprehensive Free Trade Agreement (DCFTA) embedded within a broader Association Agreement (AA). See: Michael Emerson, 'Theresa May's Deep and Comprehensive Free Trade Agreement', Policy Brief (CEPS, 6 March 2018), https://www.ceps.eu/ceps-publications/theresa-mays-deep-and-comprehensive-free-trade-agreement/.

[193] Also see: Nicole Anne Stubbs, 'Chapter 4 Regional Economic Integration: A Comparison of NAFTA and the EU'.

[194] For instance, the EU has DCFTAs towards political and economic integration, but that with the UK also 'goes beyond traditional free trade agreements' but titled 'The EU-UK Trade and Cooperation Agreement' and explained as an agreement that 'While it will by no means match the level of economic integration that existed while the UK was an EU Member State, the Trade and Cooperation Agreement …provides a solid basis for preserving our longstanding friendship and cooperation'. See: Nicole Anne Stubbs; Also see: 'The EU-UK Trade

To conclude the proposition of 'Comprehensive', I support the 'new generation' of agreements continued usage of the term to also maintain the indication of newness in the titles, to contrast with the older agreements.[195] Indeed, overlapping the trade and investment disciplines, some old agreements may also be argued to be 'Comprehensive' as they also address rights within both trade and investment. Rather, the proposition of this dissertation to use the term 'comprehensive' in the new generation, should not be understood as an interpretation that the earlier agreements are relatively not comprehensive but to serve as a label of distinction between the old and the new.[196]

ii) "*Agreement"*

Today, the majority of international instruments are designated as "agreements" either with a generic meaning for those instruments which do not meet its definition of "treaty" or for a specific meaning as a particular term referring to a "narrower range of subject-matter than "treaties".[197] On this "agreement" trend, the dissertation accepts usage of the term as the usage

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and Cooperation Agreement' (2020), https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en#:~:text=The%20EU%2DUK%20Trade%20and%20Cooperation%20Agreement%20concluded%20between%20the,security%20coordination%2C%20law%20enforcement%20and. In support of the proposition, relevant to this dissertation, the EU and China have different approaches to economic integration (China's One Belt, One Road initiative is currently the most important program for deep economic integration). Thus, befitting that the EU-China CAI is not "Deep".

[195] In contrast with "TIAs", mentioned in the previous section as agreements relevant to trade and international investment. For example, the Rwanda - Switzerland TIA (1963); 'Accord de Commerce et de Protection Des Investissements Entre La Confédération Suisse et La République Rwandaise' (1963), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3669/rwanda---switzerland-tia-1963-.

[196] Hence the general proposition to refer to such agreements as International trade and investment agreements (TIAs). The proposed term already encompasses the disciplinary overlap. Although not to suggest that the earlier agreements are not comprehensive. But perhaps also, the new generation agreements are "more comprehensive" as they cover an expanding set of policy areas, such as competition policy, environmental law etc. See: Emily O'Brien and Richard Gowan, 'What Makes International Agreements Work: Defining Factors for Success'. The areas beyond the traditional areas of "trade and investment" fall outside the scope of the dissertation, so extension to the term 'Comprehensive' to new generation TIAs in this dissertation is for the purposes of distinction by name than by the extended features for the agreements beyond "trade and investment".

[197] But also, 'treaty terminology might be indicative of the relationship of the treaty with a previously or subsequently concluded agreement.' See: United Nations Treaty Collection, 'Definition of Key Terms Used in the UN Treaty Collection'; For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), that does not have the term "treaty" in its title but described as 'a short-form treaty that incorporates by reference all of the provisions of the Trans-Pacific Partnership (TPP) agreement'. See: 'How to

of "treaty" for international instruments has considerably declined in the favour of "agreements" that are usually less formal and deal with a narrower range of subject-matter.[198] The new generation is identified as overlapping disciplines typically with more elements of trade or investment and a narrower range of either. For instance, the EU-China CAI, to be discussed in Chapter Five of the dissertation, is titled as an instrument on 'investment' but lacks provisions resembling traditional international investment agreements as well as dealing with 'trade' but to a lesser extent than typical trade agreements.

iii) *"Investment and Trade"* [199]

Finally, the dissertation's proposition of the titles of the agreements, is to explicitly accept the provision for both trade investment to complete the puzzle and settle the discourse on whether Comprehensive Investment Agreements are really investment agreements or whether Comprehensive Trade Agreements are really trade agreements. This is even more troubling when an agreement is titled as an "Investment Agreement" yet classified by its officials as a "Trade Agreement".[200] We have, anyways, already witnessed that both regimes may apply to

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Read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)', Government of Canada, n.d., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/chapter_summaries-sommaires_chapitres.aspx?lang=eng.

[198] Although the United Nations (UN) General Assembly has never laid down precise definitions of the terms, the 1969 Vienna Convention on the Law of Treaties defines "treaties" as 'international agreements' with certain characteristics. Its Art.3 refers also to 'international agreements not in written form' and thus less formal. So, the term 'international agreement' in its generic sense covers a wide range of international instruments such as oral agreements that may be rare but can have the same binding force as treaties. So, the word 'treaty' in its generic sense had been generally reserved for engagements concluded in written form. Although acknowledging this, the choice in this dissertation to accept the term "agreement" in the titles of new generation instruments is based on the specific meaning that the instruments may deal with subject matter from one of the sub-disciplines; trade or investment, but at a narrower range of one or both disciplines. See: United Nations Treaty Collection, 'Definition of Key Terms Used in the UN Treaty Collection'.

[199] Alternatively, " Trade and Investment". In that order, the abbreviation would read "CATI". With no particular importance but a matter of preference, I propose an order with a multi-layered acronym (abbreviation pronounced as a word) that reads "CAIT" as the diphthong "ai" creates a monosyllabic word that sounds more phototactically plausible.

[200] Replacing earlier ASEAN investment agreements, the ASEAN Comprehensive Investment Agreement (ACIA) is titled as an "Investment Agreement". Also see: Iain Maxwell and Kay-Jannes Wegner, 'The New ASEAN Comprehensive Investment Agreement', *Asian International Arbitration Journal* 5, no. 2 (2009): 167–89, https://doi.org/10.54648/aiaj2009008; However, although the ASEAN website makes no classification, the official website of the investment promotion of ASEAN classifies the agreement under "ASEAN Free Trade Agreements" despite the option to also categorise it under "other instruments" that is available on its website.

the same activity or measure by states, as goods and services may be supplied by way of both trade and investment.[201] Hence, the proposition to identify this new generation of comprehensive agreements as a direction to both disciplines should not necessarily be seen as a substantive novelty but a proposal to explicitly call agreements for what they already are, without a possibly misleading limitation of the titles to a single discipline. This essence is captured by some of the EU's new generation of FTAs titled as 'Free Trade Agreement and Investment Protection Agreement.'[202] In cognisance that not all trade agreements necessarily pertain to matters of 'free trade', the proposed title with 'Investment and Trade' should therefore suffice.

1.5. The Structure of the Dissertation

The research aims and objectives determine the structure of this dissertation. The problem of embarking on the research aim and objectives, discussed above, is that each of them is almost inseparably intertwined with the others. For instance, it is difficult to speak of the EU-China CAI without mentioning the convergence of Trade and Investment. Notwithstanding the overlapping of subjects, this dissertation adopts a more traditional structure. I have attempted to

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See: 'ASEAN Free Trade Area (AFTA) Agreements', Invest in ASEAN, n.d., http://investasean.asean.org/index.php/page/view/asean-agreements.

[201] Andrew Mitchell, 'Introductory Remarks by Andrew Mitchell'. The American Society of International Law (ASIL) 108th Annual Meeting, International Trade Law and International Investment Law: Complexity and Coherence panel to 'consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.'Joost Pauwleyn remarks on overlapping proceedings. There have been decisions by the WTO on the trade issues and investor-state tribunals on investment protection claims based on the same facts. Most infamous, on 8 May 1998, the US requested consultations with Mexico in respect of an anti-dumping investigation of high-fructose corn syrup (HFCS), followed by parallel Chapter 19 proceedings and WTO dispute settlement. See: Mexico – Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (WT/DS132) (United States v. Mexico). But also, under the same facts, the US investors alleged a breach of Chapter 11 of the NAFTA and imposed ISDS rights under ICSID; ICSID. Roger Alford also discusses parallel proceedings light of the convergence of trade and investment. See: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.

[202] 'EU-Singapore Investment Protection Agreement' (2018), https://trade.ec.europa.eu/access-to-markets/en/content/eu-singapore-free-trade-agreement#:~:text=The%20agreement%20removes%20customs%20duties,electronics%2C%20food%20products%20and%20pharmaceuticals; and the 'EU-Vietnam Investment Protection Agreement' (2019), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en.

arrange each subject distinctly, whilst always keeping in mind the ways in which they overlap. It leads to repetition in some points of the dissertation, which is unavoidable.

Chapter One is the introductory part of this dissertation. It discussed the background of the research, it defined the aims and significance of the work, followed by the research questions and it described the research methodology and the structure of the dissertation. It is seen in this present Chapter One that there is a call for a New World Order in dispute resolution that responds to the needs of the present times. One element evident in the present times, is the re-convergence of trade and investment. There is a substantive overlap of trade and investment aspects that contributes to the discussion on the significance of ISDS in a New World Order.

Chapter Two addresses the significance of ISDS in a New World Order. The Chapter begins with an outline of early investment protection mechanisms and circumstances under which the ISDS mechanism catapulted. After highlighting reasons and circumstances that have led to its emergence in international agreements, I describe elements of the New World Order and draw upon the claim that international trade and investment law are converging towards each other. It is an argument that has been developed by scholars in the latter years. In this chapter, this is not the argument that I attempt to develop further. I briefly establish the basis of this convergence argument in the context of the ISDS. I observe the merits of the argument that there are similarities between the underlying principles of international trade and investment and a clear convergence between some of constitutive elements of international trade and investment agreements.[203] But more relevant to the study of this dissertation, I have observed discussions that their enforcement mechanisms are structurally different. It has remained to be seen whether this difference will hold out, even with the implementation of the EU reform proposal on 'modernising' the ISDS. On the point of international trade and investment sharing the same roots, some scholars suppose that trade and investment would not be treated independently should a hypothetical need or opportunity arise to develop an international system

[203] It is argued that the interconnections between international trade and investment are more than simple points of similarity and should rather be regarded as mutual influence patterns or convergence factors.

of international economic law all over again from the beginning.[204] I do not intend to prove prediction of this hypothetical case. But rather, I point to this convergence argument as giving weight to the trade element in investment, that weakens support on the adequacy of ISDS. The Chapter concludes with an identification of the critics of ISDS as from both non-Western states as well as the West (incl. The EU) but the EU 'supposedly' playing the major role in its reformation.

Chapter Three contributes with reflections on the future of ISDS, by evaluating whether UNCITRAL efforts, the EU proposal of a multilateral investment treaty and a proposed amendment to ICSID rules are desirable and plausible in a New World Order. The second section of the chapter assesses whether the new generation of EU FTAs are able to address the concerns expressed about the substantive legitimacy crisis of the ISDS mechanism.

Chapter Four assesses whether China proposes substantive changes to the ISDS, and that contribute towards a New World Order. The Chapter considers China's submission to the UNCITRAL Working Group III as well as initiatives at domestic level that contribute towards an indication of its position towards the ISDS mechanism. That is, the chapter considers China's expansion of its existing arbitral institutions and establishment of new courts to encompass investor-state disputes. The second section of the chapter assesses whether China's new comprehensive FTAs address the concerns expressed about the substantive legitimacy crisis of the ISDS mechanism.

Chapter Five first revisits the major negotiating goal of the EU-China CAI, as introduced in Chapter One on the Background of the dissertation, to conclude an investment protection agreement that will replace the BITs that China has with most EU Member States. Following

[204] Tomer Broude supposes that "Had the need (or opportunity) emerged today to draw an international system of international economic law from scratch, it is unlikely that trade and investment would have been treated so separately*". See:* Tomer Broude, *Investment and Trade: The 'Lottie and Lisa' of International Economic Law?*, pp. 12 and 19 in Hebrew University of Jerusalem Legal Studies, 2011.

reasons discussed in Chapter Two of the dissertation, Chapter Five thereafter approaches the study on the relevance of ISDS in New World Order with a comparative analysis of the EU and China's position on ISDS. The analysis begins with characteristics in the EU's and China's new FTAs that may be reflected in the EU-China CAI. Through a comparative analysis, the chapter draws from the proposed changes identified in Chapter Three and Chapter Four, as desirable and plausible in a New World Order, to make 'feasible' propositions for the EU-China CAI investor-state dispute settlement provision. As a further step on the relevance of ISDS in a New World Order, beyond the international system as that of the West, it is explored how the investor-state provisions of the EU-China could look if substantial changes are based on China's position on ISDS or whether to adopt the EU position on ISDS.

Chapter Six is the concluding chapter of the dissertation. It briefly summarises the findings of the dissertation, provides some final thoughts on ISDS in a New World Order, and offers concluding observations and suggests areas in need of further research.

CHAPTER TWO

THE SIGNIFICANCE OF ISDS

2.1 Introduction

In achieving the aims of the dissertation, this chapter addresses the significance of ISDS in consideration of the topic on an evolving world order. The aim of the chapter builds towards the dissertation's overarching research question; what the effect of EU and China's position on ISDS has on their interaction in a new generation of investment agreements. As the dissertation will finally make investor-state dispute resolution proposals for an international investment agreement that suggests changes in the international legal order,[205] this chapter seeks to first examine whether the changes have an impact on the weight of the ISDS mechanism.[206] It is upon the findings of this chapter that I will develop proposals concerning ISDS, for the investment chapter of the EU-China CAI, as new generation of investment agreement.

It is common knowledge amongst scholars of international investment law that the ISDS mechanism is a common provision of international investment agreements, that allows foreign investors to bring claims against sovereign governments through international arbitration.

[205] Chapter Five of the dissertation will make proposals for the contents of the EU-China CAI, within scope of the dissertation by placing focus on investor-state dispute resolution.
[206] This will influence the weight of ISDS in my proposal on the EU-China CAI in Chapter Five.

However, the significance of the mechanism is debated.[207] In the present day, the core of the controversy over ISDS is the expansive interpretations taken by arbitration tribunals, which have occasionally gone beyond property rights protections.[208] This has resulted in the legitimacy crisis of ISDS that is related to how the mechanism is administered (ie. a procedural legitimacy), as well as a crisis rooted in the very logic of investment treaty law (ie. substantive legitimacy). In response to the crisis, the discussions of states challenge the significance of ISDS through suggestions to redesign it as well as discussions suggesting a withdrawal of these special rights for foreign investors, through a termination of the ISDS mechanism.[209] The proposal to withdraw these special rights for foreign investors suggests the insignificance of ISDS whereas a re-design rather suggests a commitment to the reasons for ISDS, with perhaps incremental changes that reflect the changes in the international legal order.

Accordingly, this chapter addresses the question on the reasons that ISDS is provided for in international agreements, in the New World Order. That is, in consideration of changes in the international system, international law and its institutions.[210] Before making investor --state proposals for the investment chapter of the EU-China CAI, the chapter seeks to first consider whether there is a need for ISDS in the New World Order.

[207] These debates are discussed towards the end of the chapter when addressing the supporters and the critics of the ISDS mechanism (ie. Sub-chapter '2.5 Supporters of ISDS' and sub-chapter '2.6 Critics of ISDS').
[208] This is supposedly in particular to advanced legal systems. See: Lauge N. Skovgaard Poulsen and Geoffrey Gertz, 'Reforming the Investment Treaty Regime: A "Backward-Looking" Approach'', Briefing Paper Global Economy and Finance Programme, 17 March 2021, https://www.brookings.edu/articles/reforming-the-investment-treaty-regime/#footnote-11.
[209] See eg.: Gus Van Harten, 'Is It Time to Redesign or Terminate Investor-State Arbitration?', Special Report, New Thinking on Innovation (Centre for International Governance Innovation, 2017), https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/. Van Harten suggests that a redesign of ISDS must be 'independent, fair, balanced and respectful of domestic institutions' of which if not met, it is preferable to terminate ISDS and withdraw these special rights for foreign investors.
[210] Also Chapter One definition of a New World Order and further discussion in the Chapter Two, under the subsections '2.3.1. 'ISDS in a New World Order '.

2.1.1 Structure of the chapter

I do not intend to begin every chapter of this dissertation with a discussion on how it is structured. This chapter is layered with concepts that form the foundation of the research of the dissertation. It is not necessary to begin with an explanation an explanation of the structure in every chapter. However, chapter lays the foundation for the dissertation. In order to follow the thought process, is beneficial that I begin with an explanation of how this chapter is structured. In Chapter One, I declared that there are overlapping subjects that lead to a repetition in some points of the dissertation. It is crucial that I outline the topics that will be covered and how they will be organised, it help with navigating through the content more effectively.

The structure of Chapter Two is defined by the order of the discussion on its objectives. These draw from the main aim of the dissertation, that is based on the overarching research question as already explained. In Chapter One, I defined the measurable steps in achieving the main aim of the dissertation. In this section on the Introduction of this Chapter Two, I redefine the objectives as measurable steps that will be taken to achieve the aims of this chapter, in particular.

As alluded in the introduction of the dissertation in Chapter One, the discussion on the significance ISDS in the present day is constructed on the validity of the reasons upon which the mechanism was developed. For instance, it is written by some scholars that, firstly it is contrary to the intention of the European founders of modern investment , who placed limited importance on arbitration.[211] Today, the provision of ISDS in treaties supports the substantial

[211] Hepburn et al. write that arbitration was of limited importance to early British and German investment treaty drafters. Furthermore, 'Germany and the UK are bellwether States for generalizing about what investment law stood for before arbitration since the first BITs that set the standard for modern investment law were the European ones' Jarrod Hepburn et al., 'Investment Law before Arbitration', *Journal of International Economic Law* 23, no. 4 (n.d.): 929–47, https://doi.org/10.1093/jiel/jgaa037; And 'While they are similar in important ways, the UK had the important interest of protecting investments in former colonies after decolonisation, whereas Germany did not…But even the United Kingdom, which included investor-State arbitration in its first BIT model

importance of arbitration between states and private parties, contrary to the supposed intention of the European founders of modern investment law.[212] Hence, this chapter begins with the objective of outlining the function of international investment law and international investment dispute settlement rules. I discuss the functions of investment law as disciplines, followed by a discussion on the dispute settlement mechanisms to serve its function. The intention is to ultimately discuss the function of ISDS, which gives basis for its significance.

As the function of the ISDS system is premised on dispute resolution efforts that precede it, it is sensible to briefly illuminate the beginnings of the concept of international arbitration to trace the 'intention' of its originators. Accordingly, the chapter briefly discusses early investment protection mechanisms. Particularly in the context of the research interest of this dissertation, the relationship of ISDS and the world order in which it operates. Getting a sense of history helps to make sense of where we are and how we got here.

The dissertation accepts the current change of the world order as reflective of a New World Order. This is defined in Chapter One as 'a change in the way the international system and international law and institutions operate'. Within the scope of the dissertation, this is to accept the New World Order, as written, to include changes that reflect a new era of international investment dispute resolution. These changes are followed by an inquiry into the significance of ISDS in a New World Order.

The objective of the chapter is to describe the elements of the New World Order and point to the trade and investment convergence argument in the context of the ISDS, as one such change

in 1971, did not regard the mechanism as crucial, since the treaties were mainly expected to be invoked in informal deliberations with partner states by UK officials, particularly embassy staff.' So, private foreign investors unable to resolve property rights disputes with host states depended on diplomatic protection. Also see: Geoffrey Gertz, Srividya Jandhyala, and Lauge N. Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?', *World Development* 107 (2018), https://doi.org/10.1016/j.worlddev.2018.02.023. . The authors find no evidence for the de-politicization hypothesis.

[212] Geoffrey Gertz, Srividya Jandhyala, and Lauge N. Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?'

towards a New World Order. Today, the ISDS mechanism that usually intended to protect investors in international investment agreements (ie. BITs), is also included in international trade agreements (ie. FTAs). Sharing the same roots, the synthesis of trade and investment acknowledges the changes in the present day that also reflects an overlap in the enforcement mechanisms of the two sub-disciplines into a single legal order under international economic law.[213] I consider whether ISDS would be significant in a single legal order under international economic law and extend with an inquiry on whether ISDS is still significant in the present day, should the sub-disciplines be converging to reflect the roots of trade and investment.

The chapter ends with the respective views of states. The objective is to identify the critics and the supporters of ISDS. I observe the general arguments of states in attempt to identify whether the ISDS mechanism is viewed as significant[214]

2.2 Early investment protection mechanisms

A discussion of early investment protection mechanisms gives context to the origin of the ISDS. Before discussing the mechanisms in particular to 'investment', it is important that this chapter begins the discussion of the early mechanisms of both trade and investment. As will be discussed in the upcoming sub-section on 'Early Mechanisms', there was no separation of trade and investment as individual fields, prior to the 19th century. To review these mechanisms up to the 19th century, it is beneficial for the discussion to first open with an outline of the traditional functions of both trade and investment to states, and their categorisation as disciplines under international economic law.

[213] In other words, changes from old to new world order that witness the same obligations enforced by ISDS provision in a single instrument yet brought in different forums (ie. the WTO and arbitral tribunals). See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.
[214] I observe the general arguments of states as theory fails to provide a conclusive answer. This is apparent in the discussions of this Chapter Two.

2.2.1 The Function of International Investment Law

A consideration of the traditional functions of trade and investment serves to enlighten the reasons upon which the respective dispute resolution mechanisms are developed. On revisiting the traditional functions of trade and investment, I also seek to observe whether any categorisation of the disciplines of trade and investment may have existed or perhaps suggested.[215] In reference to 'traditional', I mean in accordance with traditional theory of international trade and investment law. In referring to traditional theory I am acknowledging that theory evolves to address changes of the time as new evidence and perspectives emerge. As theory on private international law evolved to develop international economic law in response to changes of the time, it evolved further with international investment law as a separate discipline from trade law within international economic law.[216] As new perspectives continue to emerge, to not make the distinction between 'traditional' and current, would be to deny the possible existence or validity of new theory that speaks of changes in the present day.

2.2.1.1 Traditional Function of International economic law

I begin by bringing to attention that international trade law and international investment law are traditionally distinguished as sub-disciplines of the broader field of international economic law.[217] International economic law encompasses a broad range of disciplines such as trade and investment, amongst other disciplines that however fall outside the scope of this dissertation. In particular to this dissertation, general knowledge amongst scholars of international economic

[215] The purpose is to also indicate whether there may be accuracy or instead a challenge to the possible view that the convergence of trade and investment, from separate disciplines, is a new phenomenon. This serves to inform whether to refer to the phenomenon as a convergence or a 're-convergence'.
[216] See eg.: János Martonyi, 'Ferenc Mádl and International Economic Law', *Central European Journal of Comparative Law* 2, no. 2 (2021): 167–79, https://doi.org/10.47078/2021.2.167-179.
[217] International economic law encompasses a large number of areas, under modern international law.

law is that it is a field of international law that is concerned with the governance of international economic relations between states.

Regardless of the sparse scholarship providing comprehensive analyses on the relationship, it is generally accepted that the function of international economic law is to achieve economic development, such as in the form of trade and investment cooperation between states.[218] That is, the cooperation on trade and investment law, to facilitate economic development. It is accepted knowledge that international trade and investment rules are understood to play a significant role in economic development by facilitating international cooperation.[219]

2.2.1.2 The notion of 'protection' and 'individual' rights.

In accordance with the dissertation's accepted definition of 'International Law' as outlined in Chapter One, I thus accept international economic law as one that governs economic relations among nations or international economic order, through rules. In this sub-section, I acknowledge that the rules of traditional international trade law function to achieve economic development through state cooperation on trade liberalisation such as market access to goods and services. Separately, the function of traditional international investment law is to contribute to economic development with the protection of foreign investment.

As opposed to an unregulated free flow of trade, States cooperate on the appropriate rules and customs for handling trade between countries, classified as international trade law. Departing from the model of a free flow of trade across the frontiers of state, it has long been noted that international trade agreements function to determine rules to help realise the benefits of

[218] Most studies that provide comprehensive analyses on the relationship between international law and economic development, are of an economic nature. See eg.: Mostafa Beshkar and Eric Bond, *Trade Agreements: Theoretical Foundations*, Oxford Research Encyclopedia of Economics and Finance (Oxford University Press, 2019). To that point, this source refers to literature of an economic nature. I acknowledge that this dissertation is rather of a legal nature. A reference to this source simply serves the purpose of signifying the relationship between international trade law and economic development, which literature in the legal field does not provide.
[219] For instance, it is noted that one objective of the theoretical literature on trade agreements is to address the question of why international cooperation (through bilateral and multilateral trade agreements, rather than unilateral actions by individual countries) has been required to reduce trade barriers. See eg.: Mostafa Beshkar and Eric Bond; Also see: Gene M. Grossman, 'The Purpose of Trade Agreements', *Centre for Economic Policy Research (CEPR)*, Discussion Paper, no. DP11151 (March 2016).

cooperation between states.[220] The case for investment law mainly rests on the traditional distinction of investment promotion and investment protection.[221] It is classically not about 'liberalisation' and 'state-to-state exchanges of market opportunities' but rather of the notion that international investment rules are for 'protection' and 'individual' rights.[222]

2.2.2 Early Mechanisms

Naturally, the implications of international trade and international investment rules, discussed above, require the execution of detailed international trade and investment agreements. Prior to the 19th century, the models for trade and investment agreements were viewed as within a single discipline. That is, not necessarily as a single discipline called 'international economic law' but there was no separation of trade and investment law however it may have been considered or named. As such, there was no separation of trade and investment protection mechanisms.

[220] As in 1966, Friedman et al note that 'any bilateral or multilateral trade agreement is, of course, a departure from the model of a free flow of trade across the frontiers of state carried out by private traders and determined, in the in the quality, quantity and pricing of goods, by the laws of supply and demand.' See: Wolfgang Friedmann, Florentino P. Feliciano, and A. A. Fatouros, 'The Relevance of International Law to the Processes of Economic and Social Development', in *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, vol. 60, 1966, 8–28, http://www.jstor.org/stable/25657679. Free trade was best exemplified by the unilateral stance of Great Britain who reduced regulations and duties on imports and exports from the mid-nineteenth century to the 1920s. The first free trade agreement, the Cobden-Chevalier Treaty between Britain and France in 1860, sparked a wave of bilateral negotiations among Europe's other economic powers. For the first time, involved reciprocal tariff reductions between the two countries and included a strong the principle of not discriminating between one's trading partners. Arguably as historically debated, the Cobden-Chavalier Treaty and its successors instigated the "great phase of European free trade".

[221] Today, this classical distinction is viewed by some scholars as obsolete. While the traditional distinction between investment promotion and protection has historically been a cornerstone of investment law, there is scholarly debate about its continued relevance in today's context. There is a growing recognition that effective investment law should encompass a more holistic approach such as balancing the interests of both investors and host states.

[222] Amanda J. Lee and Naimeh Masumy, 'Is Investor-State Dispute Settlement an Appropriate Forum for the Resolution of Investment Disputes Arising from Armed Conflicts? Part 1: Normative Conflicts and Consequences', Opinio Juris, 14 July 2022, https://opiniojuris.org/2022/07/14/is-investor-state-dispute-settlement-an-appropriate-forum-for-the-resolution-of-investment-disputes-arising-from-armed-conflicts-part-1-normative-conflicts-and-consequences/.

In this sub-chapter, I will discuss early trade and investment protection mechanisms, up to the 19th century.[223] I do not attempt to get into historical arguments. Rather, the intention is to outline the reasons and context that led to the ISDS mechanism as an instrument for international investment protection under the international investment law discipline, separate from international trade law. Following the 19th century, the trade and investment fields parted ways as separate sub-disciplines under international economic law. In the next sub-chapter, I note that the ISDS emerged from this development. Firstly, I address the mechanisms prior to the 19th century, when the ISDS mechanism was insignificant. As the dissertation does not intend to participate in the historical arguments, the intention is to briefly describe the historical status of the protection of investment prior to the ISDS mechanism. I elaborate on this claim early mechanisms offered no distinction between trade and investment as separate disciplines, with brief discussions on State Responsibility on trade and investment and the lack of investment law framework and enforcement. Following existing scholarship, I have limited the historical discussion to Customary International Law, the Treaties of Westphalia and the Treaties on Friendship, Commerce and Navigation.[224]

2.2.2.1 Customary international law (CIL)

I begin the discussion with the natural source of the law of investment protection, considered to be customary international law.[225] I accept Customary international law (CIL) within the limitations set out in Chapter One. I consider that the conception of sources of international investment law that emerge from the pre-1945 era of investment protection indicates a loose

[223] Infact, there was no distinction between trade and investment. I specifically mention it this way to maintain the focus of the dissertation.
[224] See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.
[225] It still plays a significant role in investment arbitration disputes today. See eg: Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment', *The Journal of World Investment & Trade* 8, no. 5 (2007): 691–715, https://doi.org/doi: https://doi.org/10.1163/221190007X00143; Also see: Stephan W. Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?', https://www.biicl.org/files/5630_stephan_schill.pdf.

concept of customary law.[226] There may be disagreement amongst scholars on whether a customary investment protection regime ever really emerged.[227] Although, with no intention to necessarily imply hierarchy on the sources of international law, it is generally accepted that CIL precedes investment treaties that proliferated in the late 1980s and early 1990s. The general acceptance is that the investment protection regime finds its roots in the international protection of aliens abroad and their property, including foreign investors and their investment.[228] The regime offered no distinction between trade and investment as separate disciplines.

2.2.2.1.1 State Responsibility on trade and investment

Within the accepted definition of CIL relating to investment and the scope framed in Chapter One of this dissertation, it revolves around the Law of State that was developed in the 19th century.[229] The traditional 'law of State Responsibility for Injuries to Aliens' recognised that foreign investors and foreign investment were subject to protection by the host state, under the same conditions as nationals of the respective host state.[230] It was originally intended for the purpose of protecting individuals but later extended to 'foreign companies and foreign business concerns.'[231] In this dissertation, I propose a thought that the extension may be reflective of the custom to protect companies and businesses, dating as far back as the British government sponsored intercontinental trading corporation, the English East India Company (EIC) established in 1600 and the Dutch the set up the Vereenigde Oostindische Compagnie (VOC) in 1602 better known as the Dutch East India Company.

[226] Also see the limitations framed in the definition of CIL framed in Chapter One of this dissertation. The pre-1945 history of investment law falls short of general practice linked with *opinio juris*.
[227] See: Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox', in *Tarcisio Gazzini, Eric De Brabandere (Eds) International Investment Law: The Sources of Rights and Obligations* (Leiden: Martinus Nijhoff, 2012), 5–47; Also see: The University of Melbourne, 'International Investment Law', The University of Melbourne Library, n.d., https://unimelb.libguides.com/c.php?g=929887&p=6719574.
[228] Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox'.
[229] See: Samuel K. B. Asante, 'International Law and Foreign Investment: A Reappraisal', *The International and Comparative Law Quarterly* 37, no. 3 (1988): 588–628.
[230] See: Samuel K. B. Asante. 'It was inspired by Western laissez -faire ideals and liberal concepts of property'.
[231] Samuel K. B. Asante.

The EIC and VOC were commercial enterprises that are commonly regarded to be somehow genetically related to the modern multinational corporations.[232] The EIC combined the rights of private persons, such as to sue and be sued or contract debts, with features of public sovereign power.[233] This includes the disciplines of trade and investment, of which the features are discussed earlier in this sub-chapter. But as discussed earlier, the field of international law that is concerned with the governance of international economic relations between states is international economic law, the umbrella of trade and investment. Particularly through the seventeenth century, the EIC maintained the rights to own and dispose of private property while also acting as a form of public government, *especially abroad*.[234][235] And although often labelled a trading company, the VOC also diversified into multiple commercial and industrial activities. With the Dutch dubbed as 'pioneering investors and capitalists', the VOC is said to have pioneered outward foreign direct investment in 'underdeveloped or undeveloped lands' of the early modern world.[236] The VOC safeguarded their investment interests by taking over surrounding territories of its trade posts, as colonies.[237] These dual responsibilities demonstrate an overlap in the disciplines of trade and investment.

2.2.2.2 Treaties of Westphalia

[232] See: Philip J. Stern, 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations', *Seattle University Law Review* 39, no. 2 (2016), https://digitalcommons.law.seattleu.edu/sulr/vol39/iss2/10/.

[233] 'Sovereign power such as the prerogative to wage war and conduct diplomacy, govern over people and places, coin money, and so on.' See: Philip J. Stern.

[234] *See:* Philip J. Stern, The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations, Seattle University Law Review Vol. 39:423 (2016).

[235] See: Philip J. Stern, 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations'.

[236] E.g. History of Taiwan (Tainan) and South Africa (Cape Town and Stellenbosch).

[237] And in its foreign colonies, the VOC enjoyed quasi-governmental powers which included the negotiation of written international agreements. Ie. Treaties. The Vienna Convention on the Law of Treaties defines a 'treaty' as 'an international agreement concluded between States in written ...*See* Chapter One of this dissertation discussion on the proposal of 'CAIT'.

The Peace of Westphalia in 1648,[238] is one of the first attempts at codifying an international set of laws -'modern international law', in which decades of wars ended.[239] As a consent based international law method, the 'treatification' addressed the weakness of CIL, which Guzman describes as one that "can only generate cooperation when the gains from violation are small."[240] The series of treaties served as an example of peaceful cooperation through negotiated agreements. However, the treaties of Westphalia did not address the 'weakness of CIL applying to foreign investments.[241]

As will be discussed in the next sub-chapter of this dissertation on how dispute settlement mechanisms contribute to the fragmentation of international economic law into the separate trade and investment disciplines, the treaties of Westphalia made no separation between trade and investment.[242]

2.2.2.3 Treaties on Friendship, Commerce and Navigation (FCN)

[238] Two different documents, the Peace Treaty of Osnabrück (Instrumentum pacis Osnabrugensis) between the Holy Roman Empire of the German Nation (HRE) and Sweden, and the Peace Treaty of Münster (Instrumentum Pacis Monasteriensis) between the HRE and France, signed between May and October 1648 in the Westphalian cities of Osnabrück and Münster in north-western Germany. Though, not without criticism, the notion of the 'Westphalian system' can be traced back to the ideas of 18th-century and not just to the late 1940s as presumed. Nonetheless, the 'Westphalian system' is widely regarded as the foundation of modern international law. See: Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *The International History Review* 21, no. 3 (1999), http://www.jstor.org/stable/40109077.

[239] 'Sovereignty' serves as the basis for the modern system of nation-states. Accordingly, the treaty gave the Swiss independence of Austria and the Netherlands gained independence from Spain. German States secured their autonomy over the religion of their lands. See: Derek Croxton.

[240] Andrew T. Guzman, *How International Law Works A Rational Choice Theory* (Oxford University Press, 2008).

[241] See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements', *U.C.-Davis Journal of International Law & Policy* 12, no. 157 (2005), https://jilp.law.ucdavis.edu/issues/volume-12-1/van5.pdf.; Also see: Jeswald W. Salacuse, *The Law of Investment Treaties*, chap. A History of Internal Investment Treaties; As illustrated today, within investment treaty arbitration, reference to customary international law is the exception rather than the rule. And Schill writes that it can be argued that discursive practices of decision-making by investment treaty tribunals increasingly replace customary international law in 'creating a rather uniform, (quasi-)multilateral order for all those States and their investors that are part of the investment treaty arbitration regime.' See: Stephan W. Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?'

[242] *See* subchapter; 2.3 The emergence of ISDS. I discuss that ISDS contributed to the fragmentation of international economic law into the separate trade and investment disciplines.

Treaties that afforded specialised investment protection began with the Treaty of Amity and Commerce in 1778, the first bilateral treaty of "Friendship, Commerce and Navigation" (FCN) by the United States.[243] The FCN treaties were mainly concerned with establishing trade or commercial relations but investment protection had for the first time become a primary goal with the inclusion of investment provisions after WWII.[244] It must also be noted that the treaties were comprehensive agreements, covering trade and a variety of other disciplines in addition to investment disciplines, in a single document.[245] This comprehensive approach in a single document seemingly furthered the CIL outlook of the trade and investment disciplines.

2.2.3 Lack of Investment law framework and enforcement

The protection of such earlier corporations and business mainly emanated from the relationship with the state and its cooperation on trade. In order to enforce rights, an investor would normally need to seek the intervention of the government of its home state. Although including the negotiation of written international agreements, the protection of foreign investments was not often a concern in the colonial era.[246] These agreements sometimes included some provisions on the specific protection of property of nationals of one state in the territory of another state,

[243] For instance, to establish trade relations, the United States, began to conclude a number of bilateral treaties of "Friendship, Commerce and Navigation" (FCN) as early as the Eighteenth Century. The first such agreement was the Treaty of Amity and Commerce, U.S.-Fr., July 16, 1782, 8 Stat. 12, negotiated with France in 1778 by Benjamin Franklin, Arthur Lee and Silas Dean.. See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'; Also see: Jeswald W. Salacuse, *The Law of Investment Treaties*.

[244] The efforts that were pursued at the League of Nations to codify treatment of 'foreign nationals' and clarify their property rights failed to produce an international agreement. See: Roderick Abbott, Fredrik Erixon, and Martina Francesca Ferracane, 'Demystifying Investor-State Dispute Settlement (ISDS)', ECIPE Occasional Paper (Brussels: European Centre for International Political Economy, 2014), https://www.econstor.eu/bitstream/10419/174728/1/ecipe-op-2014-5.pdf; Following WWI, FCN treaties included more detailed provisions relating to property protection. After WWII, greater emphasis was placed on protecting the foreign investments. See: John F. Coyle, 'The Treaty of Friendship, Commerce, and Navigation in the Modern Era', *Columbia Journal of Transnational Law* 51 (21 September 2012): 302; The United States had already started launching a new series of post-war FCN agreements from 1946, negotiated principally through the GATT. See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.

[245] Ie.intellectual property, and even human rights. See: 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): 455–86.

[246] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.

despite the lack of focus on broader 'investment'.[247] There was no clear, if at all, distinction between trade and investment rights.[248]

2.2.3.1 Customary International Law (CIL)

Despite the lack of a separation of an investment discipline from a trade discipline, it seems to have been long accepted that foreign commercial enterprises do not have obligations but they do have rights, under traditional international law.[249] In any 'injury' to the 'alien' and its property, whether for the commercial purposes of trade or investment, the home state was considered to have a legitimate basis to the right if diplomatic protection of the 'alien.'[250] CIL did not develop a normative framework for investment law.[251] This offered an inadequate mechanism for the protection of foreign investment such as the absence to submit disputes to arbitration that provides a means of legal enforcement.[252]

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[247] Kenneth J. Vandevelde.

[248] There was no separation of agreements on 'property' or 'investment'. It may be prematurely interpreted that there was no international investment rather than more an issue of 'words' and 'terminology'. To further this point, scholars write of international investment in the 18th and 19th centuries. See e.g: Stone, Irving, 'British Direct and Portfolio Investment in Latin America Before 1914', *The Journal of Economic History* 37, no. 3 (1977): 690–722.

[249] See eg.: Joseph E. Stiglitz, 'Multinational Corporations: Balancing Rights and Responsibilities', *Proceedings of the Annual Meeting (American Society of International Law)* 101, no. 207 (n.d.): 3–60; It is also upon this matter that the legitimacy of ISDS is contested. See eg: Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS', *European Journal of International Law* 28, no. 3 (August 2017): 731–61, https://doi.org/10.1093/ejil/chx058; In particular, ISDS has also been the mechanism that mainly MNCs of the West have economically benefitted from less developed states. As discussed in Chapter One, I use the term "The West" in avoidance of the meta-categorisation such as the terms 'developed' vs 'developing' countries. Here, instead of "developing states" I speak of states of the "Non-West" as per definition in Chapter One. Those non-Western states of which some are even less powerful than the MNCs. See: Ehrenfried Pausenberger, 'How Powerful Are the Multinational Corporations?', *Intereconomics – Review of European Economic Policy (1966 - 1988)*, ZBW - Leibniz Information Centre for Economics, 18, no. 3 (1983): 130–36, https://doi.org/10.1007/BF02928572.

[250] Predicated on the inherent right to protect nationals abroad, such as on host state treatment for 'aliens and alien property or economic interests...'. See: Samuel K. B. Asante, 'International Law and Foreign Investment: A Reappraisal'.

[251] Also see: Malebakeng A. Forere, 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?', *PER / PELJ* 21 (2018), http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3282.

[252] As discussed above, customary international law obligated host states to treat foreign investment in accordance with an international minimum standard treatment, which some countries disputed. Latin American countries asserted the entitlement of treatment that the host country afforded to its own investors in accordance

Since at least 1794, arbitration has been used as a mechanism for fostering foreign investment and providing a neutral forum to resolve international disputes.[253] Although the absence of an investment agreement by the host state to submit the dispute to arbitration, states were left with an entitlement to settle claims on any terms with no guarantee.[254] Espousal, a diplomatic process whereby individual foreign investor's state assumed the individual investor's claim as its own as a sovereign and presented the claim against the host state, was the only mechanism offered by customary law for enforcement of customary norms.[255] However, the individual investor's state espoused a claim only after an exhaustion of the investor's remedies under the law of the host state, without satisfactory resolution.[256] Thus, the non-legal mechanisms of military force and diplomacy were left to provide the principal means for protecting foreign investment. And as an alternative to diplomacy, nations sometimes utilized military force to protect foreign investments ('gunboat diplomacy').[257] This blurred the line between the legal framework and enforcement mechanism of trade between states and that for private investment rights.

2.2.3.2 Treaties of Westphalia

The Peace treaties of Westphalia served as a diplomatic model for resolving disputes,[258] as under the CIL framework. While investment treaty arbitration is unique, one should not lose sight of this ancestry or fact that early international arbitrations of investment disputes sometimes followed in the wake of foreign invasion and occupation.[259] In this context, international law has been a mechanism for conflict resolution that had already existed as a slow growth of the sources of international law such as state practice as briefly discussed in the above sub-section

with the Calvo doctrine. And even where it was agreed that an international minimum standard treatment existed, it was vague and arguably not particularly demanding. See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.

[253] Gus Van Harten, *Investment Treaty Arbitration and Public Law*.

[254] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.

[255] Kenneth J. Vandevelde.

[256] With no obligation of the investor's state to espouse a claim, reluctance often reeked regard of the potential disruption of diplomatic relations with the host state. See: Kenneth J. Vandevelde.

[257] Kenneth J. Vandevelde.

[258] For dealing with 'Inter-state relations'. See: Yannick Radi, *Rules and Practices of International Investment Law and Arbitration* (Cambridge University Press, 2020).

[259] See eg: Gus Van Harten, *Investment Treaty Arbitration and Public Law*.

on the lack of an investment law framework and enforcement, as well as precedent and doctrine from ancient history.[260]

The success of the treaties of Westphalia is in codification. However, with limited importance on arbitration. The treaties were limited in scope and the investment protection afforded was weak, particularly insofar as the treaties provided no means for enforcement.

2.2.3.3 Treaties on Friendship, Commerce & Navigation (FCN)

Accordingly, reflecting an important post war development, FCN treaties included a dispute resolution provision consenting to the jurisdiction of the ICJ.[261] The FCN treaties contemplated that disputes arising under the treaty would be resolved by the national courts of the host state or, alternatively, by the ICJ.[262] However, individual investors had no standing and no direct cause of action against a Sovereign for a violation of international law that adversely affected their investment.[263] Rather, investors were forced to lobby their home country to espouse a claim on their behalf at the ICJ. This was not substantially different from 'diplomatic protection of the alien 'under CIL. [264]

Of interest to the dissertation, there is a new generation of agreements that is comprehensive and relatively akin to the design of FCNs on investment protection 'in context'.[265] This new

[260] See: Amos S. Hershey, 'History of International Law Since the Peace of Westphalia', *The American Journal of International Law* 6, no. 1 (1912): 30–69, https://doi.org/10.2307/2187396.
[261] Over disputes involving the interpretation or application of the agreement. See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.
[262] See: John F. Coyle, 'The Treaty of Friendship, Commerce, and Navigation in the Modern Era'. The ICJ preceded the establishment of the Permanent Court of International Justice (PCIJ) of the League of Nations.
[263] See: Permanent Court of International Justice, Statute of the International Court of Justice, art. 34(1) noting that 'Only states may be parties in cases before the Court.'
[264] Only that, in this case following the period of the Peace treaties of Westphalia, the United Nations Charter 1945, adopted at the end of the war, had prohibited the use of military force except in self-defense, which rendered the use of force to collect debts or protect investment illegal under international law. The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN).
[265] See: Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law'. Although comprehensive, the modern FCNs

generation development supports the enquiry of the dissertation into investment protection in a New World Order, that is also signalled by the re-convergence of trade and investment. In the following sub-chapter, I will begin by discussing the emergence of ISDS as a mechanism for investment protection and its inquiry in a New World Order. I will discuss how the parting of trade and investment into separate disciplines of international economic law gave ground for ISDS, which is questioned in a New World Order today. This discussion will be followed by a sub-chapter on of a re-convergence of trade and investment, as the elements of a New World Order.

2.3 The Emergence of ISDS

The ISDS mechanism is a procedural mechanism that is commonly provisioned for in international investment agreements.[266] It allows foreign investors to bring claims against these sovereign states through international arbitration. Up until the 19th century, the mechanism did not exist. As discussed in the previous sub-chapter and illustrated by early dispute resolution mechanisms, trade and investment nor their dispute resolution mechanisms were not considered to be separate disciplines. In this sub-chapter, I will discuss how the parting of trade and investment into separate disciplines of international economic law gave significance to the ISDS, and in the present day (ie. New World Order) faces questions of its function.

2.3.1 The Rationale of ISDS

Individual investors had no standing and no direct cause of action against a Sovereign for a violation of international law that adversely affected their investment.[267] Rather, investors were

were very much primarily still considered as trade agreements while European agreements focused exclusively on the protection of investments.

[266] European Commission, 'Factsheet on Investor-State Dispute Settlement', 3 October 2013.

[267] See: Permanent Court of International Justice, Statute of the International Court of Justice.

without a private mechanism and thus forced to lobby their home country to espouse a claim on their behalf at the ICJ. This resulted in only episodic investment disputes and even smaller numbers of successful claims. As it is believed that the one of the purposes of law is to protect the legitimate interests of individuals, groups as well as states, by providing a mechanism for resolving disputes when those interests are in conflict,[268] the ISDS mechanism protected the interests of foreign investors as subjects of international law, beyond the protection of states.

The ISDS' mechanism specialises in investment protection. But as acknowledged earlier in this chapter, there was no initial separation of trade and investment. I will thus begin the discussion on ISDS with efforts demonstrating the separation of the disciplines. I will discuss that it is upon this separation of trade and investment framework and agreements that the ISDS' system is premised. That is, a mechanism that specialises in the protection of investment, separate from trade protection.

2.3.1.1 Separating disciplines towards an investment framework

Legal experts and business interests in Europe, began to formulate general principles and rules that led to the proposal of 'Draft Convention of Investments Abroad' called the Abs-Shawcross Convention (1959), to protect private foreign investment".[269] Although, the convention notes that ' Proposals for the negotiation of a multilateral agreement to protect private foreign investment have been made from time to time since the end of WWI.'[270]

[268] Jeswald W. Salacuse, *The Law of Investment Treaties*.
[269] 'Abs–Shawcross Draft Convention on Investments Abroad' (1959) developed by English lawyer, Hartley Shawcross (a director of Royal Dutch Shell), and a German businessman, Hermann Abs (chairman of the Deutsche Bank) (1959/1960); See: Roderick Abbott, Fredrik Erixon, and Martina Francesca Ferracane, 'Demystifying Investor-State Dispute Settlement (ISDS)'.
[270] See: Abs–Shawcross Draft Convention on Investments Abroad; Also see text of the draft convention and commentary by its authors. See: Herman Abs and Hartley Shawcross, 'The Proposed Convention to Protect Private Foreign Investment: A Round Table', *Journal of Public Law* 9 (1960): 115–18.

In November 1947, a month after the creation of The General Agreement on Tariffs and Trade (GATT) in October 1947, a year of negotiations for a separate treaty were started mainly intended to create a liberal investment regime for both trade and investment.[271] The intention was to include private foreign investment. The UN members included an attempt at multilateral investment protection measures as well, known as the Havana that that was to establish the International Trade Organisation in 1948.[272]Although, the failure to enforce the Havana Charter meant that negotiations over investment measures would not make their way into the GATT until the Uruguay round spanning from 1986 to 1993.[273] Until then, entry into force of the GATT, created a major multilateral organisation with no competence over investment but competence over trade only. Investment would need to be treated outside the GATT framework, which to a large extent meant separately from trade.[274]

The traditional protection of investment outside of the GATT framework, was through BITs. The BITs, as their name implied, dealt exclusively with the protection of investment. This notion of investment protection provided by the BITs was similar to those that had been provided in the modern FCNs concluded by the US.[275] However, FCNs had been concerned principally with establishing economic relations with a comprehensive approach but still considered to be trade

[271] Jacques Berthelot, 'The Havana Charter Is Not the Model to Reform the WTO' (SOL: alternatives agroécologiques et solidaires, 4 January 2019), https://www.sol-asso.fr/wp-content/uploads/2019/01/The-Havana-Charter-is-not-the-model-to-reform-the-WTO-SOL-4-January-2019.pdf.
[272] Members of the United Nations began to negotiate a Charter for an under the auspices of the United Nations Economic and Social Council. Also see: Jacques Berthelot.
[273] But although signed, it never entered into force due to refusal of the US. The US congress refused to ratify it. See: Georgetown Law Library, 'From the GATT to the WTO: A Brief Overview', in *International Trade Law Research Guide* (Georgetown Law Library, n.d.), https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235#:~:text=The%20Havana%20Charter%20never%20entered,reciprocal%20reductions%20in%20tariff%20barriers.
[274] In 1955, the GATT contracting parties adopted a resolution on International Investment for Economic Development in which they, inter alia, urged countries to conclude bilateral agreements to provide protection and security for foreign investment." See: 'WTO Agreement on Trade-Related Investment Measures' (1994), https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm; Also see: José E. Alvarez and Kenneth J. Vandevelde, 'The BIT Program: A Fifteen-Year Appraisal', *American Society of International Law*, Proceedings of the Annual Meeting, 86 (1992): 532–40, https://doi.org/ttp://www.jstor.org/stable/25658681; And see: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.
[275] The notion to protect foreign investment with state interaction. Also see: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.

agreements.[276] In contrast, BITs were short, simple' and specialised in investment protection only.[277]

2.3.2 ISDS emergence in BITs

One major innovation in the BITs was the ability to enforce substantive protections directly against the host state with the inclusion of a provision in which the host state consented to international arbitration of certain disputes with investors.[278] Through the provision, private foreign investors were able to bring claims against these sovereign states through international arbitration. The right of foreign investors to directly bring disputes with host states before independent international arbitral tribunals is enabled by the ISDS mechanism.

The ISDS' mechanism is traditionally provided for in BITs. Although, I acknowledge that the first BIT between Germany and Pakistan in (1959) did not provide for ISDS.[279] This first BIT echoed the Abs-Shawcross Convention (1959), requiring the consent of the host state whom the

[276] What I refer to modern FCNs are those discussed under 'Treaties on Friendship, Commerce and Navigation' in the sub-chapter on 'Early investment protection mechanisms ' as the FCNs post WWII, including investment provisions. Although, the United States refused to conclude BITs unless they explicitly adopted the principle of 'prompt, adequate and effective compensation' requiring payment of fair market value in the event of expropriation. Establishing the principle of prompt, adequate and effective compensation standard was seemingly more important to the US than obtaining protection for any specific asset of foreign investment.
[277] Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law'.
[278] See: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.
[279] Despite sensitive to the political risks to which foreign investment was exposed following its defeat in WWII, it provided that in the event of a dispute,"…the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship." Where, "If no such solution is forthcoming, the dispute shall be submitted (a) to the International Court of Justice if both Parties so agree or (b) if they do not so agree to an arbitration tribunal upon the request of either Party." See: 'Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments' (1959), art. 11(2); Although different from Germany v Malaysia BIT (1960) which makes no explicit provision for the International Court of Justice but rather Article 10(1)"…settled by the Governments of the two Contracting Parties. (2) If a dispute cannot thus be settled it shall upon the request of either Contracting Party, be submitted to an arbitral tribunal." See: 'Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments' (1960).

claim is brought against, before the arbitration may commence.[280] Notwithstanding, as a mechanism of this specialisation, ISDS was gradually included in BITs towards the end of the 1960s.[281] The significance of ISDS is linked with the argument that that 'rule of law was lacking in overseas territories, usually former colonies.[282] The ISDS mechanism in BITs specially served investment goals, separate from the mechanism in FCNs which were trade agreements that were comprehensive but considered to serve trade goals. Hence, the proliferation of specialised agreements, such as BITs, led to a "fragmented" international legal order and more ominously, to resolve conflicts that may arise between various treaty regimes. By entering into BITs providing for ISDS, advance consent was given to investors to commence arbitration without requesting state consent for each particular dispute.

Although the ISDS mechanism specialised in investment, it should be noted that investors commencing arbitration without requesting state consent is contrary to the Abs-Shawcross Convention (1959). The Abs-Shawcross required the consent of the host state whom the claim is brought against.[283] Indeed it may be argued that entering into the treaty is to be accepted as consent in advance. However, it is difficult to accept that any state would prefer to agree in advance to any possible claim or prefer to agree commencement on a case-by-case basis depending on the merits of the claim. Thus, in this dissertation, I accept the assertion of Paulewyn that advance rights given to private investors was possibly a mistake.[284] It was not intended by lawyers and investors but by states. Advance consent served as convenience of that time when requests to commence arbitration were perceived to be most likely, during a period of decolonization. Scholars, alert that driven by 'peacebuilding and development aims' , ISDS

[280] See: Abs–Shawcross Draft Convention on Investments Abroad; With no advance consent, allowing opportunity to avoid direct complaints of investors, these dispute settlement clauses were regarded as relatively weak but offered potentially the most effective means of protection given the deficiencies of customary international law as a means of protecting international investment. Also see: Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements'.
[281] Gus Van Harten, 'Origins of ISDS Treaties', in *The Trouble with Foreign Investor Protection*, online (Oxford,: Oxford Academic, 2020), https://doi.org/10.1093/oso/9780198866213.003.0002.
[282] Rooted in decolonisation to protect former colonisers' property assets from newly independent states. See: Gus Van Harten.
[283] Gus Van Harten.
[284] Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in *The Foundations of International Investment Law: Bringing Theory into Practice*, online (Oxford: Oxford Academic, 2014).

was not created because there was evidence that it facilitates investment as 'there was no such evidence'.[285] In this context, I echoed Paulewyn that trade and investment are converging in their substantive "legal orders," but diverging in terms of perceived legitimacy. [286] There is a legitimacy gap as trade dispute resolution is perceived as successful while ISDS' is facing criticism in the present day.[287]

2.4 The Re-convergence of Disciplines

This Chapter Two on the significance of ISDS began with the knowledge on the roots of trade and investment. I have discussed that the parting of trade and investment into separate disciplines of international economic law gave significance to the ISDS. I now discuss that international trade and investment law is once again converging towards each other. It is an argument that has been developed by scholars in the latter years.[288] As the convergence of trade and investment from separate disciplines is not a new phenomenon, it could be said to be experiencing a renaissance, reflecting its roots. Some scholars suppose that trade and investment would not be treated independently should a hypothetical need or opportunity arise to develop an international system of international economic law all over again from the beginning.[289] A re-convergence, reflecting its roots, brings with it questions on the significance of ISDS in the present day. I should bring to attention that I do not intend to prove prediction of the hypothetical case that trade and investment are re-converging. But rather, I accept the thesis and point to this

[285] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018).
[286] Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.
[287] Also see: Catherine A. Rogers, 'Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn', *109 AJIL Unbound*, Penn State Law Research Paper No.9-2016, 294, no. 109 (21 April 2016), https://www.asil.org/sites/default/files/Rogers,%20Apparent%20Dichotomies,%20Covert%20Similarities.pdf; And see: Chios C. Carmody, 'Obligations Versus Rights: Substantive Difference Between WTO and International Investment Law', *Asian Journal of WTO & International Health Law and Policy* 12, no. 1 (March 2017): 75–104.
[288] See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'; And see: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.
[289] Tomer Broude, 'Investment and Trade: The 'Lottie and Lisa" of International Economic Law?'

argument as giving weight to the investment element in trade in support of the significance of ISDS.

In the following section, I discuss how the lines between international trade and investment law have become obscure, which has led to the assertion of a re-convergence.[290] I also attempt to identify how this re-convergence affects the significance of ISDS in the present day, which the dissertation has termed as reflective of a New World Order. In suggesting a re-convergence, scholars have noted traditional investment elements in trade agreements as well as traditional trade elements in investment agreements. In the following discussions of this chapter, I place focus on the elements of investment seeping into trade agreements. I have limited the discussion to trade agreements as it is already traditionally known and expected that the ISDS mechanism is provisioned for in investment agreements. As the question of interest in the chapter is on the significance of the ISDS mechanism, it is a more valuable discussion on how a mechanism that traditionally specialises in investment has also made its way into trade agreements. It is worth considering the significance of ISDS today such that it is provisioned for in trade agreements in which it was traditionally not provisioned for.

2.4.1 Investment Protection in Trade Agreements

Trade agreements seek to liberalise trade flows, known as market access. Today, they are increasingly intended to liberalise investment flows. They have become instruments of development by supposedly removing barriers to investment in addition to traditional goals of removing barriers to trade.[291] The possibility of investments requires market access to establish the investments, of which the protection thereof would follow. In this sense, international investment protection has trickled into international trade agreements.

[290] See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'; And see: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.
[291] Much in the same way that the FCNs of the Eighteenth and Nineteenth Centuries sought to establish commercial relations between countries. See: Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law'.

As discussed in the previous section on 'The Emergence of ISDS', entry into force of the GATT, prior to 1986, created a major multilateral organisation with competence over trade, but not investment. In the late 1990s, there was a discussion over a new Multilateral Agreement on Investment (MAI) with a broad framework for "investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures."[292] The MAI would establish a new body of universal investment laws that would guarantee private investors unconditional rights without any regard for national laws that threatened their interests.[293] The MAI draft included issues that are generally covered in BITs as well as new issues.[294] The EU, in agreement with other WTO members, tried to introduce the MAI through a range of issues including investment, that were studied for the feasibility and desirability of WTO rules.[295] However, the talks on a possible WTO agreement on investment through the MAI were discontinued and not expected to be resumed.[296] Notwithstanding, the essence of the treaty to converge trade and investment in trade still lingers today.[297] Rebranded with different names, the notion of a convergence of trade and investment has continued to be adamant. Since the talks started, it is referred to with various names; a Multilateral Agreement on Investment (MAI), a Multilateral Investment Agreement (MIA) a Multilateral Framework on Investment (MFI) and a Multilateral Investment Framework (MIF). Recently, the EU has even started calling it an Investment for Development Framework (IDF).[298] The EU suggested that investment could form part of the new issues for negotiation in the

[292] At the time, the MAI was negotiated in the OECD. Negotiations were discontinued in April 1998 and will not be resumed. See: OECD, 'Multilateral Agreement on Investment', n.d., https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.
[293] OECD.
[294] See: UNCTAD, 'Lessons from the MAI', UNCTAD Series on Issues in International Investment Agreements (UNCTAD, 1999), https://unctad.org/system/files/official-document/psiteiitm22.en.pdf.
[295] Ie. The 'Singapore' issues or the 'new issues'. See: World Development Movement and Friends of the Earth, 'Investment and the WTO – Busting the Myths', Briefing, June 2003, https://www.citizen.org/wp-content/uploads/invandwtomyths.pdf.
[296] OECD, 'Multilateral Agreement on Investment'.
[297] The moves to adopt multilateral investment rules initiated at the Doha Ministerial Conference in 2001 had to also be abandoned. Finalisation was held up due to differences on investment issue, among others. See: World Trade Organization, 'Doha Development Agenda', Understanding the WTO, n.d., https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.
[298] World Development Movement and Friends of the Earth, 'Investment and the WTO – Busting the Myths'.

WTO.[299] The MAI may not have materialised but the essence of investment in trade is seen in Multilateral Trade Agreements (MTAs), Regional Trade Agreements (RTAs) and bilateral Free Trade Agreements (FTAs).

2.4.1.1 Multilateral Trade Agreements (MTAs)

Special rules on investment first made an appearance through two multilateral trade agreements (MTAs); the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS), that are under the WTO which succeeded the GATT 1947.The WTO expands upon basic GATT disciplines for trade in goods by providing additional MTAs, such as in recognition that certain investment measures can restrict and distort trade.[300] Although, the multilateral system is not able to satisfy all the ambitions or needs of states within a reasonable time-frame.[301] It is has also been asked by some scholars how the current protection of investment under the WTO Agreement compares with the MAI.[302] In this dissertation, I do not intend to look into a comparison. The intention is merely to indicate these efforts towards the provision of investment in trade, regardless of their similarities and/or differences. The ISDS' mechanism is not provisioned for in MTAs but I observe their influence on RTAs and FTAs with the endeavour to protect investment.

2.4.1.2 Regional Trade Agreements (RTAs)

[299] Following the 2015 Ministerial Conference. Although, despite all efforts, work has not been completed due to differences such as on the relevance and the scope and definitions.
[300] WTO Agreement on Trade-Related Investment Measures; OECD, 'Multilateral Agreement on Investment'; Also see: Chi Carmody, Yūji Iwasawa, and Sylvia Rhodes, *Trilateral Perspectives on International Legal Issues* (American Society of International Law, 2003).
[301] See eg.: Parliament of Australia, 'Chapter 10 - Bilateral or Multilateral Agreements?', Parliament of Australia, n.d., https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/2004-07/china/report01/c10.
[302] Eg. . "One remaining question is how the current protection of investment under the WTO Agreement compares with the Multilateral Agreement on Investment (MAI)?". See: Parliament of Australia.

It is accepted that Regional Trade Agreements operate alongside multilateral agreements under the World Trade Organization (WTO).[303] They continue with the process of trade liberalisation in the absence of multilateral agreements. RTAs also reflect the proliferation of international investment protection in international trade agreements. They have comprehensive provisions of dispute settlement for both of trade and investment. With an attempt to fill the gaps such as those of TRIMS and GATS, today RTAs are developing in ways that go beyond existing multilateral rules.[304] Their demand is, in part, for deeper integration than what has been achieved by older MTAs.[305] One such illustration is the North American Free Trade Agreement (NAFTA) which came into force in 1994 with its investment component, Chapter 11. Chapter 11 of NAFTA was designed to protect the interests of foreign investors, with the continuing goal of liberalizing international investment.[306] It established a framework of rules and disciplines that provided investors from NAFTA countries with a predictable, rules-based investment climate, as well as dispute settlement procedures which are designed to provide timely recourse to an impartial tribunal.[307]

The main novelty of NAFTA is on the protection of investments through a trade agreement. As discussed previously on the emergence of ISDS, it was a mechanism that featured in the separation of the disciplines of trade and investment. It serves to protect the interests of private foreign investors against the host state, beyond the protection of state-state dispute settlement. The ISDS is initiated through private proceedings whereas most state-state disputes are handled by the WTO system, the primary body governing international trade.[308] It is written that NAFTA

[303] OECD, 'Regional Trade Agreements Are Evolving – Why Does It Matter?', Regional trade agreements, n.d., https://www.oecd.org/trade/topics/regional-trade-agreements/.
[304] OECD.
[305] OECD. Also see discussion in Chapter One if this dissertation on the proposed title "Comprehensive Agreements on Investment and Trade (CAIT)".
[306] Also see: Bronwyn Pavey and Tim Williams, 'The North American Free Trade Agreement Chapter 11' (Science and Technology Division, 26 February 2003), https://publications.gc.ca/Collection-R/LoPBdP/inbrief/prb0254-e.htm.
[307] Government of Canada, 'The North American Free Trade Agreement (NAFTA) - Chapter 11 - Investment', Global Affairs Canada, n.d., https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng.
[308] James McBride and Andrew Chatzky, 'How Are Trade Disputes Resolved?', *Council on Foreign Relations*, 6 January 2020, https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.

"put the ISDS on the map" and held responsible for the spur in ISDS cases[309] But also, it has illustrated an overlap in international investment and international trade law.[310]

There is a trend of parallel proceedings, involving the ISDS mechanism and WTO claims under NAFTA, that points to an overlap in these substantive norms.[311] Indeed, the investment chapters in international trade agreements are separately sectioned. Trade and investment enforcement mechanisms are also structurally different. The question that remains is how investors have different standings over the same obligation within a single legal document. Within the same legal document, investors have legal standing in arbitral tribunals but not at WTO, yet they may espouse the state to initiate WTO proceedings over same obligations. In cognisance, it begs the question on the significance of ISDS with the option of WTO proceedings over the same issue. Within the scope of the dissertation, I do not intend to discuss the matter further beyond noting an overlap of the trade and investment disciplines questioning the significance of the ISDS mechanism.

2.4.1.3 Bilateral Free Trade Agreements (FTAs)

Compared to MTAs and RTAs, bilateral agreements are easier to negotiate but these are only between two countries. Many are negotiated when MTAs and RTAs are unsuccessful.[312] In this sense, bilateral agreements have been noted to be "the rule and multilateralism the exception

[309] Nathalie Bernasconi-Osterwalder, 'USMCA Curbs How Much Investors Can Sue Countries—Sort Of', *International Institute for Sustainable Development*, 2 October 2018, https://www.iisd.org/articles/usmca-investors; Also see: Elizabeth Whitsitt, 'NAFTA Fifteen Years Later: The Successes, Failures and Future Prospects of Chapter 11', *International Institute for Sustainable Development*, 16 February 2009, https://www.iisd.org/itn/en/2009/02/17/nafta-fifteen-years-later-the-successes-failures-and-future-prospects-of-chapter-11/.

[310] See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.

[311] See: Brooks E. Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration'. The authors cite the Arbitral Tribunal in the Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) that, 'There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder'.

[312] Arie Reich, 'Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity', *The University of Toronto Law Journal* 60, no. 2 (2010): 263–87, https://doi.org/10.3138/utlj.60.2.263.

"[313] This is not confined to international trade but the broader discipline of international economic law, including international investment law.[314] In the context of this dissertation, it is sensible to expect bilateral FTAs to encapsulate relative progression on the convergence of trade and investment. A new generation of bilateral FTAs, negotiated after 2006, provide for establishment rights for goods and services. These markets access rights are essentially investment rights.[315] They provide foreign investors the rights to entry and establishment without (or with minimal) conditions and regulations and to operate without most conditions.[316] In the spirit of the convergence of trade and investment, these FTAs provide for comprehensive chapters on investment.[317] These trade agreements provide the same protection to foreign investors as investment agreements, with the main novelty being dispute resolution.[318]

The EU has negotiated investment chapters in large FTAs.[319] Initially, the EU advocated strongly in favour of ISDS. In what I interpret as supporting the significance of ISDS in FTAs as an available 'best practice', so that," no EU investor would be worse off than they [sic] would be under member states' BITs."[320] This implies that FTAs are also mandated with the protection of investment, reflecting a convergence of trade and investment as hypothesised.[321] ISDS is relied on to enforce international trade rights.[322] But as discussed on the emergence of ISDS,

[313] See: Arie Reich.
[314] See: Arie Reich.
[315] Also see: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.
[316] Martin Khor, 'Bilateral and Regional Free Trade Agreements: Some Critical Elements and Development Implications' (Third World Network, September 2008), , https://www.twn.my/title2/par/Bilateral_and_regional_fta-MK-sept08.doc .
[317] The EUs so-called new generation FTAs negotiated after 2006 is the EUs "second generation" FTAs that are described as comprehensive FTA's that go beyond trade in goods, also covering services and potentially other aspects such as investment related issues. See: European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2017 - 31 December 2017'.
[318] See: Anastasia Makarenko and Lyudmila Chernikova, '"New Generation" EU Free Trade Agreements: A Combination of Traditional and Innovative Mechanisms'.
[319] I will discuss this further in Chapter Four of this dissertation.
[320] European Commission, 'Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions - Towards a Comprehensive European International Investment Policy', European Parliament Resolution (Brussels: European Commission, 7 July 2010), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF.
[321] Also see discussion on 'ISDS in a New World Order', earlier in this chapter.
[322] Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.

earlier in this chapter, the parting of trade and investment into separate disciplines of international economic law gave significance to the ISDS. In the present day, the EU's position on ISDS in their "new generation" of free trade agreements reflects the emergence of a paradigm shift 'from a strong emphasis on interests of private property protection towards a more comprehensive approach.' A return to the provision of investment and trade within a single document reasonably invites an enquiry into the beginnings of the ISDS' mechanism and its reasons thereof. The beginnings weaken support of ISDS that was created to be separate from trade where investors have no legal standing but lobby state espousal.

The beginnings do not provide legal standing to challenge states on their obligations to protect investments fairly and equitably, as provided by ISDS in the present day. Facing a legitimacy crisis, ISDS yearns for a conclusive answer on whether or not it is significant in the present day. New evidence and perspectives, in relation to the convergence of trade and investment, do not give a clear view on whether the ISDS is still significant.

2.5 ISDS in a New World Order

Today, scholars speak of a New World Order that serves the needs of the present day. In Chapter One, I defined the New World Order as 'a change in the way the international system and international law and institutions operate'. I have noted that this is not entirely my own definition but one that draws from legal scholarship that identifies changes in the present day as a New World Order. Discussed in the immediate sections above, changes have been witnessed, from trade and investment in single instruments to a parting of ways into separate disciplines. Today, towards a New World Order, there are elements that reflect a change in the way that the international system operates. One such reflection is the 're-convergence' of trade and investment from separate sub-disciplines. Accordingly, international trade and investment law are seemingly converging towards each other, once again. Relevant to the topic of the dissertation, the interest is whether ISDS is still significant in consideration of these changes reflecting a New World Order.

Until the 1960s, FCN treaties remained the ‘American alternative' to the European BITs that specialise in investment protection and provisioned for ISDS.[323] There are still many FCN treaties that are in force and exist in parallel to BITs today.[324] Notwithstanding, there is, a larger number of BITs in force as they provided motivation to remedy perceived deficiencies of earlier treaties, such as the arbitration provisions of FCN treaties.[325] Although, today a new generation of comprehensive agreements have also begun to rise above BITs. Of interest, the new generation of agreements are more akin to the design of FCNs on investment protection ‘in context'.[326] It is written that ' European BIT Model, including ISDS, has become ill-equipped to deal with a new economic context.’.[327] This development supports the enquiry of the dissertation into investment protection in a New World Order, that is also signalled by the re-convergence of trade and investment

As highlighted in the Scope of the dissertation, I acknowledge that there may be many changes in the international system, law and its institutions that resemble a ‘New World Order’. Thus, relevant to dispute settlement, the following sub-chapter on the re-convergence of international investment and international trade law should not be interpreted as a negation of other possible changes reflecting a New World Order. The intention of the dissertation is not to explore a whole explanation of the New World Order but a part of it.

[323] See: Wolfgang Alschner, ‘Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law’.
[324] Wolfgang Alschner; Also see: The Office of Trade Agreements Negotiation and Compliance (TANC), ‘List All Trade Agreements’, Enforcement and Compliance (The Office of Trade Agreements Negotiation and Compliance (TANC), n.d.), https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp; Nations have entered into specialised agreements on topics that were historically addressed in FCN treaties. The General Agreement on Tariffs and Trade, for example, now covers trade issues. The International Covenant on Civil and Political Rights now covers many human rights issues. Bilateral investment treaties now cover issues relating to foreign investment. See: John F. Coyle, ‘The Treaty of Friendship, Commerce, and Navigation in the Modern Era’.
[325] See: Wolfgang Alschner, ‘Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law’.
[326] See: Wolfgang Alschner. Although comprehensive, the modern FCNs were very much primarily still considered as trade agreements while European agreements focused exclusively on the protection of investments.
[327] Wolfgang Alschner.

In the present day, the EU is asserting to secure the "right balance" between private and public interests will also be central.[328] Proposing a hybrid of 'public' and 'private', the plan of the EU is to model the MIC that maintains the ISDS mechanism.[329] Questions are whether it will be *'under the aegis of the UN, or will it be a body of the WTO, an extension of the International Centre for Settlement of Investment Disputes (ICSID), or a self-standing organisation.'*[330] Comparisons are drawn between the investment treaty system and other sub-fields of public international law that concern a state's right to act and regulate domestically, like trade.[331] Which Anthea Roberts groups together as examples of "international public law."[332]

2.5.1 The "public" vs. "private" debate

As discussed in this chapter, traditional theory has not been helpful in deciding on the significance of ISDS with the convergence of the trade and investment disciplines. Likewise, theory is also argued to be of little value in the discussion of ISDS as a public or private discipline. Accordingly, I acknowledge and accept the supportive view of the EU but the public-private theoretical justification is weak. In support of my impression, I will briefly describe the academic problems on the distinctions of these disciplines.

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[328] Directorate-General for External Policies of the Union, 'Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements', vol. 1-Workshop (European Union: European Parliament, 2014), https://doi.org/10.2861/6828.

[329] I will not discuss the MIC in this chapter. I will address such proposed changes in Chapter Three and Four of the dissertation.

[330] European Parliament, 'Question for Oral Answer O-000084/2017 to the Commission Rule 128 Bernd Lange, on Behalf of the Committee on International Trade', Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (MIC) (European Parliament, 9 November 2017), https://www.europarl.europa.eu/doceo/document/O-8-2017-000084_EN.html; Also see: Hannes Lenk, 'The EU Investment Court System and Its Resemblance to the WTO Appellate Body', in *Szilárd Gáspár-Szilágyi, Daniel Behn, Malcom Langford (Eds), Adjudicating Trade and Investment Disputes : Convergence or Divergence?* (Cambridge: Cambridge University Press, 2020), 62–91.

[331] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', *American Journal of International Law* 107, no. 1 (2013): 45–94, https://doi.org/doi:10.5305/amerjintelaw.107.1.0045.

[332] Anthea Roberts; Also see: Frank J. Garcia et al., 'Reforming the International Investment Regime: Lessons from International Trade Law', *Journal of International Economic Law* 18, no. 4 (December 2015): 861–92, https://doi.org/10.1093/jiel/jgv042.

ISDS has grown over the years to become one of the most controversial features of international investment law. Criticized as violating the rule of law, ISDS is said to be a misguided attempt to "privatize" what should remain in the "public" domain, such as concerning governmental decisions that involve the public interest than mere contractual disputes between private parties.[333] It is noted in academia and by states, as a mechanism to resolve "public law" disputes.[334]

There is also the question of whether 'private international law' is even international law. Essentially this question potentially threatens the significance ISDS if it is classified as belonging to 'private international law' that has sought to include international organisations and some individuals as subjects of international law. That is, the ISDS mechanism is created to protect foreign investors as subjects of international law beyond the protection of states (i.e. to protect both public and private actors).[335] Should 'private international law' not be considered as international law, so would ISDS if it is considered as 'private international law'.

However, scholars have pointed that there is a blurred line between "private international law" and "public international law".[336][337] The definition of 'international law', as between states,

[333] José E. Alvarez, 'Is Investor-State Arbitration "Public"?'
[334] For instance, although concluding that the regime of which it is a part, should best be seen as a hybrid between public and private, José E. Alvarez acknowledges the general consensus that ISDS is "public". See: José E. Alvarez; Also, the note by the General Assembly Secretariat that reproduces a submission from the Government of China in preparation for the thirty-eighth session of the United Nations Commission on International Trade Law Working Group III on the possible reform of investor-State dispute settlement (ISDS), acknowledges the 'public-law nature of the ISDS mechanism.' See: United Nations General Assembly Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China', United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-Eighth Session (Vienna, 14 October 2019), https://uncitral.un.org/sites/uncitral.un.org/files/wp_177_wgiii.pdf .
[335] See: Ian Brownlie and James R Crawford, *Brownlie's Principles of Public International Law (8th Edition)*, 8th ed. (Oxford University Press, 2012); Also see: Martin Dixon, *Textbook on International Law*, 7th ed. (Oxford University Press, 2013).
[336] This is a discussion not only limited to the topic on ISDS. Referring to social clauses in new-generation FTAs, Hajdú argues that a shift from public to private regulation has occurred. See:
[337] This is a discussion not only limited to the topic on ISDS. Referring to social clauses in new-generation FTAs, Hajdú argues that a shift from public to private regulation has occurred. See: József Hajdú, 'International Labor Standards and Non-Trade Values', in *Csongor István Nagy (Ed), Global Values and International Trade Law*, 1st ed. (Routledge, 2021).

was seemingly appropriate at one time. However, this definition has also faced criticism such as that it has now been generally recognised that not only states, but international organisations and to some extent individuals have also certain rights and duties under International Law.[338] The term "private international law" was coined to cover these matters, as distinct from "public international law" that addresses legal arrangements between states.[339] At face value, it may seem folly to question whether this criticism means that international organisations and some individuals have also certain rights and duties under the discipline of 'public international law'. This is, though, a question that mind boggles scholars of international law.[340]

Although a seemingly valid theoretical debate, it is noted by some scholars that the distinctions between "public international" and "private international law" are of "little value in theory and of no practical use".[341] Hence, I do not intend to add to the arguments on the distinctions of these disciplines. Rather, I agree with scholars that are of the view that 'establishing whether investment treaty arbitration is a part of public or private international law or not, is not assuming anything about facts.'[342] Whether ISDS is significant, based on the nature of its field, is a conceptual analysis. It is a conceptual argument with no facts to invalidate the argument. The only substance that is played with is concepts, no facts can be brought to refute the argument, only competing narratives.

The view of the EU to secure the "right balance" between private and public international law thus neutralises the arguments upon which it's choice may be criticised. This "sitting on the fence" view avoids being caught in the wrong yard, whichever that may be. I interpret it as a

[338] Jeremy Bentham coined the term 'International law' as the concept of 'the law between nations.' Scholars such L. Oppenheim expanded with various definitions noting international law as that is a law 'of States with one another, not a law for individuals.' See: Lassa Oppenheim, *International Law, A Treatise*, vol. 1–2 (London: Longmans, Green, and co., 1905), https://ia800901.us.archive.org/15/items/internationalla00oppegoog/internationalla00oppegoog.pdf.
[339] Joseph Story coined the term in the 1830's. See: Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic : In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Boston: Hilliard, Gray & Co, 1834).
[340] Eg. José E. Alvarez, 'Is Investor-State Arbitration "Public"?'
[341] 'The science of international law is merely a name for the formal method of studying the subject better described as the philosophy of international law.' See: Roland R. Foulke, 'Definition and Nature of International Law', *Columbia Law Review* 19, no. 6 (December 1919): 429–66.
[342] Shai Dothan, 'As If: Why Legal Scholarship Needs Assumptions', *Seton Hall Law Review* 51, no. 3 (2021), https://scholarship.shu.edu/shlr/vol51/iss3/2.

weak conceptual justification rather than addressing the facts that make the MIC more significant than the traditional ISDS. Thus, I accept the position of the EU in support of the MIC which I will further discuss in the dissertation but reserve my support for the private- public international law conceptual justification.

2.5.2 Supporters & Critics of ISDS

As discussed earlier in the chapter, the ISDS mechanism coincides with the separation of trade and investment but it is also argued that it may possibly not have been intended to operate entirely as we know it.[343] In the absence of assistance from traditional theory, I seek to review the views of states in support of ISDS' and those that critique the mechanism as the final sub-chapters of this Chapter Two. I agree with some scholars on the suggestion that the significance of ISDS depends on the view of states for which this reform is required to address. Within the limitations of this dissertation, as declared in Chapter One, the focus of the discussions of this dissertation is on the EU and China.

ISDS reform options form part of the EU-China CAI negotiations. The EU's negotiating party to the EU-China CAI, China, is indeterminate on its position on ISDS.[344] It is developing its own system for investment disputes such as in the context of its Belt and Road Initiative but still 'open to possible proposals for improving the ISDS mechanism.'[345] This approach may be interpreted in its role in the triangular EU–US–China trade and investment relationship.[346] The

[343] See: Joost Pauwelyn, 'Remarks by Joost Pauwelyn', *Proceedings of the ASIL Annual Meeting*, Proceedings of the 116th Annual Meeting, 98 (2004): 135–38, https://doi.org/doi:10.1017/S0272503700061024.
[344] Yuwen Li and Cheng Bian, 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options'; Also see: Huiping Chen, 'Reforming ISDS A Chinese Perspective', in *Yuwen Li, Tong Qi, Cheng Bian (Eds), China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*, 1st ed. (Routledge, 2019).
[345] United Nations General Assembly Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China'.
[346] Guillaume Van der Loo, 'Lost in Translation? The Comprehensive Agreement on Investment and EU–China Trade Relations'.

EU and the US have contrasting views on ISDS while China is seemingly in the middle. The US, once the world's leading proponent of ISDS, has largely criticised and eliminated ISDS from the United States–Mexico–Canada Agreement (USMCA) referred to as the "New NAFTA". With the EU proposing a re-design, the US leans towards termination of ISDS. It reduces the scope of ISDS considerably. By July 2023, ISDS was terminated between the United States and Canada.[347] The position if China is not clear. I interpret China's position on the fence as suggesting that it is also open to opposing views on ISDS whether to re-design or to terminate the ISDS system.

2.5.2.1 ISDS Reformers

While the acceptability of investor-state arbitration is being questioned, there is currently no agreement among states on the specific changes to implement. Anthea Roberts is cited by scholars to have simplified the varying views on the ISDS reform into three main groups; (1) Advocating for gradual changes (Incrementalists), supporters of structural or systemic reforms (Systemic reformers) and those that advocate for a complete shift in the established approach (Paradigmatic Shifters).[348]Discussing the terms is not to strictly call the EU and China either instrumentalists, systemic reformers or paradigm shifters of the ISDS system. Rather, the intention in this dissertation is to note the difference in the views on ISDS between the EU and China. The purpose of this section in this chapter is to bring light to this difference, with sophistication. The three groups divide the views on ISDS reform rather than divide varying states into groups. As demonstrated in this dissertation with reference to the EU and China, the

[347] The ISDS mechanism that was in place under the original NAFTA is removed by the CUSMA. The ISDS provisions under Chapter 14 (Investment) of CUSMA do not apply to Canada. But the original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of CUSMA (ie. Until July 2023). See: 'Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada the United States of America, and the United Mexican States' (2018), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng; and 'Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States' (2019).

[348] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', *American Journal of International Law* 112, no. 3 (July 2018): 410–32, https://doi.org/10.1017/ajil.2018.69.

position of some states on ISDS, involves various views that span across the three different groups. In Chapter Three and Four, I will discuss their respective positions further.

2.5.2.1.1 Most Supportive: A Re-Design of the ISDS system

Incremental and systemic reformers are supporters of the ISDS system. In response to the legitimacy crisis, the supporters of ISDS continue to support the existence of the ISDS system. The insistence is that the ISDS mechanism does protect investor rights. Supporters rather seek procedural reformation that still maintains the ISDS mechanism.

2.5.2.1.1.1 Incrementalists

Incremental reformers prefer to adopt small to moderate adjustments and more targeted reforms as opposed to systematic reforms.[349] I interpret these arguments to maintain ISDS, as a mechanism that is still significant notwithstanding changes in the present day. It is believed to be 'almost certain' that ISDS will be included in the EU-China CAI.[350] Thus in this sense it is believed that the EU and China would not be reforming the ISDS system or atleast more of incrementalists. Building up to proposals in Chapter Five of the dissertation, I will discuss the views and positions of the EU and China in Chapter Three and Four, respectively.

2.5.2.1.1. 2 Systemic Reformers

[349] The CPTPP is a typical example of an incremental approach to ISDS reform. An example of one of the main supporters of an incremental reform of the current ISDS system is Japan. See: Ming Du, 'Explaining China's Approach to Investor-State Dispute Settlement Reform: A Contextual Perspective', *European Law Journal* 28, no. 4–6 (3 August 2023): 281–303, https://doi.org/10.1111/eulj.12468.

[350] Jun Xiao, 'Concrete Issues in Instituting an International Investment Court', in *Yuwen Li, Tong Qi, Cheng Bian (Eds), China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*, 1st ed. (Routledge, 2019).

Systemic reformers move further compared to incrementalists. Although, they still see merit in retaining the ISDS based on its oft-repeated advantages, they view the current ISDS as seriously flawed and push for systematic and structural reforms. The most vocal advocate for systemic reform is the EU.[351] As discussed, the EU has incorporated the ICS in some recent FTAs towards the ultimate goal of establishing a MIC that is modelled on the WTO dispute resolution system.

The EU has been engaging in negotiations with other countries and stakeholders to build consensus around its proposals towards reformation of the ISDS mechanism.[352] It has proposed to set up an international investment court, composed of a first instance court and an appeal body' that would adjudicate claims brought under investment treaties that member states have decided to assign to its authority such as in the Canada-EU Comprehensive Economic and Trade Agreement (CETA).[353] The European Commission proposed the establishment of an ICS to replace traditional ISDS system. The EU later incorporated the ICS in some recent FTAs towards the ultimate goal of establishing a MIC.[354] I will elaborate on the MIC in the following Chapter Three when I discuss the position of the EU on ISDS. In this Chapter I seek to discuss the views of the critics and the supporters of ISDS and where the EU and China lies.

Critics argue that the MIC proposal still leaves the possibility of a re-institutionalisation of ISDS through procedural reform, without addressing the substantive issues.[355] In other words, accepting the merits of the argument that the distinction between procedural and substantive reforms is difficult to make, the MIC proposal suggests the significance of ISDS' by not

[351] See Chapter Three of this dissertation.
[352] The EU 'engages with partner countries and stakeholders to build consensus around its proposals and ensure that the agreements negotiated reflect the interests of all parties.' See: European Commission, 'Making Trade Policy', n.d., https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy_en.
[353] See: Directorate-General for Trade, 'Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court', *European Commission*, 20 March 2018, https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en; And see: General Secretariat of the Council, 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and Its Member States, of the Other Part', Statements to the Council minutes (Brussels: Council of the European Union, 27 October 2016), https://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf.
[354] See Chapter Three of this dissertation.
[355] See: Fabian Flues, 'Ten Reasons Why the EU's Proposal for a Multilateral Investment Court Doesn't Fix a Fundamentally Flawed System', *Friends of the Earth Europe*, 24 November 2017, https://friendsoftheearth.eu/publication/the-multilateral-investment-court-locking-in-isds/.

addressing the critical issues arising out of the investment treaty jurisprudence that focus on substantive issues. In this sense, the EU is a systematic reformer. However, the MIC proposal in negotiations for the EU-China CAI is uncertain.

2.5.2.1.2 Most critical: A Termination of the ISDS system

The narrative of critics of the ISDS system competes with that of the supporters. Critics of the ISDS system view procedural reform is not enough. Whereas the support for ISDS argues for significance of the mechanism in the present day, criticism of the system follows the discussion of the critics over the 1990s MAI.[356] Paradigm shifters hold the most critical view of the ISDS system.

2.5.2.1.2.1 Paradigm Shifters

Paradigm shifters dismiss the current system as irrevocably flawed and arguing for a fundamental overhaul. Anthea Roberts notes that the approaches of paradigmatic reformers often do not require collective agreement. In practice, they advocate going back to the past before the existence of ISDS.[357] Such as going back to the reliance on domestic courts. Afterall, it is only in minority cases that local courts are considered inadequate for ISDS.[358]

2.5.3 Support & Criticism of ISDS in a New World Order

[356] The MAI was criticised as a one-sided instrument, to ensure higher standards of protection and legal security for foreign investors than host states. See earlier discussion on MTAs, in this chapter.
[357] Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting', *European Journal of International Law (EJIL): Talk!* (blog), 20 September 2019.
[358] In analysis of court-related ISDS cases, investors are alleging inadequacies of local courts in only a minority of all ISDS cases. See: Maria Rocha, Martin D. Brauch, and Tehtena Mebratu-Tsegaye, 'Advocates Say ISDS Is Necessary Because Domestic Courts Are "Inadequate," But Claims and Decisions Don't Reveal Systemic Failings', 2021, https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/207.

The question in this dissertation is whether the proposals of the EU and China meet the needs of the present day. In other words, whether the respective views support or criticise the proposals that reflect re-convergence of the disciplines of trade and investment.

The criticism understands the re-convergence of trade and investment as a response to the legitimacy crisis of the ISDS. Indeed, the causes of a re-convergence in the present day are unclear but amongst many other possible explanations, it is claimed to be a response to the legitimacy crisis of ISDS.[359] Some scholars suppose that 'FTAs probably recognise that some issues such as on investments are best resolved at the WTO.'[360] While the EU addresses the ISDS procedure by proposing 'provisions in the framework of negotiations on EU trade and investment agreements without calling into question the ISDS system itself, critics question the entire existence of the ISDS system.'[361] Research draws from evidence on the problematic uses of the ISDS to explore the proposition that the mechanism is no longer justified.[362] The insistence is that ISDS does not protect investor rights.[363] The arguments purport that investors will likely keep investing in the absence of ISDS as it is not the most attractive feature to foreign investors.[364] Hence, the critics of ISDS rather seek substantive reformation, such as the termination of the ISDS mechanism. Within the topic and scope of this dissertation, the proposal is for investor-state disputes to be included in the WTO agenda. Accordingly, I interpret this call for the termination of ISDS as insisting that the ISDS is insignificant in the present day.

2.5.3.1 A Court System Converging Disciplines

[359] For example, other possible explanations such as the Investment off WTO agenda (1999 Singapore issues) and the Lisbon Treaty (EU powers to negotiate not only external commerce but investment). See: Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'.
[360] Heng Wang, 'The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?', *Journal of World Trade* 53, no. 2 (April 2019): 317–42, https://doi.org/10.54648/trad2019015.
[361] Marta Latek and Laura Puccio, 'Investor-State Dispute Settlement (ISDS) State of Play and Prospects for Reform', Briefing (European Parliamentary Research Service, January 2015), https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29130710_REV2_EN.pdf.
[362] Marta Latek and Laura Puccio.
[363] Marta Latek and Laura Puccio.
[364] Marta Latek and Laura Puccio.

Earlier in this chapter, I discussed that investment protection has trickled into international trade agreements as the EU has negotiated investment chapters in large FTAs. Although ISDS is provisioned in the trade chapters of FTAs, we assume that it does not deal with trade issues which are typically heard by the World Trade Organisation (WTO) Dispute Settlement Body (DSB).[365] But the trend of parallel proceedings claiming ISDS protection in investment arbitration tribunals as well as a WTO claim, points to an overlap.[366]Moreover, the EU proposal of the MIC to replace the ISDS mechanism is described as resembling the WTO DSB that handles disputes between member states of the WTO.[367] Despite the difference that the MIC would be a permanent court, whereas the WTO DSB operates on an ad hoc basis, they will have similar rules of procedure.[368] The EU has defended its proposal for the MIC, stating that the proposed MIC safeguard the right of governments to regulate in the public interest.[369] As a global proposal, which I will discuss further in Chapter Three, the EU has also emphasised that the proposed MIC is open to all countries and is not limited to EU member states.[370] Likewise, the WTO has not been limited to EU member states so it is not clear how the EU differentiates the MIC proposal from it on that substantive note.

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[365] And in recent years, there is an increasing number of cases in which the same dispute is simultaneously dealt by the WTO and by the investor-state dispute settlement (ISDS). In discussing the convergence of trade and investment arbitration, Roger Alford also discusses some examples of parallel proceedings have occurred in the recent years. See: Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration'.

[366] See: Brooks E. Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration'.

[367] See: Hannes Lenk, 'The EU Investment Court System and Its Resemblance to the WTO Appellate Body'; And see: Andrea K Bjorklund and S.R Ratner, 'The Multilateral Investment Court: A Step Forward in the Evolution of the International Investment Regime?', *American Journal of International Law* 112, no. 4 (2018): 589–627, https://doi.org/Doi: 10.1017/ajil.2018.53. The scholars compare the EU's proposal for the MIC to the WTO DSB; Also see: Andrea K Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court', *Arbitration International* 37, no. 2 (June 2021): 433–47, https://doi.org/10.1093/arbint/aiab015.

[368] Also see discussions of the MIC proposal in Chapter Three of this dissertation.

[369] Some critics argue that the process of the WTO DSB is too focused on legal technicalities and does not take into account broader concerns. The substantive criticism is that it is biased towards the interests of rich countries who have more resources to navigate the legal process and exert pressure on poorer countries. See eg.: University of Ottawa, 'Rethinking WTO Dispute Settlement', Conference Report, 27 July 2023, https://www.uottawa.ca/faculty-law/sites/g/files/bhrskd406/files/2023-08/Ottawa_Rethinking%20WTO%20Dispute%20Settlement_1Aug2023.pdf.

[370] The MIC is intended to resolve disputes between states similar to the WTO DSB. The MIC would similarly have the authority to interpret and apply international investment law. See: Bjorklund, A. K., & Ratner, S. R.. The Multilateral Investment Court: A Step Forward in the Evolution of the International Investment Regime? American Journal of International Law, 112(4), 589-627(2018). Doi: 10.1017/ajil.2018.53.

The EU has also been a vocal critic of the WTO DSB, advocating for reforms to the WTO, including modernising its rules.[371] The EU has argued that the current system of the WTO DSB is being undermined by the failure of some members to appoint new members to the Appellate Body, which is responsible for hearing appeals of panel reports.[372] The proposal of the EU is for the MIC to have a more structured and formalised system of appeals, which is not present in the WTO DSB.[373] In other words, it seems that the EU proposes the MIC to re-design ISDS with a court system similar to the WTO DSB, with a more formalised system of appeals. Although, critics argue that the proposed MIC would only have jurisdiction over investment disputes and would not be able to address broader issues.[374]

2.5.3.2 Limited Scope of Jurisdiction

Earlier in the chapter, I also briefly noted the possible reasons of the new generation FTAs. One of the supposed reasons is the failure of the WTO to address behind the border issues. The WTO

[371] See: European Commission, 'EU Trade Policy Review: Frequently Asked Questions', 2021, https://ec.europa.eu/commission/presscorner/detail/en/fs_21_1108. The EU has expressed its position on the WTO and the need for reform. Noting that it has proposed several reforms to the WTO, it expresses that the EU has been a 'long-standing and vocal advocate' for WTO reform, including efforts to modernise its rules and strengthen its dispute settlement system .

[372] See: European Commission, 'The EU's Approach to WTO Reform', 2019, https://ec.europa.eu/trade/policy/policy-making/wto-reform/; Also see: Gisela Grieger, 'International Trade Dispute Settlement World Trade Organisation Appellate Body Crisis and the Multi-Party Interim Appeal Arbitration Arrangement', Briefing (European Parliamentary Research Service, 17 June 2024), https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf.

[373] See: European Commission, 'Investment Court System' (European Commission, 2018), https://ec.europa.eu/trade/policy/in-focus/investment-court-system/.; The EU provides an overview of the proposed MIC and its differences from the current ISDS system. It states that the MIC would have a more structured and formalized system of appeals. By contrast, the WTO DSB does not have a formal appeals process, and its decisions are often subject to political pressure and delay. Also see: European Union, 'Joint Statement by Commissioner Malmström and Minister of Commerce Zhong Shan on the Conclusion of the Negotiations of the EU-China Investment Agreement', 2019, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2257.

[374] Tarcisio Gazzini and N. Skoutaris, 'Multilateralizing Investment Dispute Settlement: The European Union's Radical Proposal', *European Journal of International Law* 31, no. 1 (2020): 141–63, https://doi.org/doi: 10.1093/ejil/chz045. Gazzini & Skoutaris also discuss the criticism that the MIC would have limited jurisdiction and would not be able to address broader issues. They note that the proposed MIC would have a narrow focus on investment disputes, which could limit its effectiveness in addressing systemic issues related to investment and development. The scholars suggest that the proposed MIC could be improved by incorporating elements of other international dispute settlement systems, such as the WTO's dispute settlement system. Also see: Gus Van Harten, 'The Multilateral Investment Court: The Appeal of an International Investment Court to Advanced Economies', in *Investment Treaty Arbitration and International Law* (Edward Elgar Publishing, 2019), 451–73. Van Harten discusses the concern that the MIC would have a limited scope and would not be able to address broader issues beyond investment disputes.

has long received criticism of not addressing broader issues and only having jurisdiction over trade disputes. Thus, the position of the EU is to re-design the ISDS with a court system similar to the WTO DSB, although with limited jurisdiction on international investment disputes. The MIC would be limited to hearing disputes relating to investment protection and not other areas of law.[375] The EU has proposed that the MIC should only have jurisdiction over disputes between investors and states that have signed the MIC agreement.[376] In this way, the failure of the WTO in respect of investment is addressed by the MIC.

2.5.3.3 ISDS and State -State Dispute Settlement (SSDS) in parallel

The dissertation has already mentioned that the ISDS reform option in the form of the MIC is modelled on the WTO dispute settlement system that is mandated resolve trade disputes among its member states rather than private investors.[377] While the DSU is not explicitly labelled as a "State-State Dispute Settlement" (SSDS) mechanism, it serves a similar purpose by resolving disputes between states at the WTO. The WTO DSU, dispute settlement procedures involve consultations between the parties, panel proceedings, and the possibility of appellate review by the WTO Appellate Body. This WTO dispute settlement process is distinct from traditional ISDS mechanisms, which involve disputes between private investors and sovereign states.

[375] See: Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes', Draft Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes. (Council of the European Union, 20 March 2018), https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf; Also see: August Reinisch and Marc Bungenberg, 'Draft Statute of the Multilateral Investment Court' (2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf. In a Draft Statute of the Multilateral Investment Court, August Reinisch and Marc Bungenberg demonstrate what is possible on the basis of current debates in UNCITRAL. See:

[376] Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes'; August Reinisch and Marc Bungenberg, Draft Statute of the Multilateral Investment Court.

[377] World Trade Organization, 'Understanding on Rules and Procedures Governing the Settlement of Disputes-Annex 2 of the WTO Agreement', Dispute Settlement: Legal Text, n.d., https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

Proposing to reform ISDS with an MIC indicates the incorporation of state -to-state dispute settlement mechanism in investment dispute settlement as well.[378]

I have already discussed in the dissertation that the ISDS traditionally involves direct arbitration between an investor and a host state, while SSDS facilitates dispute resolution between states involved in the investment agreement. SSDS complements ISDS by fostering a state-centric approach to investment dispute resolution.

The parallel use of ISDS and SSDS mechanisms provides a versatile framework for addressing investment disputes, recognising the importance of both investor protection and state cooperation. This dual-track system offers a comprehensive framework for addressing diverse scenarios. It emphasises diplomatic and cooperative solutions. States engaging in SSDS prioritise promoting amicable settlements such as negotiations, that consider broader diplomatic relations beyond the specific investment dispute. The combined use of both mechanisms allows for a flexible and context-specific approach. While ISDS offers a mechanism for investors to protect their rights, SSDS enables states to engage in a collaborative resolution process, potentially mitigating the confrontational adversarial nature associated with traditional arbitration.

2.6 Conclusion

There is no absolute answer on whether or not ISDS has lost significance in the present day. The synthesis of trade and investment in what the dissertation defines as a New World Order, cannot simply be interpreted as indicating the insignificance of ISDS. In response to one of the research questions of the dissertation, the reasons for which ISDS is provided for in international agreements in the New World Order are not clear. I began the discussions of the chapter with a

[378] More directly, some investment treaties provide for state -to-state dispute settlement inspired by the WTO dispute settlement system. See: Nathalie Bernasconi-Osterwalder, 'State–State Dispute Settlement in Investment Treaties', *International Institute for Sustainable Development*, Best Practices Series, October 2014, https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

visit of the traditional functions of trade and investment law to gain on elements that would justify its function and thus significance in the present day.

I began with noting that international trade law and international investment law are traditionally distinguished as sub-disciplines of the broader field of international economic law. It is generally accepted that the function of international economic law is to achieve economic development, such as in the form of trade and investment cooperation between states. The chapter discussed that the case for investment law mainly rests on the traditional distinction of investment promotion and investment protection. While the function of international trade law is for appropriate rules and customs for handling trade between countries, the function of traditional international investment law is to contribute to economic development with the protection of foreign investment. Prior to the 19th century, the models for trade and investment agreements were viewed as within a single discipline. I developed the discussion on scholarship identifying CIL, Treaties of Westphalia and FCNs as such illustrations.

I concluded that the development of the ISDS mechanism rested on the separation of the disciplines of trade and investment. Up until the 19th century, the ISDS mechanism as a mechanism that specialises in investment protection separate from trade protection, did not exist. It developed as a mechanism for investors to bring claims against these sovereign states through international arbitration. The rationale was to protect the interests of foreign investors as subjects of international law, beyond the protection of states. Attempts at multilateral investment protection measures were not successful. Rather, entry into force of the GATT as a major multilateral organization had competence over trade but no competence over investment.

I discussed that BITs dealt exclusively with the protection of investment. The ISDS mechanism in BITs specially served investment goals, separate from trade. I observe that their enforcement mechanisms are structurally different. The significance of ISDS is linked with the argument that that 'rule of law was lacking in overseas territories. Amongst such suppositions, ISDS is facing criticism in the present day. It faces a legitimacy crisis while the mechanism for trade dispute resolution is perceived as successful.

In the present day, international trade and investment law are seemingly converging towards each other, once again. Which the dissertation has defined as a New World Order, there are

elements that reflect a change in the way that the international system operates. One such reflection is the ‘re-convergence’ of trade and investment from separate sub-disciplines of international economic law. A new generation of comprehensive agreements have also begun to rise above BITs. The new generation of agreements approach investment protection ‘in context’. They address the new ‘economic context ' that there is a re-convergence of trade and investment, including its dispute resolution mechanisms. The interest is whether ISDS is still significant in consideration of these changes reflecting a New World Order.

I discussed how the lines between international trade and investment law have become obscure. I limited the discussion to how international investment protection has trickled into international trade agreements, as it is already traditionally known and expected that the ISDS mechanism is provisioned for in investment agreements. I observe the merits of the argument that there are similarities between the underlying principles of international trade and investment and a clear convergence between some of constitutive elements of international trade and investment agreements. In questioning the significance of ISDS today, I noted that it is worth considering its provision in trade agreements in which it was traditionally not provisioned for. I began the discussion with the essence of investment in trade of earlier initiatives that have influenced Multilateral Trade Agreements (MTAs), Regional Trade Agreements (RTAs) and bilateral Free Trade Agreements (FTAs). My discussion followed the logic that initiatives were first at a multilateral level. ISDS may not have been provisioned for in MTAs but has influenced RTAs and FTAs with the endeavour to protect investment. In the spirit of the convergence of trade and investment, these FTAs provide for comprehensive chapters on investment. Indeed, the investment chapters in international trade agreements are separately sectioned. However, the questions on the significance of ISDS with the option of WTO proceedings over the same issue, remains. The provision of investment and trade within a single document invites an enquiry into the beginnings of the ISDS mechanism and it’s reasons thereof. I concluded that, as theory is inconclusive, some scholars suggest that whether the ISDS is significant should be left to the respective view of states.

The chapter concluded with the discussion that both supporters and critics acknowledge the ISDS legitimacy crisis but with different proposals on its reformation. The supporters of ISDS are of the view that the ISDS is still significant in the present day notwithstanding changes. Only seeking for a procedural rather than a substantive reform of ISDS, the EU has been the main driver of reform proposals. Proposing a redesign rather than a termination, the EU is asserting to secure the "right balance" between private and public interests by proposing a MIC that still leaves possibility of a re-institutionalisation of ISDS. However, scholars have argued that the distinctions between "public international" and "private international law" are of "little value in theory and of no practical use. As theory does not sufficiently support the EU's view but competing narratives, the matter on the significance of ISDS requests fundamental research on the varying positions of states and the issues for which this reform is required to address. Beyond this chapter, further research on EU's position on ISDS is required in Chapter Three of this dissertation.

In the final discussion of the chapter, critics of the ISDS system argue that mechanism is no longer justified. Critics seek substantive reformation, such as the termination of the ISDS mechanism. I interpreted China's undecided view on ISDS as open to supporting as well as opposing views on ISDS. Before such a conclusion on China's position on ISDS, research in Chapter Four of this dissertation, is required.

I highlighted the MIC as an ISDS reform option that is largely supported by the EU. It draws inspiration from the WTO dispute settlement system that is designed to resolve trade disputes among member states. Although not SSDS, the WTO DSU serves a similar purpose in resolving disputes between states. It involves consultations, panel proceedings, and possible appellate review, distinct from traditional ISDS mechanisms involving private investors. I briefly explored the combined use of ISDS and SSDS. The possibility of a dual-track system offers a versatile framework recognises the significance of both investor protection and state cooperation.

The contrast between the EU and China' position on the ISDS system and reform options contributes to the uncertainty on whether the ISDS' mechanisms is significant to be provisioned for in the investment chapter of the EU-China CAI. Chapter Four of the dissertation, which in

contrast with the findings of Chapter Three, will be viewed in light of making proposals for the EU-China CAI in Chapter Five.

CHAPTER THREE

EU POSITION ON ISDS

3.1 Introduction

The dissertation aims to evaluate the EU and China's position on ISDS as reflected in their new 'comprehensive' FTAs, towards the modelling of investment dispute resolution in a new generation of investment agreements such as the EU-China CAI. In Chapter Two, it is concluded that the contrast between the EU and China' position on the ISDS system contributes to the uncertainty on whether the ISDS' mechanisms is significant to be provisioned for in the investment chapter of the EU-China CAI. The aim of this chapter is to examine the EUs position on ISDS and answers the question on whether changes are relevant to the New World Order.[379] The objective is to collect evidence on EU's perspective on ISDS reform as an indication of the EU's position on the ISDS mechanism. The findings of the chapter will be viewed in light of making proposals for the EU-China CAI.[380]

The examination of the EU's position on ISDS cannot be conceptualised in isolation from reform proposals. This chapter reflects on the future of ISDS, by evaluating whether UNCITRAL efforts, the EU proposal of a multilateral investment treaty and a proposed amendment to ICSID rules are desirable and plausible in a New World Order. The aim of the

[379] The usage of a "New World Order" in this dissertation is defined in Chapter One and discussed in Chapter Two.
[380] Chapter Five of the dissertation will make proposals for the contents of the EU-China CAI,

dissertation is not to give a response to the question of which reform options of ISDS are better. Rather than which option is 'better', the dissertation addresses whether the EU proposes changes that are 'relevant' to the New World Order. To answer the question on whether changes are relevant to the New World Order, the chapter will analyse the EU's recently signed new generation of FTAs, as evidence. The chapter assesses whether the new- generation of EU FTAs address the concerns that the EU has expressed about the legitimacy crisis of the ISDS mechanism.

3.2 EU Perspective on ISDS Reform

As introduced in Chapter One, the emergence of a paradigm shift 'from a strong emphasis on interests of private property protection towards a more comprehensive approach' is reflected in the EU's position on ISDS in their "new generation" of FTAs.[381] A new generation has served towards achieving greater economic integration to go beyond traditional FTAs.[382] This new generation provides for comprehensive chapters on investment including provisions on ISDS.[383] The new generation seeks to substantially liberalise all trade by addressing trade and investment in a "comprehensive" manner.[384] Overlapping disciplines, it was introduced in Chapter One that these trade agreements provide the same protection to foreign investors as investment agreements, with the main novelty being dispute resolution.

It is publicly known that as far back as in a resolution on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States, that the European Parliament

[381] *See:* European Commission, Report on Implementation of EU Free Trade Agreements, 1 January 2017 - 31 December 2017, European Union, 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0728.
[382] Also see: Thembi Pearl Madalane, 'EU DCFTAs: Carrot- and-Stick?', in *Zoltán Víg (Ed), Challenges of International Trade and Investment in the 21st Century* (Ankara Yıldırım Beyazıt University, University of Szeged, State University of Moldova, 2022) for a discussion of EU FTAs serving beyond traditional FTAs.
[383] Thembi Pearl Madalane. FTAs that are described as comprehensive FTAs that go beyond trade in goods, also covering other aspects such as investment related issues. The EUs new generation FTAs is the EUs "second generation", negotiated after 2006?.
[384] Thembi Pearl Madalane. The new generation of EU FTAs provide for 'comprehensive' chapters on investment.

requested the replacement of ISDS with a new system.[385] The resolution requested that the new system include an appellate mechanism and ensure consistency of judicial decisions.[386] The European Commission proposed the ICS in September 2015 as a replacement for the ISDS mechanism.[387] Since, the EU has been working on a proposal for a reformed ISDS system that would address concerns of ISDS, which was discussed up in Chapter Two. In most direct terms of the EUs position on ISDS, following it's early reform proposals, a speech was given at the Vienna Arbitration Debate regarding the EU's approach to investment dispute settlement.[388] The speech focused on the EU's recent efforts to establish a MIC which scholars describe as resembling trade dispute settlement mechanism, a proposal of a court system which will be discussed in a later section of this chapter. The proposal of the EU is for the MIC to 're-design' the existing ISDS system. As part of this reform process, the EU has been holding intersessional regional meetings to discuss the proposed reforms with stakeholders from various regions.[389] The meetings have brought a range of views on the proposed reforms including both support for and concerns about the proposed reforms that call for a complete termination of the system.[390]

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[385] European Parliament, Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2014/2228(INI) at: https://www.europarl.europa.eu/doceo/document/TA-8-2015-0252_EN.html. The EU began reform initiatives such as proposals in UNCITRAL which we discuss in the following section of this sub-chapter. Although, it must be noted that UNCTAD did publish a report on investment dispute settlement in June 2013, prior to the official start of the TTIP negotiations in July 2013. This report, titled "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," discussed various options for reforming the investor-state dispute settlement (ISDS) mechanism, including the establishment of a permanent court system. Therefore, it is possible that the idea of a two tiered system of an appellate mechanism and a permanent investment court was discussed in the context of the TTIP negotiations, as well as in other international forums and discussions that were taking place at the time. *See:* UNCTAD, Reform of Investor State Dispute Settlement: In Search of a Roadmap. Updated for the launching of the World Investment Report (WIR), 26 June 2013 at: https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.

[386] UNCTAD, Reform of Investor State Dispute Settlement: In Search of a Roadmap.

[387] *See:* European Commission, Investment in TTIP and beyond – the path for reform, 16 September 2015 at: https://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/investment/.

[388] European Commission, The 3rd Vienna Investment Arbitration Debate - 22 June 2018 - The European Union's approach to investment dispute settlement, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/c148ac95-1b33-4cb5-8e16-4ed90598a705/details.

[389] The meeting brought together representatives from governments, civil society organizations, and business groups to discuss the proposed reforms and provide feedback. *See:* First intersessional regional meeting on ISDS reform in Incheon, Republic of Korea,10-11 September 2018, Second intersessional regional meeting on ISDS reform in Santo Domingo, Dominican Republic.23-14 February 2019, Third intersessional regional meeting on ISDS reform in Conakry, Guinea, 25-26 September 2019 at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.

[390] Also, responding to the strong opposition of ISDS, the European Parliament had formally rejected the use of investor state arbitration in EU's international agreements. "The European Parliament, (...) rejects the inclusion of investor-to-state dispute settlement (ISDS) in any future or ongoing EU trade or investment agreements and urges the Commission and the Council to take this into account in all negotiations under way or planned with third

In cognisance of different views of stakeholders from the various regions, the EU has submitted proposals in efforts to reform the ISDS system. Most important in addressing concerns about ISDS, the EU has made submissions to the UNCITRAL Working Group III proposing novelties to the ISDS mechanism.[391] The novelty, contained in the CETA, is a bilateral Investment Court System (ICS) to set up a permanent body to decide investment disputes.[392] I will later discuss how the ICS may be seen as a precursor to the MIC.[393] Notwithstanding the current jurisdiction of the CJEU, a permanent court system has been the EU's new approach to the protection of investor rights to replace the ISDS mechanism.[394] The CJEU has issued Opinions confirming the compatibility of an ICS with the Treaties of the EU.[395] Although, it has been noted by some scholars that there are questions that have been left unanswered regarding new generation trade agreements.[396] These comprehensive agreements reflect the notion of a re-convergence of disciplines that comes through in the decisions of the CJEU.[397] Moreover, mainly focussing on

countries" *See:* Recommendation to the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, July 5, 2018 at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0301_EN.html. The MIC is proposed as a termination of the ISDS system. I discuss this issue later in this chapter under '3.2.2 Multilateral Court (MIC) proposal'.

[391] This will be discussed further in the following sub-chapter, 3.2.1 UNCITRAL Working Group III (Submission from the European Union and its Member States).

[392] The CETA (2016), chap. 8.

[393] See discussion in '3.2.2 Multilateral Court (MIC) proposal'.

[394] Finckenberg-Broman has also reported that the rejection of ISDS by the EU is a symptom of several underlying causes that include to avoid jurisdictional conflicts. See: Finckenberg-Broman,P., Weaponizing EU State Aid Law to Impact the Future of EU Investment Policy
in the Global Context, Studies in European Economic Law and Regulation, Volume 23, 2022.
The CJEU has jurisdiction in disputes concerning the interpretation and application of EU legislation so it is unclear how the ICS will interact with this: See: Thembi Pearl Madalane, EU DCFTAs: carrot- and-stick?.

[395] Following a request submitted by Belgium in 2017 regarding CETA, the CJEU issued an Opinion on 30 April 2019. See: Court of Justice, Opinion of the Court (Full Court) of 30 April 2019, Opinion 1/17 at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN. The issue of competencies was also addressed in Opinion 2/15 on 16 May 2017 that dealt with the EU-Singapore FTA. See: Court of Justice, Opinion of the Court (Full Court) of 16 May 2017 at:
https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN.

[396] For instance," Specifically, the EU competences regarding the ISDS mechanisms are not fully clear yet". See: Balazs Horvathy, 'Opinion 2/15 of the European Court of Justice and the New Principles of Competence Allocation in External Relations - A Solid Footing for the Future?', in *Csongor, István Nagy (Ed) Investment Arbitration and National Interest* (Indianapolis: Council on International Law and Policy, 2018).

[397] See eg.: Csongor István Nagy, 'Case C-66/18 Commission v. Hungary (Central European University)', *American Journal of International Law* 115, no. 4 (2021): 700–706, https://doi.org/doi:10.1017/ajil.2021.45. Nagy notes the contradictions of the CJEU judgement, in using WTO law as a tool of interpretation in a trade dispute that was not at all about trade.

ISDS' reform, the EU proposed amendments to the ICSID Rules and to recognise the supranational organisation as a contracting member.[398]

Before I examine the dispute settlement provisions in the EUs new generation FTAs for evidence of its position on ISDS, I will begin with a reflection of its position through its stance on the MIC as reform of ISDS, proposals in UNCITRAL and its proposal to ICSID with respect to its impact on ISDS. The logic is to first discuss the UNCITRAL submissions followed the proposal of the EU. However, the proposal of the EU is that of a MIC which may not be immediately of knowledge to the reader of the dissertation. Thus, I will begin with a discussion of what the MIC is such that the discussion of UNCITRAL submissions is understandable.

3.2.1 Permanent Investment Court proposal

As discussed in Chapter Two, the criticism of ISDS is overwhelmingly a substantive one such as the call to rebalance the rights and obligations of investors and states. There have been various proposals that aim to reform the ISDS system substantively, rather than just procedurally. However, thus far, proposals reform ISDS procedurally rather than substantively. Amongst the proposals is the EU's proposal of a new Investment Court System (ICS), which is already mentioned that it would replace traditional ISDS tribunals with a permanent court system.

3.2.1.1 The Bilateral Investment Court System (ICS)

The ICS is proposed as a two-tiered dispute resolution mechanism. It is the first tier of the proposed mechanism which involves a standing tribunal that is responsible for hearing

[398] The EU proposed a series of amendments to the ICSID Rules. The EU's proposed amendments were outlined in a letter sent by the European Commission to the Secretary-General of ICSID on November 12, 2020. The letter also states the EU's intention to become a contracting member of ICSID and notes that the proposed amendments reflect the EU's commitment to reforming the international investment regime. See: https://icsid.worldbank.org/sites/default/files/2020-11/EC_Letter_to_SG_re_ICSID_Rules_Review_-_12_Nov_2020.pdf. .....Also see: brief commentary on the changes proposed in the Working Paper at: https://icsid.worldbank.org/resources/rules-amendments.

investment disputes and rendering awards.[399] The ICS would not be the final level of appeal for investment disputes. An appellate mechanism would be the second tier of the dispute resolution process. This mechanism involves an appellate tribunal that is responsible for reviewing decisions made by the ICS to ensure that decisions may be corrected if necessary.

3.2.1.2 The Multilateral Investment Court System (MIC)

Similarly, to replace the current ad hoc ISDS system, the MIC is also a permanent court system proposed by UNCITRAL. The ICS is a regional proposal by the EU, while the MIC is a global proposal by the UNCITRAL.[400] The common objective of the EU is also to take into account the global proposal undertaken in the context of UNCITRAL on a MIC.[401]

The EU considered negotiations on a MIC, with the aim of "having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place," rather than have various bilateral ICSs.[402] Although illustrated in the sub-chapter, 'ISDS in EU FTAs', the ICS is already being implemented in some EU new generation FTAs, while the MIC is still in the process of being developed.

In UNCITRAL, differing views were expressed on whether the work on a multilateral instrument on ISDS reform should begin at an earlier stage than reflected in the workplan or

[399] See: European Commission, 'Investment Court System'.
[400] The UNCITRAL is currently working on a draft convention to establish the MIC. The UNCITRAL Working Group III has been tasked with developing reforms to the ISDS system, including the establishment of a MIC. Also see: August Reinisch and Marc Bungenberg, Draft Statute of the Multilateral Investment Court.
[401] European Commission, ' EU and China reach agreement in principle on investment' , European Commission, 20 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541.
[402] The European Commission made a recommendation to the Council of the EU to start international negotiations on a MIC, with the aim of "having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place." See: Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes COM/2017/0493 final, 13 September 2017 at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017PC0493. Although, the possibility of replacing the various ICSs by a single MIC had already been provided for by the CETA, the EU-Singapore FTA (EUSFTA) and the EU-Vietnam FTA (EUVFTA), the Council formally gave its agreement on 20 March 2018. I will discuss these FTAs later in this chapter of the dissertation See: Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 20 March 2018 12981/17 ADD 1 DCL 1 FDI 25 WTO 229

later following the development of the other reform options.[403] It was further said that many of the reform options were intertwined and could not be implemented on their own, particularly if a multilateral instrument were to be prepared to implement the reforms holistically.[404]

3.3 The position of the EU in UNCITRAL

The UNCITRAL WGIII group holds both formal and informal meetings to discuss various aspects of ISDS reform. The EU actively participates in both of these types of meetings. The official sessions organised by UNCITRAL where member states, observer organisations, and other stakeholders come together to discuss and negotiate specific topics related to ISDS reform are the formal meetings. They typically follow a structured agenda and involve EU presentations, discussions, and negotiations on draft texts and proposals. The outcomes of these formal meetings are documented in meeting reports and draft texts that are circulated among participants. In analysing the position of the EU on ISDS', I refer to these documents.

The UNCITRAL WGIII also holds informal meetings, often referred to as intersessional or working group meetings. These meetings provide an opportunity for more in-depth discussions and informal exchanges of views among participants outside of the formal negotiation process. These informal meetings may focus on specific topics or issues that require further exploration or clarification. They allow the EU to engage in more flexible and candid discussions without the constraints of formal procedures. In this dissertation, I refer to these meetings as ' Outside UNCITRAL Working Group III sessions'. I will first begin discussing the 'informal' position of the EU on ISDS as demonstrated in these meetings. After which I will consider the formal position of the EU on ISDS as communicated in the official sessions of the UNCITRAL WGIII.

[403] See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044.
[404] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020).

3.3.1 Outside UNCITRAL Working Group III sessions

It was further noted that the workplan proposed the increased use of informal meetings during the intersessional periods (intersessional meetings, drafting groups, joint work with other organisations as well as supporting webinars). It was explained that such informal meetings were aimed at reducing the overall time required at formal Working Group meetings by facilitating a better understanding of the different positions of the delegations and keeping them informed of, and engaged in, the ongoing deliberations. It was clarified that no decisions would be made during such informal meetings.

3.3.1.1 Transatlantic Trade and Investment Partnership Agreement (TTIP)

At EU level, the idea of establishing a multilateral investment dispute settlement system is recorded to have first been put forward in the public consultation conducted on investment protection and ISDS in the Transatlantic Trade and Investment Partnership Agreement (TTIP) negotiated between the EU and the US .[405] This was followed by a concept paper on "Investment in TTIP and beyond - the path for reform" calling for work to start towards the establishment of a multilateral system for the resolution of investment disputes.[406] It included a number of potential reforms including the creation of a MIC, the introduction of provisions to protect governments' right to regulate, and the establishment of an appellate mechanism to review investment tribunal decisions.[407] The negotiations for the TTIP were suspended and later

[405] The consultation took place on in 2014 and was organized by the European Commission. The consultation aimed to gather feedback and opinions from stakeholders on investment protection and ISDS in the TTIP. See results of the 2014 public consultation at: European Commission, COMMISSION STAFF WORKING DOCUMENT - Report - Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ea21eb75-3d87-4a16-b16f-e80c9a3a0bbc/details.

[406] European Commission, 'Concept Paper 'Investment in TTIP and beyond – the Path for Reform'', 5 May 2015, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[407] European Commission, 'Concept Paper 'Investment in TTIP and beyond – the Path for Reform'. It also proposed a comprehensive approach with the inclusion of sustainable development provisions in investment agreements.

declared by the European Commission as "obsolete and no longer relevant".[408] In parallel with its bilateral efforts, the European Commission committed to "engage with partners to build consensus for a fully-fledged, permanent International Investment Court".[409] It signalled a shift in the EU's approach to trade and investment policy, with a greater emphasis on ensuring that these policies contribute to sustainable development and benefit all stakeholders.[410] Finally, representing a significant milestone in and seen as a model for future trade agreements, the CETA showed support of the Council of the EU for the Commission's work on the establishment of the MIC.[411] Signalling it's commitment to exploring potential reforms to the ISDS mechanism and to provide input for the decision on whether to proceed with its establishment of the MIC, the Commission published a consultation strategy on the impact assessment for the establishment of a MIC.[412]

3.3.1.2 Stakeholder Meetings

The EU Commission held a stakeholder meeting as part of a broader consultation process aimed at assessing the potential benefits and drawbacks of the MIC.[413] It released a recommendation

[408] A Council decision of the EU on 15 April 2019, states that the negotiating directives for the TTIP are obsolete and no longer relevant. *See:* Council of the European Union, Council Decision authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, Brussels, 9 April 2019 at: https://www.consilium.europa.eu/media/39180/st06052-en19.pdf.

[409] European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions- Trade for All Towards a more responsible trade and investment policy, COM/2015/0497 final, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:52015DC0497.

[410] European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions- Trade for All Towards a more responsible trade and investment policy.

[411] Council of the European Union, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21, 27 October 2016, http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf.

[412] European Commission, Consultation Strategy - Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution, 10 August 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/1dd88340-8881-4e48-abf0-d3a7a02836fc/details.

[413] European Commission, Stakeholder meeting on a multilateral reform of investment dispute resolution including the possible establishment of a multilateral investment court - 27 February 2017, 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/b11b4d2f-0f26-46d2-b549-

that an MIC would be beneficial and recommended that negotiations Convention establishing a multilateral court for the settlement of investment disputes proceed.[414] Accompanying the recommendation authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, the EU Commission also released an Impact Assessment and Regulatory Scrutiny Board study.[415] The study provided feedback to help improve the impact assessment and ensure that the proposed multilateral court is effectively assessed before any decisions are made.

To facilitate dialogue and cooperation among stakeholders to advance the development of a multilateral framework for ISDS reform, the EU Commission organised a side event called 'Multilateral reform of ISDS: Possible paths forward' on the sidelines of the United Nations Conference on Trade and Development's (UNCTAD) Annual High-level International Investment Agreements (IIA) Conference.[416] There seems to be no publicly available information on the specific conclusions or outcomes of this side event. However, the event was part of a broader effort by the to facilitate dialogue and cooperation among stakeholders on

5aac956fb2f8/details. Also see the Commissioners remarks: European Commission, Reforming investment dispute settlement - Speech by Cecilia Malmström, 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/419d98fd-2fdc-4588-a9c9-d3f60d29eb39/details. Malmström, the former European Commissioner for Trade, noted that the European Commission has been exploring potential reforms to the ISDS mechanism, including the establishment of a Multilateral Investment Court (MIC) for investment dispute resolution.

[414] Once adopted by the Council would permit the EU to take part in negotiations for a new MIC. See: European Union, Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM/2017/0493 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A493%3AFIN&qid=1505306108510.

[415] European Union, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Multilateral reform of investment dispute resolution Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, SWD/2017/0302 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2017%3A302%3AFIN&qid=1505303601241. See Summary at: European Union, Commission Staff Working Document Executive Summary of the Impact Assessment, Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, SWD/2017/0303 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=SWD:2017:303:FIN. See Regulatory Scrutiny Board study at: European Commission, Regulatory Scrutiny Board Opinion - Impact Assessment - Multilateral reform of investment dispute resolution, 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ed94101b-6a04-4169-929b-70194a437baa/details.

[416] Colin Brown, 'Multilateral Reform of ISDS: Possible Paths Forward' (High-Level IIA Conference 2017: Moving to the Next Phase of IIA Reform, UNCTAD, Geneva (Switzerland), 9 October 2017), https://investmentpolicy.unctad.org/uploaded-files/document/Multilateral%20reform%20of%20ISDS-Possible%20paths%20forward_EU%20Commission.pptx.

potential paths for multilateral reform of ISDS and advance the development of a multilateral framework for ISDS reform. The position of the EU is evidenced in publicly available presentations of its multiple Stakeholder meetings on the establishment of a MIC. [417] Considering the available presentations, one may be able to draw several conclusions about the views and concerns of various stakeholders as well as the progress and design of the MIC project. the Council adopted and published the negotiating directives for a MIC to provide a framework for the EU's approach to negotiations on the establishment of the Multilateral Court, including the scope and objectives of the court, amongst other matters of discussion.[418] A press release highlighted the commitment of the EU to the MIC the EU intention to pursue negotiations with other countries to establish the MIC as a global mechanism for resolving investment disputes.[419] The Dispute Settlement and Legal Aspects of Trade Policy Directorate-

[417] In addition to the first stakeholder meeting See: European Commission, Presentation - MIC stakeholder meeting - November 2017 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/f6363bb7-52c3-4e7d-91ce-d5364b3adb92/details. European Commission, Presentation – MIC stakeholder meeting – April 2018 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ca411dca-2853-437a-b41c-cc3cc362bd4a/details. European Commission, Presentation - MIC stakeholder meeting - October 2018 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/36cae3b6-1209-498c-a149-b0872302568e/details . European Commission, Presentation - MIC stakeholder meeting - April 2019 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/84de8e70-6109-4fa4-80d2-1b270762be21/details. European Commission, Presentation - MIC stakeholder meeting - October 2019 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/dbbd2245-e1ab-4f95-a0fb-852b64086fe7/details. European Commission, Presentation - MIC stakeholder meeting - January 2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/aeebd42d-1241-468b-8f8a-1d966f14d10e/details. European Commission, Presentation - MIC stakeholder meeting - October 2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/031bf8ce-83bd-4663-bf81-37e897aa96f3/details. European Commission, Slides of the stakeholder meeting on the establishment of a Multilateral Investment Court - 3 Feb 2021 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ad47b630-b838-4d82-bdb3-5e7f56dc89b0/details. European Commission, Slides of the stakeholder meeting on the establishment of a Multilateral Investment Court - 12 Nov 2021 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/fad89ae9-4e2c-44c6-89d9-0a2c6c479cb5/details. European Commission, Slides of the stakeholder meeting on the establishment of a Multilateral Investment Court - 8 Feb 2022 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/fc1456d7-9909-4161-8192-56212073533e/details. There are currently no publicly available documents reporting the following meetings: European Commission, Stakeholder meeting on the establishment of a Multilateral Investment Court- 2 September 2022, live streaming, European Commission, Stakeholder meeting on the establishment of a Multilateral Investment Court- 19 January 2023 live streaming &European Commission, Stakeholder meeting on the establishment of a Multilateral Investment Court- 22 March 2023 live streaming..

[418] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1 DCL 1, FDI 25 WTO 229, 20 March 2018, http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf. Also see: Directorate General for Trade, Commission welcomes adoption of negotiating directives for a multilateral investment court, 20 March 2018, https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en.

[419] Directorate General for Trade, Commission welcomes adoption of negotiating directives for a multilateral investment court.

General for Trade European Commission also considered a presentation for discussion on what the MIC is, why the MIC is a reform option and how it would function.[420] As a contribution to the conversation about reform of investment dispute settlement, the EU Trade Commissioner laid out EU plans for a MIC at a foreign event.[421] The EU Commission also presented on the MIC as a structural reform of ISDS, addressing the concerns identified by the UNCITRAL Working Group III, how a permanent structure responds to the identified concerns, the main features of a MIC, why other reform options do not address the identified concerns and the structure of the proposed MIC.[422] The EU has submitted comments to the Secretariat of UNCITRAL including on draft provisions on selection and appointment of members of a standing multilateral mechanism.[423]

I will not provide an in-depth discussion of the position of the EU in ISDS in these informal meetings and presentations outside of UNCITRAL. The informal proposals of the MIC make their way to the UNCITRAL Working Group III meetings. Discussing the details of the proposals under this section of the dissertation and once again on my discussion of the UNCITRAL Working Group III meetings will only serve as a repetition. I have noted that the stakeholder meetings outside of UNCITRAL are considered informal as no decisions would be made during such informal meetings. It is based on this reason that I have outlined the position of the EU but reserved details of its proposals for my discussion on the formal UNCITRAL Working Group meetings. True to the style of this dissertation, I began with an outline of the

[420] Colin Brown, at the time holding the position of Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy Directorate-General for Trade European Commission gave a presentation at the Columbia Law School. See link to video recording at: 13 November 2018: Presentation on the path ahead in the construction of a Multilateral Investment Court at the Columbia Fall 2018 International Investment Law and Policy Speaker Series,
https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.

[421] European Commission, A Multilateral Investment Court - A contribution to the conversation about reform of investment dispute settlement - Speech by European Commissioner for Trade Cecilia Malmström, 22 November 2018, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/29ccc94a-d122-435e-b691-f0bc4d19b64d/details.

[422] View the slides at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/1461c3a2-5e94-46a7-a4e1-41b07bea1ae2/details.

[423] See eg. Annotated comments from the EU and its Member States to the Secretariat of UNCITRAL on draft provisions on selection and appointment of members of a standing multilateral mechanism at: 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.

position of the EU outside of UNCITRAL, to give depth to "where are we going and how did we get here" in the formal UNCITRAL Working Group submissions. In the following section, I will thus delve into the EUs concerns with ISDS, the EUs reform options and how the MIC is proposed to function, as formally proposed.

3.3.2 UNCITRAL Working Group III (Submission from the European Union and its Member States)

In this section of the chapter, I examine the formal position of the EU on ISDS beyond informal presentations and stakeholder discussions. Formal ongoing multilateral ISDS reform discussions being held under the Working Group III process within the UNCITRAL, a subsidiary body of the General Assembly of the United Nations. It is tasked with the mandate of furthering the progressive harmonisation and unification of international trade and investment law.[424] I will discuss the EUs position on ISDS in the UNCITRAL Working Group III (UNCITRAL WGIII).

In achieving its mandate, all State members of UNCITRAL gather at the working groups, where they carry out substantive preparatory work on topics of interest to UNCITRAL[425]. In 2015, UNCITRAL noted that the current circumstances in relation to investor-State arbitration posed challenges and proposals for reform had been formulated by a number of organisations.[426] Following the request to address ISDS, its members decided that a Working Group would start discussing it. Namely, the UNCITRAL Working Group III that has been pursuing reform of investor–state dispute settlement since 2017.[427] The Working Group is mandated to consider a range of issues, including the need for such a system, the form and structure of such a system, the scope of its application, and the methods of dispute resolution.

[424] UNCITRAL, Methods of Work: https://uncitral.un.org/en/about/methods.
[425] The Commission has established six working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Working Group III: Investor-State Dispute Settlement Reform is that which is of interest in this dissertation. See: UNCITRAL, Methods of Work.
[426] See: 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) Part I, A/CN.9/930/Rev.1 at: https://uncitral.un.org/en/working_groups/3/investor-state.
[427] UNCITRAL, Methods of Work.

I have thus far discussed that the ICS is a regional proposal by the EU, while the MIC is a global proposal by the UNCITRAL. I have also noted that the ICS is already being implemented in some EU new generation FTAs, while the MIC is still in the process of being developed. In Chapter One, I indicated that this chapter contributes with reflections on the future of ISDS. In cognisance that following a formal request from many countries, including the EU and its Member States, the UNCITRAL agreed to work on the possible reform of ISDS, through a Working Group.[428] It was stated in the UNCITRAL Working Group discussions that the ISDS reform proposals 'ought to take into account the current fragmented investment regime, consisting of many different investment treaties, and the potential impact on the development of investment law'. [429] It is thus worth the discussion on the position of the EU on ISDS in the UNCITRAL reform discussions. In the Working Group, it was said that reform efforts should focus on improving the existing regime rather than replacing it.[430] It was said to consider the compatibility of different possible models with the existing ISDS regime.[431] References were made to recently concluded FTAs that contained provisions on appellate mechanisms. Reference was also made to existing appellate mechanisms, like the WTO Appellate Body.[432] In these

[428] See: UNCITRAL, Methods of Work.
In this document, the EU explains its concerns with the current ISDS system and proposes the establishment of a permanent MIC to address its concerns. The document also includes a draft mandate for the working group III, which outlines the specific issues that the group should address in its work on ISDS reform. UNCITRAL subsequently established the working group on ISDS reform, which has been tasked with considering possible reforms to the ISDS system. Also see: UNCITRAL, UNCITRAL to consider possible reform of investor-State dispute settlement, UNIS/L/250 14 July 2017 at: https://unis.unvienna.org/unis/en/pressrels/2017/unisl250.html.
[429] 'It was stated that the development of an appellate mechanism ought to take into account the current fragmented investment regime, consisting of many different investment treaties, and the potential impact an appellate mechanism might have on the development of investment law.' See: 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.
[430] 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 Vienna, 28 June–16 July 2021, A/CN.9/1050 at: http://undocs.org/en/A/CN.9/1050.
[431] More specifically, it was said that additional information on the different possible models (such as an ad hoc or institutional appellate mechanism) would be needed to consider the particularities of an appellate mechanism and its compatibility with the existing ISDS regime. See: 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 Vienna, 28 June–16 July 2021, A/CN.9/1050 at: http://undocs.org/en/A/CN.9/1050.
[432] 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.

Working Group discussions, I will consider the position of the EU and the proposal of reform options in UNCITRAL as the future of ISDS.

The EU as observer

It is understood that the UNCITRAL carries out its work at annual sessions, of typically one or two sessions for each working group.[433] The EU enhanced observer status in these UNCITRAL sessions.[434] Although formally the membership of UNCITRAL is composed of states, it also invites interested organisations and parties to actively participate in its discussions.[435] The EU is invited to attend and participate in sessions of the UNCITRAL Commission and its working groups as well as to table documents and topics for discussion.[436] The European Commission planned to organise further consultations with interested stakeholders in advance of the first session of the Working Group III.[437] These consultations with stakeholders are outside of UNCITRAL and circle around the idea of establishing a multilateral investment dispute settlement system. I have addressed these meetings in the previous section on the MIC proposal. In this section, I focus specifically on meetings within the UNCITRAL Working Group III.

The UNCITRAL Working Group III has held several sessions.[438] Prior to the first meeting of the Working Group, the EU issued a recommendation for a council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of

[433] See: UNCITRAL, Methods of Work. Also see: A Guide to UNCITRAL – the United Nations at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.
[434] European Commission, UNCITRAL Factsheet, https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf.
[435] All EU Member States are either members of UNCITRAL or can take part as observers. See: UNCITRAL, Methods of Work.
[436]Also see: UNCITRAL, Methods of Work: https://uncitral.un.org/en/about/methods.
[437] European Commission, UNCITRAL Factsheet.
[438] 27 November-1 December 2017: First meeting, 27 April 2018: Second meeting, 29 October-2 November 2018: Third meeting, 5 April 2019: Fourth meeting, 14-18 October 2019: Fifth meeting, 20-24 January 2020: Sixth meeting, 5-9 October 2020: Seventh meeting, 8-12 February 2021: Eighth meeting, 4-5 May 2021: Ninth meeting, 15-19 November 2021: Tenth meeting, 14-18 February 2022: Eleventh meeting. See: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.

investment disputes.[439] The Council authorised the opening of negotiations in order for the Convention to be developed and established.[440] These negotiations are conducted by the UNCITRAL Working Group III.[441] The working group held its first meeting prior to authorisation of the Council to open negotiations for the Convention to establish a multilateral court.[442] These negotiations began in the sixth meeting of the UNCITRAL Working Group III. Rather, the Working Group had planned to proceed discussions in three separate stages: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[443] Although, the first two stages would be considered together, if the element of ISDS concerned so warranted.[444]

UNCITRAL mandate

Notwithstanding that the first meeting of UNCITRAL Working Group III adopted the agenda item on the 'Possible reform of investor-State dispute settlement (ISDS) on the basis of the notes by the Secretariat, the session included the attendance of observers from the EU.[445] In addition to notes by the Secretariat, the Working Group considered submissions received by the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA). At this first meeting, deliberations and decisions of the Working Group III

[439] See: European Union, Recommendation for a council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes , COM/2017/0493 final at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:493:FIN.
[440] European Union, Recommendation for a council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.
[441] European Union, Recommendation for a council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.
[442] The first UNCITRAL Working Group III meeting took place on 27 November-1 December 2017. See: European Commission, Multilateral Investment Court project - Relevant documents at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.
[443] *See:* 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) Part I, A/CN.9/930/Rev.1 at: https://uncitral.un.org/en/working_groups/3/investor-state.
[444] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017).
[445] *See:* 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) Part I, A/CN.9/930/Rev.1 at: https://uncitral.un.org/en/working_groups/3/investor-state.

were made with respect to the possible reform of ISDS. They do not speak to the position of the EU on ISDS. Rather, the purpose that I address the first meeting is to give context and restrictions of the submissions of the EU in the UNCITRAL Working Group III, within its mandate agreed in this first meeting.[446]

ICSID, which at the time of the submission had administered 54 UNCITRAL cases, reported to have been in the process of amending its Rules and Regulations.[447] ICSID indicated their willingness to work with UNCITRAL in integrating reforms into the ICSID mechanism.[448] The PCA's position regarding ISDS reform considered that it is the prerogative of governments to select the dispute settlement. Although, available to provide technical support, it is reported that the experience of PCA suggests that "permanence" and "institutionalization" of may possibly provide helpful inspiration to the Working Group's discussion on ISDS reform.[449] Moreover, the PCA is reportedly prepared to work with UNCITRAL in designing and implementing a permanent investment court or a permanent appeals facility.[450] Although the EU had already prepared its submission document for the discussions on the possible reform of ISDS in the Working Group, no EU submitted document was recorded at this first meeting.[451]

Amongst the various deliberations and decisions, it was noted that critical questions on possible ISDS reform involved the underlying substantive rules.[452] However, it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement

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[446] This document is dated 20 November 2017. *See:* 27 November-1 December 2017: First meeting of UNCITRAL Working Group III at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.

[447] Possible reform of investor-State dispute settlement (ISDS) Submissions from International Intergovernmental Organizations, A/CN.9/WG.III/WP.143 at: https://undocs.org/en/A/CN.9/WG.III/WP.143.

[448] The ICSID Secretariat indicated their willingness to provide further analysis and research on the issues raised, including on the ways in which the proposed appeal mechanism could be integrated into the ICSID mechanism. See: 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.

[449] United Nations General Assembly, Possible reform of investor-State dispute settlement (ISDS) Submissions from International Intergovernmental Organizations, A/CN.9/WG.III/WP.143 at: https://undocs.org/en/A/CN.9/WG.III/WP.143.

[450]United Nations General Assembly, Possible reform of investor-State dispute settlement (ISDS) Submissions from International Intergovernmental Organizations.

[451] This document is dated 20 November 2017. See: European Commission, Multilateral Investment Court project - Relevant documents , 27 November-1 December 2017: First meeting of UNCITRAL Working Group III at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en.

[452] European Commission, Multilateral Investment Court project - Relevant documents

rather than on the substantive provisions.[453] Furthermore, although, it was understood that delegations continue to raise concerns and views on contract and investment law based ISDS, it was agreed that the Working Group would focus on treaty-based ISDS.[454]

3.3.2.1 EU Concerns with ISDS

Deliberations were held in the first Working Group meeting, on the importance of ensuring a coherent and consistent ISDS regime. The report of the first meeting makes a note that it was mentioned that criticism of a lack of consistency and coherence was one of the reasons behind the decision of UNCITRAL to embark on work on possible ISDS reform.[455] In that light, although some States questioned whether such a formal structure was necessary, others suggested'... some type of hierarchical system, an appellate body, an investment court, and a mechanism through which tribunals could direct questions to the treaty partners...' to address the concerns of ISDS. [456]

A lack of appellate review

It is in the second UNCITRAL Working Group III meeting that the EU is recorded to have made a submission on "Possible reform of investor-State dispute settlement (ISDS)".[457] The EU aimed to identify and consider concerns regarding the current system of ISDS in response to the matter

[453] European Commission, Multilateral Investment Court project - Relevant documents
[454] European Commission, Multilateral Investment Court project - Relevant documents. It is reported that the UNCITRAL Working Group III would later consider the possibility of extending the results of its work to contract and investment law based ISDS.
[455] See: 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) Part II, A/CN.9/930/Add.1/Rev.1 at: https://undocs.org/en/A/CN.9/930/Add.1/Rev.1.
[456] 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).
[457] 'The Working Group recalled that its deliberations at the 34th session on these issues were to be continued at its 35th session.' See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part II, A/CN.9/930/Add.1/Rev.1 at: https://undocs.org/en/A/CN.9/930/Add.1/Rev.1. *Also see:* 35 th session, 23-27 April 2018, New York, A/CN.9/WG.III/WP.145 - Submissions from the European Union, https://uncitral.un.org/en/working_groups/3/investor-state.

concerning possible reform of ISDS.[458] In its contribution to the discussions, the EU concluded that there are significant concerns with the existing ISDS system.[459] It noted these concerns as systemic in nature, deriving from the interplay of multiple elements of the current system, 'but above all the ad hoc nature of the tribunals and the lack of appellate review'.[460] In its comparative analysis on how disputes in regimes with comparable characteristics to the investment regime are managed, the EU also uses the WTO as an example permitting for appellate review by adjudicators appointed by the treaty parties.[461]

Work plan: A Government led reform process

In the third UNCITRAL Working Group III meeting, amongst the various issues on the possible reform of ISDS, the need for a multilateral or a systemic approach was suggested once again.[462] The Working Group decided on the desirability of developing reforms in UNCITRAL to address concerns raised in the first and second meetings.[463] However, in implementing the mandate of the working group, it was also stated that 'it would be premature to engage in discussion

[458] See: UNCITRAL, The identification and consideration of concerns as regards investor to state dispute settlement, Working Group III: Investor-State Dispute Settlement Reform, 20 November 2017 at: https://uncitral.un.org/en/working_groups/3/investor-state. This document is attached as relating to the first UNCITRAL Working Group III meeting. The document for the first meeting built and responded to the Note by the UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS)" of 18 September 2017.
[459] UNCITRAL, The identification and consideration of concerns as regards investor to state dispute settlement, Working Group III: Investor-State Dispute Settlement Reform.
[460] UNCITRAL, The identification and consideration of concerns as regards investor to state dispute settlement, Working Group III: Investor-State Dispute Settlement Reform.
[461]UNCITRAL, The identification and consideration of concerns as regards investor to state dispute settlement, Working Group III: Investor-State Dispute Settlement Reform. A note is made that "Although it does not have jurisdiction on claims advanced by individuals, the WTO also deals with the review of state action." Also see: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat, 19.10.2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details. In discussing the mixed question of law and fact that may arise, the EU notes this is as shown and addressed by the jurisprudence of the WTO Appellate Body.
[462] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, (Vienna, 29 October–2 November 2018)
[463] Although, the concerns are noted to be interlinked, the working group categorised them as falling into three broad categories (those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision makers; and those pertaining to cost and duration of ISDS cases) for ease of deliberation. The Working Group also took note that it would have to consider other concerns not covered by the broad categories of desirable reforms already identified. In that context, governments that wished to raise additional concerns were encouraged to submit them in writing before the next session. See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), Fifty-second session Vienna, 8–26 July 2019 at: http://undocs.org/en/A/CN.9/964.

regarding which type of reform would be preferable and which solutions would need to be developed, both of which would form the third phase of the mandate of the Working Group.'[464] The report of the third meeting records the encouragement of a 'government-led process' awaiting governments to submit proposals.[465]

The Working Group agreed that it would next have to develop a work plan to address the concerns for which it had decided that reform by UNCITRAL was desirable.[466] On the work plan of the working group, the EU prepared a submission for the fourth meeting, suggesting 'four related steps' for phase three of the Working Group's work that would develop relevant solutions should the working group conclude that a reform of ISDS is desirable.[467] The steps suggest to begin with the 'identification and proposal by governments of their preferred reform options' and end at step 4 with 'governments analysing different design approaches in creating concrete solutions to the problems identified'.[468]

No distinction between incremental and systemic reform

At the fourth meeting, it was recalled that the Working Group was discharging the third phase of its mandate, which was to develop solutions for ISDS reforms.[469] It was stressed that all possible reform options should first be presented before developing the workplan. As I discussed on the previous meeting, it was stressed that the workplan to be developed should ensure that

[464] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), Fifty-second session Vienna, 8–26 July 2019.
[465] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), Fifty-second session Vienna, 8–26 July 2019. Again, at this session, the EU was noted as observer. As discussed earlier, observers are permitted to participate in discussions at sessions of the Commission and its working groups to the same extent as members.
[466] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), Fifty-second session Vienna, 8–26 July 2019.
[467] Submission of the European Union and its Member States to UNCITRAL Working Group III, Possible work plan for Working Group III, 18 January 2019 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/e10399fe-69d3-4368-a4f0-48de5dc0620e/details.
[468] Submission of the European Union and its Member States to UNCITRAL Working Group III, Possible work plan for Working Group III, 18 January 2019 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/e10399fe-69d3-4368-a4f0-48de5dc0620e/details.
[469] In accordance with the planned three stages of the Working Group, as already discussed under 'EU as Observer '.

the process would be government-led and consensus-based. Including the four-step proposal by the EU, a number of work plan proposals were considered.[470] In response to the proposals that priority should be given to certain concerns, it was stated that the Working Group might wish to take a comprehensive approach in its workplan so as to address all of the concerns identified by the Working Group as deserving reform.

It was stated that it would be difficult to prioritise concerns as they were intertwined and as States had different experiences with ISDS.[471] In that context, the reform option of a Multilateral Investment Court was outlined by the Working Group. It was explained that such a systemic reform option would aim to address all of the concerns by suggesting a structural change to the current ISDS.[472] However, the decision of the Working Group was that a distinction between incremental and systemic reform was not necessarily a useful one to make.[473] It was noted that there were indeed fundamental differences in some of the reform solutions that were being proposed. Although, for the purpose of its work, the Working Group agreed that there was no need to have a discussion about which solutions might fit into which category.[474] Rather, a thorough discussion on the advantages and the disadvantages of the respective reform options was suggested.[475] It was agreed that the Working Group would discuss, elaborate and develop multiple potential reform solutions simultaneously.[476] The Working Group noted the previous 'Possible reform options for discussion' in the Tabular presentation of framework for discussion in the previous meeting, as a good basis.[477] The Working Group agreed that other solutions could

[470] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), Fifty-second session Vienna, 8–26 July 2019 at: http://undocs.org/en/A/CN.9/970.
[471] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[472] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[473] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[474] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[475] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[476] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
[477] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session

also be proposed.[478] The EU submitted a 'Possible workplan for Working Group III' and made a submission that the permanent standing two-tier mechanism is the only suggested option that can successfully respond to all of the concerns identified in the Working Group.[479] The Working Group suggested that once all the options had been tabled, it could then be in a position to determine the solutions to be developed further.[480]

3.3.2.3 EU Reform options

It was at the fifth meeting of the UNCITRAL Working Group III that it was agreed that the Working Group, at its current session, would first focus on developing a project schedule on how to move the reform options forward in parallel, and then consider identified reform options without yet making a decision at that stage.[481] The preliminary discussions on identified reform options would take place during the remainder of the current fifth meeting as well as the sixth and the seventh meetings.[482]

The sixth meeting addressed general remarks on an appellate mechanism, followed by discussions on a multilateral instrument from the seventh meeting. The EU made submissions

[478] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session

[479] See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, A/CN.9/WG.III/WP.159 at: http://undocs.org/en/A/CN.9/WG.III/WP.159. Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, A/CN.9/WG.III/WP.159/Add.1 at: http://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.

[480] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), Fifty-second session Vienna, 8–26 July 2019 at: http://undocs.org/en/A/CN.9/970.

[481] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), Fifty-third session, New York, 6–17 July 2020 at: http://undocs.org/en/A/CN.9/1004. This would be through an opt-in convention that could be modelled after the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.166 at: http://undocs.org/en/A/CN.9/WG.III/WP.166.

[482] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), Fifty-third session; UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Thirty-eighth session.

of a Multilateral advisory centre similar to the Advisory Centre on World Trade Organization (WTO) Law, a Stand-alone review or appellate mechanism and a standing first instance and appeal investment court, with full-time judges.[483] Deliberations on the stand-alone review or appellate mechanism and the standing MIC reform options were to be considered in the sixth meeting of the Working Group or postponed to the seventh meeting to allow States to better prepare.[484] Following the suggestion in the eighth meeting that work should focus on reform options and issues where it would be more feasible to achieve consensus so that concrete discussion could take place,[485] the ninth meeting of the Working Group discussed a proposal that reform options could be subject to "approval in principle" by the Commission in a staggered manner beginning in 2022.[486] This would provide the flexibility to return to any reform option in order to guarantee consistency and coherence with the other reform options. It was said that many of the reform options could not be implemented on their own as they were intertwined. Particularly if a multilateral instrument is proposed to implement the reforms holistically. This decision of the Working Group to progress on the establishment of a standing mechanism in parallel to other reforms was reiterated, in the tenth meeting considering draft provisions.[487]

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[483] See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat Addendum, Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.166/Add.1, at: http://undocs.org/en/A/CN.9/WG.III/WP.166/Add.1. Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session (resumed) Vienna, 20–24 January 2020, A/CN.9/WG.III/WP.185 at: http://undocs.org/en/A/CN.9/WG.III/WP.185.

[484] See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.166 at: http://undocs.org/en/A/CN.9/WG.III/WP.166.

[485] 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.

[486] It was explained that this approach would ease the workload of the Commission and allow for a formal adoption of all of the reform options in 2025. which would be approximately 8 years after the ISDS Project begun in 2017. See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session (Vienna, 4 and 5 May 2021), Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1054 at: https://undocs.org/en/A/CN.9/1054. Also see: UNCITRAL, Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform) Fortieth session (resumed) Vienna, online, 4–5 May 2021,A/CN.9/WG.III/WP.206 at: http://undocs.org/en/A/CN.9/WG.III/WP.206.

[487] It was reiterated in the deliberations on the draft code of conduct for adjudicators, to encompass the implementation of a code of conduct in the current ISDS regime and in the context of potential standing multilateral mechanisms for ISDS. See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session (Vienna, 15–19 November 2021), Working Group III (Investor-State
Dispute Settlement Reform) Forty-first session Vienna, 15–19 November 2021, A/CN.9/1086 at: https://undocs.org/en/A/CN.9/1086.

Advisory Centre on International Investment Law (ACIIL)

The EU recalled that the establishment of, a multilateral advisory centre, the Advisory Centre on International Investment Law (ACIIL) that constitutes an integral part of a broader reform of ISDS.[488] As outlined in the draft provisions, the purpose of the Centre is to provide services in international investment law and ISDS proceedings.[489] It emphasizes the importance of maintaining independence, free from external influence.[490]

The specific services to be provided include pre-dispute and dispute avoidance services, mediation and alternative dispute resolution (ADR) services, representation and assistance in ISDS proceedings, as well as legal and policy advisory services, capacity-building, and the establishment of a platform for sharing best practices.[491] The EU submitted that the MIC is key to the creation of an Advisory Centre, and that discussions on the setting up of both institutions should be held in parallel.[492]

The "Appellate Mechanism "

Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) ,Draft Code of Conduct Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform)Forty-first session Vienna, online, 15–19 November 2021, A/CN.9/WG.III/WP.209 at: http://undocs.org/en/A/CN.9/WG.III/WP.209.

[488] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Advisory Centre Note by the Secretariat, A/CN.9/WG.III/WP at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/7a6febbf-4d38-432d-8c21-48a7d3b0d7a5/details. Also see: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) Possible reform of investor-State dispute settlement (ISDS)
Draft statute of an advisory centre, Forty-seventh session Vienna, 22-26 January 2024 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp.236_advance_copy.pdf.

[489] Particularly to what are referred to as 'least developed states' as well as small and medium-sized enterprises (SMEs). As outlined in Chapter One of this dissertation I refrain from the usage of the terms 'developed' or 'developing' states. In this case I am quoting the description rather than participating in the discourse. Also see UNCITRAL, Multilateral Advisory Centre Notes by the secretariat at: https://uncitral.un.org/en/multilateraladvisorycentre.

[490] UNCITRAL, Multilateral Advisory Centre Notes by the secretariat.

[491] UNCITRAL, Multilateral Advisory Centre Notes by the secretariat.

[492] UNCITRAL, Multilateral Advisory Centre Notes by the secretariat.

The Working Group agreed that a reform may take the form of the establishment of a permanent multilateral appellate body or standing first-tier body , which could either complement the existing arbitration regime, or constitute the second tier in a multilateral investment court which is discussed under 'Multilateral Court (MIC) proposal' earlier in the chapter.[493] It was noted that the various components were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court. All these various possible forms options are referred to as "appellate mechanism".[494] In the revised workplan of the Working Group, a view was expressed that more time should be allocated to the appellate mechanism and the MIC.[495]

i. Permanent Multilateral Appellate Body

In the sixth meeting, general remarks were made on how an appellate mechanism would operate in ISDS and how it could address the problems and concerns that had been identified by the Working Group.[496] It was pointed out that the existing mechanisms for reviewing arbitral awards

[493] See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044.. See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, Working Group III (Investor-State Dispute Settlement Reform) Resumed thirty-eighth session Vienna, 20–24 January 2020, A/CN.9/1004/Add.1 at: http://undocs.org/en/A/CN.9/1004/Add.1. Also see: Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session (resumed) Vienna, 20–24 January 2020, A/CN.9/WG.III/WP.185 at: http://undocs.org/en/A/CN.9/WG.III/WP.185. And further see EU reform options in Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat, 19.10.2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details.

[494] And the panel of ISDS appellate tribunal members is referred to as "appellate tribunal". See: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Working Group III (Investor-State Dispute Settlement Reform) Fortieth session Vienna, Online, 8–12 February 2021, A/CN.9/WG.III/WP.202 at,: http://undocs.org/en/A/CN.9/WG.III/WP.202.

[495] UNCITRAL, Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform) Fortieth session (resumed) Vienna, online, 4–5 May 2021,A/CN.9/WG.III/WP.206 at: http://undocs.org/en/A/CN.9/WG.III/WP.206.

[496] See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, Working Group III (Investor-State Dispute Settlement Reform) Resumed thirty-

were too limited, and the goal of creating an appellate mechanism would be to increase the correctness, consistency, predictability and coherence of ISDS decisions and hence the legitimacy of ISDS.[497] The Working Group agreed to consider further an appellate mechanism in ISDS as one of its possible reform options. In order to develop the option further, the Working Group provided guidance to the Secretariat in conducting preparatory work on the nature, scope and effect of appeal.[498] Guidance included elaboration on how an appellate mechanism might work outside the context of treaty-based ISDS and more broadly, elaboration on the interaction between an appellate mechanism and existing ISDS mechanisms.[499] In support of its submissions, the EU noted that certain investment treaties already include a reference to an appellate body to be set up on a multilateral basis.[500] It considered that a multilateral appellate body could be established as a complement to the current ISDS regime, which would maintain most of its basic features.[501]

The EU compiled a preliminary draft provision regarding the procedure and enforcement of the proposed appellate mechanism, which it could be presented in a multilateral instrument or in a

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eighth session Vienna, 20–24 January 2020, A/CN.9/1004/Add.1 at: http://undocs.org/en/A/CN.9/1004/Add.1. Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session (resumed) Vienna, 20–24 January 2020, A/CN.9/WG.III/WP.185 at: http://undocs.org/en/A/CN.9/WG.III/WP.185.

[497] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms Note by the Secretariat. Also see report of Eighth meeting. See: 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.

[498] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms Note by the Secretariat; UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021).

[499] Id. The UNCITRAL Working Group noted that the various components were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (all these various possible forms options are referred to as "appellate mechanism"; the panel of ISDS appellate tribunal members is referred to as "appellate tribunal"). Also see: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat, 19.10.2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details.

[500] See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat, 19.10.2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details

[501] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues.

bilateral investment treaty or separate rules on appellate procedure.[502] Furthermore, the EU proposed models for establishing an appellate mechanism; (i) Treaty-specific appellate mechanism (ii) Ad hoc appellate mechanism (iii) Institutional appellate mechanism. It is justified that the proposal for an appellate mechanism in ISDS as found its way in investment treaties as 'programmatic language', with some investment treaties provide for the possibility of establishing an appellate mechanism in the future, either on a multilateral or bilateral basis.[503] An appellate mechanism is proposed as one that could be developed on a purely ad hoc basis, with the appellate panels being constituted by the parties on a case-by-case basis, similar to the first instance arbitral tribunals in the current ISDS framework based on international arbitration.[504] Lastly, the proposal of the institutional appellate mechanism is described by the EU as one that would come close to the setting up of a permanent body, hosted by an existing institution.[505] The appellate mechanism could be developed for use by institutions handling ISDS cases, to the extent that the instrument that established the relevant institutions would permit such mechanism.[506]

ii. Standalone Multilateral Investment Appellate Mechanism (MIAM)

An alternative to the two-tiered MIC is an independent new organisation, the Standalone Multilateral Investment Appellate Mechanism (MIAM).[507] The ISDS system would be maintained. This would be added with an Appellate Body. The organs of the single-tier court system MIAM, would be identical to those of the MIC. The difference with the MIC is that the

[502] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement' in: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat, 19.10.2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details

[503] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement'.

[504] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement' .

[505] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement'.

[506] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement'.

[507] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement, issues. 'Consolidated draft provision on appellate mechanism and enforcement'.

ad hoc arbitration would continue. Under the MIAM system, the investors would participate in the appointment of ad hoc arbitrators unlike under a permanent investment court system.

Multilateral instrument on ISDS reform (MIIR)

At the seventh meeting, the Working Group recalled the submissions made with regard to the possible means to implement the reform options. Mainly a multilateral instrument on ISDS reform (MIIR) such as through "arbitration rules, guidance texts or model clauses".[508] The characteristics of a possible MIIR were discussed.[509] It could be in the form of a "single legal instrument that would include core provisions along with optional protocols and/or annexes".

Although greater preference has been expressed for an application to both existing and future treaties, it is reported that 'the whole purpose of a multilateral instrument was to make some, or all, of the reform options being developed applicable to existing investment treaties'.[510] The

[508] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044. Also see: United Nations Commission on International Trade Law Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session, Fifty-sixth session Vienna, 3-21 July 2023 (Vienna, 5–16 September 2022), A/CN.9/1124 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_1124_advance_copy_0.pdf.

[509] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session, Fifty-sixth session Vienna, 3-21 July 2023 (Vienna, 5–16 September 2022). 'The following characteristics were suggested as being important: the instrument should (i) respond to identified concerns, in particular consistency and coherence, and promote legal certainty in ISDS; (ii) establish a flexible framework, whereby States could choose the reform options – including the mechanism for ISDS and relevant procedural tools, also accommodating future developments in the field of ISDS; (iii) provide temporal flexibility to allow continued participation by States Parties; (iv) allow for the widest possible participation of States to achieve an overall reform of ISDS; and (v) provide for a holistic approach to ISDS reform clearly setting forth the objective of achieving sustainable development through international investment.'

[510] See: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), 19.10.2020, A/CN.9/WG.III/WP.at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details. The Submissions at the UNCITRAL Working Group III refer to possible models for the development of an instrument on ISDS reform made applicable to existing investment treaties, including the Mauritius Convention on Transparency and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI"). See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session New York, 30 March–3 April 2020, A/CN.9/WG.III/WP.194 at: http://undocs.org/en/A/CN.9/WG.III/WP.194.

proposed multilateral instrument was reportedly considered to be preferably in parallel to the development of the other reform options.[511] It was said that a MIIR should provide a framework for implementing multiple reform elements, and that a coherent and flexible approach to the different reform elements was needed, which would allow State Parties to choose whether and to what extent they would adopt the relevant reform elements.[512] This decision of the Working Group to work simultaneously on different reform options in parallel streams was also highlighted in the Eighth meeting of the Working Group, 'due to the fact that there were diverging views on the reform options and issues.'[513] In the interest of time, and given the nature of a multilateral instrument as a tool implementing all reforms, this approach is preferred rather than as part of the work on each reform option.[514] Given the need to thoroughly analyse the form such instrument would take, as well as the legal implications of such an instrument, including on the existing ISDS framework and other considerations, support was expressed for continuing work on a MIIR, including through intersessional work performed by interested delegations.[515]

At a Pre-Intersessional meeting, the EU shared views on the functioning of mediation in the context of a MIC.[516] As discussions moved forward in formal Working Group meetings, the EU continued to consider the possibility that a mediated solution would benefit from enforcement

[511] See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044. Also see: See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session New York, 30 March–3 April 2020, A/CN.9/WG.III/WP.194 at: http://undocs.org/en/A/CN.9/WG.III/WP.194.
[512] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020); UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session New York, 30 March–3 April 2020. Also see: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022), Fifty-sixth session Vienna, 3–21 July 2023, A/CN.9/1124 at: http://undocs.org/en/A/CN.9/1124.
[513] 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.
[514] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021).
[515] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021).
[516] European Commission, DG TRADE Delegation of the European Union to UNCITRAL Working Group III, UNCITRAL WORKING GROUP III, 9 November 2020, Virtual Pre-Intersessional Meeting, The Use of Mediation in ISDS, 9 November 2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/70b400f1-490a-48b9-8721-4ab4684e70fc/details.

mechanism attached to the MIC.[517] That the issue of improving recourse to mediation should be seen in the broader context of the ISDS reform process.[518] The EU advocated for the resolution of disputes through alternative dispute resolution (ADR) and mediation as an efficient option in areas beyond investor-state.[519] The idea is to make available a clear framework whilst incorporating flexibilities that allow the parties to resort to mediation at any time in the proceedings.[520] In this context, expressed its commitment to the creation of a permanent court mechanism that provides also for the resolution of investor-state disputes through ADR and in particular mediation.[521] The EU submitted that a permanent MIC could constitute a forum for the conduct of investment mediation in a manner that would bring significant advantages to the system of international investment dispute resolution.[522]

Enforcement of Awards

The reform direction of the ISDS in UNCITRAL may be summarised into three groups; 1) code of Conduct of Adjudicators, 2) appellate mechanism and enforcement, and 3) selection and Appointment of ISDS tribunal members.[523] It is beyond the scope of this dissertation to partake

[517] See Draft clauses - Possible reform of investor-State dispute settlement (ISDS) - Mediation and other forms of alternative dispute resolution (ADR) - Note by the Secretariat, 9 August 2022 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4a173a2d-f890-4b55-a23e-55ee82c2466e/details.
[518] Draft clauses - Possible reform of investor-State dispute settlement (ISDS) - Mediation and other forms of alternative dispute resolution (ADR) - Note by the Secretariat.
[519] Also see: European Commission, DG TRADE Delegation of the European Union to UNCITRAL Working Group III, UNCITRAL WORKING GROUP III, 9 November 2020, Virtual Pre-Intersessional Meeting, The Use of Mediation in ISDS, 9 November 2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/70b400f1-490a-48b9-8721-4ab4684e70fc/details. The EU notes examples such as; Examples of Mediation Directive, ADR Directive, ODR Directive.
[520] Also see: European Commission, DG TRADE Delegation of the European Union to UNCITRAL Working Group III, UNCITRAL WORKING GROUP III, 9 November 2020, Virtual Pre-Intersessional Meeting, The Use of Mediation in ISDS, 9 November 2020 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/70b400f1-490a-48b9-8721-4ab4684e70fc/details.
[521] European Commission, DG TRADE Delegation of the European Union to UNCITRAL Working Group III.
[522] Draft clauses - Possible reform of investor-State dispute settlement (ISDS) - Mediation and other forms of alternative dispute resolution (ADR) - Note by the Secretariat, 9 August 2022 at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4a173a2d-f890-4b55-a23e-55ee82c2466e/details.
[523] This is in accordance with discussions and drafts in UNCITRAL Working Group III, separated in this manner. UNCITRAL Working Group III has completed a draft Code of Conduct for Arbitrators, draft Notes by the Secretariat on appellate mechanism and enforcement issues and draft provisions on the selection and

in a detailed discussion on the procedural rules on the implementation of the reform options. The interest of the dissertation is in the proposed mechanism itself than the rules of its functioning such as the conduct of adjudicators or the appointment of tribunal members.[524] I will only make reference to these subjects in so far as it impacts the relevance of the EU as a member in the proposed reform options.[525]

In this dissertation, I also do not intend to address issues of enforcement of arbitral awards. However, as I intend to make proposals on investment dispute settlement, it is unavoidable to consider the feasibility of the proposed reforms to determine their relevance. The relevance of dispute settlement mechanisms essentially lies in the enforceability of the awards rendered thereof. I briefly consider this matter as a determinant to the relevance of the proposed reforms. That is, the relevance of the proposed appellate mechanism, possibly in the form of a second-tier MIC.

The compatibility of the two-tier structure and appeal mechanism under the MIC is questioned. In the Working Group, the question was raised of the possible incompatibility between this multilateral instrument and other existing multilateral instruments including in particular the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and the New York Convention on the Recognition and Enforcement

Appointment of ISDS tribunal members. See: UNCITRAL, UNCITRAL Working Group III completes a draft Code of Conduct for Arbitrators at: https://uncitral.un.org/en/draftcodeofconductarbitrators. Also see draft Notes by the Secretariat on appellate mechanism and enforcement issues and draft selection and Appointment of ISDS tribunal members.at:https://uncitral.un.org/en/working_groups/3/investor-state. The UNCITRAL Secretariat issued three documents which summarise the proposals and give reform directions; 1) code of Conduct of Adjudicators, 2) appellate mechanism and enforcement, and 3) selection and Appointment of ISDS tribunal members.

[524] In making investment dispute settlement proposals for the EU-China CAI, the interest of this dissertation is whether the ISDS is feasible or its reform thereof. That is, whether to propose the ISDS mechanism or its proposed reform mechanisms, based on the position of the parties to the agreement. I do not intend to critique which reform option is better but rather which is desirable to the parties.

[525] For instance, whether the proposed statute to form the MIC is open for adoption by the EU and whether the definition of "investor-State dispute settlement" recognises the EU. The first version of the draft Code of conduct, reference was made to the definition of "investor-State dispute settlement", which also referred to "a Regional Economic Integration Organization (REIO)". Moreover, the EU proposed recognition in ICSID rules which acknowledges states rather than REIO as members. I discuss this in the following section '3.3.3 Proposed Amendment to ICSID Rules'.

of Foreign Arbitral Awards (1958).[526] There is no mechanism for enforcement of MIC awards under the ICSID Convention. Different views were expressed on how an appellate mechanism would interact with the existing annulment or setting aside procedures and suggestions were made to clarify that relationship.[527]

It was also recalled that awards rendered by ISDS tribunals were generally enforceable through the New York Convention and the ICSID Convention.[528] The EU submitted comments that, following considerations regarding the enforcement under the New York or under the ICSID Convention may possibly be negligible.[529] It was noted in the Working Group that the question whether the decisions made by an appellate panel could be enforced under the New York Convention largely depends on how the appellate mechanism would be set up.[530] The comment of the EU was that if the instrument is set-up as a second-tier mechanism for the review of arbitral awards, this would most probably not change the nature of the whole process as there already exist examples of arbitration regimes. In this sense, The EU submitted that the introduction of an appeal mechanism does not per se change the "arbitral" nature of an arbitral award. It was also reported in the Working Group that it may be noted that any instrument that

[526] The question arises whether the ICS is an arbitral system, a judicial system or a hybrid. For enforcement under the ICSID Convention, the award must have resulted from arbitration proceedings conducted in accordance with the ICSID Convention and ICSID Rules. It was suggested that such question would need to be examined together with the possible amendments of the provisions of these conventions. See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044. Also see: 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 Vienna, 28 June–16 July 2021 at: http://undocs.org/en/A/CN.9/1050.

[527] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020); UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021).

[528] See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020), United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, A/CN.9/1044 at: http://undocs.org/en/A/CN.9/1044.

[529] Depending on the expected number of contacting parties to the new instrument, since they may be relevant only for enforcement in countries that are not members to the instrument. See: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), 19.10.2020, A/CN.9/WG.III/WP.at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details.

[530] See: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), 19.10.2020, A/CN.9/WG.III/WP.at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details.

would be developed in the reform process may include its own enforcement regime, requiring enforcement of decisions by ISDS tribunals in the States Parties to such a regime on multilateral instrument to implement reform options.[531] Although, it was suggested in the Working Group that the analysis should be conducted, covering whether an appellate mechanism could co-exist with the current ISDS legal framework.[532] The EU also suggested amendments to integrate the appeal to the ICSID mechanism.[533] The suggestion was to amend the ICSID Convention stating that ICSID Awards should "not be subject to any appeal or to any other remedy except those provided for in the Convention".[534] The ICSID discussion paper on "Possible Improvements of the Framework for ICSID Arbitration" of 22 October 2004 contained the draft features of an ICSID Appeals Facility in its annex.[535] Alternatively, pursuant to article 41 of the Vienna Convention on the Law of Treaties ("VCLT") may also be modified, which the EU agrees that such an inter se modification of the ICSID Convention would be legally feasible.[536]

Proposed Amendment to ICSID Rules

I have already declared that I will engage in the discussion on procedural rules in so far as it impacts the relevance of the EU as a member in the proposed reform options. If I do not address

[531] See: Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), 19.10.2020, A/CN.9/WG.III/WP.at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/4e6ea331-169c-4a36-b473-e6e634c0eaf8/details.
[532] 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 Vienna, 28 June–16 July 2021, A/CN.9/1050 at: http://undocs.org/en/A/CN.9/1050.
[533] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021).
[534] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021). Also see: Article 53 of the ICSID Convention (1966).
[535] ICSID, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat, Discussion Paper October 22, 2004, ICSID Secretariat Discussion Paper October 22, 2004 at: https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration_0.pdf. Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues Note by the Secretariat, Working Group III (Investor-State Dispute Settlement Reform), Fortieth session Vienna, Online, 8–12 February 2021, A/CN.9/WG.III/WP.202 at: http://undocs.org/en/A/CN.9/WG.III/WP.202.
[536] ICSID, Possible Improvements of the Framework for ICSID Arbitration; UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues Note by the Secretariat.

the matter of whether the EU is recognised as a member in these reform options, my discussion of the position of the EU on ISDS and reform options will be largely irrelevant. In the preceding section of this dissertation, concerning the enforcement of arbitral awards, I raised the matter that the UNCITRAL Working Group III questioned the possible incompatibility between the proposed reform with and other existing multilateral instruments including in particular the ICSID Convention. In response, the EU suggested amendments to integrate the proposed reform to the ICSID mechanism. In this section, I will address the discussion on suggested amendments in ICSID to as an entity that can be party to disputes under the ICSID. I will also extend the discussion with the EU's proposed amendment to the ICSID rules towards a comprehensive approach in investment agreements.

i. REIOs as members

Established by a multilateral treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), ICSID is heralded as the world's leading institution devoted to international investment dispute settlement. Disputes including member States are covered by the ICSID Convention.[537] Recourse to ICSID is voluntary but the dispute has to be between contracting member states or a national of a contracting member state.[538] The EU is not a state and thus cannot be recognised as a party in ICSID disputes nor as a Non-member under the ICSID Additional Facility rules.

The EU is not a member of ICSID and thus not bound by the ICSID Convention. However, it has incorporated the ICSID Arbitration Rules as well as the Additional Facility Arbitration Rules in all of its trade and investment agreements that include rules on investment protection.[539]

[537] International Centre for Settlement of Investment Disputes (ICSID), 'Member States', About ICSID, n.d., https://icsid.worldbank.org/about/member-states.
[538] https://icsid.worldbank.org/services/arbitration. Non-member states are eligible to choose ICSID for dispute resolution under the ICSID Additional Facility Rules, created for certain disputes that fall outside the scope of the ICSID Convention. Also see: https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview. These rules of procedure are commonly called the ICSID Arbitration Rules. They have governed most of the ISDS cases.
[539] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0038&from=EN

Moreover, it has proposed to be recognised as an entity that can be party to disputes under the ICSID Additional Facility Rules.[540] The proposed amendment would require that all EU member states be represented by a single representative in any ICSID proceeding.[541] Presented as the most extensive amendment to date, the ICSID Rules and Regulations were amended and effective July 1, 2022.[542]

In the preceding section, I discussed that the EU suggested amendments to integrate the proposed Appellate mechanism to the ICSID mechanism. ICSID is not an international court or tribunal but provides an institutional framework that facilitates international investment arbitration, mainly through arbitral tribunals that are constituted on an *ad hoc* basis. Although, the ICSID also contemplated a multilateral approach to investment disputes in the form of a MIC.[543]Furthermore, it pursued the creation of an ICSID Appeals Facility as a single appeal mechanism to serve as an alternative to multiple mechanisms.[544] Accordingly, ICSID indicated the possibility to abstain from this pursuit should multiple appeal mechanisms be established.[545]

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[540] The EU has been called a supra-national organisation because it resembles both an international organisation and a nation. However, the proposal of the EU is in its capacity as a 'Regional Economic Integration Organisations' (REIO). The proposal is for REIOs to be among the entities that can be parties to disputes under the ICSID Additional Facility Rules. See: ICSID, Revised comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Members States, https://icsid.worldbank.org/sites/default/files/amendments/state-input/EU_6.7.2019.pdf.

[541] The EU proposed an amendment to the rules that supposedly seeks to introduce changes that also aim to enhance the legitimacy in the ICSID Arbitration process. See: Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States at: https://icsid.worldbank.org/sites/default/files/amendments/state-input/ICSID%20reform-comments%20on%20behalf%20of%20the%20European%20Union%20and%20its%20Member%20States.pdf.

[541] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0038&from=EN.

[542] This marks the fourth time the ICSID rules have been updated. See: ICSID, ICSID Rules and Regulations Amendment, https://icsid.worldbank.org/resources/rules-amendments.

[543] ICSID discussion paper on "Possible Improvements of the Framework for ICSID Arbitration" of 22 October 2004 Also see: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat

[544] The ICSID discussion paper on "Possible Improvements of the Framework for ICSID Arbitration" of 22 October 2004 contained the draft features of an ICSID Appeals Facility in its Annex. *See:* ICSID, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat , Discussion Paper October 22, 2004 at: https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration_0.pdf. Also see mention of this in UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat

[545] ICSID, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat; UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat.

However, due to "divergent views expressed" and thus lack of consensus amongst member states, "the Secretariat informed the Administrative Council that it would not attempt to establish an appellate mechanism for the foreseeable future."[546] This was in the context of the ICSID Additional Facility Rules, rather than the ICSID Convention itself.[547]

In cognisance that ICSID does not recognise REIOs under the convention nor under Additional Facility Rules, the EU notwithstanding seemingly treats ICSID as a "set of rules" for the conduct of investor-state arbitral proceedings. The EU does not seem to treat ICSID as an institution pursuant to the terms of the ICSID Convention, providing the framework for the conduct of an arbitration proceeding.[548] Currently, in its proposed integration of the appellate mechanism to the ICSID mechanism, one may suppose an adoption of ICSID rules such as that "parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." [549] Awards rendered by the Appellate mechanism may be treated as having been rendered "under the Convention" through an *inter se* modification, if we assume it permissible.[550] Although, it may well be debated whether an appellate review of awards rendered under the ICSID Convention is permissible without a proper amendment of the Convention. The compatibility of the proposed Appellate mechanism with the multilateral treaty

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[546] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat.

[547] Although, the Secretariat indicated that it would "continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism". See UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues, Note by the Secretariat.

[548] Traced back to the TTIP Proposal, the EU's new generation treaties indicate that the intention of awards rendered under these treaties to be treated as though they have been rendered pursuant to the ICSID Convention. See: Art. 30(6), TTIP Proposal: "For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID)." Also see: Art. 8.41(6), CETA: "For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention." And see e.g. Article 31(8), EU-Vietnam FTA: "For greater certainty . . . where a claim has been submitted to dispute settlement pursuant to Article 7(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID)."

[549] ICSID Convention, Article 53.

[550] That is, "In accordance with the general treaty law rules reflected in Article 41 of the 1969 Vienna Convention of the Law of Treaties, the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention." See: ICSID discussion paper on "Possible Improvements of the Framework for ICSID Arbitration" of 22 October 2004

of ICSID is a discussion that continues.[551] I will not go further with this discussion than simply note the possibilities of compatibility of the proposed reform with the ICSID Convention. Given the commitment of the EU to ICSID, I simply note its possible relevance as a "pseudo" member of ICSID if not a member. But more convinced to being beyond a "pseudo member ", the EU Commission has requested a consideration that ' the ICSID Additional Facility Rules will potentially become applicable to disputes initiated against REIOs such as the EU.[552]

As far as progress in Working III is concerned, the UNCITRAL and the Secretariats of ICSID jointly prepared a draft Code of conduct, which provided a basis for deliberation in the UNCITRAL Working Group III.[553] In the first version of the draft Code, reference was made to the definition of "investor-State dispute settlement", which referred to "a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO)...", such as the EU, "...or any constituent subdivision of the State or an agency of the State or the REIO...".[554] This echoes the note in the UNCITRAL Working Group meetings such as that the establishment of the tribunal of the MIC would likely require the preparation of a statute, which would not only be open for adoption by States but also open to REIOs.[555]

[551] The Mauritius Convention, adopted by the General Assembly of the United Nations on 10 December 2014, has been considered as a model to introduce an investment court or appeal mechanism. The Convention is applicable to arbitrations between an investor and a State or a REIO based on an investment treaty concluded before 1 April 2014. See:UNCITRAL, .

[552] See: European Commission, Proposal for a Council Decision on the position to be taken on behalf of the European Union in the International Centre for Settlement of Investment Disputes (ICSID), Brussels, 9.2.2022 COM(2022) 38 final at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0038&from=EN.

[553] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session (Vienna, 15–19 November 2021), Working Group III (Investor-State Dispute Settlement Reform) Forty-first session Vienna, 15–19 November 2021 Report of Working, A/CN.9/1086 at: https://undocs.org/en/A/CN.9/1086.

[554] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session (Vienna, 15–19 November 2021), Working Group III (Investor-State Dispute Settlement Reform) Forty-first session Vienna, 15–19 November 2021 Report of Working, A/CN.9/1086 at: https://undocs.org/en/A/CN.9/1086.

[555] See: The eleventh Working Group III meeting, UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14–18 February 2022), Working Group III (Investor-State Dispute Settlement Reform) Forty-second session New York, 14–18 February 2022, A/CN.9/1092 at: http://undocs.org/en/A/CN.9/1092.

ii. A comprehensive approach

As discussed in Chapter Two of this dissertation, on the Significance of ISDS, it was only from the 1970s onwards that states started to include provisions permitting the investor to enforce the agreement without the need to persuade its home state to espouse the claim. The EU refers to this as in part by the suggestion of ICSID.[556] And after consideration of proposals, the ICSID Administrative Council approved the amendment of ICSID Rules. March 21, 2022: Member States of the ICSID approved a comprehensive set of amendments to ICSID's flagship rules for resolving disputes between foreign investors and their host States.[557]

The focus of the EU's proposed amendment to the ICSID rules is on ISDS. The EU's proposed amendment to the ICSID rules also supports a comprehensive approach in investment agreements.[558] The EU has taken note that the ICSID Convention was conceived before the large body of investment treaties came into existence.[559] This is also prior to the proliferation of comprehensive agreements. Therefore, the inference is that the drafters of the ICSID Convention

[556] European Commission, The identification and consideration of concerns as regards investor to state dispute settlement, A/CN.9/WG.III/WP.142., 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/a5935e60-9fe8-4b33-9272-3f8d55bc9ef1/details.

[557] https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules#:~:text=March%2021%2C%202022-,ICSID%20Administrative%20Council%20Approves%20Amendment%20of%20ICSID%20Rules,investors%20and%20their%20host%20States.

[558] The proposed amendment seeks to introduce a number of procedural and substantive changes to the ICSID arbitration process that are broadly consistent with the objectives of CETA's trade and sustainable development chapter. The proposed amendment to the ICSID rules seeks to incorporate many of the provisions in CETA into the arbitration process for investment disputes. It seeks to include provisions on the protection of human rights, the environment, and sustainable development in investment agreements. CETA is not the only agreement that includes provisions on sustainable development and the protection of human rights and the environment, it is one of the most comprehensive and influential agreements in this regard. As it is briefly mentioned in Chapter One of this dissertation, it has served as a model for other agreements. See EU proposed amendment to ICSID rules at: Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States, https://icsid.worldbank.org/sites/default/files/amendments/state-input/EU_6.7.2019.pdf. And see: Revised comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Members States, https://icsid.worldbank.org/sites/default/files/amendments/state-input/EU_6.7.2019.pdf.

[559] The ICSID Convention entered into force on 14 October 1966. Only 63 investment treaties were in place in 1970. Also see: European Commission, The identification and consideration of concerns as regards investor to state dispute settlement, A/CN.9/WG.III/WP.142., 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/a5935e60-9fe8-4b33-9272-3f8d55bc9ef1/details.

did not have in mind that the system of dispute settlement contained in the Convention would be used, as it currently is, primarily for treaty dispute settlement.[560] Seen to have motivated the key design choices made in the Convention, the EU refers to research that reports that the drafters estimated that around 90% of cases would be under investment contracts and concessions and not under investment treaties.[561] The EU notes that, there have been more investment treaty related disputes, contrary to the estimation of the drafters.[562] Hence, in the position of the EU, ICSID is not used as initially intended.

3.4 ISDS in EU FTAs

The EU has been moving away from traditional ISDS mechanisms in recent years. Discussed in the introduction, the aim of this chapter is to examine the EUs position on ISDS to answer the question on whether it's proposed changes are relevant to the New World Order. Defined in Chapter One, a New World Order in this dissertation refers to 'a change in the way the international system and international law and institutions operate'. That is, a New World Order that serves the needs of the present day. In Chapter Two, I discussed that changes have been witnessed such as international trade and investment law disciplines seemingly re-converging.[563] On convergence, ISDS is relied on to enforce international trade rights.

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[560] European Commission, The identification and consideration of concerns as regards investor to state dispute settlement.

[561] The EU cites J.C. Thomas and H.K. Dhillon "The Foundations of Investment treaty Arbitration, The ICSID Convention, Investment Treaties and the review of Arbitration Awards" (2017) 32(3) ICSID Review. See: Id. European Commission, The identification and consideration of concerns as regards investor to state dispute settlement, A/CN.9/WG.III/WP.142., 13 September 2022, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/a5935e60-9fe8-4b33-9272-3f8d55bc9ef1/details.

[562] The European Union has acknowledged an increase in investment treaty-related disputes, which contradicts the initial expectations of the treaties' drafters. This is reflected in the EU Termination Agreement for intra-EU Bilateral Investment Treaties (BITs), which addresses the termination of these treaties partly due to the rising number of disputes and the legal uncertainties they create. The termination wipes out the parties' consent to ISDS, arbitration clauses in Intra-EU BITs. See: Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29.

[563] There may be many changes in the international system, law and its institutions that resemble a 'New World Order'. The scope of this dissertation on the re-convergence of international investment and international trade law. As discussed in Chapter One if this dissertation, this focus should not be interpreted as a negation of other changes.

The objective of this chapter is to collect evidence on EU's perspective on ISDS reform, as an indication of the EU's position on the ISDS mechanism in this New World Order. In the first part of this chapter, I discussed the EU's proposals on ISDS' reform in changes reflecting this New World Order. I have also indicated that an examination of the EU's position on ISDS cannot be conceptualised in isolation from reform proposals.

At a workshop for ISDS provisions in the EU's International Investment Agreements, it was addressed by scholars how international investment became interrelated with international trade law.[564] In this sub-chapter, I examine the relevance of the EU proposals in a New World Order by examining whether EU proposals are reflected in the EUs new generation FTAs.

3.4.1 'New generation' in a New World Order

The EU's new generation of agreements followed the NAFTA which was described as "the most comprehensive regional trade agreement" of its time.[565] The agreement ushered in a new generation of FTAs.[566] As previously mentioned in this dissertation, the second largest FTA after NAFTA was the EU-South Korea FTA, considered as the first in the series of EUs new generation FTAs building on the prototype.[567] The EU followed a new generation of FTAs with other states, such as with Canada that had participated in NAFTA in pursuance of regional

[564] See: European Commission, Workshop - Investor-State Dispute Settlement (ISDS) provisions in the EU's International Investment Agreements, Directorate General for External Policies, Policy Department and Committee on International Trade, https://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf.
[565] Thembi Pearl Madalane, 'EU DCFTAs: Carrot- and-Stick?'; The NAFTA came into force on January 1, 1994. Although a trilateral agreement, it emanated from the initial plan of the US to make separate FTAs with Canada and Mexico with the main goals including the 'lifting the restrictions on trade, fostering the movement of goods and services across the borders' by addressing other aspects such as investment. See: Zoltán Víg, 'International Economic and Financial Organizations', in *Zsuzsanna Fejes, Márton Sulyok, Anikó Szalai (Eds), Interstate Relations* (Szeged: Iurisperitus Kiadó, 2019), chap. 8.
[566] This comprehensive approach to trade is seen in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2016) and other new generation FTAs that have followed.
[567] The EU-South Korea, signed on 15 October 2009 (entered into force 2011) was the EU's first FTA in Asia. At the time of signing , it was the second largest FTA after NAFTA. Some scholars write that 'it is the most important trade agreement concluded by the European Union (EU) since the conclusion of the Marrakesh Agreement establishing the World Trade Organization (WTO) in 1994.' See: Thembi Pearl Madalane, EU DCFTAs: carrot- and-stick? (2022).

economic integration.[568] The CETA marked new milestones, overlapping the disciplines of both trade and investment.[569]

In Chapter Two, I discussed that the EU new generation agreements overlap the disciplines of trade and investment. I also began the discussion that the proposed MIC as a ISDS reform option, overlaps the disciplines of trade and investment. In this Chapter I have discussed the MIC in UNCITRAL Working Group III meetings on the reform of the ISDS system. The discussion examines the EU position on ISDS in the Working Group meetings and it's promotion of the MIC. In EU FTAs, I discussed earlier in this chapter that the TTIP was notable for its scope and ambition as well as it's introduction of the MIC. Although the negotiations were suspended, it planted a seed for the MIC in the EUs new generation agreements.

It's worth noting that the establishment of the MIC is still a work in progress and its precise structure and mandate are still under discussion amongst states. The EU may be a key driving force behind the MIC initiative, but its establishment will require the support and cooperation of other states.

In this section, I will analyse the investment chapters of the EU's new generation FTAs with other states. As per scope of this dissertation, I will search for whether there is provision for ISDS in the FTAs. I will examine whether it is provisioned for in its traditional form or an appellate mechanism in the form of the MIC as discussed in the sub-chapter above, or whether none exists.

[568] The EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed: 30 October 2016.
[569] Zoltán Víg enlightens that the original CETA was to be more of a traditional FTA which due to public pressure resulted in a more comprehensive agreement that 'surpasses traditional trade questions to deal with a diverse range of topics, such as investment…'. See: Zoltán Víg, Chapter 8. International Economic and Financial Organizations.

3.4.1.1 EU-Republic of Korea free trade agreement [570]

The EU–Korea FTA is commonly referred to as the first of the new generation FTAs signed by the EU as part of the EU's post-2006 "Global Europe" strategy. It set a trend towards greater trade liberalisation. At that time, the agreement was the most comprehensive the EU had ever negotiated, addressing trade concerns beyond tariffs.

In reforming ISDS, the EU-Korea FTA does not include a permanent investment court system nor an appellate mechanism. The agreement makes provision for a quasi-WTO dispute settlement mechanism.[571] The approach is accompanied by the provision for a mutually agreed solution and the SSDS mechanisms; consultations and mediation.[572]

3.4.1.2 EU-Canada Comprehensive Economic and Trade Agreement [573]

While the EU-Korea FTA was an important milestone in EU trade policy, CETA set a trend towards a more comprehensive and controversial type of FTA that goes beyond traditional tariff reduction and includes provisions on a wide range of economic and regulatory issues. CETA set a trend beyond the EU-Korea FTA in several ways that include provisions on investment protection and dispute settlement. CETA updated its investment chapter to re-design its initially more traditional ISDS mechanism with an ICS, similar to that in the FTA with the TTIP proposal. Although, despite the ICS innovation, the CETA had to be put into force provisionally without the ICS.[574]

[570] European Union [EU] – Republic of Korea [South Korea] Free Trade Agreement [FTA] (2011). See Appendix IA of the dissertation.
[571] Article 14.19. See Appendix IB of the dissertation.
[572] Article 14.3 and ANNEX 14A of the EU -South Korea FTA.
[573] Comprehensive Economic and Trade Agreement [CETA] (2016). *See* Appendix IA
[574] [CETA] (2016)..

Canada and the EU signed the CETA, paving the way for a new type of dispute settlement mechanism.[575] The ICSID framework and rules are referred to in a number of places in the CETA agreement.[576] However, the agreement includes several modifications that address some of the concerns raised by critics of the system. The investment chapter of CETA provides for a two-tiered dispute resolution mechanism for resolving disputes between investors and states:

1) First instance tribunal in the form of a permanent ICS [577]
2) an appellate mechanism in the form of a permanent ICS.[578]

If a party is dissatisfied with the ruling of the ICS, they can then appeal to the second tier, which is an appellate tribunal.[579] Moreover, the CETA commits to "pursue the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes." This provision anticipates the transition from the bilateral ICS included in the agreements to a permanent MIC.[580] The EU, as an REIO, will be recognised as a member of the MIC.[581]

The CETA provides for making use of the institutional expertise of ICSID.[582] CETA also makes provision for a quasi-WTO settlement mechanism accompanied by providing for a mutually agreed solution accompanied by the SSDS mechanisms; consultations and mediation.

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[575] Most recently, Canada has also signed several agreements that exclude ISDS. For example, the Canada-United States-Mexico Agreement (CUSMA), which replaced the North American Free Trade Agreement (NAFTA), does not include an ISDS mechanism between Canada and the United States, but instead includes a government-to-government dispute settlement process. *See*: The United States-Mexico-Canada Agreement (USMCA)(2019).
[576] For instance, Article 8.27.states that the ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support. Article 8.41. states that final awards rendered under the CETA dispute settlement mechanism shall qualify as award under Chapter IV, Section 6 of the ICSID Convention. Article 8.25.2(a) provides that the consent to the settlement of the dispute by the Tribunal shall satisfy the requirements of Article 25 of the ICSID Convention and Chapter II of Schedule C of the ICSID Additional Facility Rules regarding written consent of the disputing parties. Article 8.23.2 (a) and (b) provides that proceedings before the Investment Court System (ICS) may be conducted in accordance with the ICSID Convention and Rules of Procedure for Arbitration Proceedings and the ICSID Additional Facility Rules if the conditions for proceedings pursuant to the ICISD Convention and Rules of Procedure for Arbitration Proceedings do not apply.
[577] Article 8.27. *See:* Appendix IB of the dissertation for provisions.
[578] Article 8.28., CETA. See: Appendix IB.
[579] Article 8.27 outlines the establishment of the Investment Court System (ICS), which is described as "a permanent institution responsible for the resolution of disputes between investors and states." Article 8.28 establishes the appellate tribunal, which is responsible for hearing appeals of ICS decisions. See: Appendix IB.
[580] Article 8.29, CETA. Also see: Appendix IB.
[581] See: Article 8.21 CETA.
[582] As The ICSID framework and rules are referred to in the CETA agreement.

3.4.1.3 EU-Mexico Trade Agreement[583]

The EU and Mexico have not yet concluded negotiations on an Investment Protection Agreement (IPA) that includes an Investment Court System (ICS). Like CETA, the modernised EU-Mexico TA went beyond traditional tariff reduction. In force since 2000, negotiations on modernisation began in 2016, 'Agreement in principle' on the trade part reached in 2018.[584] The new agreement, once ratified, will replace the existing EU-Mexico Global Agreement.

It covers a broader range of sectors, including investment. The agreement contributed to the trend towards a more comprehensive and innovative type of FTA. Similar to the CETA, the ICSID framework and rules are referred to in a number of places in the EU-Mexico TA.[585] Like the CETA, it re-designs the old ISDS mechanism.[586]

The investment chapter of the EU-Mexico TA provides for a two-tiered dispute settlement mechanism:

1) a first instance in the form of a permanent ICS
2) an appellate mechanism in the form of a permanent ICS.[587]

[583] European Union [EU] – United Mexican States [Mexico] Global Agreement. (2020). *See:* Appendix I
[584] *See* Appendix I of this dissertation.
[585] E.g. Article 11 (17) and Article 12(15) provide that the Secretariat of ICSID shall act as Secretariat for the Tribunal and provide it with appropriate support. Article 7.2(a)&(b) provides that A claim may be submitted under the ICSID Convention and Rules of Procedure for Arbitration Proceedings and the ICSID Additional Facility Rules if the conditions for proceedings pursuant to ICSID Convention and Rules of Procedure for Arbitration Proceedings do not apply. Article 30.1(c) states that the grounds for appeal are those provided for in the ICSID Convention.
[586] Most recently, the new United States-Mexico-Canada Agreement (USMCA), which replaced the NAFTA, includes several modifications to the ISDS system that address some of the concerns raised by Mexico and other countries.
[587] Section[X] -Resolution of Investment Disputes- Article 12 EU-Mexico Agreement (agreement in principle): "A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal." See: Appendix I.

The investment chapter of the EU-Mexico TA, which is currently in force, does provide for a two-tiered dispute settlement mechanism, but it is not an appellate mechanism in the form of a permanent ICS. Instead, it provides for the establishment of an ICS that includes a first instance tribunal and an appellate tribunal. The EU-Mexico TA also makes provision for the commitment that parties "should cooperate for the establishment of a multilateral mechanism for the resolution of investment disputes," which is widely seen as a step towards the creation of a MIC.[588]

As with the CETA, the EU-Mexico TA provides for making use of the institutional expertise of ICSID.[589] The EU-Mexico TA also makes provision for a mutually agreed solution and the SSDS mechanisms; consultations and mediation.

3.4.1.4 EU-Japan Economic Partnership Agreement[590]

The EU-Japan EPA includes an investment chapter similar to the CETA and the EU-Mexico FTA. However, with some key differences such as that the EU-Japan EPA 's dispute resolution mechanism does not include an ISDS mechanism.[591]

The investment chapter of the EU-Japan EPA provides for the following two-tiered dispute settlement mechanism:

1) State-state dispute settlement mechanism in the form of an ad hoc tribunal and
2) an appellate mechanism in the form of a in the form of a joint committee.

[588] Article 14, EU Mexico TA ('Global Agreement').
[589] As, similar to the CETA, the ICSID framework and rules are referred to in the EU-Mexico TA.
[590] European Union [EU] – Japan Economic Partnership Agreement [EPA] (2019)
[591] See Appendix 1A if this dissertation.

Constituting an improvement to the current ISDS, the ICS was subject to bilateral negotiation in the EU-Japan EPA.[592] However, unlike the CETA and the EU-Mexico TA, the EU-Japan EPA provides for a state-to-state dispute settlement mechanism as the first tier of the dispute resolution process and the with the appellate mechanism in the form of a in the form of a joint committee serving as a secondary option. This approach represents a departure from the ISDS mechanism in CETA and the EU-Mexico TA, which have ad hoc tribunals as the first tier of dispute resolution and ICS as the second tier. Furthermore, towards what is interpreted as an MIC, the EU-Japan EPA also makes provision for the commitment to "work towards establishing a permanent, multilateral investment dispute resolution system." However, this court has not yet been established.

The EU-Japan EPA makes provision for a quasi-WTO settlement mechanism accompanied by the provision for a mutually agreed solution.[593] The agreement also makes provision for a mutually agreed solution and the SSDS dispute settlement mechanisms; consultations and mediation.[594]

3.4.1.5 EU-Singapore Investment Protection Agreement [595]

The EU-Singapore IPA follows the EU's new generation approach to trade negotiations and its efforts to modernise the traditional ISDS mechanism. Similar to the CETA, EU-Mexico TA, the EU-Singapore IPA does not provide for the traditional ISDS mechanism.

The EU-Singapore IPA also represents a new generation of investment dispute settlement mechanisms for investment disputes between investors and states. The investment chapter of the EU-Singapore IPA provides for a two-tiered dispute settlement mechanism:

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[592] While the EU pursues the setting up of an investment court system (ICS), already introduced in its new generation agreements with Canada, Vietnam and Singapore, Japan favours the ISDS system. See: Krisztina Binder, EU-Japan trade agreement: a driver for closer cooperation beyond trade, European Parliamentary Research Service, July 2018 at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633164/EPRS_BRI(2019)633164_EN.pdf.
[593] See Appendix 1A &1B.
[594] See Appendix 1A &1B.
[595] European Union [EU] – Singapore Free Trade Agreement [FTA]. (2019),See Appendix I

1) a first instance in the form of a permanent ICS
2) an appellate mechanism in the form of a permanent ICS.[596]

In addition, the EU-Singapore IPA pursues "the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes" as similarly provided in the CETA, EU-Mexico TA and EU-Japan EPA.[597] However, I have already noted, the MIC has not yet been established. The EU, as an REIO, will be recognised as a member of the MIC.[598]

As with the CETA, EU-Mexico FTA, the EU-Singapore FTA provides for making use of the institutional expertise of ICSID.[599] The EU-Singapore makes provision for a quasi-WTO settlement mechanism accompanied by the provision for a mutually agreed solution accompanied by the SSDS mechanisms; consultations and mediation.[600]

3.4.1.6 EU-Vietnam Investment Protection Agreement[601]

[596] Article 3.9 EU-Singapore IPA: "A permanent Appeal Tribunal is hereby established to hear appeals from provisional awards issued by the Tribunal." See: Appendix IA &1B.
[597] See: Art. 3.12, EU-Singapore IPA . There is variation in the treaty language with provision for MIC with other FTAs.
[598] Article 3.5. 2, 3, 4 EU-Singapore IPA.
[599] Article 3.6.1 (a) &(b), EU -Singapore IPA. provides that the claimant may submit the claim to the Tribunal under the dispute settlement rules of the ICSID Convention provided that both the respondent and the State of the claimant are parties to the ICSID Convention. Alternatively, in accordance with the Rules on the Additional Facility provided that either the respondent or the State of the claimant is a party to the ICSID Convention. The Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.09. 16 and 3.10. 14 EU-Singapore IPA. Article 3.19(c) provides that the grounds for the appeal of an award are those provided for in the ICSID Convention.
[600] See Appendix 1A&1B of this dissertation
[601] European Union [EU] – Socialist Republic of Vietnam [Vietnam] Free Trade Agreement [FTA]. (2020), *See* Appendix I.

The EU-Vietnam IPA also includes a new type of investment dispute settlement system that is similar to the one established in the EU-Singapore FTA. The EU-Vietnam IPA text followed the EU's new approach as set out in the CETA and the EU's TTIP proposal.[602]

The investment chapter of the EU-Vietnam IPA provides for a two-tiered dispute settlement mechanism:

1) a first instance in the form of a permanent ICS[603]
2) an appellate mechanism in the form of a permanent ICS.[604]

The EU-Vietnam IPA makes provision for " negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism", which we have already discussed that it has not yet been established. This provision anticipates the permanent MIC, as with CETA, the EU-Mexico TA and the EU-Singapore IPA. The EU, as an REIO, will be recognised as a member of the MIC.[605]

The ICSID framework and rules are referred to in a number of places in the EU-Vietnam IPA.as with the CETA, EU-Mexico TA and the EU-Singapore IPA.[606] The EU-Vietnam FTA also makes provision for a mutually agreed solution and the SSDS mechanisms; consultations and mediation.[607]

[602] Also see: European Commission. CETA: EU and Canada agree on new approach on investment in trade agreement, Press release 29 February 2016 at: https://ec.europa.eu/commission/presscorner/detail/lt/IP_16_399.
[603] Article 38, EU-Vietnam IPA.
[604] Article 3.39 EU-Vietnam IPA: "A permanent Appeal Tribunal is hereby established to hear appeals from awards issued by the Tribunal." See: Appendix IB.
[605] Article 3.32. 2, 3, 4 EU-Vietnam IPA. /Art. 3.41, EU-Vietnam IPA
[606] Article 3.33.2 provides that a claim may be submitted to the Tribunal under the ICSID Convention and the ICSID Additional Facility Rules by the Secretariat of ICSID", where the conditions for proceedings pursuant to ICSID Convention do not apply. The Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.38. 18 and 3.39. 18 EU-Vietnam IPA.
[607] See: Appendix IA and Appendix IB.

3.4.1.7 EU-New Zealand Free Trade Agreement[608]

The EU-New Zealand FTA provides for the arbitration of investment disputes.[609] However, it makes no mention of particular institutions nor rules for investment dispute settlement. It makes provision for a mutually agreed solution accompanied by the SSDS mechanisms; consultations and mediation.[610]

The EU-New Zealand agreement does not make provision for a MIC but it provides for a review mechanism. Moreover, the agreement provides for relations with the WTO and other agreements.[611]

3.5 Conclusion

The focus of this chapter has been on the EU's perspective on ISDS reform. The EU has proposed a reformed ISDS system that would address concerns of ISDS and establish a MIC which would re-design the ISDS mechanism. This is the multilateral initiative extending from the EU's proposed ICS is a bilateral system as contained in the CETA, to set up a permanent body to decide investment disputes. I noted that the CJEU has issued Opinions confirming the compatibility of an ICS with the Treaties of the EU. I discussed that the EU has made submissions to the UNCITRAL Working Group III proposing novelties to the ISDS mechanism, and it has proposed amendments to the ICSID rules to recognize the REIO as a contracting member. The chapter also discusses the EU's efforts to reform the ISDS system and its stance on the MIC, in UNCITRAL, also taking cognisance of and ICSID proposals.

In UNCITRAL, the proposals for reforming the ISDS system are substantive, rather than procedural. Accordingly, I discussed the proposal of the EU's ICS as a re-design of the traditional

[608] See: Appendix IA and Appendix IB.
[609] Article 26.4 EU-New Zealand FTA
[610] Article 26.3, article 26.25, article 26.26 EU-New Zealand FTA
[611] Article 1.5, EU-New Zealand FTA.

ISDS, and the UNCITRAL's proposal of a MIC, to take over the current ad hoc ISDS system. The UNCITRAL Working Group III work plan proposed the increased use of informal meetings in support of the formal UNCITRAL sessions. The EU Commission organised stakeholder meetings to assess the potential benefits and drawbacks of the MIC, and to facilitate dialogue and cooperation among stakeholders to advance the development of a multilateral framework for ISDS reform. The EU's position on ISDS in the informal meetings found its way in the formal UNCITRAL Working Group III submissions. The EU has observer status in UNCITRAL sessions.

In addressing UNCITRAL Working Group III discussions in this chapter, I have provided evidence that EU's position in these discussions suggests improving the existing ISDS regime rather than replacing it. The EU suggests considering the compatibility of different models with the current ISDS regime. The EU has proposed models for establishing an appellate mechanism: Treaty-specific appellate mechanism, Ad hoc appellate mechanism, and Institutional appellate mechanism. The proposed Appellate Mechanism discussed by the Working Group on ISDS Reform, may take the form of a permanent multilateral appellate body or standing first-tier body, either complementing the existing ISDS regime or constituting the second tier in a MIC. The goal of creating an appellate mechanism is to increase the correctness, consistency, predictability, and coherence of ISDS decisions and hence the legitimacy of ISDS.

I have discussed the role of ICSID, one of the main institutions that administers investor ISDS cases, in the MIC as a proposed reform of ISDS. The ICSID has actively participated in the UNCITRAL Working Group III discussions, including providing input on specific issues related to the ICSID Convention and Rules. It is expected that the MIC will be established as a complementary institution to the existing ISDS system, including ICSID. Although, the compatibility of the proposed Appellate mechanism with the multilateral treaty of ICSID is still under discussion. ICSID is not an international court or tribunal but provides an institutional framework that facilitates international investment arbitration pursuant to the ICSID Convention and thus rules. The UNCITRAL Working Group III discussions suggest that if the MIC were to be established, it would likely work in conjunction with existing investment dispute settlement mechanisms, including ICSID. It is possible that ICSID could provide administrative or other

support to the MIC, although this would depend on the specific details of the court's creation and operation.

The discussions in the chapter also note that the EU proposed a comprehensive set of amendments to ICSID rules which focus on ISDS. The EU also proposed an amendment to the ICSID rules, requiring that all EU member states are represented by a single representative in any ICSID proceeding. The EU treats ICSID as a "set of rules" for the conduct of investor-state arbitral proceedings. However, ICSID does not recognise REIOs under the convention nor under the Additional Facility Rules. The EU Commission has requested a consideration that the ICSID Additional Facility Rules will potentially become applicable to disputes initiated against REIOs such as the EU.

Finally, the chapter examined the position of the EU on ISDS, to determine if its proposed changes are relevant to the New World Order, which the dissertation has referred to as a change in the way the international system and international law operate. Following the discussion on the EU's proposals on ISDS reform and how international investment is interrelated with international trade law as reflective of a New World Order, the chapter examined the investment dispute resolution in the EU's new generation FTAs with other states, including the EU-South Korea FTA, CETA, EU-Mexico FTA, EU-Japan, EU-Singapore FTA and EU-Vietnam. In Chapter Two, I discussed that the proposed MIC overlaps the disciplines of trade and investment, reflecting elements of the New World Order as discussed in the dissertation. This chapter concludes on the position of the EU by noting that while the ICS is already being implemented in some EU new generation FTAs, it is still in the process. In particular, the position of the EU of the MIC is still being developed, as a re-design of the current ad hoc ISDS system.

CHAPTER FOUR

CHINA POSITION ON ISDS

4.1 Introduction

The dissertation has thus far progressed its aim to evaluate the EU and China's position on ISDS as reflected in their new 'comprehensive' FTAs, towards the modelling of investment dispute resolution in a new generation of investment agreements such as the EU-China CAI. Following the work of chapter Three, the aim of this chapter is to examine the China's position on ISDS and answers the question on whether changes are relevant to the New World Order.[612] The objective is to collect evidence on China's perspective on ISDS reform as an indication of the its position on the ISDS mechanism. The findings of the chapter will be viewed in light of making proposals for the investment chapter of the EU-China CAI.[613] In Chapter Two, I concluded that the EU and China' position on the ISDS system contributes to the uncertainty on whether the ISDS' mechanisms is significant. The evidence on the position of the EU on ISDS in Chapter Three indicates an inclination to re-design the ISDS with a MIC which is however not yet developed. In this chapter, I seek evidence on the position of China on ISDS in this context.

[612] The usage of a "New World Order" in this dissertation is defined in Chapter One and discussed in Chapter Two.
[613] Chapter Five of the dissertation will make proposals for the contents of the EU-China CAI,

The examination of China's position on ISDS also cannot be conceptualised in isolation from reform proposals. This chapter reflects on the future of ISDS, by evaluating whether China's submission to the UNCITRAL Working Group III as well as initiatives at domestic level as well in joint centres that contribute towards an indication of its position towards the ISDS mechanism, are 'relevant' in a New World Order. To answer the question on whether changes are relevant to the New World Order, the chapter will analyse the China's recently signed new comprehensive FTAs, as evidence. The chapter assesses whether China's new comprehensive FTAs propose substantive changes on ISDS to address the concerns expressed about the substantive legitimacy crisis of the ISDS mechanism.

4.2 China Perspective on ISDS Reform

I have discussed in the dissertation that the ISDS mechanism is provisioned for in the majority of agreements with investment provisions. Moreover, China is a leader in the number of investment agreements it has concluded.[614][615] Notwithstanding reform proposals in the present day, China still believes that the ISDS mechanism is generally worth maintaining.[616] Although,

[614] China has signed 145 BITs (107 in force) and 24 treaties with investment provisions (19 in force) by June 2022, second only to Germany in terms of the number of IIAs concluded. In the recent years, China's BRI has led to numerous investment agreements with countries involved in this initiative, promoting infrastructure and development projects across Asia, Africa, and Europe. Also see other works where I write on Chinese investment agreements in the context of BRI. See eg.:

[615] China has signed 145 BITs (107 in force) and 24 treaties with investment provisions (19 in force) by June 2022, second only to Germany in terms of the number of IIAs concluded. In the recent years, China's BRI has led to numerous investment agreements with countries involved in this initiative, promoting infrastructure and development projects across Asia, Africa, and Europe. Also see other works where I write on Chinese investment agreements in the context of BRI. See eg.: Thembi Madalane, 'Exiting International Joint Ventures between Chinese and South African Banks', in *Matthew S. Erie (Ed), China's BRI Has Led to Numerous Investment Agreements with Countries Involved in This Initiative, Promoting Infrastructure and Development Projects across Asia, Africa, and Europe.* (Cambridge University Press, (forthcoming)).

[616] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.

also noting that after two years of discussion, the UNCITRAL Working Group III acknowledged that there are problems requiring reform in the present ISDS mechanism.[617]

4.2.1 ISDS with ADR and an Appellate Mechanism

The commitment of China to the ISDS mechanism also seeks to balance with its preference for consultation and mediation mechanisms in ISDS. Chinese culture plays an important role in shaping China's preference for consultation and mediation mechanisms in ISDS.[618] UNCITRAL WG III, Submissions from states underline the need to further explore mediation, conciliation and other alternative dispute resolution methods to prevent and reduce the occurrence of investor-state disputes.[619] As a cultural predisposition, Chinese investors usually prefer non-adversarial methods to resolve their disputes with host states.[620]

However, China also explicitly states that it is 'open to possible proposals for improving the ISDS mechanism'.[621] It has expressed an ambition for a 'comprehensive approach' to ISDS reform. China has pointed out structural problems of the ad hoc ISDS system and prefers a

[617] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat.
[618] China's deeply rooted Confucian philosophy emphasizes harmony and conflict avoidance and sees that the optimal resolution of disputes should be achieved not by the exercise of legal power but by moral persuasion. See: Xue Hanqin, 'Cultural Element in International Law', Melland Schill Lecture at University of Manchester (5 May 2016) at: https://www.youtube.com/watch?v=JRRDxCk9hi8.
[619] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session, New York, 30 March–3 April 2020, Possible reform of investor-State dispute settlement (ISDS), Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat, A/CN.9/WG.III/WP.190 at:
https://uncitral.un.org/sites/uncitral.un.org/files/wp190_dispute_prevention.pdf.
[620] Also see: Thembi Madalane, 'China-Africa "Legal Cooperation" on Investment Dispute Settlement: Current Practice and the Role of Europe', Research Brief (China, Law and Development (University of Oxford), 22 November 2022), https://cld.web.ox.ac.uk/files/finalrbthembipdf. I note that promoting China promotes informal and diplomatic means to address investment disputes. In consideration of the limitations of "legal cooperation" in China-Africa investment disputes, I consider what Europe has to offer.
[621]UNCITRAL, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 ,'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China', Note by the Secretariat (8 July 2019), A/CN.9/WG.III/WP.177 at:
https://documents.un.org/doc/undoc/ltd/v19/073/86/pdf/v1907386.pdf?token=iZQsI5eiQTpMel79cm&fe=true.

comprehensive reform. This is also including the establishment of an appellate mechanism. China has called for institutional reforms of ISDS such as the establishment of an appellate mechanism modelled on the WTO dispute settlement system.[622]

4.3 The Position of China in UNCITRAL

As discussed in Chapter Three, the UNCITRAL WGIII group holds both formal and informal meetings to discuss various aspects of ISDS reform. I will also begin discussing the 'informal' position of China on ISDS as demonstrated in in meetings outside the UNCITRAL WGIII sessions. After which I will consider the formal position of the EU on ISDS as communicated in the official sessions of the UNCITRAL WGIII.

4.3.1 Outside UNCITRAL Working Group III

Although FTAs that the have been entered into with associations or multiple states as co-signatory in a single EU FTAs are beyond the scope of this dissertation, there is a need to refer to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

4.3.1.1 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

[622] See: UNCITRAL, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 ,'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'. Largely based on the experience of China with inconsistent ad hoc arbitration awards. Such as the view of the tribunal in China Heilongjiang International Economic & Technical Cooperative Corp. v. Mongolia that jurisdiction was limited to the amount of compensation for an expropriation, under the …BIT. See: China Heilongjiang International Economic and Technical Cooperative Corp, Beijing Shougang Mining Investment Company Ltd, and Qinhuangdaoshi Qinlong International Industrial Co. Ltd v.Mongolia (Award, 30 June 2017), PCA Case No 2010-20.This contradicted with the tribunal in Tza Yap Shum v. Peru and Sanum v. Laos of the view that a limitation of the ISDS clause would deprive the clause of its effect utile. See: Tza Yap Shum v. The Republic of Peru, ICSID Case No ARB/07/6, Award (7 July 2011).

The CPTPP does not form part of the analysis of China's comprehensive FTAs which we analyse later in this chapter. There is a need to point to it for some direction of China's view on the appellate mechanism. Largely operating under the traditional ISDS framework, the CPTPP does not pursue the creation of an appeal facility but only contains an 'opening clause' that requires the contracting parties to consider opting into a future appellate mechanism. China formally submitted a request to accede to the CPTPP in September 2021.

On the other hand, China does not go so far as to endorsing the EU's two-tier permanent MIC proposal and prefers to retain the investors' right to appoint arbitrators. Such a preference is demonstrated in its UNCITRAL Working Group III Submission which I discuss in the following sub-section.

4.3.2 UNCITRAL Working Group III (Submission from the Government of China)

China believes that the ISDS mechanism is generally worth maintaining as it plays an important role in protecting the rights and interests of foreign investors and assisting to build the rule of law into international investment governance, amongst other reasons.[623] However, China affirms it's support for Member States in promoting the reform process by various means under UNCITRAL and also supports cooperation between UNCITRAL and other international organizations on this issue.[624]On 19 July 2019, the Government of China submitted the first proposal on ISDS reform to UNCITRAL.[625]

[623] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.
[624] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.
[625] See: UNCITRAL, Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China' (8 July 2019), A/CN.9/WG.III/WP.177 at:

4.3.2.1 China Concerns with ISDS

In its proposal, China reaffirms its commitment to ISDS as an important mechanism for resolving investor-state disputes, outlines its concerns about the current ISDS regime, and suggests several priority areas for reform.[626]In response to a list of the main problems of the current ISDS mechanism, China made the following six proposals in UNCITRAL, that it proposes can be currently considered for improving the ISDS mechanism[627]:

1. Creation of an appellate mechanism for ISDS
2. Retaining right to appoint arbitrators
3. Rules relating to arbitrators: Improve the rules governing arbitrators' qualifications, conflicts of interest, selection and disqualification procedures.
4. Commitment to alternative dispute resolution measures
5. Inclusion of pre-arbitration consultation procedures
6. Transparency of third-party funding

In this dissertation, I will not provide an in-depth discussion on the arguments surrounding these proposals and their functioning. As discussed in Chapter One on the scope of this dissertation, the intention of the dissertation is to research the implications of the current reform efforts on the new generation on investment agreements rather than argue whether it is better or not to reform ISDS. In other words, the intention is a focus on the first level of whether the new generation agreements will continue with the provision for ISDS or provide for the reform of ISDS. The second level on whether the proposed reform options are practicable or best, is beyond the scope of the dissertation. The interest of the dissertation is on the position of China on ISDS. That is on 'what' China proposes. The reasons 'why' thereof, will not change the

[626] UNCITRAL.
[627] 'Proposals that can currently be considered include, but are not limited to, the following areas' See: UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.

proposals of the EU-China CAI in the dissertation, based on the position of China on ISDS.[628] In this chapter, I analyse and report on the position of China on ISDS.

4.3.2.2 China Reform options

In the interest of academic sophistication, I will give a brief account of the reasons for the particular proposals by China to reform the ISDS mechanism to highlight preferences in terms of important characteristics in the particular proposals. This is not to be misunderstood as the intention of the dissertation to participate in the critical discussion on which reform option is best in reforming the ISDS mechanism. Taking note of the characteristics of the proposals will assist in the identification of feasible proposals for the EU-China CAI based on shared characteristics.[629]

i. Appellate Mechanism

First, China has called for institutional reforms of ISDS such as the establishment of an appellate mechanism modelled on the WTO dispute settlement system. The lack of an appellate mechanism in Current ISDS system does not allow the opportunity to address the inconsistency of awards. It would help improve error-correcting mechanisms, strengthen legal expectations for investment dispute settlement and establish limitations for the conduct of judges.'[630]

China's proposal is not surprising as China has long held a favourable view and made active system. of the WTO dispute settlement system.

[628] In Chapter Five, the proposals for the investment chapter of the EU -China CAI is based on the position of the EU on ISDS and the position of China on ISDS.
[629] In Chapter Five I will make proposals to the investment chapter of the EU- China CAI based on shared characteristics of the EU proposals and China proposals dependent on their respective positions on ISDS.
[630] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.

ii. Right to appoint arbitrators

Second, China favours the option of retaining the right of the parties to appoint arbitrators at the first-instance stage of investment arbitration in any reform proposal. China views the right of the parties to appoint arbitrators not only a widely accepted institutional arrangement in settling international disputes, but also the 'core and most attractive feature of international arbitration.[631]

China notes that Working Group III and the ICSID are jointly studying relevant codes of conduct.[632]

iii. Rules relating to arbitrators

Third, China notes that, given the public international law foundation of investment arbitration, arbitrators should have professional knowledge in the fields of public international law and international economic law.[633] China also notes that the ISDS mechanism should be more 'open and inclusive.' China calls for greater participation of experts from developing countries who comprise only a very small pool of experts.[634]

iv. Alternative dispute resolution measures

Fourth, in contrast with investment arbitration, China proposes the exploration of a more effective investment conciliation China believes that, offering a high degree of flexibility and

[631] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'. China justifies its preference on the right of parties to choose arbitrators at the first-instance stage of investment arbitration on the three grounds; the advantage of a broad expertise, it is a widely accepted arrangement, it is an important aid to enhancing the confidence of parties to disputes.
In addition, China also noted the lack of a code of conduct for arbitrators in investment arbitration to address 'double- issue in which potential conflicts of interest arise with inequities, that may be caused by arbitrators improperly practicing as legal counsel in other arbitral proceedings. This resonates with UNCITRAL WGIII support for developing a code of conduct for ISDS tribunal members.
[632] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.
[633] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'.
[634] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'.

autonomy, conciliation provides more opportunities to adopt creative and forward-looking methods to promote the settlement of investment disputes.[635]

v. Pre-arbitration consultation procedures

Fifth China reaffirms its commitment to alternative means of dispute settlement, including a mandatory three to six month pre-arbitration consultation procedure.[636] The rules on mediation and other alternative dispute resolution methods that could be applied in ISDS have also been developed in UNCITRAL and ICSID.[637]

vi. Transparency of third-party funding

Sixth, Although China views third-party funding as problematic, it does not propagate an outright prohibition but rather the regulation of third-party funding in ISDS by imposing transparency obligations on the parties.[638]

Multilateralism and the Appeal mechanism

These six proposals discussed above, have revealed several characteristics but without a mention of the MIC. As discussed in Chapter Two, the MIC is a global proposal resembling the WTO trade dispute settlement mechanism, to re-design the ISDS mechanism. I discussed that it incorporates the elements of both disciplines of international economic law reflects a New World Order of a re-convergence of trade and investment. In Chapter Three, I discussed that the EU has continued to support the establishment of the MIC towards reformation of the ISDS

[635] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China.
[636] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'.
[637] Note by the Secretariat, 'Possible reform of ISDS Dispute prevention and mitigation - Means of alternative dispute resolution', A/CN.9/WG.III/WP.190 (15 January 2020).
[638] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China'.

mechanism. As I intend to make proposals in the EU-China CAI, it is thus required to discuss the view or indication of China on this MIC proposal.

China believes that the formulation of multilateral rules requires the joint efforts of Member States; and the vitality of multilateral mechanisms also depends on the joint participation of Member States.[639] China favours a multilateral approach to ISDS reform, 'The Chinese Government has been steadfast in its pursuit of multilateralism'.[640] Although it is seemingly not yet convinced of the MIC proposal.

China believes that among the many problems of ISDS that have come to light, some of the institutional issues tend not to lend themselves to resolution through bilateral investment agreements between Member States.[641] China insists that 'regulating appeal mechanisms by formulating multilateral rules is more efficient than doing so through bilateral investment agreements.'[642] However, China is seemingly not yet ready to endorse the EU's ICS proposal in either bilateral or multilateral negotiations. Notwithstanding it's argument that some of the institutional issues of ISDS tend not to lend themselves to resolution through bilateral investment agreements and regional trade agreements.[643]

ICSID reluctance

[639] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177.
[640] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China.
[641] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China.
[642] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat.
[643] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement: Submission from the Government of China.

Furthermore, in the six proposals as discussed, China makes reference to ICSID. Today, China is deeply engaged and intertwined with ICSID and other mechanisms of investment protection and investor-state arbitration. I will discuss other mechanisms of investment protection and investor-state arbitration in the following sections of the chapter. In this section I will address the approach of China to ICSID.

Most notably, China has evolved from an "observer" to a "member" of ICSID. China has been reluctant to accept the jurisdiction of ICSID but deposited its instruments of ratification of the ICSID Convention on 7 January 1993.[644] However, the lack of clarity is on the jurisdiction of ICSID. Even following its ratification of the ICSID Convention, China continued to conclude international investment agreements without reference to ICSID arbitration.[645] Many of the early investment agreements do not provide for ISDS.[646] They only provide for ', the dispute should be submitted to the competent national court of the host state' to settle ISDS' disputes.[647]Although the legal effects are unclear, China also made a declaration under Article 25(4) of the ICSID Convention, accommodating a limitation of the jurisdiction of ICSID.[648] Article 25(4) of the ICSID Convention states that a declaration made under this Article and its subsequent notification 'shall not constitute the consent …' Parties must separately give consent to ICSID jurisdiction in a separate bilateral agreement or treaty. Thus one may interpret such a declaration as without legal effects.[649]

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[644] China acceded to the ICSID Convention on February 9, 1990. China deposited its instruments of ratification of the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) on 7 January 1993.

[645] ICSID Centre has jurisdiction under two conditions. First, the state has ratified the ICSID Convention and second, it has consented expressly to its jurisdiction in accordance with Article 25(1) of the ICSID Convention.

[646] Many of the early investment agreements concluded after 1993. See: Ming Du, 'Explaining China's Approach to Investor-State Dispute Settlement Reform: A Contextual Perspective'.

[647] Ming Du.

[648] See: Ming Du. '[a]ny Contracting State may, at the time of ratification, acceptance of approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre'. The ICSID Convention is silent on such a declaration so it is supposed by some scholars that it is a reservation provided for under Article 2(1)(d) of the Vienna Convention on the Law of Treaties (the 'VCLT').

[649] '[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes over compensation resulting from expropriation and nationalization'. [ICSID/8-D, Notifications concerning classes of disputes considering suitable or unsuitable for submission to the centre, 1 (2008)]. The ICSID Convention states that a declaration made under this Article and its subsequent notification 'shall not constitute the consent required by [Article 25] paragraph (1)'.

Later, international investment agreements to which China is party to, provide for ISDS under ICSID but only for questions of compensation for expropriation. A few of its investment agreements included a limited the scope of its consent to ICSID's jurisdiction with a declaration that 'the Chinese Government would only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalization.'[650]

It is in the newly negotiated investment agreements that China provided for the ICSID arbitration clause without limitations.[651] However, the provision is typically under two conditions recognising Chinese law;

1.The investor has referred the issue to an administrative review procedure according to Chinese law;[652] and

2.In case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.

China seemingly commits to ICSID arbitration 'subject it's preference for Chinese characteristics. On this basis, China is intertwined with ICSID and other mechanisms of investment protection and investor-state arbitration.[653] This is notwithstanding a new generation of the ICSID Rules, formulated in response to the current ISDS concerns. In the following sections, I discuss the other mechanisms of investment protection. China has catered for its preference for investor-state arbitration with Chinese characteristics through its domestic arbitral institutions and courts and joint arbitration centres.

[650] A declaration under Article 25 (4) of the ICSID Convention. Also see E.g. the BIT between China and Lithuania (1993) or China and Bahrain (1999).
[651] BITs include the BIT between China and the Netherlands (2001), China and Bosnia-Herzegovina (2002), China and Germany (2003) and China and Finland (2004).
[652] And the dispute still exists three months after he has brought the issue to the review procedure. See eg. China - Germany BIT.
[653] Many Chinese BITs concluded after 1993 still contain the 'old' Chinese standard clause indicating that if the investor-host state dispute could not be settled through negotiations, the dispute should be submitted to the competent national court of the host state. ee: Ming Du, 'Explaining China's Approach to Investor-State Dispute Settlement Reform: A Contextual Perspective'

4.4 Investment arbitration with Chinese characteristics

It is understood that the launch of a new generation of the ICSID Rules, the most used rules of procedure in ISDS, have been formulated in response to the current ISDS concerns.[654] However, as discussed earlier in this chapter, China has been reluctant to commit to ICSID rules. Seemingly, domestic arbitral institutions in China have also released new rules that reflect some of the concerns raised about the current ISDS system.[655]

In addition to the well-established ICSID, China has since 2015 begun to expand the jurisdiction of its existing arbitral institutions, allowing them to facilitate ISDS disputes in China. Previously only with competence of commercial dispute resolution, China has reformed domestic arbitral institutions, such as the Shenzhen Court of International Arbitration (SCIA) and the China International Economic Trade Arbitration Commission (CIETAC), by extending their competence with Investor-state Investment disputes. The domestic institutions issued rules allowing them to also facilitate ISDS disputes in China.

Currently, some Chinese arbitral institutions accept claims between an investor and a state[656]. Although, according to the PRC Arbitration Law, only disputes resulting from a commercial relationship (whether contractual or not) are permitted.[657] The Supreme People's Court clarified this to exclude disputes between foreign investors and a State[658]. Moreover, the 1994 Arbitration Act of China is ambiguous in determining the legal basis of ISDS in China. There is no express provision for investor-state arbitration in the Act. The ambiguity of the 1994 Arbitration Act

[654] Also see discussions in Chapter Two
[655] Such as matters on Confidentiality, Third-party funding, and Third-party submissions as I will discuss on the CIETAC in the following paragraphs.
[656] Shenzhen Court of International Arbitration (SCIA), updated its rules (effective 1 December, 2016) and became the first Chinese arbitral institution accept claims between an investor and a state. http://www.sccietac.org/download/files/document/20161031184962.pdf... In 2017, though not governmental institution but the oldest and largest arbitral institution in China, China International Economic and Trade Arbitration Commission (CIETAC) also updated its rules to include investor-state disputes.
[657] *See* Arbitration Law of China (1994).
[658] Notice of the Supreme People's Court on the Implementation of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" Acceded to by China at: http://cicc.court.gov.cn/html/1/219/199/201/698.html

may be problematic, requiring much needed clarification. Although, it remains uncertain whether the 1994 Arbitration Act in China will be updated to 'explicitly' permit investor-state arbitration, China is seemingly promoting Chinese arbitration mechanisms and influencing the rules and practices in ISDS.

4.4.1 Domestic Arbitral Institutions and Courts

The intention of the discussion 'Investment arbitration with Chinese characteristics' in this dissertation is to view the role of the preference for mediation and negotiating in ISDS disputes, with the acceptance that they are Chinese characteristics. I am aware that, in the recent years, ICSID began to work on the first institutional mediation rules designed specifically for investment disputes to complement ICSID's existing rules for arbitration.[659] This development precedes domestic developments in China. Thus, in the following paragraphs I will first discuss the domestic developments, in particular to the desirability of SCIA and CIETAC prior to the new ICSID mediation rules. The discussion seeks to enlighten on the likely position of China on ISDS, following the new ICSID mediation rules and the possible approach to the MIC proposal. It is beyond the scope of this dissertation to engage on the specifics of Chinese culture and tradition. Nor do I intend to contribute to the argument of how mediation and negotiating are characteristics embedded in Chinese legal culture and tradition. I simply draw this observation from the analysis of other scholars in this research area.[660]

[659] In 2018, ICSID began work on a new set of mediation rules to complement ICSID's existing rules for arbitration, conciliation and fact-finding. ICSID supports efforts by parties to resolve investment disputes through mediation at all stages of a dispute.' See: ICSID, Services, Mediation at: https://icsid.worldbank.org/services/case-administration/mediation.

[660] See eg.: Xue Hanqin, Chinese Contemporary Perspectives on International Law, vol. 15, The Pocket Books of The Hague Academy of International Law / Les Livres de Poche de l'Académie de Droit International de La Haye (The Netherlands: Brill | Nijhoff., 2012).

SCIA[661]

Taking the lead, the SCIA published its rules allowing the administration of investor-state arbitration under the UNCITRAL Rules.[662] The SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules constitute the first guidelines to apply UNCITRAL Arbitration Rules on the mainland.[663] Reflecting a new generation of investment arbitration rules, SCIA was also the first to explore the optional appellate arbitration procedure in China.[664]

Although dispute resolution of SCIA closely cooperates with numerous international organisations, such as ICSID and UNCITRAL, it builds upon Chinese traditions described as "Diversified Harmonious Dispute Resolution".[665] It combines mediation and arbitration and furthermore, the facilitation of negotiation with arbitration.[666] As discussed earlier under the section 'China perspective on ISDS reform', China also has a preference for negotiation and mediation, rather than litigating in front of courts or tribunals.

Likewise, the CIETAC Investment Arbitration Rules reflect features that address concerns at the heart of the legitimacy crisis of ISDS.[667] The rules also have Chinese characteristics, reflecting Chinese legal culture and tradition.

[661] SCIA was previously known as the China International Economic and Trade Arbitration Commission South China Sub-commission (that is, CIETAC South China Sub-commission). See: Article 1, Shenzhen Court of International Arbitration Arbitration Rules at: https://www.scia.com.cn/files/fckFile/file/SCIA%20Arbitration%20Rules%20(effective%20from%20Feb_%2021,%202019).pdf.
[662] SCIA published its rules in 2012. SCIA formulated the SCIA Guidelines for the Optional Appellate Arbitration Procedure, which were recommended by GAR on 3 January 2019.
[663] Peter Malanczuk, 'Some Remarks on International Arbitration in China: My Experience with the Shenzhen Court of International Arbitration (SCIA)', *Shenzhen Court of International Arbitration*, 20 August 2020, https://www.scia.com.cn/en/index/newsdetail/id/3628.html.
[664] Peter Malanczuk.
[665] Peter Malanczuk.
[666] Peter Malanczuk.
[667] China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (2015). See discussions in following sub-chapter.

CIETAC

The CIETAC rules do not reflect a new generation of investment arbitration rules in with some key features in the rules such as culture-specific principles and transparency requirements. Chinese characteristics are further extended in the combination of mediation and arbitration of Investor-State disputes. While the investment arbitration is pending, the rules provide for mediation of the case by the tribunal itself.[668] The mediation is confidential, and the tribunal has the discretion to conduct the mediation as it deems appropriate.[669]

The "Cheng Shi Xin Yong" principle that is common under Chinese law is also obligated in the CIETAC rules.[670] This principle of 'good faith ' obligates parties to ISDS to join the arbitral proceeding by the principle of good faith, also recognised in China's Civil Code and China's Civil Procedural Code.[671]

The necessary role of China's Civil Code and China's Civil Procedural Code is acknowledged in Arbitral rules for CIETAC investor state disputes. Since the early days of CIETAC as the Foreign Economic and Trade Arbitration Commission (FETAC),[672] the CCOIC as we know it today, was authorised to formulate the arbitral rules which the State Council (ie.Central government) would amend in accordance with PRC laws and thereof adopt.[673] The Arbitration Act of China provides that 'Foreign arbitration rules may be formulated by the China Chamber of International Commerce (CCOIC) in accordance with this Law and the relevant provisions

[668] Article 43, The CIETAC Investment Arbitration Rules.
[669] Article 4, China's Civil Code. Also see: Civil Procedure Law of the People's Republic of China (1991), Article 13.
[670] See: Article 6, CIETAC Investment Arbitration Rules
[671] Civil Procedure Law of the People's Republic of China (1991), Article 4, and 13.
[672] Under the China Council for the Promotion of International Trade (CCPIT), the China International Economic and Trade Arbitration Commission (CIETAC) was set up in April 1956, formerly known as the Foreign Trade Arbitration Commission. The Foreign Trade Arbitration was renamed as Foreign Economic and Trade Arbitration Commission (FETAC) in 1980. Then FETAC renamed as the CIETAC in 1988. Since 2000, CIETAC is also known as the Arbitration Court of the China Chamber of International Commerce (CCOIC).CIETAC is the arbitration court of CCOIC. See: China International Economic and Trade Arbitration Commission (CIETAC), Introduction at: http://114.247.131.178/en/articles/25083. Also see: CCPIT, Related Agencies at: https://en.ccpit.org/infoById/8a8080a94fd37680014fd3c885fc0006/5.
[673]Article 73 of Chapter VII, Arbitration Law of the People's Republic of China, MOFCOM December 20, 2013 – 13:34 BJT at:
http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml.

of the 2017 general rules of China's Civil Code/ Civil Procedure of China.'[674] This interpretation allows ISDS through the power granted to the CCIOC. Thus, through new CIETAC rules effective from 2017.[675]

4.4.2 Joint Arbitration Centres

The CEAC is one such example of efforts towards a joint arbitration centre that may consider the legal traditions and principles of the EU and China. It is a joint initiative designed to deal with international arbitrations involving a Chinese party. Formerly known as the Asian European Arbitration Centre (ASEAC), the CEAC is a Hamburg-based arbitration institution established to provide dispute resolution services, primarily for 'commercial and investment matters' between Chinese and European parties.[676] It was founded in 2008 as the only arbitration institution with a multilateral approach with regards to European-Chinese ASEAN relations.[677]

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[674]Article 73 of Chapter VII, Arbitration Law of the People's Republic of China, MOFCOM December 20, 2013 – 13:34 BJT at: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml.

[675] CIETAC is the arbitration court of CCOIC. Also see: CCOIC, Introduction of CIETAC, 2019-03-28 at: http://ccoic.cn/ecms/content/119#:~:text=Since%202000%2C%20CIETAC%20is%20also,disputes%20by%20means%20of%20arbitration. CIETAC adopted its first investment Arbitration Rules in 2017. See: The State Council The People's Republic of China, China launches first Investment Arbitration Rules to defend rights (20 September 20170 at: https://english.www.gov.cn/news/video/2017/09/20/content_281475871634494.htm.

[676] See: Asian European Arbitration Centre at: https://www.aseac-arbitration.com/?utm_campaign=domain_change&utm_medium=ceac-arbitration_com&utm_source=redirect.

[677] In addition, China is building joint arbitration centres with other regions, such as the China-Africa Joint Arbitration Center (CAJAC). The initial impetus came from the Chinese Law Society along with the Shanghai International Arbitration Centre (SHIAC) which contacted the Arbitration Foundation of South Africa (AFSA) to assess the possibility of establishing CAJAC's first African centre. See: CAJAC Johannesburg at: http://www.cajacjhb.com; CAJAC Shanghai at http://www.shiac.org/CAJAC/aboutus_E.aspx?page=3 Also see: Dawid Welgemoed, CAJAC:A New International Arbitration Centre, Keating Chambers at: www.keatingchambers.com. The SCIA, discussed earlier, co-established the CAJAC with other key arbitration institutions in China and Africa, to break the monopoly of existing Western dominated investment arbitral institutions. Although, all members of CAJAC have agreed for CAJAC to conduct further work under the guidance of 'Chinese arbitration mode and path' .As per suggestion of CAJAC Johannesburg, following the inauguration of China-Africa Joint Arbitration Centre(CAJAC) Nairobi. See: http://www.bjac.org.cn/english/news/view?id=3250. Even though the CAJAC centres have previously made their own rules, the CAJAC uniform rules were agreed upon for conformity across the centres. On 25 November 2015, the Guiding Committee of CAJAC Johannesburg and CAJAC Shanghai met in Johannesburg to agree on the CAJAC Model Clause and the CAJAC Johannesburg rules and the panel of arbitrators. See: https://www.hoganlovells.com/en/publications/cajac-update. Chinese influence in the adoption of rules is admitted on a report, that the new CAJAC rules are to be modelled on the rules of a Chinese arbitral institution. See: AFSA Newsletter of June-July 2020 Available at: https://arbitration.co.za/news-and-events/ . Also see: http://szac.org/en/index/newsdetail/id/3607.html The CAJAC Johannesburg website states that the focus is on

It may also, well within reason, be academically argued that State enterprises which based on the Broches test, may qualify for investor-state arbitration, despite classified as 'commercial disputes'.[678] This argument may be particularly plausible when major Chinese investments are by state owned enterprises[679].

I do not intend to contribute to the discussions on whether commercial disputes of state enterprises are 'pseudo'-Investor-State disputes. I simply bring the discussion up to note the possible influence of CEAC on investment dispute resolution concerning China. That is, with the intention of considering CEAC as one of the possible indications of 'Chinese arbitration mode and path', on the position of China on ISDS.

4.5 ISDS in China FTAs

Towards the reformation of the ISDS system, China has shown a growing interest in alternative approaches to investment dispute settlement. China's approach to investment dispute settlement also offers flexibility in choosing arbitration rules, closely in line with it's UNCITRAL WGIII proposal as discussed earlier in this chapter.[680] It has traditionally relied on investment agreements to govern investment protection and dispute settlement. However, in recent years, China has shifted its focus towards negotiating comprehensive FTAs instead of bilateral investment agreements. The transition to China's comprehensive FTAs allows China to establish

China-Africa commercial disputes. See: CAJAC Johannesburg at: http://www.cajacjhb.com; CAJAC Shanghai at http://www.shiac.org/CAJAC/aboutus_E.aspx?page=3. However, early discussions also suggested the resolution of Investor-State disputes.

[678] Whether international investment disputes between investors and states are considered commercial is subject to debate. Also See: Anran Zhang, Letter to the Journal The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases, Chinese Journal of International Law, Volume 17, Issue 4, December 2018.

[679] Major Chinese investments in Africa are larger projects are conducted by Chinese SOEs in critical industries; Transport, Energy & Metals. See: https://www.brookings.edu/blog/africa-in-focus/2018/09/06/figures-of-the-week-chinese-investment-in-africa.

[680] Parties involved in a dispute can select from a range of internationally recognized arbitration rules, such as those provided by the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).See: Appendix IIB.

a broader framework incorporating investment protection and dispute settlement provisions. China deems its FTAs as a new platform to further opening up to the outside and speeding up domestic reforms, such as discussed in the former sections of the dissertation.[681]

4.5.1 A 'Comprehensive' approach in a New World Order

In Chapter One, I defined the New World Order as 'a change in the way the international system and international law and institutions operate'. In Chapter Two, I discussed that the re-convergence of the trade and investment disciplines has been one such change. The ISDS mechanism is relied on to enforce international trade rights. Accordingly, investment is one of the critical components of China's comprehensive FTAs. Investment dispute settlement mechanisms in China's comprehensive FTAs exhibit certain aspects that distinguish them from traditional dispute resolution frameworks. They do typically include ISDS provisions. In addition to ISDS, China's comprehensive FTAs often incorporate state-to-state dispute settlement mechanisms, allowing investment disputes to be resolved through negotiations and consultations by focusing on diplomatic negotiations rather than individual investor claims. Although there seems to be no public official document concerning the position of China on the MIC, it has been exploring the possibility of establishing a MIC or other multilateral mechanisms.[682] In its new comprehensive FTAs, China has gone as far as provide for an "appeal mechanisms " of ISDS awards, but with no direct mention of an ICS nor an MIC.[683]

In the following sub-sections, I will analyse the investment chapters of the China's comprehensive FTAs with other states. As per scope of this dissertation, I will search for whether

[681] 'The Chinese Government deems Free Trade Agreements (FTAs) as a new platform to further opening up to the outside and speeding up domestic reforms', See: Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/english/index.shtml.
[682] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session, Vienna, 14–18 October 2019, A/CN.9/WG.III/WP.177 at: http://undocs.org/en/A/CN.9/WG.III/WP.177. As discussed above in this chapter, 'China welcomes this reform initiative. The Chinese Government has been steadfast in its pursuit of multilateralism'. But it has not been explicit on the 'MIC'.
[683] See Art 9.23, China -Australia FTA

there is provision for ISDS in the FTAs. As evidence of the position of China on ISDS, I will examine whether it's FTAs provide for ISDS with Chinese characteristics as discussed. More so, I will examine the comprehensive FTAs for the possibility of establishing a MIC or other multilateral mechanisms. In other words, I will examine whether ISDS is in its traditional form or an appellate mechanism in the form of the MIC as discussed in the Chapter Three on the position of the EU on ISDS, or whether none exists.

4.5.1.1 China-New Zealand Free Trade Agreement [684]

The China -New Zealand FTA includes provisions for the protection of investors and their investments. It encompasses an investment chapter that focuses on investment protection and dispute resolution mechanisms.

It includes an ISDS mechanism, allowing investors to initiate claims against the host state for alleged breaches of investment protections.[685] Investment disputes are provisioned to be resolved through either ICSID or UNCITRAL arbitration.[686] Although, the agreement establishes a process for the settlement of investor-state disputes, emphasizing amicable resolution through consultations and negotiations.[687] If no settlement is reached, the investor can choose to submit the dispute to arbitration.[688]

Moreover, the exhaustion of domestic administrative review procedures may be required before arbitration.[689] Additionally, if the dispute is already in domestic court, the investor must withdraw the case before it can be submitted to international dispute settlement.[690]

[684] China – New Zealand FTA (2008). See: Appendix IIA & IIB.
[685] Section 2, Chapter 11, China – New Zealand FTA.
[686] Article 153(1), China – New Zealand FTA.
[687] Article 152, China – New Zealand FTA.
[688] Article 153, China- New Zealand FTA.
[689] Article 153 (2) , China -New Zealand FTA.
[690] Article 153(3), China -New Zealand FTA.

In providing for investment dispute resolution, the China -New Zealand FTA is silent on the possibility of the MIC and or an appellate mechanism.

4.5.1.2 China-Singapore Free Trade Agreement [691]

The China-Singapore FTA (CSFTA) goes beyond trade in goods and services by promoting investment flows between China and Singapore. It includes provisions related to investment protection and dispute settlement. In the event of an investment dispute, the CSFTA provides a framework for ISDS. It incorporates an ISDS mechanism, allowing investors to bring claims against the host state for alleged violations of investment protections. Disputes are provisioned to be resolved through arbitration.

The CSFTA refers to the ASEAN-China Investment Agreement, which was established under the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China.[692] The provisions of the ASEAN-China Investment Agreement are incorporated into CSFTA, with the exception of those unrelated to China or Singapore.[693] The CSFTA does not specify a particular institution for investment dispute resolution. Instead, it provides a framework for resolving investment disputes through arbitration. The CSFTA allows the submission of claims to an ad hoc arbitral tribunal.[694] In the absence of specific provisions in the CSFTA regarding the choice of arbitral institution or rules, the dispute resolution mechanism for investment disputes, the ASEAN-China Investment Agreement is considered for consistency.[695]

The ASEAN-China Investment Agreement provides that if the dispute cannot be resolved through consultations and negotiations, it may be submitted to either the domestic courts or to international arbitration bodies such as the International Centre for Settlement of Investment

[691] China – Singapore FTA (2008). See: Appendix IIA & IIB. The agreement underwent an upgrade in 2018, known as the CSFTA Upgrade Protocol, introduced new provisions to deepen and expand bilateral cooperation.
[692] Article 84, China -Singapore FTA.
[693] Article 84(1), China -Singapore FTA. The provisions of the CSFTA prevail if any inconsistencies arise.
[694] Article 96, Chapter 12, China -Singapore FTA.
[695] ASEAN -China Investment Agreement (2009)

Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), or other arbitration institutions or rules.[696] ASEAN-China Investment Agreement provides that the provisions of the 'ASEAN-China Dispute Settlement Mechanism Agreement' shall apply.[697]

The ASEAN-China Dispute Settlement Mechanism Agreement provides that emphasizes investment dispute resolution through consultations as the first option.[698] Conciliation or mediation is provided for if the dispute is not resolved through consultations.[699] As a last option, the appointment of an arbitral tribunal maybe requested to settle the dispute if the dispute is not resolved by the first options.[700]

The China -Singapore FTA is silent on the possibility of the MIC and or an appellate mechanism. The agreements with ASEAN offer no insight either.

4.5.1.3 China-Peru Free Trade Agreement [701]

The China -Peru FTA addresses is an agreement that also places emphasis in both trade and investment. Recognising the importance of investment and the need to protect the rights of investors, the agreement provides a framework for addressing investment disputes.

The ISDS mechanism plays a crucial role in the dispute settlement process outlined in the agreement.[702] Although, the agreement established a mechanism for 'consultation through

[696] Article 14, ASEAN-China Investment Agreement. During the dispute settlement process, interim measures of protection from the domestic courts may be sought. Diplomatic protection may not be initiated for an international claim for a dispute that has been submitted to arbitration, unless the other party fails to comply with the arbitration award.
[697] Article 13, ASEAN-China Investment Agreement. "The provisions of the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China signed in Vientiane, Lao PDR on the 29th day of November 2004 shall apply to the settlement of disputes between or amongst the Parties under this Agreement." See: Article 4-6, ASEAN-China Dispute Settlement Mechanism Agreement (2004).
[698] Article 4, ASEAN-China Dispute Settlement Mechanism Agreement.
[699] Article 5, ASEAN-China Dispute Settlement Mechanism Agreement.
[700] Article 6, ASEAN-China Dispute Settlement Mechanism Agreement.
[701] China -Peru FTA (2009). See: Appendix IIA & IIB.
[702] Article 139, China -Peru FTA.

diplomatic channel' as the first step in resolving investment disputes.[703] If a dispute could not be settled through consultations within a specified period, further dispute settlement procedures may be initiated.[704] In the event that consultations failed to resolve the dispute, conciliation or the establishment of an ad hoc arbitral tribunal may be requested.[705] The China -Peru FTA provides for ICSID, UNCITRAL or other arbitration rules.[706]

However, the China -Peru FTA is silent on the possibility of the MIC and or an appellate mechanism.

4.5.1.4 China-Costa Free Trade Agreement[707]

The China-Costa Rica Free Trade Agreement not only fosters economic cooperation and trade but also plays a crucial role in establishing a framework for investment dispute resolution.

The China-Costa Rica FTA reflects the importance of the pre-existing Agreement on the Government of the People's Republic of China and the Government of the Republic of Costa Rica on the Promotion and Protection of Investments.[708] The agreement reaffirms the commitments made under this China-Costa Rica PPI. In this way, it acknowledges the existing legal framework for investment protection and highlights the ongoing commitment. Negotiations are emphasized to settle investment disputes.[709]It is if the dispute cannot be settled through negotiations that other options are provided for.[710] The agreement provides for the settlement of investment disputes through a competent domestic court or ISDS through ICSID.[711]

[703] Article 138(1), China -Peru FTA.
[704] Article 138(2) & Article 139 (1)
[705] Article 139(2), China -Peru FTA.
[706] Article 139(2), China -Peru FTA.
[707] China -Costa Rica FTA (2010). See: Appendix IIA & IIB.
[708] Article 89, Chapter 9, China -Costa Rica FTA.
[709] Article 9 (1), China -Costa Rica PPI (2007).
[710] Article 9(2), China -Costa Rica PPI.
[711] Article 9(2), China -Costa Rica PPI.

The China-Costa Rica PPI nor the China-Costa Rica FTA offers insight on the possibility of the MIC and or an appellate mechanism.

4.5.1.5 China-Iceland Free Trade Agreement[712]

The China-Iceland FTA is one of the earliest bilateral FTA that China entered into with a European country. This agreement has a comprehensive scope including investment.

Similar to the China -Costa Rica FTA, the China-Iceland FTA reaffirms the commitments made under a pre-existing agreement. The China -Iceland FTA makes reference to the Agreement Between the Government of the People's Republic of China and the Government of Iceland concerning the Promotion and Reciprocal Protection of Investments.[713]

The China-Iceland PRPI places emphasis on negotiations to settle investment disputes.[714]It is if the dispute cannot be settled through negotiations that it may be submitted to a competent national court. [715] The inclusion of ISDS provides an additional alternative for resolving disputes. The agreement provides for the resolution of investment disputes through domestic courts or initiating arbitration proceedings. If a dispute 'involving the amount of compensation for expropriation' is not settled through negotiations, it may be submitted to ICSID or to an ad hoc arbitral tribunal.[716]

The China -Iceland FTA and the China-Iceland PRPI are both silent on the possibility of the MIC and or an appellate mechanism.

[712] China-Iceland FTA (2013). See: Appendix IIA & IIB.
[713] Article 92, Chapter 8, China-Iceland FTA.
[714] Article 9 (1), China -Iceland PRPI (1994).
[715] Article 9(2), China -Iceland PRPI.
[716] Article 9(3), China -Iceland PRPI.

4.5.1.6 Canada-China Promotion and Reciprocal Protection of Investments Agreement[717]

Although the China-Canada Foreign Investment Promotion and Protection Agreement (FIPA) has various trade-related obligations, it also resembles an investment protection agreement. It provides a framework for protecting and promoting foreign investments between China and Canada.

The China -Canada FIPA includes provisions for investment protection and dispute settlement, featuring an ISDS mechanism.[718] Under the FIPA, the investor-State tribunal is invoked, where an investor submits a claim to arbitration.[719] The agreement provides for arbitration under ICSID or UNCITRAL' as supplemented or modified by the rules set out in this Agreement or adopted' by China and Canada.[720] However, the agreement also encourages the amicable resolution of disputes through consultation by providing for conditions precedent to the submission of a claim to arbitration.[721]

The China -Canada FIPA is silent on the possibility of the MIC and or an appellate mechanism.

[717] China -Canada FIPA (2012). See: Appendix IIA & IIB.
[718] Article 20, China -Canada FIPA.
[719] Article 20(2) China -Canada FIPA.
[720] Article 22(1), China -Canada FIPA.
[721] Article 21, China -Canada FIPA.

4.5.1.7 Free Trade Agreement between the People's Republic of China and the Swiss Confederation[722]

The China-Switzerland FTA is an agreement that covers various aspects of trade and investment, including investment protection and dispute settlement. It incorporates mechanisms such as ISDS and other dispute resolution mechanisms, offering investors a platform to seek redress for alleged investment violations.

The agreement establishes a mechanism for consultations as the first step in resolving investment disputes. If a dispute could not be settled through consultations within a specified period, further dispute settlement procedures may be initiated.[723] In the event that consultations failed to resolve the dispute, conciliation or the establishment of an ad hoc arbitral tribunal may be requested.[724] However, the China -Switzerland FTA provides for the WTO or the International Court of Justice (ICJ) should the WTO not be possible.[725]

The China -Peru FTA is also silent on the possibility of the MIC and or an appellate mechanism.

4.5.1.8 China-Korea Free Trade Agreement[726]

The China-Korea FTA also goes beyond the traditional focus on trade in goods and includes provisions specifically aimed at promoting and protecting investment. It establishes mechanisms to address investment disputes.[727]

[722] China -Switzerland FTA(2013). See: Appendix IIA & IIB.
[723] Article 15(4), China -Switzerland FTA.
[724] Article 15(4), China -Switzerland FTA.
[725] Article 139(2), China -Peru FTA.
[726] China -Korea FTA (2015). The China-Korea FTA second phase is under negotiation. See: See: Appendix IIA & IIB.
[727] Article 12, China -Korea FTA.

The China -Korea FTA provides for ISDS in resolving investment disputes. Although, the China -Korea FTA provides that disputes may be submitted for arbitration if they cannot be resolved through consultation.[728] As an additional option, investment disputes in the China -Korea FTA are provisioned to be resolved through either domestic courts, ICSID, UNCITRAL or any other arbitration in accordance with arbitration rules.[729]

The China-Korea FTA makes no mention of the possibility of the MIC or an appellate mechanism.

4.5.1.9 China-Australia Free Trade Agreement [730]

With a comprehensive approach, the China -Australia FTA includes provisions for dispute settlement in trade and investment matters. The China-Australia FTA includes notable provisions related to investment dispute settlement that incorporates an ISDS mechanism.[731]

Investment disputes in the China -Australia FTA are provisioned to be resolved through either ICSID, UNCITRAL or to any other arbitration institution or under any other arbitration rules [732] Although, the China -Australia FTA provides that, in the event that an investment dispute cannot be settled by consultations, a claim may be submitted for arbitration as an additional option for resolving the investment dispute.[733]

The China-Australia FTA does not make any mention of the MIC. Although, the agreement does envisage an ISDS appeal mechanism. The China-Australia FTA suggests an aim to create a system that allows for the review of arbitration awards. The China-Australia FTA provides for

[728] Article 12.12(3)(i), China -Korea FTA.
[729] Article 12.12(3), China- Korea FTA.
[730] China -Australia FTA (2015). See: Appendix IIA & IIB.
[731] Chapter 9, China -Australia FTA.
[732] Article 9.12(4), China- Australia FTA.
[733] Article 911(1)-.12(2), China -Australia FTA.

commencing negotiations 'with a view to establish an appellate mechanism to review awards rendered' in arbitrations.[734]

4.5.1.10 China-Mauritius Free Trade Agreement[735]

The China-Mauritius FTA is China's first FTA with an African country.[736] It includes provisions for resolving investment disputes between Chinese investors and the government of Mauritius.

The China -Mauritius FTA provides for ISDS in resolving investment disputes.[737] Although, the China -Mauritius FTA encourages consultations prior to submission of the dispute to arbitration.[738] Investment disputes in the China -Mauritius FTA are provisioned to be resolved through either ICSID, UNCITRAL or any other arbitration institution or under any other arbitration rules.[739]

The China -Mauritius FTA does not provide for the encouragement of negotiations to establish the MIC lest mention the MIC. Although, the agreement does acknowledge the possibility of establishing an appellate mechanism to review awards made by ISDS tribunals in the future. The agreement provides that if the appellate mechanism for reviewing awards is developed, it will be considered whether awards rendered should be subject to that appellate mechanism.[740]

[734] Article 9.23, China -Australia FTA.
[735] China -Mauritius FTA (2019). See: Appendix IIA & IIB.
[736] Ministry of Commerce of the People's Republic of China, China FTA Network, China-Mauritius FTA at: http://fta.mofcom.gov.cn/topic/enmauritius.shtml.
[737] Chapter 8, China -Mauritius FTA.
[738] Article 8.23(1), China - Mauritius FTA.
[739] Article 8.24(3), China- Mauritius FTA.
[740] Article 8.11. Also see: Article 8.28(8), China -Mauritius FTA.

4.5.1.11 China-Cambodia Free Trade Agreement[741]

The provision for investment dispute settlement in China -Cambodia FTA is similar to the China -Singapore FTA which provide for the relationship with the ASEAN-China Investment Agreement.

As I discussed earlier, the ASEAN-China Investment Agreement provides that if the dispute cannot be resolved through consultations and negotiations, it may be submitted to either the domestic courts or to international arbitration bodies such as ICSID, UNCITRAL or other arbitration institutions or rules.[742]

The China -Cambodia FTA gas no provision for the MIC or an appellate mechanism. The ASEAN-China Investment Agreement provides no insight, either.

4.4 Conclusion

The chapter sought to examine China's position on ISDS. It is a challenging task to align China with either the ISDS' 'incrementalists' or 'systemic reformers' discussed in Chapter Two. Despite acknowledging the need for reform in the present ISDS mechanism, China believes that the ISDS system is generally worth maintaining. However, China is also open to proposals for improving the ISDS mechanism and has expressed a desire for a comprehensive approach to reform.

[741] China -Cambodia FTA (2020)
[742] Article 14, ASEAN-China Investment Agreement. During the dispute settlement process, interim measures of protection from the domestic courts may be sought. Diplomatic protection may not be initiated for an international claim for a dispute that has been submitted to arbitration, unless the other party fails to comply with the arbitration award.

China recognizes structural problems with the ad hoc ISDS system and advocates for institutional reforms, including the establishment of an appellate mechanism modelled after the WTO dispute settlement system. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides some direction on China's view of the appellate mechanism, although it falls outside the scope of analysis in this dissertation. China does not explain how a permanent appellate mechanism could be implemented. For example, it is not clear whether China supports an appeal facility in lieu of ICSID annulment under the ICSID framework, a permanent standalone appellate body that will hear all ISDS cases, or an appellate mechanism as the second tier in a MIC.

In the chapter, we discussed that China submitted a proposal on ISDS reform to the UNCITRAL WG III, expressing its support for maintaining the ISDS mechanism while acknowledging the need for reform. China identifies several concerns with the current ISDS regime and suggests priority areas for reform. These include the creation of an appellate mechanism for ISDS, retaining the right to appoint arbitrators, improving rules related to arbitrators' qualifications and conflicts of interest, promoting alternative dispute resolution measures, introducing pre-arbitration consultation procedures, and ensuring transparency of third-party funding. However, the dissertation clarifies that it does not extensively discuss the arguments surrounding these proposals or their feasibility.

China made six proposals in UNCITRAL WGIII, that it proposes can be currently considered for improving the ISDS mechanism. The reform options highlight China's preferences for important characteristics in the proposals. While the dissertation does not engage in a critical discussion on which reform option is best, it aims to identify feasible proposals for the EU-China CAI based on shared characteristics and China's position on ISDS. For instance, China prefers non-adversarial methods to resolve disputes. This preference is evident in China's submission to the UNCITRAL Working Group III. Limiting exposure to international tribunals, China has sought to maintain as much control and influence over the selection of arbitrators.

China has also eschewed any treaty that requires it to submit to the compulsory jurisdiction of an international tribunal. There is ambiguity regarding China's jurisdiction under ICSID. Even after ratifying the ICSID Convention, China continued to conclude international investment agreements without reference to ICSID arbitration. Some of these agreements stipulated that disputes should be settled in the national courts of the host state. China made a declaration under Article 25(4) of the ICSID Convention, which may be interpreted as lacking legal effects. In later investment agreements, China included provisions for ISDS under ICSID, but with limitations. It consented to ICSID jurisdiction only for compensation-related disputes resulting from expropriation and nationalization. In newly negotiated investment agreements, China provided an ICSID arbitration clause without limitations, but subject to the investor following Chinese law's administrative review procedure and court process. China's commitment to ICSID arbitration is influenced by its preference for Chinese characteristics. Despite the development of a new generation of ICSID Rules in response to ISDS concerns, China has established its domestic arbitral institutions, courts, and joint arbitration centres to cater to its preference for investor-state arbitration with Chinese characteristics.

The chapter discussed that China's perspective on ISDS reform is influenced by its significant involvement in investment agreements and its cultural predisposition towards consultation and mediation. China is promoting its domestic arbitral institutions and influencing the rules and practices in ISDS, incorporating these Chinese characteristics and traditions. China has expanded the jurisdiction of its domestic arbitral institutions, such as the SCIA and the CIETAC, to include ISDS. These institutions have released new rules that address concerns raised about the current ISDS system. The SCIA and CIETAC have implemented rules that reflect a new generation of investment arbitration, incorporating Chinese traditions and characteristics. Moreover, the chapter discusses that influence of CAJAC on investment dispute resolution involving China is worth considering as an indication of the "Chinese arbitration mode and path" and China's position on ISDS.

In consideration of discussions in the chapter, one may wonder if the development of China-led arbitration mechanisms do not conflict with China’s asserted preference for a multilateral

approach to ISDS reform. China prefers a multilateral approach to ISDS reform, but not necessarily the dominance of Western arbitral institutions. It seems unlikely that China will accept the bilateral ICS. China is seemingly not yet ready to endorse the EU's ICS proposal. Nor does it fully endorse the EU's two-tier permanent MIC proposal notwithstanding that it favours a multilateral approach to ISDS reform. The preference of China for the practice of party-appointed arbitrators contrasts with the EU's MIC proposal at UNCITRAL WG III. China has not endorsed the EU's ICS proposal in bilateral or multilateral negotiations, despite acknowledging the limitations of bilateral agreements and regional trade agreements in resolving institutional issues of ISDS. I re-iterated in the chapter that the focus of the dissertation is to research the implications of current reform efforts on new generation investment agreements, rather than debating the merits of ISDS reform. Thus, the primary interest of the chapter has been on understanding China's position on ISDS and analysing the proposals it puts forward. The chapter did not delve into the reasons behind China's proposals but focuses on reporting and analysing China's stance on ISDS in the context of the EU-China CAI.

Finally, reflecting a New World Order, the chapter begins the examination of evidence with a note that China is shifting its focus from bilateral investment agreements to negotiating comprehensive FTAs that incorporate investment protection and dispute settlement provisions. These comprehensive FTAs align with its proposal in the UNCITRAL Working Group III. China's comprehensive FTAs often incorporate ISDS provisions, However, the comprehensive FTAs evidence that China's approach to investment dispute settlement is not solely reliant on ISDS. They include dispute settlement mechanisms that emphasize diplomatic negotiations and consultations as a means to resolve investment disputes. This indicates that China is open to alternative approaches and values the importance of diplomatic channels in dispute resolution.

While the findings do not specifically mention the position of China on the establishment of a MIC some agreements do mention the possibility of an appellate mechanism for reviewing arbitration awards in the future. This suggests that China may be open to considering the establishment of an appellate mechanism to review ISDS awards, although the specific details are not outlined in the agreements examined.

Overall, the findings indicate that China's position on ISDS in its comprehensive FTAs demonstrates a willingness to address investment disputes through a combination of ISDS mechanisms, consultations, and potential future considerations for appellate review mechanisms. Perhaps, the EU suggestion that the envisaged MIC may adopt an 'open architecture' could potentially enhance its appeal to China. In the following Chapter Five, I will approach the relevance of ISDS in New World Order with a comparative analysis of the EU and China's position on ISDS. I will consider the characteristics in the China's comprehensive FTAs that may be reflected in the EU-China CAI. Through a comparative analysis, the chapter draws from the proposed changes identified in the previous Chapter Three on the EU position on ISDS. I will explore how the investor-state provisions of the EU-China could look if substantial changes are based on China's position on ISDS in this chapter Four or whether to adopt the EU position on ISDS in Chapter Three.

CHAPTER FIVE

THE EU-CHINA COMPREHENSIVE AGREEMENT ON INVESTMENT (CAI) IN PRINCIPLE

5.1 Introduction

The aim of this dissertation has been introduced in the Chapter One, as to know the interaction of the EU and China's position on ISDS in a new generation of investment agreements. The EU and China contributes to the establishing a new generation of investment agreements, which the China–EU CAI is expected to represent. Throughout the dissertation, we have indicated that this chapter will revisit this major negotiating goal of the EU-China CAI. That is, the negotiating goal of the EU-China CAI as introduced in Chapter One on the Background of the dissertation, to conclude an investment protection agreement with provision for investment dispute resolution.

The originally envisaged 'comprehensive' China-EU CAI has not been fully completed. The CAI does not yet include substantive standards of investment protection. It was agreed that negotiations on investment protection and investment dispute settlement will be completed

within 2 years of the signature of the EU-China CAI [743]. In the 'agreement in principle', China and the EU only agreed to a detailed state to state dispute settlement system, coupled with a monitoring mechanism at pre-litigation phase established to ensure effective monitoring of the implementation of the EU-China CAI. Old member state BITs with China will continue to provide investment protection and access to traditional ISDS. The EU and China have committed to pursue the negotiations on investment protection and investment dispute settlement.

Following reasons discussed in Chapter Two of the dissertation, this chapter approaches the relevance of ISDS in New World Order with an analysis of the EU and China's position on ISDS. The chapter makes proposals on the EU-China CAI by considering the position of China on ISDS in relation to the EU position on ISDS. It draws from the EU and China's position on ISDS as identified in Chapter Three and Chapter Four of this dissertation, to make 'feasible' proposals for the EU-China CAI investor-state dispute settlement provision. The basis of making such proposals is on principles that align with various discussions and academic literature within international law and dispute resolution.[744] I begin the chapter with a discussion of the principles that underlie the dissertation proposals of the EU-China CAI investment dispute resolution provision.

5.2 The EU-China CAI 'in principle'

The EU-China CAI will be the first investment agreement concluded between the EU and China.[745] A draft text of the agreement "in principle" was released on 22 January 2021.[746] It is a

[743] See: European Commission, EU and China reach agreement in principle on investment Press release (30 December 2020) at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541.
[744] Aligning with various discussions and academic literature in the legal field, particularly within international law and dispute resolution, See discussion in the following sub-Chapter.
[745] See: UNCTAD Investment Policy Hub International Investment Agreements , EU (European Union) Treaties with Investment Provisions (TIPS), https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union-
[746] The EU-China Investment Agreement Draft; EU – China Comprehensive Agreement on Investment (CAI) 22 January 2021, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237 (Accessed 23 March 2021)

way of expressing support or acceptance of the concept or idea of the EU-China CAI, in a general sense, without committing to specific details or implementation.[747] Although the agreement details are inconclusive, the *EU* and *China* agreed to the fundamental *principles* to be reflected in the EU-China CAI. The EU-China CAI is grounded in principles that guide its design and implementation.

This dissertation explores the principles that are particularly relevant to the investment dispute resolution provision of the EU-China CAI, shedding light on its significance and implications within the context of the agreement. International investment agreements often include dispute resolution provisions which may incorporate principles such as transparency, predictability and impartiality amongst others. In the New World Order, the dissertation identifies other emerging principles. The aim is to deepen the understanding of the foundational framework upon which the proposals of the EU-China CAI in this dissertation are built.

5.2.2 The principles of ISDS in A New World Order

In Chapter Two, we discussed that the ISDS is a mechanism that is provisioned for in standard international investment agreements. In this dissertation, I take note that the EU-China CAI "in principle" is not a traditional investment agreement but a new generation agreement.[748] In addition to its traditional focus on investment protection, the CAI consolidates drawing from international trade law as well. In the CAI, the EU and China agree to an enforcement

[747] The EU stated that the EU-China CAI in principle should be considered ad referendum, subject to further confirmations and finalisation of details. See: European Commission, EU-China Comprehensive Agreement on Investment - The Agreement in Principle – Factsheet, 30 December 2020 at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/6b4e0ec7-5ff0-4872-a4cf-54717b881d90/details.

[748] It has been argued that the EU-China CAI, is not just be another major investment agreement following the second-generation BITs but indicates the emergence of a new generation of bilateral investment agreements worldwide. Also see: Anthea Roberts. In Chapter Two, I discussed the model for trade and investment agreements and the shift towards a comprehensive approach. In this chapter I focus only on the EU-China CAI.

mechanism as in EU trade agreements.[749] Such a change pointing to the convergence of international trade and investment, is reflective of a New World Order, as defined in Chapter Two and discussed throughout the dissertation.

The China–EU CAI is expected to replace the existing BITs that China separately has with individual EU member states[750]. The China–EU CAI provides that it would liberalise market access, which is currently not provisioned for in existing investment treaties.[751] The EU-China CAI contains provisions on market access commitments on the basis of a 'negative list' of reserved sectors and where relevant commitments are taken for all sectors, except those that are explicitly excluded or to the extent they are being reserved on the so called 'policy space'.[752] This dissertation is of the view that this provision for the trade concept of market access in the CAI, an investment agreement, reveals a *sui generis* character.[753] It is on this basis that the

[749] The EU remarked that in the monitoring of implementation of the CAI and its dispute settlement, 'China agrees to an enforcement mechanism (state-to-state dispute settlement), as in our trade agreements.'See: European Commission, Key elements of the EU-China Comprehensive Agreement on Investment, Brussels, 30 December 2020 at: https://www.eeas.europa.eu/eeas/key-elements-eu-china-comprehensive-agreement-investment_en.

[750] See: Y.Li., T.Qi, T and C.Bian, C, 'China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement.Especially following the agreement with EU member states to terminate of intra-EU bilateral investment treaties. See: European Commission, ' EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties', European Commission, 05 May 2020, https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en.

[751] Article 2 Section II Liberalisation of Investment, EU-China Investment Agreement Draft text. Also see: Heinrich Böll Foundation, 'EU-China comprehensive agreement on investment: A scoping study', Heinrich Böll Foundation, 16 December 2020, https://isds.bilaterals.org/?eu-china-comprehensive-agreement (accessed 23 March 2021)

[752] Article 2, Section II Liberalisation of Investment, EU-China Investment Agreement Draft . Also see: Details of the schedule of commitments (Annexes I and II) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2253 (Accessed 23 March 2021)

[753] The traditional 'European' approach to BITs, focused on investment 'protection' without including solid commitments in investment market access. BITs of major Western States to no surprise follow the European approach which can be divided into two generations; the first generation of BITs from the 1990s and earlier (Global BIT 1.0); and the second generation of BITs from the mid-2000s (Global BIT 2.0). The second generation of BITs included concrete market access commitments, based on a combination of pre-establishment national treatment clauses and a negative list of reserved/protected sectors and industries. See: Anthea Roberts,' Investment Treaties: The Reform Matrix' AJIL Unbound , 2018, vol. 112, p191-196 . Some scholars have rather divided Chinese BITs into three or four generations '...in terms of their different levels of substantive protection and their disparate characteristics of investor-state dispute settlement (ISDS) provisions'. See: Y.Li & C.Bian, ' China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options ', Netherlands International Law Review, 2020, vol. 67, p503–551. But regardless of the number of divisions, agreement is that there was continuity of the first-generation BIT model up until the late 1990s when a change in substantive provisions and dispute settlement changes were introduced . The generation/s, whether second or third (between

dissertation also considers emerging principles shaping international investment law in the New World Order. The dissertation aims to make proposals for the investment dispute settlement provision, grounded on principles that guide the design and implementation of international investment agreements in the New World Order.

Scholars write that international law is also shaped by international agreements.[754] Throughout the dissertation, I discuss that recent international agreements overlap the disciplines of trade and investment. There is literature on this evolution of international investment law but little discussion on possibly emerging principles that underlie the agreements. Thus, I deduce the principles upon which the New World Order proposals of the dissertation are built, from the EU new generation agreements, China comprehensive FTAs and the EU-China CAI. These are international agreements overlap the disciplines of trade and investment and contributing to international law in the present day. Staying within the boundaries determined by the scope of the dissertation on the EU, China and ISDS, I deduce some principles that underlie international investment dispute resolution as follows:

'Adaptability'

The dissertation has discussed that there is a New World Order, that is, 'a change in the way the international system and international law and institutions operate'.[755] It is discussed in the dissertation that one of the shifts that reflect a New World Order the re-convergence of international investment and international trade law. This is reflected in the investment provision of the EU new generation agreements and comprehensive FTAs of China. Within the scope of

late 1990s and mid-2000s), begins embracing investor-state arbitration (ISDS). Also see: Axel Berger, ' Investment Rules in Chinese Preferential Trade and Investment Agreements-Is China following the global trend towards comprehensive agreements?', Discussion Paper / Deutsches Institut für Entwicklungspolitik , 2013, https://www.files.ethz.ch/isn/163216/DP%207.2013.pdf (accessed 23 March 2021). And the last generation (mid-2000s) in alignment with global changes in the European BIT model began to introduce balancing mechanisms such as MFN treatment not extended to ISDS, which in this dissertation I will also refer to as the second generation.

[754] Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, Principles of International Investment Law, 3rd edition (Oxford University Press, 2022).

[755] See Chapter One, 'Semantics and Terminology '.

this dissertation, there is a need for ISDS mechanisms to adapt to legal developments and changes in the world order. I deduce the principle of the Adaptability in that ISDS takes cognisance of the dynamic nature of ISDS mechanisms and the necessity for flexibility in their application[756]

'Inclusive Participation'

The ISDS mechanism is typically provided for in international investment agreements. However, the EU-China CAI -agreement in principle is without the provision for investment dispute resolution, which indicates that there are also differing perspectives on ISDS, despite its typicality in international investment agreements. The discussions on the position of the EU on ISDS, in the dissertation, have also highlighted the consideration of input from various perspectives to ensure that ISDS reforms address the concerns and interests of all stakeholders. This consideration of different perspectives and contributions suggests ISDS reform initiatives that incorporate inclusive participation. Simply put, the principle of Inclusive Participation is deduced in that ISDS reform emphasises the importance of involving diverse perspectives in the reform of ISDS.

'Global Governance Consistency'

There have been questions on the operation of ISDS with other international legal regimes, such as trade agreements. As discussed, ISDS is provided for in comprehensive new generation agreements that provide for both international trade and international investment dispute resolution in a single agreement. The clauses of the EU new generation agreements and comprehensive FTAs of China that stipulate the relationship with the WTO agreement and other international agreements, evidence this. The principle of Global Governance Consistency is thus

[756] Scholars are writing on the adaptability of ISDS. See eg : Flavia Marisi, Adaptability of Investor-State Arbitration, October 2023, DOI:10.1007/978-3-031-38184-3_3.

deduced, in that ISDS may examine the compatibility of ISDS with overarching principles of global governance and its contribution to a cohesive international legal framework.

'Balanced Treaty Design'

The dissertation has touched on the impact of international investment agreements on the balance of rights and obligations between investors and states, as well as their implications for ISDS legitimacy.[757] It has been discussed that ISDS reform proposals such as the ICS and the MIC attempt to address some of the criticisms associated with the traditional ISDS while striking a balance between private and public interest. In this, I deduce the principle of Investor-State Balanced Treaty Design that involves designing international investment agreements with balanced provisions and the impact of balanced provisions on the legitimacy of ISDS.

5.3 EU-China CAI ISDS Reform Options

In the following sections of this chapter, I will discuss ISDS reform options for the EU-China CAI based on the shifts that characterise a new era of international investment dispute resolution. One of the shifts that the dissertation has declared focus on, that characterises a new era of international investment dispute resolution, is the shift from distinct international economic law sub-disciplines of trade and investment towards a re-convergence. The second shift is that from the ISDS mechanism, which is subjected to reform options. Before a discussion on the first shift, I will begin with a discussion the second shift because by first addressing the reform options for ISDS, I lay the foundational understanding for examining how these changes align with or diverge from the evolving landscape of international investment dispute resolution. In addition to the principles deduced earlier in this chapter, this sequential approach contextualises how ISDS intersects with and influences the broader re-convergence of the trade

[757] See Chapter Two of the dissertation.

and investment sub-disciplines, therefore enabling more informed proposals for the EU-China CAI.

The common objective of the EU and China is to work towards modernised investment protection standards and a dispute settlement that takes into account the work undertaken in the context of the UNCITRAL WGIII deliberations on the EU's MIC proposal.[758] I have limited the discussion mainly to reform options that have advanced in the UNCITRAL Working Group III discussions.[759] I have considered these reform options as mainly incremental and systemic reform of ISDS, in accordance with the classification by Roberts that is discussed in Chapter Two. I observe that these allow ISDS. To accommodate the consideration for paradigmatic reform of ISDS as a possible proposal, I have added with a discussion on the paradigmatic reform options domestic courts and state-to-state arbitration. Discussions on domestic court mechanisms and state-to-state mechanisms may also be taken into account in the UNCITRAL WGIII considerations of solutions on ISDS at a later stage of its mandate.[760] I observe that these paradigmatic reform options may disallow ISDS. I have thus separated the discussion on reform options into two parts; the first to address dispute settlement reform options that *allow ISDS* and a second part on dispute settlement reform options that *may disallow ISDS*. Tying the discussions to the topic and scope of the dissertation, this is followed by a discussion on the relationship of the ISDS dispute settlement reform options with trade dispute settlement.

It has been relayed earlier in this dissertation, that it is not the intention of the dissertation to contribute to the general or philosophical arguments on which reform options are best. In other words, I do not intend to address questions concerning how reforms target the distinct issues of concern on the UNCITRAL WG III's agenda. The scope of this dissertation is limited to research on the implications of the current reform efforts on the new generation on investment

[758] See Chapter Three and Chapter Four of the dissertation.
[759] The options I discuss in this dissertation, are the main ones advanced in the UNCITRAL Working Group III discussions around reform of the ISDS system. See: UNCITRAL Working Group III, Possible reform of investor-State dispute settlement (ISDS) – Note by the Secretariat, A/CN.9/WG.III/WP.166 at: http://undocs.org/en/A/CN.9/WG.III/WP.166. And see tabulation at: http://undocs.org/en/A/CN.9/WG.III/WP.166/Add.1. Also see: Chapter discussions in Chapter Three and Chapter Four of this dissertation.
[760] See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017) (A/CN.9/930/Rev.1), paras.31–33, para.60.

agreements rather than argue whether it is better or not to reform ISDS. I will briefly discuss the models and the positions of the EU and China as reflected in their respective new generation agreements and comprehensive FTAs.

5.3.1 Reform Options that Allow ISDS

There are various models for the reform of ISDS that are advanced in the UNCITRAL Working Group III discussions around reform of the ISDS system.[761] These include incremental and systemic changes to the existing ISDS. The ISDS "incremental" changes propose modest reforms of improvements that refer to making small, gradual adjustments to the existing ISDS system rather than implementing radical reforms. Systemic reforms such as the MIC advocate for more radical change but are associated with the existing ISDS process, and the Appellate Review Mechanism (ARM) serves as an addition to the existing ISDS regime. Systemic reforms may also incorporate alternative dispute resolution mechanisms (ADR). This involves dispute resolution models that exist based on the incorporation of other ADR into the existing ISDS system. In such a model, I observe that these other ADR mechanisms exist on the basis of incorporation with the existing ISDS system such that they do not exist independent from the existing ISDS system. Thus, in this model, they inherently allow ISDS.

5.3.1.1 ISDS “incremental” changes or improvements

Although I have also indicated that it can be difficult to distinguish from systemic reform, as explained in Chapter Two, the ISDS "incremental" changes or improvements approach aims to

[761] See: UNCITRAL Working Group III, Possible reform of investor-State dispute settlement (ISDS) – Note by the Secretariat, A/CN.9/WG.III/WP.166

address specific concerns within the existing ISDS framework while maintaining its fundamental structure.[762] The goal is to improve the ISDS system without completely overhauling it. It is indicated in Chapter Three that the reform direction of the ISDS in UNCITRAL may be summarised into the three groups; 1) code of Conduct of Adjudicators, 2) appellate mechanism and enforcement, and 3) selection and Appointment of ISDS tribunal members. As pointed in Chapter Three, the proposals towards ISDS "incremental" changes or improvements include developing a code of conduct for arbitrators, promoting consistency and predictability in arbitral decisions through guidelines for arbitrators and measures to increase transparency in ISDS proceedings. These proposals address specific challenges and concerns associated with ISDS, without disrupting the existing ISDS framework.

The ISDS reform proposal for incremental changes suggests that the existing ISDS still has supporters. The EU new generation agreements such as the CETA, EU-Mexico, EU-Singapore and the EU-New Zealand provide for the existing ISDS.[763] Most of the comprehensive FTAs of China, provide for the existing ISDS.[764] Only few agreements such as the China-Costa Rica FTA makes no provision for the existing ISDS.[765] While the China- Singapore and the China-Cambodia FTA make reference to the ASEAN investment agreement which provides for ISDS.[766]

As highlighted in Chapter Three, there is no absolute distinction between incremental and systemic reform as the concerns of ISDS are intertwined. Hence, the discussion about which categories the reform options would fit was not given further time in the UNCITRAL WGIII discussions. However, in order to have an orderly structure in this dissertation, I have thought it necessary to separate the academic discussions on the reform options into categories. In the discussions, I will refer to the categories as introduced in Chapter Two of the dissertation. Under

[762] These changes might include enhancing transparency, refining the criteria for initiating cases, clarifying ambiguous terms, or establishing a code of conduct for arbitrators. These incremental changes are discussed in UNCITRAL Working Group III.
[763] See: Appendix IA of the disseration.
[764] See: Appendix IIA. Also see: Appendix IIB of the dissertation.
[765] See: Appendix IIA & IIB of the dissertation.
[766] Appendix IIA & IIB of the dissertation.

the categories, I will briefly remind of the respective reform options as discussed in Chapter Three. In this chapter, I add with an analysis of the new generation agreements and comprehensive FTAs to examine the support or the rejection of the respective reform options.

5.3.1.2 Systemic Reform

I discussed in Chapter Two that the systemic reform of ISDS involves more changes on the overall functioning of the ISDS system. This may entail revisiting the procedures to address the systemic inadequacies. In this chapter I go further with categorisation that this approach often includes structural reforms and non-structural reforms.

i) Structural

Structural reforms refer to the need to create new international institutions such as the proposal for establishing a permanent ICS, creating a MIC and the ARM.[767]

Multilateral Investment Court (MIC)

Discussed in Chapter Two and Three, the MIC represents a significant reform proposal, aiming to create a more institutionalised framework for resolving ISDS disputes. The MIC is designed to address some of the criticisms and challenges associated with the existing ISDS process with systemic reform, by creating a specialised international court to handle investment disputes. It has been discussed in the dissertation that the EU has proposed the ICS as a re-design of the existing ISDS. The ICS is a regional proposal by the EU, while the MIC is a global proposal in

[767] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019, published 9 April 2019)' UN Doc A/CN.9/970.

UNCITRAL that would require a multilateral treaty or agreement among participating countries for its establishment.[768]

The ICS is already being implemented in some EU new generation agreements such as the CETA, EU-Mexico, EU-Singapore and EU-Vietnam.[769] While the MIC is still in the process of being developed, its efforts are provisioned for in EU new generation agreements such as the CETA, EU-Mexico and EU-Singapore.[770] The comprehensive agreements of China do not provide for the ICS nor the establishment of the MIC.

Appellate Review Mechanism (ARM)

The introduction of a MIC, includes key features, with or without a built-in appeal. The dissertation discussed in Chapter Three that the ARM is a proposed model for reforming the ISDS system, by serving as an addition to the current investment arbitration regime. The existing ISDS process has no formal mechanism for appeal. Once an arbitral tribunal reaches a decision, it is generally final and binding. The main idea behind the ARM proposed in UNCITRAL, is to introduce systemic reform through a separate appellate body that reviews decisions made by arbitral tribunals in ISDS cases.

Efforts towards exploring the possibility of an appellate mechanism are provisioned for in EU new generation agreements such as the CETA, EU-Mexico, EU-Singapore and EU-New Zealand. The comprehensive agreements of China, such as the China-Australia and the China Mauritius also provide for an appeal tribunal.[771]

[768] The common objective of the EU is to take into account the work undertaken in the context of UNCITRAL on a MIC. See discussions in Chapter Three of the dissertation
[769] See: Appendix IA of the dissertation.
[770] See: Appendix IA of the dissertation.
[771] See: Appendix IIA of the dissertation.

A Multilateral Advisory Centre

It is discussed in Chapter Three that discussions in UNCITRAL propose that setting up the MIC should be held in parallel with the creation of an Advisory Centre. In UNCITRAL, it was noted that avoiding international investment disputes is closely connected to the reform option of establishing a multilateral ACIIL.[772] These services of the ACIIL are aimed at ADR methods such that they are incorporated into the ISDS system. Discussed in Chapter Three, the systemic reform of ISDS by establishing an ACIIL would be tasked with dispute prevention and capacity-building activities that promote ADR. These services of the ACIIL are aimed at ADR methods such that they are incorporated into the ISDS system. In this model, ISDS is allowed subject to first initiating ADR to resolve the investment dispute.

The ACIIL will provide technical assistance that includes training, negotiations support and funding for drafting international investment agreements, domestic investment laws as well as state contracts that avoid conflicts between international investors and respective host states.[773] At promoting dispute resolution at the domestic level, the services of ACIIL will also include assistance in the establishment of domestic investment grievance mechanisms to deal with investor grievances at an early stage.[774]

Both the EU new generation agreements and comprehensive agreements of China do not provide for the establishment of an ACIIL.

[772] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020), Fifty-fourth session Vienna, 28 June – 16 July 2021 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/report_wg_iii_advance_copy.pdf.
[773] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020).
[774] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020).

ii) Non- structural

Non- structural reforms refer to textual adjustments to agreements. This implies that such reforms focus solely on modifying the language or content of these legal documents without altering their fundamental framework or institutional setup.[775] This is such as incorporating alternative dispute resolution mechanisms (ADR) and the proposed Multilateral instrument on ISDS reform (MIIR) , a legal instrument with provisions that incorporate the various reform options.

Incorporating alternative dispute resolution mechanisms (ADR)

The reference to systemic reform may mistakenly give the impression that its supporters are in support of the MIC or the ARM. This has been observed by some scholars as not necessarily the case.[776] Some supporters of systemic reform are fully committed to the reform of ISDS, beyond incremental changes. However, while the supporters share the goal of improving the ISDS system, their preferred methods differ. In their various methods, there is also the advocacy for incorporating ISDS with other alternative approaches such as consultation, negotiations, mediation & conciliation, where parties seek to reach an amicable or mutually acceptable solution to resolve the dispute.

Amicable or Mutually Agreed dispute settlement

In the mutually agreed dispute resolution process, parties agree on the method and forum for resolving their dispute. I limit the dissertation discussion on these other alternative reform options on mutually agreed dispute settlement mechanisms to negotiations, consultation and mediation & conciliation. This is not to imply judgement on the merit of that other alternative

[775] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019, published 9 April 2019)' UN Doc A/CN.9/970.
[776] See: Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reforms: Battles over Naming and Framing, April 30, 2019 at: https://www.ejiltalk.org/uncitral-and-isds-reforms-battles-over-naming-and-framing/.

mechanisms. Rather, the discussion is on the alternative mechanisms that have been reflected in the EU position on ISDS and China position on ISDS, in Chapter Three and Four of this dissertation, respectively.

Negotiations, Consultation, Mediation & Conciliation

The provision for negotiations, consultation, mediation and conciliation in international investment agreements is not to entirely disallow ISDS. Rather, towards systemic reform, it is typically to incorporate these alternative approaches into the exiting ISDS framework. Incorporating other ADR methods into the ISDS framework aims to modernise the existing ISDS, by expanding the range of investment dispute resolution mechanism available within ISDS. By incorporating these ADR methods, the ISDS system becomes more adaptive to the needs of the parties to the dispute. They emphasise a collaborative approach to investment dispute resolution.

Negotiations is the most flexible and informal of the other ADR methods. It is a process that involves parties discussing their interests and reaching a mutually acceptable solution. Similarly, the aim of consultations is to assist parties to communicate their concerns, interests, and viewpoints directly with one another, with the goal of finding a mutually acceptable solution. Expert advice can be relevant to both negotiations and consultations. In negotiations, parties often rely on expert advice to assess the potential impacts of different proposals, understand the legal implications of various options, or evaluate the technical feasibility of certain measures. Similarly, during consultations, parties may seek expert advice to better understand technical or complex aspects of the issues under discussion. The incorporation of negotiations and consultations into the ISDS framework emphasises a proactive, flexible and collaborative approach to dispute resolution before resorting to formal ISDS. Discussed in Chapter Three, the case for a Multilateral Advisory Centre proposed in UNCITRAL as a reform option for ISDS, will provide technical support aimed at promoting ADR to avoid the escalation of disputes to the international level.

Mediation is a structured negotiation process. It is a consensual process in which parties negotiate their dispute directly with one another, with the help of a mediator.[777] There is no precise definition of mediation. Whereas mediation was more common for international commercial dispute settlement, today it also refers to a process in international investment dispute settlement.[778] Historically, it is rather conciliation that applied to investor-state disputes. Today, the definitions are used interchangeably. In my discussion of the processes, I do not follow academic discussion on the clauses that include mediation and conciliation, addressed separately. This is not to be interpreted as a negation of the existing arguments on the lack of distinction of the two processes. What I seek to bring attention to in this dissertation is that there is difficulty in drawing a distinct line between mediation and conciliation. There is thus no consensus on the precise definition of mediation nor conciliation. Notwithstanding, the lack of consensus on the definition of mediation relating to international investment dispute settlement is beyond the scope of this dissertation. What is of relevance in this research is the feasibility of mediation for the proposals, whatever the distinction from conciliation. This is not to ignore that the lack of consensus that could possibly be understood as a support for mediation which, based on features rather than mere definition, may have meant a support for conciliation. In this dissertation, both mediation and conciliation are promoted by the EU and China in investor - State dispute resolution. There is no significant difference in the position on the two processes, which would require a separation of the concepts in order to address the differing approaches. It is thus less important to distinguish between the two processes. Both the incorporation of mediation and conciliation into the existing ISDS framework modernises ISDS by offering flexibility and collaboration compared to the traditionally adversarial ISDS. Commonly known as the "cooling-off" period, UNCITRAL noted that international investment agreements foresaw a time frame, during which the disputing parties were required to attempt amicable settlement before initiating ISDS.[779] The UNCITRAL efforts towards the reform of ISDS has developed

[777] ICSID, Background Paper on Investment Mediation, July 2021 at: https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf.
[778] See eg.: Romesh Weeramantry, Brian Chang, Investor-State Conciliation and Mediation, 26 MAY 2021 at: https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0219.xml.
[779] 'The Working Group noted that investment treaties foresaw a time frame (ranging from three to eighteen months) during which the disputing parties were required to attempt amicable settlement before arbitration

instruments and guidelines on mediation and conciliation, aimed to modernise ISDS by incorporating ADR.

EU new generation agreements typically provide for mutually agreed dispute settlement explicitly. EU new generation agreements such as the CETA, EU-Mexico, EU-Singapore and EU-New Zealand provide for the existing ISDS and incorporate ADR mechanisms.[780] The agreements include the provision consultations and negotiations, mediation and conciliation before ISDS may be initiated.[781] Most of the comprehensive FTAs of China, also provide for the existing ISDS while incorporating some ADR mechanisms. The China-Singapore and the China-Cambodia FTA, comprehensive agreements of China, make reference to the ASEAN investment agreement which also provides for ISDS and incorporates ADR mechanisms.[782] The China-Singapore refers to the DSM Framework of ASEAN, makes explicit provision for a 'mutual solution'.[783] Most comprehensive FTAs of China provide for consultations and negotiations before ISDS may be initiated.[784] A few comprehensive FTAs of China such as the China-Costa Rica and the China- Switzerland FTA provide the request for mediation and conciliation before ISDS may be initiated.[785] Thus, ADR in the EU new generation agreements and the comprehensive FTAs of China, do not disallow ISDS completely. Rather, ISDS is allowed subject to first initiating ADR methods towards a mutually agreed solution to resolve the dispute.

(commonly known as the "cooling-off" period)' See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020), Fifty-fourth session Vienna, 28 June – 16 July 2021 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/report_wg_iii_advance_copy.pdf.

[780] See: Appendix IA of the dissertation.

[781] See: Appendix IA of the dissertation.

[782] See: Appendix IIA. Also see: Appendix IIB of the dissertation. These agreements provide for traditional ISDS as well as ADR. This suggests incorporation ADR into ISDS. Also see discussion on Mutually Agreed dispute settlement int he following sextions of the chapter.

[783] See: Appendix IIA and Appendix IIB of the dissertation.

[784] See: Appendix IIA of the dissertation.

[785] See: Appendix IIA of the dissertation.

Multilateral instrument on ISDS reform (MIIR)

In these discussions on ISDS reform, it is apparent that there isn't necessarily a single, unified preference for ISDS reform options. The preferences for specific reform options may reflect different perspectives and priorities regarding ISDS reform, as reflected in the dissertation discussions on the positions of the EU and China on ISDS. In Chapter Three, it was discussed that UNCITRAL proposed that a multilateral instrument should provide a framework for implementing multiple reform options.[786] It would be in the form of a single legal instrument that could include core provisions. A coherent and flexible approach to the different reform options would allow the states that are party to the MIIR to choose whether and to what extent they would adopt the relevant reform options.[787] Although, the application of any agreed reforms to existing investment agreements would be one of the objectives of the MIIR, there appears to be no consensus in relation to the application of the MIIR to future treaties.[788] As an instrument aimed at consolidating reform options, the MIIR would allow for ISDS in its reformed form.

EU new generation agreements and comprehensive agreements of China do not provide for the establishment of a Multilateral instrument on ISDS reform (MIIR).

[786] Appendix IIA of the dissertation. 'The following characteristics were suggested as being important: the instrument should (i) respond to identified concerns, in particular consistency and coherence, and promote legal certainty in ISDS; (ii) establish a flexible framework, whereby States could choose the reform options – including the mechanism for ISDS and relevant procedural tools, also accommodating future developments in the field of ISDS; (iii) provide temporal flexibility to allow continued participation by States Parties; (iv) allow for the widest possible participation of States to achieve an overall reform of ISDS; and (v) provide for a holistic approach to ISDS reform clearly setting forth the objective of achieving sustainable development through international investment.' Also see: United Nations Commission on International Trade Law Working Group III (Investor-State Dispute
Settlement Reform), Forty-third session Vienna, 5–16 September 2022, Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform Note by the Secretariat.

[787] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Forty-third session, Vienna, 5–16 September 2022, Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform Note by the Secretariat at: https://undocs.org/en/A/CN.9/WG.III/WP.221.

[788] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Forty-third session.

5.3.2 Reform options that may Disallow ISDS

Paradigmatic reform in dispute resolution mechanisms propose disengaging from the existing ISDS system and thus may disallow ISDS. They involve shifting towards methods such as domestic courts and SSDS. In my observation of methods that may disallow ISDS, I do not mean that there cannot be a hybrid model of these dispute resolution mechanisms operating with the ISDS framework. Rather, I also observe that the methods exist independent from ISDS. Thus, they have the ability to disallow ISDS.

i) State-to-State Dispute Settlement (SSDS)

We have discussed that other ADR methods such as negotiations, consultations, conciliation or mediation may be incorporated into the ISDS framework. Such reform models allow ISDS. However, negotiation and consultation methods, may also include state-to-state 'filtering' such as the provision for diplomatic consultations and diplomatic negotiations. Discussed in Chapter Two, state-state dispute resolution predates ISDS arbitration. Although, diplomatic consultations and diplomatic negotiations are not typically considered as SSDS mechanisms, they may sometimes be part of the process leading to investment dispute settlement.[789] In addition to diplomatic consultations and diplomatic negotiations, the respective states of the international investment agreement can establish formal arbitration or adjudication traditionally known as SSDS, to resolve the investment dispute.

It was discussed in Chapter Two that the rationale of ISDS was to protect the interests of foreign investors as subjects of international law, beyond the protection of states. It developed as a mechanism for investors to bring claims against these sovereign states through international arbitration without depending on states for espousal. The dissertation has discussed the

[789] The Canada-United States-Mexico Agreement (CUSMA), an improvement of NAFTA Chapter 20 is an example. 'The state-to-state dispute settlement mechanism places emphasis on resolving disagreements through cooperative means (such as consultations)'. See: Government of Canada, Canada-United States-Mexico Agreement (CUSMA) - State-to-state dispute settlement chapter summary at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/state-etat.aspx?lang=eng.

legitimacy crisis of ISDS revolving around several key issues such as that ISDS prioritises the protection of investor rights over the public policy objectives of states. The preference for SSDS mechanism has become apparent relative to ISDS. In the SSDS model, only states would be able to initiate disputes. Unlike ISDS, which allows individual investors to sue governments directly for alleged violations of international investment agreements, SSDS shifts the focus to directly resolving disputes between governments without involving private investors. In this sense, the SSDS model disallows ISDS. In UNCITRAL, it was raised whether the provisions of the MIIR could apply in the context of SSDS mechanisms to resolve investment disputes. The MIIR may include mechanisms to facilitate state-state cooperation in resolving investment disputes. However, there seems to be no responses or further discussions beyond this.[790]

EU new generation agreements do not typically provide for 'state-to-state' filtering through diplomatic consultations and diplomatic negotiations. Some Comprehensive FTAs of China such as China-Peru, China-Singapore and CETA provide for diplomatic consultations between states before the initiation of ISDS. Some comprehensive FTAs such as the China-Singapore furthermore provide for 'diplomatic protection' if there is no consent or initiation of ISDS. Such provisions in the EU new generation agreements and China comprehensive FTAs do not completely disallow ISDS.

ii) Domestic Mechanisms

Domestic courts have been suggested as an alternative model to replace the ISDS system in international investment agreements. This approach has also been proposed as a way to address some of the criticisms associated with traditional ISDS mechanisms. The evolving nature of utilising local courts in traditional ISDS arbitration is acknowledged. This involves directing

[790] United Nations Commission on International Trade Law Fifty-sixth session, Vienna, 3-21 July 2023 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022) at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_1124_advance_copy_0.pdf.

investment disputes to the judicial systems of the host country rather than the utilisation of a separate arbitration mechanism. The idea is to integrate domestic judicial systems into the resolution of investment disputes between states and investors. Parties may be encouraged or required to seek resolution through local courts first. In this way, incorporating domestic courts into ISDS does not completely disallow ISDS.

Rather than exclusive dispute resolution in domestic courts, there is a preference for alignment with international mechanisms. In UNCITRAL, the ACIL is proposed to provide technical assistance that includes training, negotiations support and funding for drafting international investment agreements, domestic investment laws as well as state contracts that avoid conflicts between international investors and respective host states. At promoting dispute resolution at the domestic level, the services of ACIL will also include assistance in the establishment of domestic investment grievance mechanisms to deal with investor grievances at an early stage.

Similar to the ACWL, the ACIL will provide technical assistance that includes training, negotiations support and funding for drafting international investment agreements, domestic investment laws as well as state contracts that avoid conflicts between international investors and respective host states. At promoting dispute resolution at the domestic level, the services of ACIL will also include assistance in the establishment of domestic investment grievance mechanisms to deal with investor grievances at an early stage.

EU new generation agreements do not typically provide for domestic courts to handle investor-state disputes.[791] Some comprehensive FTAs of China such as China-Singapore, China-Peru, China-Korea and China-Mauritius provide that there is no limitation on the utilisation of domestic courts before initiating ISDS.[792] Thus the provisions on resorting to remedies in

[791] See: Appendix IA of the dissertation.
[792] See Appendix IIA of the dissertation.

domestic courts in comprehensive FTAs of China typically do not disallow ISDS completely. Only few such as the China-Peru disallow ISDS.[793] It provides that ISDS may be initiated if the dispute has not been submitted to domestic courts.

5.3.3 The Relationship of ISDS Reform with Trade

It is established in the dissertation that ISDS, typically provided for in investment agreements, is also provided for in FTAs. The inclusion of ISDS in trade agreements reflects the increasing integration of trade and investment issues. It is noted that ISDS incremental changes or improvements are not absolutely distinctive from systemic reform.

The dissertation already discussed in Chapter Three that incremental changes also fall under the category of systemic reform options. As distinguished above, it is apparent that proposals of the MIC, ARM, promoting ADR and the ACIL are modelled on elements of the WTO dispute resolution framework.[794] The ISDS paradigmatic reform options also resemble the WTO dispute resolution system. Firstly, it is clear that as the exiting ISDS provides for dispute resolution between investors and states. Reform options that rather provide for investment dispute resolution between states resembles the WTO dispute settlement framework which handles disputes between states. Secondly, the ACIL, as with the ACWL, promotes the resolution of disputes at the domestic level. It is thus imperative to make a balanced proposal for a new generation investment agreement, such as the EU-China CAI, that considers the role and implications of ISDS within the context of the re-convergence of the trade and investment.

[793] Also see Appendix III of the dissertation.
[794] 'There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling.' See: World Trade Organiszation, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module,: Chapter 6, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm.

It was discussed in Chapter Two that international trade disputes and international investment disputes are two types of international economic disputes. Trade disputes are resolved between states in WTO, a multilateral organisation. While investment disputes involve private investors through the initiation of "ad hoc" ISDS, typically in ICSID. The ISDS mechanisms and the WTO dispute settlement system serve different purposes. However, disputes arising from the same factual background can be litigated in both investor-state arbitral tribunals and the WTO. There may be an overlapping of these jurisdictions and the lack of hierarchy between them. International investment agreements and FTAs may allow the choice between the WTO dispute resolution system or investment dispute resolution mechanisms provided for in the agreement, regarding the same factual and legal issues.[795] Providing for a choice between the jurisdictions may disallow ISDS in the choice of trade dispute settlement in the WTO, regarding the same factual and legal issues.

EU new generation agreements typically provide for the consideration of the rights and obligations under the WTO, including the WTO dispute settlement framework.[796] Some comprehensive FTAs of China also provide for rights and obligations under the WTO framework.[797] Although, the provision for WTO may disallow ISDS if it needs to be exclusive, should it be chosen as the dispute resolution method instead of the dispute resolution mechanisms provided for in the investment agreement.[798] Such exclusivity is not provided for in these EU new generation agreements and comprehensive FTAs of China.

5.4 Proposals for EU-China CAI Investment Dispute Resolution

[795] Eg. NAFTA allows the choice between GATT dispute resolution or NAFTA. See: North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). Also see eg. For example, the softwood lumber dispute between the U.S. and Canada led to WTO disputes and disputes under NAFTA Chapter 11. See: Panel Report, United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/R and Corr.1, 29 August 2003. And see: LCIA Case No. 7941 — Canada-US Softwood Lumber Agreement of 2006.
[796] See: Appendix IB of the dissertation.
[797] See: Appendix IIB of the dissertation.
[798] See: Appendix IIB of the dissertation.

I have established that the aim of the dissertation is to make proposals for the investment dispute resolution provision of the EU-China CAI. The dissertation proposals of the the EU-China CAI Investment Dispute Resolution provision draw on 1) the principles of ISDS in a New World Order and 2) the EU position on ISDS and the position of China on ISDS, in relation to the reform option models discussed in the previous section.[799] In the last sections of this chapter, I seek to consider the provisions of the EU -China CAI to make the dissertation proposal for its investment dispute settlement provision. In cognisance of the position of the EU and China as well their respective agreements as discussed, I make the dissertation proposals for the investment dispute settlement provision of the EU-China CAI which I firstly propose to be titled the 'EU-China CAIT'.

5.4.1 The 'EU-China Comprehensive Agreement on Investment and Trade (CAIT)'

The title 'EU-China Comprehensive Agreement on Investment and Trade (CAIT)'refers to an instrument that does not yet exist. In Chapter One, I proposed a usage of terms in the titles of agreements in the New World Order, as defined in the dissertation. Noting the changes to traditional models of investment and trade agreements, I now directly propose the EU-CAI to be titled as the 'EU-China CAIT'.[800] In this chapter of the dissertation, I also make proposals for the contents of the agreement.

It is typically expected that dispute settlement provisions in international investment agreements provide for the ISDS mechanism. However, the ISDS as a common provision which is facing a legitimacy crisis that has led us to question its significance. It is thus far discussed in the chapter that the EU and China pursue incremental reform of ISDS in some agreements while accepting systemic or even paradigmatic in some. It has been discussed earlier in the chapter that the EU

[799] The EU position on ISDS and the position of China on ISDS are discussed in Chapter Three and Chapter Four of the dissertation, respectively.
[800] See discussions in Chapter One, Semantics and Terminology.

and China are pursuing a wide range of options to resolve investment disputes, some of which are incompatible with one another. These range from a preference for arbitration to a preference for a court system. In Chapter Three the dissertation discussed the proposal of the MIC as a court system mainly supported by the EU. Chapter Four discussed that China suggests a preference for investor-state arbitration with Chinese characteristics. China has also called for institutional reforms of ISDS such as the establishment of an appellate mechanism.

In Appendix III of the dissertation, I have graphed the investment dispute settlement mechanisms provisioned for in the EU new generation agreements and comprehensive FTAs of China. From the analysis of EU new generation agreements and the comprehensive FTAs of China, it is observed that the existing ISDS system has supporters. However, while ISDS dominates in investment arbitration, other forms of dispute resolution methods such as consultations, negotiations, mediation and domestic courts are incorporated in it. In reforming ISDS, the EU new generation agreements and the comprehensive FTAs show preference for mechanisms that allow ISDS but little support for the MIC. The agreements evidence support for incorporating alternative methods into ISDS. The alternative methods disallow ISDS as far as resolving disputes between investors and states without first engaging in a period of alternative dispute resolution. Some of the EU new generation agreements and the comprehensive FTAs provide for relationship with WTO obligations and other agreements. In different ways, ISDS is substantively apparent. I have captured this in a model, as illustrated in Figure 1 of this dissertation.[801]

Based on this analyses as per earlier discussions captured in this model, I make proposals for the EU-China CAIT. These are addressed as proposals 1-6. I have also included rejections 1-3 in the discussions. I discuss why the dissertation has identified these rejected reform options as

[801] See List Figures of the dissertation.

not feasible for provision in the EU-China CAIT, in cognisance of the position of the EU on ISDS and that of China on ISDS.

5.5.1.1 Proposed investment dispute resolution clauses for CAIT

It should be remembered that although some of the dispute resolution reform options discussed earlier are incompatible, they are usually compatible and combined.[802] It is also this approach that I follow in the following proposals. I will propose clauses that do not constrain the dispute settlement options but accommodative to additional dispute settlement methods. This is through clauses that are not exclusive and restrictive but open-ended. Open-ended clauses in international agreements provide flexibility and adaptability, allowing parties to address evolving circumstances without constantly renegotiating the agreements to accommodate alternative options. To make proposals for investment dispute resolution in the EU-China CAIT, I draw characteristics of investment dispute resolution from the ISDS reform options,

Characteristics of ISDS in a New World Order

Based on the discussions on EU-China CAI Reform Options, the following characteristics have been identified as feasible for the investment dispute settlement provision for the 'EU-China CAIT':

1. "Incremental" changes or improvements rather than an overhaul.
2. An MIC.
3. An appellate mechanism.

[802] Also see: Kaufmann-Kohler, G., Potestà, M. (2020). The Path to Reform of ISDS: What Role for National Courts?. In: Investor-State Dispute Settlement and National Courts. European Yearbook of International Economic Law(). Springer, Cham. https://doi.org/10.1007/978-3-030-44164-7_4.

4. Mutually Agreed dispute resolution
5. Diplomatic negotiations and consultations.
6. Domestic institutions

I have organised the proposals by considering the characteristics and incorporations to ISDS. The discussions are separated into four sections; An MIC for ISDS arbitration, ISDS with ADR, ISDS with SSD and Local courts for ISDS arbitration. These proposals are discussed in the order separated from incremental, systemic, to the most radical reforms of ISDS, in accordance with the order captured in appendix III of the dissertation.

5.4.2 MIC and an appellate review mechanism for ISDS arbitration

Firstly, I do not specifically propose incremental changes to ISDS. I discussed earlier that these are difficult to distinguish from systemic changes of ISDS. I will work with the assumption that these are enmeshed in systemic reform options such as the MIC. Indeed, conclusions on the EU and China s position are pending the finalisation of the MIC structure. The dissertation has focussed on understanding and analysing the positions of the EU and China. Although, the uncertainty gives difficulty in making definitive proposals on the MIC. Considering the respective positions, an open-ended clause that incorporates proposal 1 and 2 may provide a middle ground.

I discussed in Chapter Three that the UNCITRAL discussions on the MIC proposal include talks on an appeal mechanism. This suggests the inclusion of a review process to appeal the decisions of the MIC that may be in the form of a built-in appeal mechanism or a standalone appeal mechanism. While a built-in appeal mechanism typically integrates the appellate review process within the structure of the MIC itself, a standalone appeal mechanism implies that the appellate review process exists as a separate entity or institution outside the primary structure of the MIC. Earlier in the dissertation, I discussed that the EU has been a significant proponent of the MIC.

The EU has actively advocated for the establishment of a permanent and independent court to handle investment disputes, aiming to replace the traditional ISDS system. The specifics of China's position on an MIC with an appellate review mechanism can depend on the details of the proposed structure and functioning of such a court.

Proposal 1&2: *Open-ended MIC and appellate review mechanism for ISDS clause*

Currently, the provision for the MIC in the EU's new generation FTAs generally provide that *"the parties shall pursue the establishment of a multilateral investment tribunal and appellate mechanism"*. It is appropriately open-ended considering the uncertainty pertaining to the MIC. However, still maintaining an open-ended approach, it could elaborate further that, *"In the event of disputes arising under this treaty, parties may opt for resolution through the MIC with an appellate review mechanism. The MIC shall consist of a court of first instance and an appellate body, facilitating a two-tiered structure. However, recognizing flexibility, parties dissatisfied with decisions of the court of first instance may choose either the built-in appellate mechanism within the MIC or a standalone appellate body."* This open-ended clause seeks to incorporate elements from both Proposal 1 and 2 that I will discuss, allowing parties to tailor their approach to the specific circumstances of each dispute while promoting a harmonious compromise between the EU and China's perspectives on the MIC. This aims to accommodate both the EU's preference for a permanent court and China's inclination towards institutional reforms, fostering a balanced resolution framework.

Proposal 1: *A two-tiered MIC structure*

"Any disputes arising under this treaty shall be submitted to the Multilateral Investment Court (MIC), which shall consist of a court of first instance and an appellate body. The decisions of the court of first instance may be subject to appeal before the appellate body. The appellate body shall have the authority to review the legal interpretation and application of the court of first

instance and ensure consistency and coherence in the application of international investment law. Parties shall be bound by the decisions of the appellate body."

The MIC, as per this proposal, is envisioned to consist of two main components: (1) The Court of First Instance which serves as the initial level of adjudication for disputes brought before the MIC and (2) The Appellate Body which functions as an appellate mechanism, providing a higher level of review beyond the court of first instance. The proposal allows for the decisions of the court of first instance to be subject to appeal before the appellate body. This introduces a two-tiered structure.

China has remained mum on the MIC. However, I discussed in Chapter Three that China advocates for institutional reforms, including the establishment of an appellate mechanism modelled after the WTO dispute settlement system. The WTO has a built-in appeal mechanism known as the Appellate Body (AB). China has not directly spoken of a MIC nor of one with a built-in appellate review mechanism. Nonetheless, what I deduce from China's recognition of structural problems with the ad hoc ISDS system, the advocacy for institutional reforms and its support of the WTO, is that the idea of an investment dispute settlement system that is modelled after the WTO dispute settlement system may not be far-fetched.

Proposal 2: *A Standalone Multilateral Investment Appellate Mechanism (MIAM) with ISDS arbitration*

"Disputes arising under this treaty shall be submitted to the MIC for resolution. The MIC shall include a court of first instance and a standalone appellate body. Parties dissatisfied with decisions of the court of first instance may appeal to the appellate body. The appellate body shall operate independently from the court of first instance, providing a separate and impartial

review of legal interpretations and applications. Decisions of the appellate body shall be final and binding on the parties."

In this proposal, the MIC comprises a primary court and a distinct appellate body. The parties can appeal to the appellate body, which functions independently. Chapter Three of this dissertation discusses that there are also other options currently under discussions at UNCITRAL, including setting up a Standalone Multilateral Investment Appellate Mechanism (MIAM) that is independent from the MIC. Although, an alternative to the two-tiered MIC, the organs of the single-tier court system MIAM would be identical to those of the MIC. I deduce that, other than a separation into two independent systems, the MIC and the standalone MIAM in substantively similar manner as if it remained a two-tiered MIC system. I have already discussed that a system modelled after the WTO may not be far-fetched idea. However, the WTO has a built-in appeal mechanism so it is not clear what the position of China on an independent review mechanism. The EU is open to reform options. However, as the MIC is still in the process of being developed, we are also not able to conclude in the position of the EU.

5.4.3 ISDS with ADR

Proposal 3: *Open-ended Negotiations, Consultations, Mediation and Conciliation with ISDS clause*

ISDS clauses not only refer the parties to arbitration for dispute resolution, but also can provide consent to other ADR mechanisms such as negotiations, consultations, mediation and conciliation. In the following sections, I indicate how the proposal of open-ended clause that provides for 'mediation or other amicable dispute resolution methods' and may be more feasible. Among the proposals discussed below, Proposal 3e, which encourages mediation without mandating it, seems to strike a balance. It provides a favourable consideration for mediation, sets a timeframe for initiating the process, and outlines conditions to promote the use of

mediation or other amicable dispute resolution methods. This approach allows flexibility and cooperation between the EU and China while emphasising the importance of resolving investment disputes amicably.

I will discuss that the use of one or more designated amicable dispute resolution mechanisms is encouraged. This is depicted in proposal 3b. This is also such as consultations and negotiations which is discussed in proposal 3a. Although, it is China that has placed an emphasis on diplomatic negotiations and consultations. Mediation is seemingly promoted by both the EU than China. However, as discussed and analysed under proposals 3b-3f, it is an option that is usually preferred when both parties require the assistance of an intermediary third party to settle the dispute. This characteristic contrasts with consultations and negotiations. In consideration of categories in which different mediation clauses fall, relative to the contrasting position of the EU and China, mandating mediation is unlikely to be a feasible proposal for the EU-China CAIT. Furthermore, conciliation also presents a viable alternative as it shares similarities with mediation and allows for the involvement of a neutral third party in resolving the disputes.

The involvement of an intermediary third party is a characteristic that is also shared by ISDS arbitration. The EU is committed to ISDS of which the intermediary arbitrator's decision is final and enforceable. However, I alert that third-party involvement may not always appeal to China. Although, unlike binding procedures such as arbitration, non-binding procedures such as mediation allow the parties to reject the proposed resolution if they are not satisfied. Relative to ISDS, mediation may better serve the preference for non-binding, open ended mechanisms, as expressed by China.

Proposals 3(a)-(f): *Negotiations, Consultations and Mediation*

Proposal 3(a) Consultations and Negotiations

Proposal 3a: amicable settlement through consultations and negotiations

"Any investment dispute … shall, as far as possible, be settled amicably through consultations and negotiations between the investor and the Host State, where this is acceptable to both parties to the dispute."[803]

Discussed in Chapter Four, China has a preference for negotiations and consultations. Through its commitment to ICSID, it is also deduced that the EU is committed to the efforts of parties to resolve disputes amicably, not limited to ISDS. Thus, I do not challenge a general provision in the EU-China CAIT for an 'amicable' or 'mutually agreed solution'. I propose a general provision for 'amicable' or 'mutually agreed solution' that does not preclude negotiations and consultations, as a potential method in the event of an investment dispute. An 'open-ended' provision is seemingly most feasible for the EU-China CAIT in cognisance that China has explicitly expressed the preference for negotiations and consultations whereas it is only rather suggested by the position of the EU.

Proposal 3(b)-(f) Mediation

Discussed in Chapter Four of this dissertation, China seeks to balance with its preference for consultation as well as mediation mechanisms in ISDS. Discussed earlier, the EU is committed to ICSID which supports efforts by parties to resolve investment disputes, including through mediation at all stages of a dispute. It may thus be feasible to also explicitly provide for mediation in the EU-China CAIT, although with provisions that do not inhibit an environment for ISDS to function.

[803] See EU new generation agreements and China comprehensive FTA provisions for a mutual Solution, consultations and negotiations in Appendix IIA and Appendix IIB.

It is discussed earlier that mediation is generally understood as a dispute resolution method that involves the intervention of an intermediary third person into a dispute to assist the parties in negotiating a jointly acceptable resolution. For those that provide for mediation as a method for investment dispute resolution, they may be interpreted as 1) Encouraging/ Giving direction 2) Permitting or 3) Mandating mediation or other amicable dispute resolution mechanisms. Furthermore, it may be conducted 1) In the "cooling off"/waiting period 2) prior to arbitration or 3) in parallel with arbitration at any point in time. Clauses that include mediation or other amicable dispute resolution methods can be placed into the following categories:[804]

1. Direction to seek mediation or other"amicable settlement" prior to the institution of arbitration (ie. In the "cooling off" period);
2. Permit mediation or other specified amicable dispute resolution mechanism
    a) prior to arbitration (Ie. In the"cooling off period");
    b) at any point in time (i.e., stand-alone mediation).
3. Encouraging the use of mediation or other amicable dispute resolution mechanisms in the amicable settlement / "cooling off" period;
4. Mandating mediation or other amicable dispute resolution mechanisms prior to arbitration (ie. In the "cooling off" period);

I acknowledge that the language in which treaties are written affects how the treaty obligations are understood. However, this discussion is beyond the scope of this dissertation. The discussion in this dissertation rests on the premise that English is a *lingua franca*.[805] The categories of mediation or other amicable dispute resolution methods listed above, hinge on English terms. I

[804] Also see: ICSID, Overview of Investment Treaty Clauses on Mediation, July 2021at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf. ICSID has classified these into five categories. I have rather classified the permission of mediation and amicable dispute resolution a) prior to arbitration and b) at any one point into a single category, with the time permitted as subcategories under 'permit mediation or other amicable dispute resolution mechanisms' rather than completely separate categories.

[805] Moreover, the vast majority of scholarly debates and doctrinal work on the interpretation of treaties are also conducted in English. Also see eg. Mowbray, J., The future of international law: shaped by English, 18 June 2014 at;https://voelkerrechtsblog.org/the-future-of-international-law-shaped-by-english/.

will first analyse these categories and explore possible proposals before concluding on their respective feasibility for the investment dispute settlement provision of the EU-China CAIT.

Proposal 3b: Direction to seek mediation

"Any investment dispute … shall, as far as possible, be settled amicably between the two parties concerned."

This proposal follows the gradual trend to provide for amicable dispute resolution within disputes clauses. It is coupled with a general direction that the parties to the dispute should attempt to resolve the dispute "amicably". Clauses in this category remain silent as to the process the parties might use to achieve amicable settlement. This may direct the resolution of the investment dispute through mediation in this manner.

Proposal 3c: Permit mediation in the"cooling off period"

"Any investment dispute … shall, as far as possible, be settled amicably …, which may include the use of mediation where this is acceptable to both parties to the dispute. If any such dispute cannot be settled between the parties to the dispute through mediation or other amicable settlement, each Contracting Party hereby consents to submit it for settlement by arbitration."

Beyond giving direction, this proposal explicitly permits mediation. A number of disputes clauses in investment treaties that expressly provide for amicable settlement, which could include processes such as mediation.[806] The parties to the dispute, "may" agree to mediation or

[806] Providing for optional "non-binding third party procedures" could include processes such as mediation, fact-finding, and expert determinations, providing specifically for optional mediation, or including advance consent of the State to mediate at the investor's election. See: ICSID, Overview of Investment Treaty Clauses on Mediation, July 2021at:https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf. The China-New Zealand FTA (2008) provides an example of language referencing optional third-party procedures during a specified amicable settlement period. The clause imposes a six-month amicable settlement period.

another amicable dispute resolution method. During the cooling off period disputes can be resolved in a number of ways, including through mediation. It makes the initiation of ISDS contingent upon the dispute having not been resolved during the amicable settlement period.[807]

Proposal 3d: Permit stand-alone mediation

"The disputing parties may at any time, be it after notice of intent has been given or prior to the delivery of a notice of intent to submit a claim to arbitration, agree to have recourse to mediation."

This proposal provides that the parties can agree to mediation of a dispute at any point in the dispute resolution process. That is, permitting mediation prior to or during the amicable settlement period or parallel to ISDS. This creates a stand-alone option for mediation, which supplements the other requirements for dispute resolution. In this proposal, mediation is optional, and subject to an additional agreement to mediate between the parties to the dispute.

Proposal 3e: Encourage mediation

"The disputing party shall give favourable consideration to a request for mediation by the other disputing party. Such mediation, shall be initiated by a written request delivered by the disputing investor to the disputing Member State. Mediation procedures shall commence, unless the disputing parties otherwise agree".

[807] Many disputes clauses contain an amicable settlement period, ranging from 3 months to 2 years. See ICSID, Overview of Investment Treaty Clauses on Mediation, July 2021 at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf.

This proposal imposes an obligation on the parties to place considerable favour to a request for mediation yet without mandating mediation as a method. The proposal goes further than simply stipulating that the parties "may" agree to mediation or another amicable dispute resolution method during the specified period. The parties are encouraged to use mediation or other amicable dispute resolution mechanisms such as by specifying a timeframe within which the amicable dispute resolution mechanism must commence.[808] Through stipulating that specific conditions or milestones must be achieved with respect to the designated amicable dispute resolution mechanism, mediation or another amicable dispute resolution method is encouraged.

Proposal 3f: Mandate mediation

"In the event that an investment dispute cannot be resolved through consultations and negotiations, it must submit to mediation before an authorised centre of the Party complained against in the dispute".

This proposal also requires a designated procedure to have taken place before ISDS can be initiated. However, it imposes an obligation to undertake mediation. It goes further by requiring that the parties seek to resolve the dispute amicably during the amicable settlement or "cooling off" period, and mandates mediation on both disputing parties as the default procedure for achieving amicable settlement in this period.

Proposal 3(g) Conciliation

Proposal 3g: Conciliation

[808] Also see: the ASEAN Comprehensive IA (2009), Article 31.

"If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to settlement by conciliation or…"

This proposal underscores the explicit consent of the contracting parties to use conciliation or ISDS. I have indicated that it is scholarly understood that there is no clear consensus on the precise definition of mediation nor of conciliation.[809] Although, not participating in this theoretical debate, conciliation is practically considered to be a process similar to mediation with a more formal and structured dispute resolution procedure.[810]

I have already discussed that the EU has expressed commitment to ICSID despite not being bound by the ICSID convention.[811] States have agreed on ISCID as a forum for investor -State dispute settlement in most international investment treaties. It provides an independent forum to arbitrate as well as to conciliate investment disputes. ICSID promotes increased use of mediation and conciliation in ISDS. From this, one may deduce that through its commitment to the ICSID framework, the EU is also open to conciliation.

5.4.4 Advisory Centre on International Investment Law (ACIIL) for ISDS

Rejection 1: *Membership of ACIIL for ISDS*

As discussed, the ACIIL would provide technical support in the form of legal advisory services that aimed at ADR methods towards dispute prevention and capacity-building activities. I reject provision for the ACIIL in the EU-China CAIT. Including provisions on the ACIIL in EU-China

[809] See earlier discussions on Amicable or Mutually Agreed Dispute Settlement.
[810] Ian Brownlie, The Wang Tieya Lecture in Public International Law: The Peaceful Settlement of International Disputes (2009) 8 Chinese Journal of International Law.
[811] The EU is not a member of ICSID. See discussions in Chapter Three of the dissertation.

CAIT could enhance the capacity of the EU and China in the negotiations and the resolution of disputes more effectively. However, including ACIIL provisions in the EU-CAIT could lead to increased legal obligations for the EU and China. This may seemingly undermine their sovereignty in negotiating and implementing the EU-China CAIT. Additionally, the question on the funding and operational aspects of integrating the ACIIL into the international investment framework may arise.

It is discussed in the dissertation that China is a supporter of ISDS reform modelled on the WTO dispute settlement process. The ACWL, is a precedent of the ACIIL.[812] However, China is not agreed to membership of the ACWL.[813] Thus, based on the position of China, it is not feasible to propose a provision for the ACIIL in the EU-China CAIT.

5.4.5 Multilateral Instrument for ISDS

Rejection 2: *Application of Multilateral Instrument on ISDS Reform (MIIR)*

It has been discussed that the purpose of the MIIR is to provide a framework for the reform of ISDS, by incorporating the reform options into a single instrument such as arbitration rules, guidance texts or model clauses. The inclusion of a provision for the MIIR may ensure consistency and coherence in the respective international investment agreement frameworks of the EU and China. Its adoption and implementation is subject to the discussions in UNCITRAL and the consensus of states.

[812] Also see: Citation: Karl P. Sauvant, An Advisory Centre on International Investment Law: Key Features, Academic Forum on ISDS Concept Paper 2019/14, 10 September 2019 at: https://ccsi.columbia.edu/sites/default/files/content/docs/publications/KPS-ACIIL-Academic-Forum-Sept.-19-final-pdf.pdf.

[813] ACWL, Members at: https://www.acwl.ch/members-introduction/. Some scholars provide explanation that China seeks to develop “its own” lawyers. See example: at: HSIEH, Pasha L.. China-United States Trade Negotiations and Disputes: The WTO and Beyond. (2009). Asian Journal of WTO and International Health Law and Policy. 4, (2), 368-399 at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1524&context=sol_research.

In this dissertation, I reject the consideration of the MIIR for provision in the EU-China CAIT. Providing for the MIIR in the EU-China CAIT such as by reference, including specific provisions, developing model clauses, optional protocols, safeguard clauses or interpretative declarations would incorporate the MIIR and ensure that the terms of the MIIR are binding on the EU and China. However, there is the risk that overly prescriptive provisions in the MIIR may undermine the element of flexibility that is desired in ISDS.[814] The MIIR may also be viewed as imposing restrictions or limitations on access to ISDS. In consideration of discussions in this dissertation, the ISDS mechanism is still desired and supported, just not in its existing form. The preference for ISDS is along the preference for other ADR mechanisms, as discussed in this chapter. The MIIR serves to combine these reform options which may still be combined in respective international investment agreements with out the MIIR. The MIIR adds with rules that consolidate the various reform options into a single instrument. This provides a standardised framework which however comes with less flexibility, which is an element that is desired in international investment dispute resolution. Nonetheless, there is no consensus in relation to the application of the MIIR to future investment agreements. It is not clear how the MIIR will be applicable to the EU-China which has still not concluded it's investment chapter, and thus a future investment agreement in that sense.

5.4.6 ISDS with SSDS

Proposal 4: *A dual-track system of ISDS and SSDS*

a. "Investor-State Dispute Settlement (ISDS):

"If the dispute remains unresolved after the specified time, the Investor may submit the dispute to arbitration under the ISDS mechanism…."

b. State-to-State Dispute Settlement (SSDS):

[814] Also see position of China on ISDS in Chapter Four of this dissertation.

"In the event of a dispute between the Contracting Parties concerning the interpretation, application, or implementation of this agreement, and such dispute cannot be resolved through consultations or negotiations, either Contracting Party may refer the matter to arbitration. The arbitration shall be conducted in accordance with the principles of state-to-state dispute resolution. "

c. Incorporation of ISDS and SSDS:

The ISDS and state-to-state dispute resolution mechanisms shall be independent of each other. However, the Contracting Parties may agree to coordinate and consolidate proceedings when disputes involve common questions of law or fact."

Under this dual-track system, SSDS would be the primary avenue for governments to resolve disputes, emphasizing direct negotiations and consultations. This proposal recognises the preferences of both the EU and China regarding dispute resolution mechanisms. It addresses the EU's reform aspirations and China's emphasis on diplomatic negotiations and consultations for dispute resolution. China's emphasis on diplomatic solutions is consistent with the state-to-state provisions found in most of China's new comprehensive agreements.

This proposed model of a dual-track system aims to provide a comprehensive approach to dispute resolution, incorporating both ISDS and SSDS mechanisms, while allowing flexibility for coordination when necessary. The proposal incorporates a balanced approach by introducing a dual-track system that includes the SSDS and ISDS. The UNCITRAL discussions of an MIIR would similarly consolidate these dispute settlement methods. However, as discussed in relation to proposals for the EU-China CAI, the MIIR is rejected in this dissertation. It would possibly inhibit the flexibility desired in the resolution of investment disputes. The consensus on the MIIR in UNCITRAL discussions, is on existing international investment agreements. Thus, the MIIR may possibly not be applicable to the EU-China CAI that is yet to conclude the investment chapter.

5.5.7 Domestic institutions for ISDS arbitration

In proposing the role of domestic institutions in ISDS, I reject international investment dispute resolution that is exclusive to domestic courts and explore a dual-track system for dispute resolution emerges as a pivotal consideration. As discussions on dispute resolution mechanisms within the EU-China CAI continue to evolve, the exploration of dual-track systems and collaborative initiatives remains integral. Striking a delicate balance between international standards and domestic preferences is essential to fostering effective and impartial dispute resolution mechanisms that cater to the interests of both investors and host states within the EU-China investment landscape. The delicate balance between investor interests and host state sovereignty poses a challenge, especially given China's historical reluctance towards ICSID jurisdiction. Nuanced strategies address China's hesitancy towards ICSID jurisdiction. The notion of tailoring arbitration clauses to accommodate aspects of Chinese law underscores the importance of balancing international standards with domestic preferences.

Rejection 3: *Investment Dispute Resolution exclusive to Domestic Courts*

It has been discussed that domestic courts have been suggested to replace the ISDS system. However, while there is a suggestion to integrate domestic courts into the resolution of investment disputes, there is also a preference for alignment with international mechanisms. or institutions. Additionally, EU new generation agreements typically do not provide for domestic courts to handle investor-state disputes, and some comprehensive FTAs of China allow the utilisation of domestic courts before resorting to ISDS. This suggests that a hybrid approach, incorporating both domestic and international mechanisms, may be more feasible. Thus, in the dissertation, I reject exclusive international investment dispute resolution in domestic courts. In earlier discussions in this dissertation I have also rejected the ACIIL that is proposed to promote

domestic dispute resolution of investment disputes.[815] This provides further support for this rejection.

Proposal 5: *A dual-track system of ISDS and Domestic institutions*

"If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration…"

This proposal indicates that if a dispute cannot be resolved amicably or through local remedies, it may be submitted to ICSID for resolution through either conciliation or ISDS. This underscores the commitment to utilise international mechanisms for settling disputes that persist. Under this dual-option system, investors in the EU-China CAI could choose between pursuing disputes through ISDS or opting for resolution within the competent domestic courts of the host country. The challenge lies in balancing the interests of investors, who may seek neutral and impartial forums for dispute resolution, with the desire of host states to maintain control over dispute resolution processes. The use of local courts for ISDS arbitration is still an evolving concept. There are ongoing discussions, changes and experimentation regarding the involvement of local courts in the arbitration process for resolving disputes between investors and states. In Chapter Four, it is discussed that China has been reluctant to accept the jurisdiction of ICSID. In its new investment agreements, it provides for ICSID arbitration typically under conditions recognising Chinese law. I also discussed that China has begun to expand the jurisdiction of its existing arbitral institutions, allowing them to facilitate ISDS disputes in

[815] In relation to proposals for the EU-China CAI, it is discussed earlier that the dissertation rejects the proposal of the multilateral ACIIL. The ACIIL aims to promote domestic dispute resolution of investment disputes through technical legal assistance that promotes domestic mechanisms in investment disputes. Although the ACIIL aims to promote domestic dispute resolution of investment disputes to prevent escalation to the international level, there is little support suggesting its feasibility based on the position of China on the ACIIL as an ISDS reform option. Although China holds a positive view of the WTO dispute settlement process, it is not a member of the ACWL as it prefers training 'its own domestic lawyers'. As the ACWL is a precedent for the ACIIL, it suggests little promise of China accepting membership of the ACIIL.

China. Moreover, I discussed that China is building joint arbitration centres with other regions with the intention to break the monopoly of existing Western arbitral institutions.

It is important that I re-iterate that the use of local courts for ISDS arbitration is still an evolving concept. China is not completely against the concept of international mechanisms and institutions. China may be hesitant of the jurisdiction of ICSID but it is actively exploring alternative avenues such as expanding the jurisdiction of its own arbitral institutions and establishing joint arbitration centres with other regions. This reflects that China is asserting its own legal framework and institutions while also with a willingness to engage with international dispute resolution mechanisms.

5.5.8 Joint Arbitration Centres for ISDS arbitration

The establishment of joint arbitration centres often incorporates elements of both local and international legal frameworks. These centres may offer services that are tailored to the specific needs and circumstances of the parties involved.

Proposal 6: *Provision for Joint Arbitration Centres*

"If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID or CEAC] for settlement by conciliation or arbitration…"

This proposal indicates that if a dispute cannot be resolved amicably or through local remedies, it may be submitted to ICSID or CEAC for resolution through either conciliation or ISDS. In recognising China's hesitancy towards ICSID jurisdiction, tailoring ICSID arbitration

conditions to incorporate aspects of Chinese law may be considered. A feasible clause may perhaps be one that allows for flexibility in dispute resolution mechanisms, recognising that certain disputes may benefit from international mechanisms like ICSID or joint arbitration centres, while others may be more appropriately handled through local courts. Balancing international standards with domestic laws and preferences is essential.

Varying considerations need to be incorporated for an agreement that aims for a balanced, flexible approach to dispute resolution between the EU and China. Establishment of joint arbitration centres, with EU-Chinese characteristics, may also be explored to promote collaboration between China and the EU. This may signify a joint effort with China in breaking the monopoly of Western arbitral institutions towards a more inclusive and diverse approach to dispute resolution. This concept is indeed valuable for fostering collaboration between China and the EU in dispute resolution. However, it's essential to ensure that such joint arbitration centre respect the legal traditions and principles of both China and the EU, to ensure fairness and impartiality.

The multilateral Chinese European Arbitration Centre (CEAC)

The multilateral Chinese European Arbitration Centre (CEAC) also emerges as a tangible example of collaborative efforts aimed at diversifying dispute resolution mechanisms. Discussed in Chapter Three, the CEAC offers arbitration services for a wide range of commercial disputes, including those related to trade and investment. One of the key features of CEAC is that its panel of arbitrators comprises legal professionals from both China and Europe. This diverse panel ensures that parties have access to arbitrators with relevant expertise and cultural understanding, to effectively resolve their disputes. As discussed in Chapter Four of the dissertation, this reflects the preference of China for dispute resolution with Chinese characteristics. Given the track record of the CEAC and it's commitment to accommodating the

interests of China and Europe, it presents a viable model for consideration within the provision for ISDS in the EU-China CAIT.

However, while the CEAC primarily focuses on commercial disputes, including those related to trade and investment, it does not explicitly accommodate ISDS cases in the traditional sense. The CEAC could potentially play a role in facilitating ISDS cases indirectly. Such as if an investment dispute involves contractual arrangements between a foreign investor and a Chinese or European entity. While not directly part of ISDS but broader international commercial dispute, the CEAC could still provide a neutral and impartial forum for such investment-related conflicts.

5.4.9 ISDS aligned with WTO Agreements

Proposal 7: *Trade-Related Substantive Clause*

"The Parties affirm their commitment to resolve disputes related to international investment in accordance with international law and principles, including those set forth in the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO). In the event of a dispute between the Parties concerning investment measures covered by this Agreement, the Parties shall, where appropriate, consider the utilisation of existing dispute settlement mechanisms under the WTO Agreement or other relevant international agreements."

This proposal is a substantive clause for the EU-China CAI, that would establish the relationship between the parties and the WTO as well as other relevant agreements. This clause outlines commitments that include dispute resolution mechanisms, and adherence to international trade rules set by the WTO. It underscores the commitment to resolve investment disputes in accordance with established principles of international law, including those reflected in WTO agreements. It acknowledges the possibility of existing dispute settlement mechanisms under the WTO or other relevant international agreements to resolve investment-related disputes. In

cognisance of the re-convergence of international trade and investment, this proposal aims to promote consistency and coherence between the dispute resolution mechanisms provided for in the agreement and those available under the WTO framework.

Chapter Four reflects China's positive view of the WTO. In discussions about reforming the WTO dispute settlement system, China has also expressed some concerns about certain aspects. Notwithstanding, it has called for reforming the ISDS system, modelled on the WTO dispute settlement system. Over the years, from initial hesitance, China has learnt to operate the WTO system. What I deduce is that China's proposal of local mechanisms is not a rejection of international mechanisms but rather the preference for a system it has knowledge and control.

5.5 Conclusion

This dissertation has embarked on a journey to explore the interaction between the EU and China regarding ISDS within the context of a new generation of investment agreements, notably the China-EU CAI. The initial aim, outlined in Chapter One, was to make proposals for the EU-China CAI, particularly concerning investment protection and dispute resolution provisions. Building upon the analysis presented in Chapters Two, Three, and Four, this chapter has proposed feasible solutions for the investor-state dispute resolution provision of the EU-China CAI. These proposals are informed by the respective positions of the EU and China on ISDS, as well as principles derived from international law and dispute resolution literature. While the draft text of the EU-China CAI "in principle" offers a glimpse into the overarching principles guiding the agreement, specific details remain subject to ongoing negotiations.

The dissertation has taken cognisance of the principles underpinning the investment dispute resolution provision within the EU-China CAI, within the broader context of international investment agreements. As the landscape of international investment law evolves, it has also

become imperative to identify and analyse emerging principles that shape the New World Order. In examining the re-convergence of international trade and investment law within the EU-China CAI, it becomes apparent that traditional paradigms are being redefined. The incorporation of enforcement mechanisms akin to EU trade agreements within the CAI signals this departure from conventional investment treaty frameworks. The chapter highlighted the significance of principles such as adaptability, inclusive participation, global governance consistency, and balanced treaty design in shaping the discourse surrounding ISDS reform within the New World Order. Central to the endeavour to reform ISDS is the recognition of the common objective shared by the EU and China, to modernise investment protection standards and dispute settlement mechanisms. The discussions in the chapter primarily revolve around reform options advanced within the UNCITRAL Working Group III discussions, classified as incremental and systemic reforms. Paradigmatic reforms that may later be included in UNCITRAL discussions are also addressed in this chapter. The chapter separated these reforms into two groups; those that allow for ISDS and those that disallow ISDS. Calling for the consideration of the role and implications of ISDS within the context of the re-convergence of the trade and investment, the chapter discussed the reflection of the WTO framework in the ISDS reform options.

Finally, the chapter sought to make balanced proposals for the EU-China CAI. It began with a reference to the proposal the title ‘EU-China CAIT’ which is the Chapter One discussion of the usage of terms in the titles of such new generation agreements. This chapter added with proposals for the contents of the EU-China CAI. Drawing characteristics from ISDS reform options, the proposed clauses for the EU-China CAIT incorporate incremental changes, such as improvements to existing mechanisms, as well as systemic reforms, including the establishment of a MIC and appellate mechanisms and incorporating mutually agreed dispute resolution into ISDS. Additionally, the proposals include provisions for SSDS including SSDS ‘filtering’ such as diplomatic negotiations and diplomatic consultations, and the utilisation of domestic institutions and joint arbitration centres. These dissertation proposals for CAIT allow for ISDS through open ended clauses or proposals of a dual track dispute resolution that includes ISDS. And in consideration of the dissertation New World re-convergence of international investment and trade, the chapter discussed the proposal of a trade-related substantive clause.

It can be concluded in this chapter that the positions of the EU and China suggest a preference for ISDS, albeit with changes. The positions of the EU and China lean towards reform options of ISDS that include ISDS in a form similar to the WTO's dispute settlement system. Therefore, there's an expressed need to re-design ISDS within the New World Order, where investment and trade converge once again.

CHAPTER SIX

CONCLUSION

6.1 Introduction

In Chapter One, I began the dissertation with an introduction on the purpose of the research work of the dissertation. It was highlighted that the EU-China CAI is a 'comprehensive' investment agreement also known as a new generation agreement that does not resemble a classical investment agreement. The provision for investment dispute resolution in the EU-China CAI is also still under negotiation. With research focus on the significance of ISDS, The dissertation sought to make proposals for the investment dispute resolution provision of the EU-China CAI. The dissertation began with proposing the EU-China CAI as the 'Comprehensive Agreement on Investment and Trade (CAIT)'. This was followed by proposals for the contents of the investment dispute resolution provision of this agreement.

The debates are met in the in the respective Chapters of the dissertation, for discussion. In this Conclusion Chapter, I add with justifications of the research process in relation with the research purpose of this dissertation. I achieve this by concluding the research with a summary of the research questions, research methodology, key research findings in relation to the research aims and objectives and the research contribution of the dissertation. In this chapter, I will also review the limitations and propose opportunities for further research.

6.2 Conclusions

In the conclusions of this final chapter, I will review the research of the dissertation with the aim of demonstrating how the dissertation has reached its aims and objectives. I will connect the beginning of the research to the findings and implications of the research

6.2.1 Revisiting the Research Questions

In order to contextualise the findings of the dissertation, this chapter begins with a reminder of the research questions. In Chapter One, reference was made to different literature review structures in the dissertation depending on the varying purposes at different stages of the research. In this Conclusion chapter, I conclude that the chosen literature review structures were best for the needs of this dissertation such as with helping determine the dissertation research questions.

To provide an overview of the topic and identify where research may be needed, a thematic literature review and a chronological literature review was conducted to identify the major themes in existing literature and how the debates on ISDS have evolved over time. These were followed by a theoretical literature review to develop the research question and methodology chosen to answer the research questions.

Overarching Research question

Representing the overarching aim of the research, the identified overarching question is; What effect does the EU and China's position on ISDS have on their interaction in a new generation of investment agreements? This overarching research questions revolves around the significance

of ISDS in the present day, which the dissertation defined as a New World Order. This overarching research question was broken down into specific research questions.

Specific Research Questions

Specific research questions were identified and addressed by the different components of the research topic. A comprehensive survey was conducted of all the theories that relate to the area of international investment law and ISDS. Rather than focus on a particular theory, the review surveyed all the major theories in the field and identified common themes and areas of disagreement.

The dissertation examined the following research questions and conclusions:

1. In the New World Order, what are the reasons that ISDS is provided for in international agreements?

   Chapter One defined the New World Order as 'a change in the way the international system and international law and institutions operate'. Chapter Two concluded that the reasons for which ISDS is provided for in international agreements in the New World Order are not clear. In Chapter Two, the dissertation concluded that it is not conclusive whether ISDS is still significant in the New World Order. It reflected on the developments of ISDS and the re-convergence of the investment and trade disciplines. The conclusion discussed criticism and the legitimacy crisis the ISDS faces. The conclusion noted the perspectives of both the critics and supporters, recognising the evolution of international investment law that prompts the enquiry into the significance of ISDS.

   Chapter Two concludes with highlighting the contrast between the position of the EU and China on ISDS as contributing to the uncertainty on the significance of ISDS in the EU-China CAI. The conclusion in Chapter Two is that whether ISDS is significant should be left to the views of respective states.

2. Does the EU propose ISDS changes relevant to the New World Order?

Chapter Two touched on the position of the EU on ISDS in the New World Order, by highlighting its role as a main driver for ISDS reform proposals. It concluded the approach of the EU as seeking the right balance between private and public interests, advocating for procedural reform of the ISDS and the proposal of the MIC. In Chapter Three, contributed to the understanding of the position of the EU on ISDS. Chapter Three concluded that in addition to the proposal to establish an MIC, the EU has suggested models for establishing an appellate mechanism.

Although, Chapter Three reveals that the focus of the EU is on improving the existing ISDS regime rather than replacing it. Chapter Three concludes that the EU is considering the compatibility of different models with the existing ISDS system. For instance, the MIC expected to operate in conjunction with the ISDS mechanisms such as ICSID. Seeking the compatibility with the MIC, which is modelled after the WTO, is relevant to a New World Order, reflecting the developments of ISDS and the re-convergence of the investment and trade disciplines.

3. Does China propose substantive changes on ISDS, for a New World Order?

Chapter Two, briefly concluded on the undecided position of China on the ISDS. In Chapter Two, it was also difficult to categorise the position China, such as whether it is an 'incrementalist' or 'systemmic reformer'. In Chapter Four, the dissertation conducted further research to understand the position of China on ISDS in the New World Order. Chapter Four concluded that, although holding the belief that ISDS is worth maintaining, China acknowledges the need for reform and is open to proposals for improving ISDS. The Chapter concludes that China advocates for institutional reforms in recognition of the structural problems in ISDS. However, with a preference for party appointed

arbitrators which contrasts with the MIC proposal, China does not fully indorse the ICS nor the MIC proposal. The proposals of China reflect a preference for non-adversarial methods and control over arbitrator selection. The conclusion is that China balances the preference for Chinese characteristics. The approach of China emphasises a cultural predisposition towards consultation and mediation.

In addition, Chapter Four concluded that although China does not specify how the permanent appellate mechanism could be implemented, the institutional reforms advocated by China include the establishment of an appellate mechanism that is modelled after the WTO dispute settlement system. Institutional reforms of ISDS, which include the establishment of an appellate mechanism that is modelled after the WTO dispute settlement system, are relevant to a New World Order. They reflect the developments of ISDS and the re-convergence of the investment and trade disciplines. Thus, China does propose substantive changes on ISDS, for a New World Order.

4. Is there a need to reform ISDS in the New World Order?

In Chapter Three, it is concluded that the EU acknowledges the need to reform ISDS. The EU has proposed comprehensive reforms that include establishing a MIC modelled after the WTO. This proposed reform is in line with the perspective of changing dynamics of international trade and investment. This reflects the commitment of the EU to adapt ISDS to the New World Order. In Chapter Four, it is concluded that China also recognises the need for reform of the ISDS. China has advocated for institutional reforms that include establishing an appellate mechanism modelled after the WTO.

The findings in Chapter Three and Four contributed to an analysis of the position of the EU on ISDS and the position of China on the ISDS in a New World Order. In Chapter Five, the dissertation concluded that a side by side analysis of the EU new generation

agreements and China comprehensive FTAs indicates that only EU new generation agreements provide for the ICS or MIC. The comprehensive FTAs of China also do not significantly provide for a standalone appellate mechanism. Although, both the EU and China have proposed ISDS changes relevant to the New World Order, China has not sufficiently demonstrated the need to reform ISDS by providing for its proposed reforms respective comprehensive FTAs, in order to demonstrate such a need. The conclusion questions China's demonstrated need for ISDS reform in the New World Order, through its comprehensive FTAs.

Chapter Five proposed the EU-China CAI as the 'EU-China CAIT'. The proposals of contents of the EU-China CAIT from principles of international investment agreements and the positions of the EU and China on ISDS reform. Although the positions and thus the proposals reflect a preference for reform, ISDS is inherent or incorporated in these the reform options. Reform options propose ISDS that resembles the WTO dispute settlement system. This indicates that ISDS is still preferred, just not in its existing form. Thus, there is a need to reform ISDS in the New World Order with the re-convergence of investment and trade as an element.

6.2.2 Revisiting the Significance of the Research

The research questions had narrowed the research problem down to specific aspects that the dissertation aimed to investigate. The broader area of concern encapsulated by the research problem is that there is a need to understand the impact of the EU and China's stance on ISDS and how it influences their engagement in a new generation of investment.

Reiterating the problem statement

In other words, the problem that the dissertation attempted to address is that of an investment dispute resolution mechanism to be provided for in ‘comprehensive’ or new generation investment agreements. In the present day, there are changes in the international system and international law that are a response to the legitimacy crisis of ISDS. The issue that was in need of research is the significance of ISDS in the present day.

The dissertation identified the following specific theoretical and practical problems that spearheaded the research:

1. It is not agreed which ISDS reform proposal will best serve the needs of the new generation of ‘comprehensive’ international agreements that go beyond trade in goods and covers investment issues or "WTO-Plus issues" within a single agreement.

2. Whereas the assumption is that trade issues are heard by the WTO and international investment agreements typically make provision for the ISDS, the ‘modern era’ reflects a convergence of international trade and international investment law disciplines. On convergence, ISDS is relied on to enforce international trade rights, which suggests the need to reform ISDS.

3. Existing scholarship on ISDS tends to not address a ‘New World Order’. Relevant to dispute settlement, there may be many changes in the international system, law and its institutions that resemble a ‘New World Order’ in which context the provision for ISDS is questioned.

Solution to the Problem Statement

As a solution to this problem, the dissertation conducted research on the ISDS in this new era and made proposals for the investment dispute settlement provision of the EU-China CAI as a comprehensive new generation international agreement.

The dissertation aligned with legal scholarship in referring to ‘a change in the way the international system and international law and institutions operate’ as reflective of a New World Order. In a New World Order, the dissertation limits research on two significant shifts that characterise a new era of investment dispute resolution; 1) The re-convergence of international trade and international investment disciplines and 2) The subjection of ISDS to reform options.

Significance of the Research

The dissertation is significant in the present day, where there are changes in international investment law. The significance of the dissertation is that it considers international investment dispute resolution, in response to these developments. It fills the gaps in current scholarship on ISDS.

6.2.3 Addressing the Research Gaps

The problem and research questions identified in the dissertation, are informed by and connected to existing research. Reference to scientific literature identified the research gaps in order to give direction for the research. In this Conclusion chapter, it is beneficial to return to this with a brief summary of the existing literature addressed in dissertation, its weaknesses and how the dissertation has attempted to make a contribution. It returns to the review of literature and conclude how the dissertation has contributed to the knowledge gap.

Revisiting Literature Review

The investment dispute settlement regime has been the subject of criticism, which has led to a range of proposals for its reform. With much interest in this research area coupled with the dissertation intention to make a contribution to the research, the dissertation required the identification of scientific literature as sources for direction. Thus, the dissertation identified literature which has been important sources for carrying out the research.

The dissertation incorporated a reference to literature, initially introduced in Chapter One and further integrated into the subsequent discussion chapters. In Chapter One, reference was made to thematic and chronological literature review structures, to discern the research gaps in order to give direction for the research. The decision of a thematic approach was to discuss literature with reference to the themes or patterns that have emerged in the existing research. While the chronological review aimed to illuminate the historical development of ISDS in existing literature. This information provided by the literature was put together as cohesive narrative that depicted the progression of the ISDS topic.

Meeting the research gaps

The dissertation identified the following research gaps 1-5 to be filled by the research; A Focus BITs, ISDS Mechanisms in FTAs, the Emphasis on Conciliation over Arbitration, Institutional Bias and the Diversity of ISDS Reform Proposals. The dissertation demonstrates engagement with these various research gaps. Research Gap 4, as identified in the dissertation, suggested institutional bias amongst scholars associated with the ISDS framework. The dissertation acknowledged that no institutional bias should be suspected as the research is in fulfilment of a doctoral dissertation that is driven by knowledge, as opposed to a close association to the ISDS framework. The rest of the research gaps were addressed by delving into the specifics of ISDS positions in new generation agreements.

I) Analysis of comprehensive new generation international agreements

Research Gap 1 critiqued that the exclusive focus on BITs might not fully capture the evolving landscape of international investment treaties. The perspective is that a more comprehensive analysis that encompasses a broader array of agreements should be considered. Research Gap 2 marked that there are various critiques of ISDS in FTAs. Additional perspectives consider the re-convergence of international investment law and international trade law.

The specifics of the dissertation discussed the position of the EU and China on ISDS. One of the major elements featured in the reformed approach taken by EU is replacing the private nature of investment arbitration with the public nature of an investment court, which is modelled on international trade dispute settlement. It is also discussed that, although China has not moved very much beyond its commitment to ISDS, it has borrowed some features of new generation investment agreements in its FTAs. However, there is little research that conducts studies on the investment provisions of the EU new generation investment agreements and the comprehensive FTAs of China. By analysing EU new generation investment agreements and the comprehensive FTAs of China, the dissertation contributes to the exploration of the evolving landscape of international investment law.

II) Comparison of ISDS positions

Research Gap 3 was accompanied by the critique that the preference of scholars for conciliation may overlook scenarios where arbitration is more suitable. The accompanying perspective is for a more pragmatic approach that emphasises flexibility in dispute resolution approaches.

In the specifics of the dissertation, discussions on the reform of ISDS are acknowledged, with an extensive analysis of the approach of the EU which is the main driver of ISDS reform. This analysis is seldom considered in terms of feasibility in contrast to an international agreement partner such as China. For instance, in the negotiations for the EU-China CAI. The dissertation agrees that investment dispute resolution is a key issue in the China–EU CAI. Although, existing literature seldom goes beyond the supposition that the agreement of the EU and China towards the EU-China CAI suggests that the reform of ISDS is inconclusive. With little academic sophistication provided, the general conclusion is that no ISDS provision in the current draft of the CAI is indicative of the differences between the EU and China. With the objective to make proposals for the EU-China CAI, a comparison of the differences between the EU and China in the dissertation, adds with the contribution that flexible open-ended clauses that provide for formal arbitration as well alternative dispute resolution options that include conciliation are perhaps more suitable. This flexible approach proposed by the dissertation, contributes with the perspective that there are scenarios where arbitration may be more suitable.

III) Connecting the investigation and perspectives with engagement in the international legal order

Research Gap 5 acknowledged the critique of the traditional ISDS and the potential reforms to address issues that are related to its effectiveness. The diversity of perspectives mark the ongoing debate regarding the ISDS changes that are needed in the present day.

Going into the specifics of the dissertation, in light of the efforts that many states have made to improve the ISDS, emerging states such as China seeks to reform its own ISDS. The dissertation acknowledged the interest on why and how emerging states such as China, modernise their approach to the investment treaty regime. The investigation is interesting in cognisance of the varying perspectives such as with the EU. Important perspectives on ISDS are provided on how states engage in the international legal order, which is defined in the dissertation as a New World Order. The dissertation connected the perspectives on ISDS with engagement in the international legal order, which is defined in the dissertation as a New World Order. This contributes to the

understanding of the dynamics of international investment law and the diverse approaches of differing states in their agreements.

6.2.4 Justification of the Research Process

A theoretical literature review, typically undertaken at any research stage, proved to be particularly beneficial in shaping the research questions and methodology of this dissertation. In parallel, a methodological literature review critically assessed the strengths and weaknesses of various research methods, to select the most suitable method for addressing specific research questions in the dissertation.

Justifying the selection of the Research Methodology

In addressing the research problem, the dissertation employed the mainstream doctrinal methodology. This methodology involved the two-part process of locating legal sources, analysing and interpreting texts to synthesise the content of the law. This choice of methodology has been well-suited for addressing the specific research questions by guiding the identification, analysis and interpretation of principles that are related to ISDS in the present day, that the dissertation defined as a New World Order. The proposals of the dissertation drew from these principles.

i) Locating the Sources

The choice of a mainstream doctrinal methodology, analysis of primary sources such as documents from the EU, UNCITRAL WGIII, the EU-China CAI, EU new generation agreements and China comprehensive FTAs, assisted with the identification of principles that

justify the inclusion of ISDS in international agreements in the New World Order. The principles not only contribute to the legitimacy of ISDS but resonate with foundational principles within the legal discipline. In the dissertation, the principles reflect the ongoing legal thought and practice in response to the New World Order.

Adaptability

In Chapter Three and Four, the dissertation drew on primary sources such as EU official documents, UNCITRAL WGIII reports, EU new generation agreements, comprehensive FTAs of China and official documents of the government of China that illustrated the need for an ISDS mechanism that can adapt to the changes in the present day, defined in the dissertation as the New World Order. This Acknowledged the need for ISDS to adapt to the New World Order. The principle recognises that the legitimacy of ISDS is enhanced when it adapts to the emerging changes.

Inclusive Participation

In Chapter Three of the dissertation, EU official documents and UNCITRAL WGIII reports reflect a commitment to inclusivity and incorporating diverse perspectives in the ISDS reform process. The approach of the EU, on its position on ISDS, is to also consult with stakeholders. This reflects the importance of involving a broader range of stakeholders in the ISDS process in a New World Order. The principle emphasises that legitimacy of ISDS is strengthened when there is inclusive participation.

Global Governance Consistency

In Chapter Three, EU documents and WGIII reports have documented that the initial EU proposal of the regional ICS as a reform option for ISDS has evolved to a globalised version. In

the WG III, the EU is advocating for the establishment of a MIC, at a multilateral level. In Chapter Four, China is reported to make proposals of the reform of ISDS, in the context of UNCITRAL WG III conclusions. This examines how ISDS align with broader global governance structures and principles in the New World Order. The principle asserts that the legitimacy of ISDS is strengthened when it aligns with and contributes to consistent global governance practices, to foster coherence in the international legal system.

Investor-State Balanced Treaty Design

In Chapter Five, an analysis of the EU-China CAI notes that it has concluded state-state dispute resolution provisions but has not yet concluded the provision for investment dispute resolution. This recognises that the legitimacy of ISDS can be influenced by the design of investment treaties and the inclusion of provisions that balance investors and states. The legitimacy of ISDS is strengthened when investment treaties address the interests of both investors and states. The principle avoids imbalances in treaty design could strengthen the legitimacy of ISDS.

ii) Analysis and Synthesis

In order to make proposals for the EU-China CAI in Chapter Five, the dissertation drew from the principles in Chapter Five, deduced from Chapter Three and Chapter Four. The doctrinal methodology in the dissertation, effectively classified and analysed the identified principles. This provided a comprehensive understanding of the reasons that ISDS is provided for in international in the New World Order.

iii) Interpreting Texts

As summarised, applying the doctrinal approach, the analysis of primary and secondary sources, revealed the principles associated with the proposed changes of the EU and China to ISDS in

the New World Order. An inductive epistemological research method guided the interpretation of these findings. This contributed to the nuanced insights into the position of the EU and China on ISDS in a New World Order.

Potential Bias

The dissertation acknowledged potential bias, particularly the legal discipline bias, mainstream doctrinal methodology bias and the research gap rationale bias that is inherent in the methodology of the dissertation. These biases were addressed through the transparency of these choices and evaluating their impact on the research analysis and interpretation of the dissertation findings. The research findings are to be analysed and interpreted in the context of the scope and limitations of the research, which contribute to the potential biases. The research is time constrained individual task, for completion of a dissertation in the legal discipline.

6.2.5 Different views and Approaches

I have endeavoured to present an honest and unbiased account of the dissertation research. In concluding the dissertation, I also seek to confront challenges and uncertainties within the research, by acknowledging the contradictory views or beliefs that were a crucial part of dissertation research. These contradictions may lead to new research questions.

Certainly, that the introduction of 'Comprehensive Agreement on Investment and Trade (CAIT)' in the dissertation to refer to comprehensive new generation agreements, differs from widely held expectations of a reference to international investment agreements. This departure from widely expected terminology adds a nuanced perspective to the discourse on these agreements. In arriving to conclusions of the dissertation, there also views and approaches that the dissertation did not fully accept or support.

Eurocentric Assumptions

Some scholars are of the Eurocentric view that international law is universal, a global system of law. Defying the Eurocentric assumptions of international legal scholarship, the dissertation adds to research on this interaction of the EU with China with an outlook on ISDS reform that may possibly differ from reform reflected in the new generation of EU FTAs or China's comprehensive FTAs. In the negotiations of the EU-China CAI, it was observed that China seeks to contribute to international law rather than simply be determined by the EU's proposal. By examining the EU-China interaction on ISDS reform, the dissertation introduces an alternative outlook of differing perspectives. This challenge assumptions in international legal scholarship of Eurocentric views that assert that international law is universally a global system. Observations from the EU-China CAI negotiations, suggesting that China aims to contribute to international law rather than passively accept the EU's proposals, counter certain scholarly perspectives. This dynamic approach adds depth to understanding China's role in shaping international legal frameworks.

Convergence of Trade and Investment- historical roots

Although with the historical knowledge on the roots of trade and investment, there are scholars who seemingly suggest that the convergence of trade and investment is a reflection of the modern era of globalisation. This comes across as incoherent because the convergence of trade and investment is not a new phenomenon. Rather, it is experiencing a renaissance, reflecting its roots. The dissertation critiques the notion that the convergence of trade and investment is solely a product of modern globalisation, arguing that it is a recurrent theme with historical roots. These challenges perspectives suggesting an entirely new phenomenon, contributing a historical context to the discussion.

Convergence of Trade and Investment- constitutive elements

There are some views that there is no commonality of obligations across trade and investment regimes. Although the dissertation observes discussions that dispute enforcement mechanisms are structurally different, it also points to the similarities between the underlying principles of international trade and investment and a clear convergence between some of constitutive elements of international trade and investment agreements. This challenges the notion of complete divergence between the two regimes.

6.2.6 Justification of the Research Findings

Notwithstanding challenges, the research the dissertation findings align with the research aims and objectives.

Meeting the Research Aims and Objectives

This dissertation aimed to analyse the position of the EU and China on ISDS, in shaping proposals for the EU-China Comprehensive Agreement on Investment (CAI). The initiatives and implementations in new generation agreements and comprehensive FTAs were considered. The research objectives included revisiting early investment protection mechanisms, examining arguments for and against ISDS, developing an understanding of the EU's stance on ISDS through evidence collection, evaluating China's position on ISDS by exploring its innovative approaches, and assessing the relevance of these perspectives in the context of the New World Order.

The contributions of the dissertation indicate that the Research Aims and Objectives were met. In the analysis of EU new generation investment agreements and the comprehensive FTAs of China, the initiatives and implementations in new generation agreements and comprehensive

FTAs were considered. With the objective to make proposals for the EU-China CAI, collecting evidence for a comparison and evaluation of the differences between the position of the EU on ISDS and the position of China on ISDS, examined arguments for and against ISDS. The contribution of the dissertation in connecting the perspectives of the EU and China on ISDS with engagement in the EU-China CAI, assessed the relevance of the perspectives in a New World Order.

6.3 Recommendations and Further Research

It is known that research work is never truly finished. The issues of ISDS in the present day are too broad and complex to capture in a single dissertation. As also the case with the work of this dissertation, the conclusions illuminate that there are lingering questions and open ends that spark interest in further research. In this dissertation, the lingering questions are re-enforced by the research gaps and limitations. While the identified research gaps in literature can be considered as the outcome of literature review, they may also be considered as the inputs that motivate further research. Thus, I recommend further research.

6.3.1 Research Gap Limitations

Although the dissertation sought to make contributions to Research Gap 1, the scope is limited to bilateral agreements. The dissertation did not analyse other agreements such as regional and plurilateral agreements. The dissertation also encountered challenges in addressing Research the Gaps 6&7; Normative Approach and Lack of a Comparative Approach. The dissertation acknowledged that the choice of a doctrinal legal research methodology is criticised. Its limitation is that it is isolated from a social context, which in this dissertation the methodology did not observe international agreements and proposals of the EU and China within their social contexts. Although I give context to the origin of the ISDS by discussing early investment protection mechanisms, I do not scrutinise this historical context in which investment treaties and arbitration mechanisms were established and understanding how they reflect and perpetuate

existing power imbalances. I do not sufficiently address the research gap with a normative approach.

Questions for Further Research

As certain chapters concluded, others open doors to exploring new questions that invite a deeper exploration of nuanced themes. The contradictory views in the dissertation have set the stage for future research opportunities. As noted, there are areas of the dissertation research gaps and limitations that may not have provided a conclusive answer and some areas where new questions have emerged. There is the opportunity to make contributions with further research on other agreements such as regional and plurilateral agreements. The limitations of the dissertation also emphasise needs such as for future research to incorporate Socio-Legal methodology. Research gaps have also suggested unanswered questions on which cross-disciplinary perspectives could shed light. Some of those suggested by the research gaps, in the dissertation, include questions on Normative Approaches and Pragmatic Dynamics, Historical and Cultural Factors and Nuanced Understanding of ISDS, Socio-Economic Aspects of Investment Treaties and those on Law, Politics, and Socio-Political Context in ISDS. As we engage with these questions, we pave the way for exploration and discovery in the ever-evolving realm of international investment law.

BIBLIOGRAPHY

Primary Sources

International Agreements/Treaties

Accord de commerce et de protection des investissements entre la Confédération suisse et la République Rwandaise (1963)

Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments (1960).

ASEAN Comprehensive Investment Agreement (2009)

Canada-China Promotion and Reciprocal Protection of Investments Agreement (2012)

China-Cambodia Free Trade Agreement (2020)

China-Iceland Free Trade Agreement (2013)

China-Mauritius Free Trade Agreement (2019)

EU-Central America Association Agreement (2012)

EU-China Comprehensive Investment Agreement (CAI, 2020)

EU-Mexico Trade Agreement (2018)

EU-New Zealand Free Trade Agreement (2023)

EU-Peru, Columbia and Ecuador Trade Agreement (2012)

EU-Singapore Free Trade Agreement and Investment Protection Agreement (2018)

EU-Vietnam Trade Agreement and Investment Protection Agreement (2019)

European Union–South Korea Free Trade Agreement (2010)

Free Trade Agreement between China and Costa Rica (2010)

Free Trade Agreement between China and Peru (2009)

Free Trade Agreement between Singapore and China (2008)

Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea (2015)

Free Trade Agreement between the People’s Republic of China and the Swiss Confederation (2013)

Investment promotion and protection agreement between Japan, Republic of Korea and China (2012)

Japan-EU Economic Partnership Agreement (2018)

New Zealand–China Free Trade Agreement (2008)

North American Free Trade Agreement (1992)

Protocol of amendment to the Agreement between Canada, the United States of America, and the United Mexican States (2019)

Protocol replacing the North American Free Trade Agreement with the Agreement between Canada the United States of America, and the United Mexican States (2018)

The China–Australia Free Trade Agreement (2015)

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)

The Comprehensive Economic and Trade Agreement between the European Union and Canada (2016)

The EU-UK Trade and Cooperation Agreement (2020)

Trans-Pacific Partnership (2016)

Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959)

WTO Agreement on Trade-Related Investment Measures (1994)

International Conventions

Convention on the Settlement of Investment Disputes (ICSID, 1965)

Draft Convention of Investments Abroad (Abs-Shawcross Convention, 1959)

Montevideo Convention on the Rights and Duties of States (1933)

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

Vienna Convention on the Law of Treaties (VCLT, 1969)

Statutes:

Permanent Court of International Justice. Statute of the International Court of Justice (1946)

Cases

ADM v. Mexico (Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States) (ICSID Case No. ARB(AF)/04/5)(Award, 21 November 2007) < https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C43/DC782_En.pdf>.

Australia and New Zealand v Japan (Southern Bluefin Tuna Case) (Jurisdiction and Admissibility) (Arbitral Tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea) (Award, 4 August 2000) <http://www.worldbank.org/ icsid/bluefintuna/award080400.pdf>.

Canada-US Softwood Lumber Agreement (LCIA Case No. 7941) (Award, 3 March 2008) <https://ustr.gov/sites/default/files/award_on_export_measures.pdf>.

China Heilongjiang International Economic and Technical Cooperative Corp, Beijing Shougang Mining Investment Company Ltd, and Qinhuangdaoshi Qinlong International Industrial Co. Ltd v.Mongolia (PCA Case No 2010-20) (Award, 30 June 2017) < https://pca-cpa.org/en/cases/48/>.

Commission v. Hungary (Central European University) (Case C-66/18). Judgment, Court of Justice of the European Union, Grand Chamber, (October 6, 2020) < At http://curia.europa.eu/juris/document/document.jsf?text=&docid=232082&pageIndex=0&doc lang=EN&mode=lst&dir=&occ=first&part=1&cid=1828103>.

Tza Yap Shum v. The Republic of Peru (ICSID Case No ARB/07/6) (Award, 7 July 2011) < https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/6>.

United States v. Canada (United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada) (WT/DS257/R and Corr.1, 29) (August 2003) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds257_e.htm>.

United States v. Mexico (Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States) (WT/DS132/13) (February 2000) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds132_e.htm>.

<u>Secondary & Tertiary Sources</u>

Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.). ‘Handbook of Deep Trade Agreements’. The World Bank, 2020. https://openknowledge.worldbank.org/bitstream/handle/10986/34055/9781464815393.pdf.

Agatha Kratz and Janka Oertel. ‘Home Advantage: How China’s Protected Market Threatens Europe’s Economic Power’. Policy Brief. European Council on Foreign Relations, 15 April 2021. https://ecfr.eu/publication/home-advantage-how-chinas-protected-market-threatens-europes-economic-power/.

Albert A. Ehrenzweig. ‘Review of Comparative Law: Cases-Text-Materials, by R. B. Schlesinger’. *The Yale Law Journal* 69, no. 2 (1959): 360–63.

Amanda J. Lee and Naimeh Masumy. ‘Is Investor-State Dispute Settlement an Appropriate Forum for the Resolution of Investment Disputes Arising from Armed Conflicts? Part 1: Normative Conflicts and Consequences’. Opinio Juris, 14 July 2022. https://opiniojuris.org/2022/07/14/is-investor-state-dispute-settlement-an-appropriate-forum-for-the-resolution-of-investment-disputes-arising-from-armed-conflicts-part-1-normative-conflicts-and-consequences/.

Amos S. Hershey. ‘History of International Law Since the Peace of Westphalia’. *The American Journal of International Law* 6, no. 1 (1912): 30–69. https://doi.org/10.2307/2187396.

Anastasia Makarenko and Lyudmila Chernikova. ‘"New Generation" EU Free Trade Agreements: A Combination of Traditional and Innovative Mechanisms’. In *Julia Kovalchuk (Ed.), Post-Industrial Society*, 109–22. Palgrave Macmillan, Cham, 2020.

Andrea K Bjorklund. ‘Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court’. *Arbitration International* 37, no. 2 (June 2021): 433–47. https://doi.org/10.1093/arbint/aiab015.

Andrea K Bjorklund and S.R Ratner. ‘The Multilateral Investment Court: A Step Forward in the Evolution of the International Investment Regime?’ *American Journal of International Law* 112, no. 4 (2018): 589–627. https://doi.org/Doi: 10.1017/ajil.2018.53.

Andrew Mitchell. ‘Introductory Remarks by Andrew Mitchell’. In *Proceedings of The American Society of International Law (ASIL) Annual Meeting*, 108:251–51, 2014. https://doi.org/doi:10.5305/procannmeetasil.108.0251.

Andrew T. Guzman. *How International Law Works A Rational Choice Theory*. Oxford University Press, 2008.

Anne-Marie Slaughter. ‘The Real New World Order’. *Foreign Affairs* 76, no. 5 (1997): 183–97. https://doi.org/10.2307/20048208.

Annette Bongardt and Francisco Torres. ‘Comprehensive Trade Agreements: Conditioning Globalisation or Eroding the European Model?’ *Intereconomics* 52, no. 3 (June 2017): 165–70.

Anthea Roberts. ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’. *American Journal of International Law* 107, no. 1 (2013): 45–94. https://doi.org/doi:10.5305/amerjintelaw.107.1.0045.

———. ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’. *American Journal of International Law* 112, no. 3 (July 2018): 410–32. https://doi.org/10.1017/ajil.2018.69.

Anthea Roberts and Taylor St John. ‘UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting’. *European Journal of International Law (EJIL): Talk!* (blog), 20 September 2019.

———. ‘UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest’. *European Journal of International Law* (blog), 30 April 2019. https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/.

Arie Reich. ‘Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity’. *The University of Toronto Law Journal* 60, no. 2 (2010): 263–87. https://doi.org/10.3138/utlj.60.2.263.

Armand de Mestral and Alireza Falsafi. ‘8. Increasing Use of Alternative Dispute Resolution in IIAs’. In *Improving International Investment Agreements*. Routledge, 2013.

Attila Badó (ed). *Fair Trial and Judicial Independence – Hungarian Perspectives*. Switzerland: Springer Cham, 2014.

August Reinisch. ‘The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court’. Centre for International Governance Innovation (CIGI), InvestorState Arbitration 2, 2016. https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlementinvestor-state-arbitration-permane.

August Reinisch and Marc Bungenberg. Draft Statute of the Multilateral Investment Court (2020). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/bungenberg_reinisch_draft_statute_of_the_mic.pdf.
August Reinisch, Mary E. Footer, and Christina Binder (eds). *Select Proceedings of the European Society of International Law: 2014: Volume 5*. Hart Publishing, 2016.
Axel Berger and Manjiao Chi. 'The EU-China Comprehensive Agreement on Investment: Stuck Half-Way'. Columbia FDI Perspectives, 8 March 2021. https://academiccommons.columbia.edu/doi/10.7916/d8-821b-mg03/download.
Balazs Horvathy. 'Opinion 2/15 of the European Court of Justice and the New Principles of Competence Allocation in External Relations - A Solid Footing for the Future?' In *Csongor, István Nagy (Ed) Investment Arbitration and National Interest*. Indianapolis: Council on International Law and Policy, 2018.
Bonnitcha, Jonathan, Malcolm Langford, Jose M. Alvarez-Zarate, and Daniel Behn. 'Damages and ISDS Reform: Between Procedure and Substance, DRAFT'. UNCITRAL, 7 August 2021. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/damages_and_isds_-_uncitral_af_paper.pdf.
Bronwyn Pavey and Tim Williams. 'The North American Free Trade Agreement Chapter 11'. Science and Technology Division, 26 February 2003. https://publications.gc.ca/Collection-R/LoPBdP/inbrief/prb0254-e.htm.
Brooks E. Allen and Tommaso Soave. 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration'. *Arbitration International* 30, no. 1 (1 March 2014): 1–58. https://doi.org/10.1093/arbitration/30.1.1.
Carolina Kenny. 'Jeremy Bentham, Principles of International Law (1786-1789/1843)'. Classics of Strategy and Diplomacy, 20 August 2015. https://classicsofstrategy.com/2015/08/20/principles-of-international-law-bentham/.
Catherine A. Rogers. 'Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn'. *109 AJIL Unbound*, Penn State Law Research Paper No.9-2016, 294, no. 109 (21 April 2016). https://www.asil.org/sites/default/files/Rogers,%20Apparent%20Dichotomies,%20Covert%20Similarities.pdf.
———. Does International Arbitration Enfeeble or Enhance Local Legal Institutions? Delos Dispute Resolution, TagTime S01 E11, 1 July 2020. https://member-delosdr.org/video-tagtime-prof-catherine-rogers-on-does-international-arbitration-enfeeble-or-enhance-local-legal-institutions/.
———. *Ethics in International Arbitration*. Oxford University Press, 2014.
Catherine A. Rogers and Christopher R.Drahozal. 'Does International Arbitration Enfeeble or Enhance Local Legal Institutions?' *Forthcoming Cambridge University Press*, Legitimacy in Investment Arbitration, 15 June 2019. https://ssrn.com/abstract=3404615.
Cathleen D. Cimino-Isaacs and Rachel F. Fefer. 'World Trade Organization: Overview and Future Direction'. Congressional Research Service, 18 October 2021. https://crsreports.congress.gov/product/pdf/R/R45417/12.
Center for Security and Emerging Technology (CEST). 'Translation Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035 中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要'. Center for Security and Emerging Technology (CEST), 13 May 2021. https://cset.georgetown.edu/publication/china-14th-five-year-plan/.
Central Intelligence Agency (CIA). 'Field Listing-Legal System'. In *The World Factbook (2021 Archive)*, 2021. https://www.cia.gov/the-world-factbook/about/archives/2021/field/legal-system/.
Charlie Campbell. 'How Russia's Invasion of Ukraine Could Change the Global Order Forever'. *Time*, 24 February 2022. https://time.com/6150874/world-order-russia-ukraine/.

Chi Carmody, Yūji Iwasawa, and Sylvia Rhodes. *Trilateral Perspectives on International Legal Issues*. American Society of International Law, 2003.

Chios C. Carmody. 'Obligations Versus Rights: Substantive Difference Between WTO and International Investment Law'. *Asian Journal of WTO & International Health Law and Policy* 12, no. 1 (March 2017): 75–104.

Colin Brown. 'Multilateral Reform of ISDS: Possible Paths Forward'. Presented at the High-Level IIA Conference 2017: Moving to the Next Phase of IIA Reform, UNCTAD, Geneva (Switzerland), 9 October 2017. https://investmentpolicy.unctad.org/uploaded-files/document/Multilateral%20reform%20of%20ISDS-Possible%20paths%20forward_EU%20Commission.pptx.

'Comprehensive'. In *Oxford Languages*. Languages.oup.com, 1 April 2022. https://www.oxfordlearnersdictionaries.com/definition/english/comprehensive_1.

'Comprehensive'. In *Merriam-Webster*. Merriam-Webster.com, 1 April 2022. https://www.merriam-webster.com/dictionary/comprehensive#:~:text=%3A%20covering%20completely%20or%20broadly%20%3A%20inclusive,or%20exhibiting%20wide%20mental%20grasp.

Congyan Cai, Huiping Chen, and Yifei Wang (eds.). *The BRICS in the New International Legal Order on Investment*. Vol. 4. Silk Road Studies in International Economic Law. Brill | Nijhoff, 2020. https://doi.org/10.1163/9789004376991.

Consulate-General of The People's Republic of China in Auckland. 'China's Developing-Country Identity Remains Unchanged', 13 August 2010. https://www.mfa.gov.cn/ce/cgak//eng/zlgxw/t726471.htm.

Council of the European Union. 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes'. Draft Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes. Council of the European Union, 20 March 2018. https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

Csongor István Nagy. 'Case C-66/18 Commission v. Hungary (Central European University)'. *American Journal of International Law* 115, no. 4 (2021): 700–706. https://doi.org/doi:10.1017/ajil.2021.45.

Dan Harris, Mick Moore, and Hubert Schmitz. 'Country Classifications for a Changing World'. Working Paper. Institute of Development Studies, 2009. https://assets.publishing.service.gov.uk/media/57a08b65ed915d3cfd000cc4/Wp326.pdf.

Darren O'Donovan. 'Chapter 7: Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls'. In *Laura Cahillane and Jennifer Schweppe (Eds.), Legal Research Methods: Principles and Practicalities*. Dublin: Clarus Press, 2016.

Deep and Comprehensive Free Trade Areas (DCFTAs) EU, Georgia and Moldova. 'About the Deep and Comprehensive Free Trade Areas (DCFTAs) between the European Union, Georgia and Moldova', n.d. https://www.dcfta-evaluation.eu/.

Derek Croxton. 'The Peace of Westphalia of 1648 and the Origins of Sovereignty'. *The International History Review* 21, no. 3 (1999). http://www.jstor.org/stable/40109077.

Directorate-General for External Policies of the Union. 'Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements', Vol. 1-Workshop. European Union: European Parliament, 2014. https://doi.org/10.2861/6828.

Directorate-General for Trade. 'Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court'. *European Commission*, 20 March 2018. https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en.

Donald R. Harris. 'The Development of Socio-Legal Studies in the United Kingdom'. *Legal Studies* 3, no. 3 (1983): 315–33. https://doi.org/doi:10.1111/j.1748-121X.1983.tb00427.x.

Ehrenfried Pausenberger. ‘How Powerful Are the Multinational Corporations?’ *Intereconomics – Review of European Economic Policy (1966 - 1988)*, ZBW - Leibniz Information Centre for Economics, 18, no. 3 (1983): 130–36. https://doi.org/10.1007/BF02928572.
Elizabeth Cook. ‘We All Do It: How Bias Informs Legal Research and Teaching’, 2016. https://digitalcommons.law.uw.edu/law-lib_borgeson/12.
Elizabeth Whitsitt. ‘NAFTA Fifteen Years Later: The Successes, Failures and Future Prospects of Chapter 11’. *International Institute for Sustainable Development*, 16 February 2009. https://www.iisd.org/itn/en/2009/02/17/nafta-fifteen-years-later-the-successes-failures-and-future-prospects-of-chapter-11/.
Embassy of the People’s Republic of China in the United States of America. ‘China Wants New World Order’, n.d. https://www.mfa.gov.cn/ce/ceus//eng/zmgx/zgwjzc/t35080.htm.
Emily Lydgate and L Alan Winters. ‘Deep and Not Comprehensive? What the WTO Rules Permit for a UK–EU FTA’. *World Trade Review* 18, no. 3 (2019): 451–79. https://doi.org/doi:10.1017/S1474745618000186.
Emily O’Brien and Richard Gowan. ‘What Makes International Agreements Work: Defining Factors for Success’. New York University, Center on International Cooperation (CIC), September 2012. https://cic.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf.
Emmanuel Gaillard. *Legal Theory of International Arbitration*. Martinus Nijhoff Publishers, 2010.
EPP Group in the European Parliament. ‘EU-China Relations- Towards a Fair and Reciprocal Partnership’. EPP Group in the European Parliament, 10 March 2021. https://www.eppgroup.eu/newsroom/eu-china-relations-towards-a-fair-and-reciprocal-partnership.
EU & Me. ‘What Is the European Union’. EU & Me, n.d. https://op.europa.eu/webpub/com/eu-and-me/en/WHAT_IS_THE_EUROPEAN_UNION.html#:~:text=The%20European%20Union%20is%20a,countries%20are%20also%20EU%20citizens.
European Commission. ‘Commission Publishes Market Access Offers of the EU-China Investment Agreement’, 12 March 2021. https://trade.ec.europa.eu/doclib/press/index.cfm?id=2253.
———. ‘Commission Services Position Paper on the Trade Sustainability Impact Assessment in Support of Negotiations of a Deep and Comprehensive Free Trade Area between the European Union and Respectively Georgia and the Republic of Moldova’, n.d. https://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152461.pdf.
———. ‘Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions - Towards a Comprehensive European International Investment Policy’. European Parliament Resolution. Brussels: European Commission, 7 July 2010. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF.
———. ‘Concept Paper 'Investment in TTIP and beyond – the Path for Reform’’, 5 May 2015. http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.
———. ‘Deep and Comprehensive Free Trade Areas (DCFTA) of the EU-Ukraine Association Agreement’. European Commission, n.d. https://ec.europa.eu/chafea/agri/en/content/deep-and-comprehensive-free-trade-areas-dcfta-eu-ukraine-association-agreement.
———. ‘EU Trade Policy Review: Frequently Asked Questions’, 2021. https://ec.europa.eu/commission/presscorner/detail/en/fs_21_1108.
———. ‘Factsheet on Investor-State Dispute Settlement’, 3 October 2013.
———. ‘Investment Court System’. European Commission, 2018. https://ec.europa.eu/trade/policy/in-focus/investment-court-system/.
———. ‘Making Trade Policy’, n.d. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy_en.
———. ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2017 - 31 December 2017’. Brussels: European Commission, 31

October 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0728.
———. ‘The EU’s Approach to WTO Reform’, 2019. https://ec.europa.eu/trade/policy/policy-making/wto-reform/.
———. ‘The EU’s Association Agreements with Georgia, the Republic of Moldova and Ukraine’. European Commission, 23 June 2014. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_430.
European Parliament. ‘Question for Oral Answer O-000084/2017 to the Commission Rule 128 Bernd Lange, on Behalf of the Committee on International Trade’. Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (MIC). European Parliament, 9 November 2017. https://www.europarl.europa.eu/doceo/document/O-8-2017-000084_EN.html.
European Parliament Think Tank. ‘Investor-State Dispute Settlement (ISDS) - State of Play and Prospects for Reform’. European Parliament, 26 January 2015. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2015)545736#:~:text=International%20investment%20agreements%2C%20and%20the,investments%2C%20in%20countries%20considered%20risky.
———. ‘United Nations Reform’. European Parliament, 13 February 2019. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)635517.
European Union. ‘Joint Statement by Commissioner Malmström and Minister of Commerce Zhong Shan on the Conclusion of the Negotiations of the EU-China Investment Agreement’, 2019. https://trade.ec.europa.eu/doclib/press/index.cfm?id=2257.
Fabian Flues. ‘Ten Reasons Why the EU’s Proposal for a Multilateral Investment Court Doesn’t Fix a Fundamentally Flawed System’. *Friends of the Earth Europe*, 24 November 2017. https://friendsoftheearth.eu/publication/the-multilateral-investment-court-locking-in-isds/.
Frank Hoffmeister. ‘The Contribution of EU Trade Agreements to the Development of International Investment Law’. In *Steffen Hindelang and Markus Krajewski (Eds). Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, 496. Oxford University Press, 2016.
Frank J. Garcia, Lindita Ciko, Apurv Gaurav, and Kirrin Hough. ‘Reforming the International Investment Regime: Lessons from International Trade Law’. *Journal of International Economic Law* 18, no. 4 (December 2015): 861–92. https://doi.org/10.1093/jiel/jgv042.
Gabrielle Kaufmann-Kohler and Michele Potestà. *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options*. Springer, 2020.
Gary Born. ‘BITS, BATS and Buts: Reflections on International Dispute Resolution’. *Young Arbitration Review*, April 2011, 6–14.
Gary Born and Petra Butler. ‘Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution’. *Efila* (blog), n.d. at https://efilablog.org/wp-content/uploads/2019/02/461da-uncitraborn26butlerbat.pdf.
Gene M. Grossman. ‘The Purpose of Trade Agreements’. *Centre for Economic Policy Research (CEPR)*, Discussion Paper, no. DP11151 (March 2016).
General Secretariat of the Council. ‘Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and Its Member States, of the Other Part’. Statements to the Council minutes. Brussels: Council of the European Union, 27 October 2016. https://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf.
Geoffrey Gertz, Srividya Jandhyala, and Lauge N. Skovgaard Poulsen. ‘Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?’ *World Development* 107 (2018). https://doi.org/10.1016/j.worlddev.2018.02.023.
George A. Bermann. ‘General Aspects of Investor-State Dispute Settlement’. In *Chapter 12: International Arbitration and EU Law*, 242–90. Cheltenham, UK: Edward Elgar Publishing, 2021.

George A. Obiozor. ‘The United Nations and the New World Order: Role of Regional Organisations’. *India Quarterly* 50, no. 3 (1994): 43–60.

Georgetown Law Library. ‘From the GATT to the WTO: A Brief Overview’. In *International Trade Law Research Guide*. Georgetown Law Library, n.d. https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235#:~:text=The%20Havana%20Charter%20never%20entered,reciprocal%20reductions%20in%20tariff%20barriers.

Gisela Grieger. ‘EU–China Comprehensive Agreement on Investment Levelling the Playing Field with China’. European Parliamentary Research Service, March 2021. https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf.

———. ‘International Trade Dispute Settlement World Trade Organisation Appellate Body Crisis and the Multi-Party Interim Appeal Arbitration Arrangement’. Briefing. European Parliamentary Research Service, 17 June 2024. https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf.

Giuseppe Martinico. ‘The Devil Is in the Details. Five Points on the EU-China Comprehensive Agreement on Investment (CAI)’. *Rivista Di Diritti Comparati Comparare I Diritti Fundamental in Europa* (blog), 1 April 2021. https://www.diritticomparati.it/the-devil-is-in-the-details-five-points-on-the-eu-china-comprehensive-agreement-on-investment-cai/.

Gloria Maria Alvarez, Blazej Blasikiewicz, Tabe Van Hoolwerff, Mary Mitsi, Kleopatra Koutouzi, Nikos Lavranos, Emma Spiteri-Gonzi, Adrian Videgaray, and Piotr Willinski. ‘A Response to the Criticism against ISDS by EFILA’. *Journal of International Arbitration* 33, no. 1 (2016): 1–36. https://doi.org/10.54648/joia2016001.

Government of Canada. ‘How to Read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’, n.d. https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/chapter_summaries-sommaires_chapitres.aspx?lang=eng.

Government of Canada. ‘The North American Free Trade Agreement (NAFTA) - Chapter 11 - Investment’. Global Affairs Canada, n.d. https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng.

Guillaume Van der Loo. ‘Lost in Translation? The Comprehensive Agreement on Investment and EU–China Trade Relations’. *Royal Institute for International Relations*, 3 June 2021. https://www.egmontinstitute.be/lost-in-translation-the-comprehensive-agreement-on-investment-and-eu-china-trade-relations/.

———. ‘The EU’s Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study’. Policy Brief. CEPS, 24 June 2017. https://www.ceps.eu/ceps-publications/the-eus-association-agreements-and-dcftas-with-ukraine-moldova-and-georgia-a-comparative-study/.

Günter Frankenberg. ‘Comparative Law as a Discipline- From Cinderella to Queen’. In *Günter Frankenberg, Comparative Law as Critique*. Edward Elgar Publishing, 2016.

———. ‘Comparing Constitutions: Ideas, Ideals, and Ideology-Toward a Layered Narrative’. *International Journal of Constitutional Law* 4, no. 3 (2006): 439–59. https://doi.org/10.1093/icon/mol012.

Gus Van Harten. ‘A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA’, no. 16 (10 April 2015). https://ssrn.com/abstract=2595189 or http://dx.doi.org/10.2139/ssrn.2595189.

———. ‘Chapter 20, Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’. In *International Investment Law and Comparative Public Law, Schill (Ed.), Oxford University Press*. Forthcoming in Oxford University Press, 2010.

———, ed. *Investment Treaty Arbitration and Public Law*. Oxford University Press, 2008.

———. ‘Is It Time to Redesign or Terminate Investor-State Arbitration?’ Special Report. New Thinking on Innovation. Centre for International Governance Innovation, 2017. https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/.
———. ‘Origins of ISDS Treaties’. In *The Trouble with Foreign Investor Protection*, Online. Oxford,: Oxford Academic, 2020. https://doi.org/10.1093/oso/9780198866213.003.0002.
———. ‘The Multilateral Investment Court: The Appeal of an International Investment Court to Advanced Economies’. In *Investment Treaty Arbitration and International Law*, 451–73. Edward Elgar Publishing, 2019.
Hannes Lenk. ‘The EU Investment Court System and Its Resemblance to the WTO Appellate Body’. In *Szilárd Gáspár-Szilágyi, Daniel Behn, Malcom Langford (Eds), Adjudicating Trade and Investment Disputes : Convergence or Divergence?*, 62–91. Cambridge: Cambridge University Press, 2020.
Heng Wang. ‘The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?’ *Journal of World Trade* 53, no. 2 (April 2019): 317–42. https://doi.org/10.54648/trad2019015.
Herman Abs and Hartley Shawcross. ‘The Proposed Convention to Protect Private Foreign Investment: A Round Table’. *Journal of Public Law* 9 (1960): 115–18.
Huiping Chen. ‘Reforming ISDS A Chinese Perspective’. In *Yuwen Li, Tong Qi, Cheng Bian (Eds), China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*, 1st ed. Routledge, 2019.
Iain Maxwell and Kay-Jannes Wegner. ‘The New ASEAN Comprehensive Investment Agreement’. *Asian International Arbitration Journal* 5, no. 2 (2009): 167–89. https://doi.org/10.54648/aiaj2009008.
Ian Brownlie and James R Crawford. *Brownlie’s Principles of Public International Law (8th Edition)*. 8th ed. Oxford University Press, 2012.
‘I.e.’ In *Oxford Learner’s Dictionaries*, 1 April 2022. https://www.oxfordlearnersdictionaries.com/definition/english/i-e.
‘I.e.’ In *Merriam-Webster*. Merriam-Webster.com, 1 April 2022. https://www.merriam-webster.com/dictionary/i.e.
International Centre for Settlement of Investment Disputes (ICSID). ‘Member States’. About ICSID, n.d. https://icsid.worldbank.org/about/member-states.
Invest in ASEAN. ‘ASEAN Free Trade Area (AFTA) Agreements’, n.d. http://investasean.asean.org/index.php/page/view/asean-agreements.
Jacques Berthelot. ‘The Havana Charter Is Not the Model to Reform the WTO’. SOL: alternatives agroécologiques et solidaires, 4 January 2019. https://www.sol-asso.fr/wp-content/uploads/2019/01/The-Havana-Charter-is-not-the-model-to-reform-the-WTO-SOL-4-January-2019.pdf.
James McBride and Andrew Chatzky. ‘How Are Trade Disputes Resolved?’ *Council on Foreign Relations*, 6 January 2020. https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.
Jan Paulsson. *The Idea of Arbitration*. Oxford University Press, 2013.
János Martonyi. ‘Ferenc Mádl and International Economic Law’. *Central European Journal of Comparative Law* 2, no. 2 (2021): 167–79. https://doi.org/10.47078/2021.2.167-179.
Jarrod Hepburn, Martins Paparinskis, Lauge N Skovgaard Poulsen, and Michael Waibel. ‘Investment Law before Arbitration’. *Journal of International Economic Law* 23, no. 4 (n.d.): 929–47. https://doi.org/10.1093/jiel/jgaa037.
Jean d’Aspremont. ‘International Customary Investment Law: Story of a Paradox’. In *Tarcisio Gazzini, Eric De Brabandere (Eds) International Investment Law: The Sources of Rights and Obligations*, 5–47. Leiden: Martinus Nijhoff, 2012.
Jeswald W. Salacuse. *The Law of Investment Treaties*. 3rd ed. Oxford University Press, 2021.
J.F. Hornbeck. ‘Free Trade Agreements: U.S. Promotion and Oversight of Latin American Implementation’. Policy Brief. Inter-American Development Bank, December 2009.

https://publications.iadb.org/publications/english/document/Free-Trade-Agreements-US-Promotion-and-Oversight-of-Latin-American-Implementation.pdf.
Jiang, Shisong. 'Charting Socio-Legal Approaches to International Law in China: Taking the Interdisciplinary Study of International Law and History As an Example'. *Academic Journal of Interdisciplinary Studies* 9, no. 1 (2020). https://doi.org/10.36941/ajis-2020-0001.
Joanna Smith and Helen Noble. 'Bias in Research'. *Evidence-Based Nursing* 17, no. 4 (2014): 100–101. https://doi.org/10.1136/eb-2014-101946.
John F. Coyle. 'The Treaty of Friendship, Commerce, and Navigation in the Modern Era'. *Columbia Journal of Transnational Law* 51 (21 September 2012): 302.
John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah. *The Misery of International Law: Confrontations with Injustice in the Global Economy*. Oxford University Press, 2018.
Joost Pauwelyn. 'Remarks by Joost Pauwelyn'. *Proceedings of the ASIL Annual Meeting*, Proceedings of the 116th Annual Meeting, 98 (2004): 135–38. https://doi.org/doi:10.1017/S0272503700061024.
———. 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform'. *American Society of International Law*, Proceedings of the Annual Meeting, 108 (2014): 255–58. https://doi.org/10.5305/procannmeetasil.108.0255.
Jorge E. Hirsch. 'An Index to Quantify an Individual's Scientific Research Output'. *Proc Natl Acad Sci USA* 102, no. 46 (7 November 2005). https://doi.org/10.1073/pnas.0507655102.
Jorge E. Hirsch and Gualberto Buela-Casal. 'The Meaning of the H-Index'. *International Journal of Clinical and Health Psychology* 14, no. 2 (May 2014): 161–64. https://doi.org/DOI:10.1016/S1697-2600(14)70050-X.
Jorge Valero. 'China Calls for Opening Free Trade Talks with the EU'. EURACTIV, 17 December 2019. https://www.euractiv.com/section/economy-jobs/news/china-calls-for-opening-free-trade-talks-with-the-eu/.
José E. Alvarez. 'Is Investor-State Arbitration "Public"?' *Journal of International Dispute Settlement* 7, no. 3 (November 2016): 534–76. https://doi.org/10.1093/jnlids/idw019.
———. 'ISDS Reform: The Long View'. *ICSID Review - Foreign Investment Law Journal* 36, no. 2 (n.d.): 253–77. https://doi.org/10.1093/icsidreview/siab036.
———. 'The Multilateralization of International Investment Law. By Stephan W. Schill. Cambridge, New York: Cambridge University Press, 2009. Pp. Xxxvii, 451. Index.$99'. *American Journal of International Law* 105, no. 2 (n.d.): 377–84. https://doi.org/10.5305/amerjintelaw.105.2.0377.
———. 'The Once and Future Foreign Investment Regime'. In *Looking to the Future*, 607–48. Leiden, The Netherlands: Brill | Nijhoff, 2011.
José E. Alvarez and Kenneth J. Vandevelde. 'The BIT Program: A Fifteen-Year Appraisal'. *American Society of International Law*, Proceedings of the Annual Meeting, 86 (1992): 532–40. https://doi.org/ttp://www.jstor.org/stable/25658681.
Joseph E. Stiglitz. 'Multinational Corporations: Balancing Rights and Responsibilities'. *Proceedings of the Annual Meeting (American Society of International Law)* 101, no. 207 (n.d.): 3–60.
Joseph Story. *Commentaries on the Conflict of Laws, Foreign and Domestic : In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*. Boston: Hilliard, Gray & Co, 1834.
József Hajdú. 'International Labor Standards and Non-Trade Values'. In *Csongor István Nagy (Ed), Global Values and International Trade Law*, 1st ed. Routledge, 2021.
Jun Xiao. 'Concrete Issues in Instituting an International Investment Court'. In *Yuwen Li, Tong Qi, Cheng Bian (Eds), China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*, 1st ed. Routledge, 2019.
Justyna Lasik and Colin Brown. 'The EU–Korea FTA: The Legal and Policy Framework in the European Union'. In *James Harrison (Ed.), The European Union and South Korea: The Legal*

Framework for Strengthening Trade, Economic and Political Relations, 21–40. Edinburgh University Press, 2013. http://www.jstor.org/stable/10.3366/j.ctt3fgqzm.8.

Karl P Sauvant and Lisa E Sachs. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. 1st ed. New York: Oxford University Press, 2009.

Kathleen Barrett. 'Customary International Law'. In *Oxford Research Encyclopedia of International Studies*, 17 December 2020. https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-531.

Kenneth J. Vandevelde. 'A Brief History of International Investment Agreements'. *U.C.-Davis Journal of International Law & Policy* 12, no. 157 (2005). https://jilp.law.ucdavis.edu/issues/volume-12-1/van5.pdf.

Kimberly Amadeo. 'Largest Economies in the World Why China Is the Largest, Even Though Some Say It's the U.S'. The Balance, 5 May 2021. https://www.thebalance.com/world-s-largest-economy-3306044.

Konrad Zweigert and Hein Kötz. *An Introduction to Comparative Law*. 3 trad.par Tony Weir. Oxford: Oxford University Press, 1998.

Kotschwar, Barbara, and Jo-Ann Crawford. 'Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends'. WTO Staff Working Paper ERSD-2018-14, 14 December 2018. https://www.wto-ilibrary.org/content/papers/25189808/232.

Kristie Thomas. 'China and the WTO Dispute Settlement System: From Passive Observer to Active Participant?' *Global Trade and Customs Journal* 6, no. 10 (2011): 481–90.

Lassa Oppenheim. *International Law, A Treatise*. Vol. 1–2. London: Longmans, Green, and co., 1905. https://ia800901.us.archive.org/15/items/internationalla00oppegoog/internationalla00oppegoog.pdf.

Lauge N. Skovgaard Poulsen and Geoffrey Gertz. 'Reforming the Investment Treaty Regime: A "Backward-Looking" Approach"'. Briefing Paper Global Economy and Finance Programme, 17 March 2021. https://www.brookings.edu/articles/reforming-the-investment-treaty-regime/#footnote-11.

Library of Congress. 'Peace and a New World Order?', n.d. https://www.loc.gov/exhibitions/world-war-i-american-experiences/about-this-exhibition/world-overturned/peace-and-a-new-world-order/.

Library University of Toronto. 'Primary and Secondary Sources in the Sciences'. Library University of Toronto, FSC100 The Real CSI, n.d. https://guides.library.utoronto.ca/FSC100UTM/scholarly#:~:text=Scholarly%20peer%2Dreviewed%20journal%20articles,to%20the%20the%20scholarly%20community.

Louise Delany, Louise Signal, and George Thomson. 'International Trade and Investment Law: A New Framework for Public Health and the Common Good'. *BMC Public Health Volume 18* 602 (2018). https://doi.org/10.1186/s12889-018-5486-6.

Malebakeng A. Forere. 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?' *PER / PELJ* 21 (2018). http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3282.

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*. 2nd ed. Berlin, Heidelberg: Springer Nature, 2020.

Maria Rocha, Martin D. Brauch, and Tehtena Mebratu-Tsegaye. 'Advocates Say ISDS Is Necessary Because Domestic Courts Are "Inadequate," But Claims and Decisions Don't Reveal Systemic Failings', 2021. https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/207.

Mark Greenberg. 'Legal Interpretation'. In *Stanford Encyclopedia of Philosophy*, 7 July 2021. https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/.

Mark P. Thirlwell. ‘A New, New World Order? Challenges for International Economic Policy in the New Millenium’. The Lowy Institute for International Policy, March 2005. https://www.files.ethz.ch/isn/58658/2005-03-03_A%20New,%20NEw%20World%20Order.pdf.
Mark Van Hoecke. ‘Methodology of Comparative Legal Research’. *Boom Juridische Uitgevers*, 2015, 1–35. https://doi.org/10.5553/REM/.000010.
Marta Latek and Laura Puccio. ‘Investor-State Dispute Settlement (ISDS) State of Play and Prospects for Reform’. Briefing. European Parliamentary Research Service, January 2015. https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29130710_REV2_EN.pdf.
Martin Daunton, Amrita Narlikar, and Robert M. Stern (eds). *The Oxford Handbook on The World Trade Organization*. Oxford University Press, 2012.
Martin Dietrich Brauch. ‘Multilateral ISDS Reform Is Desirable: What Happened at the UNCITRAL Meeting in Vienna and How to Prepare for April 2019 in New York’. International Institute for Sustainable Development, 21 December 2018. https://www.iisd.org/itn/en/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch/.
Martin Dixon. *Textbook on International Law*. 7th ed. Oxford University Press, 2013.
Martin Khor. ‘Bilateral and Regional Free Trade Agreements: Some Critical Elements and Development Implications’. Third World Network, September 2008. , https://www.twn.my/title2/par/Bilateral_and_regional_fta-MK-sept08.doc .
Max Planck Institute for Legal History and Legal Theory. Comparative Law as a Method of Knowledge Production- Interview with Heinz Mohnhaupt, 7 April 2022. https://www.lhlt.mpg.de/2728173/notice22-04-07-Interview-Mohnhaupt.
Melissa C. Rodman. ‘Professors See Shift in Academic Attitudes on Wikipedia’. *The Harvard Crimson*, 2 April 2015. https://www.thecrimson.com/article/2015/4/2/changing-wikipedia-attitudes-professors/.
Merriam-Webster. ‘Merriam-Webster’s Ongoing Commitment’. In *Merriam-Webster About Us*, n.d. https://www.merriam-webster.com/about-us/ongoing-commitment.
Michael Emerson. ‘Theresa May’s Deep and Comprehensive Free Trade Agreement’. Policy Brief. CEPS, 6 March 2018. https://www.ceps.eu/ceps-publications/theresa-mays-deep-and-comprehensive-free-trade-agreement/.
Michael Ewing-Chow. ‘Thesis, Antithesis and Synthesis: Investor Protection in BITs, the WTO and FTAs’. *University of New South Wales Law Journal 33* 30, no. 2 (2007): 548.
Ming Du. ‘Explaining China’s Approach to Investor-State Dispute Settlement Reform: A Contextual Perspective’. *European Law Journal* 28, no. 4–6 (3 August 2023): 281–303. https://doi.org/10.1111/eulj.12468.
Ministry of Commerce People’s Republic of China. ‘China FTA Network’, n.d. http://fta.mofcom.gov.cn/english/index.shtml.
———. ‘MOFCOM Holds Press Briefing on the Relevant Issues about the Reform of the WTO’. Government. Ministry of Commerce People’s Republic of China, 24 November 2018. http://english.mofcom.gov.cn/article/newsrelease/press/201811/20181102810628.shtml.
Ministry of Foreign Affairs of the People’s Republic of China. ‘Statement by the Ministry of Foreign Affairs of the People’s Republic of China’. Ministry of Foreign Affairs of the People’s Republic of China, 2 August 2022. https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/202208/t20220802_10732293.html.
Ministry of Health. ‘The U.N. Agenda 21/2030 “New World Order” Is Not a Real Document’, 10 February 2021. https://www.gov.il/en/departments/news/fake-new-world-order.
Mission of the People’s Republic of China to the EU,. ‘Questions and Answers Concerning the Taiwan Question (2):What Is the One-China Principle? What Is the Basis of the One-China Principle?’

Mission of the People's Republic of China to the EU, 15 August 2022. http://eu.china-mission.gov.cn/eng/more/20220812Taiwan/202208/t20220815_10743591.htm.
Mostafa Beshkar and Eric Bond. *Trade Agreements: Theoretical Foundations*. Oxford Research Encyclopedia of Economics and Finance. Oxford University Press, 2019.
Muthucumaraswamy Sornarajah. 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness'. In *C. Brown and K. Miles (Eds.), Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press, 2011.
———. *The International Law on Foreign Investment*. 5th ed. Cambridge: Cambridge University Press, 2021.
Nathalie Bernasconi-Osterwalder. 'State–State Dispute Settlement in Investment Treaties'. *International Institute for Sustainable Development*, Best Practices Series, October 2014. https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.
———. 'USMCA Curbs How Much Investors Can Sue Countries—Sort Of'. *International Institute for Sustainable Development*, 2 October 2018. https://www.iisd.org/articles/usmca-investors.
Neil Fantom, Tariq Khokhar, and Edie Purdie. 'The 2016 Edition of World Development Indicators Is out: Three Features You Won't Want to Miss'. *World Bank* (blog), 15 April 2016. https://blogs.worldbank.org/opendata/2016-edition-world-development-indicators-out-three-features-you-won-t-want-miss.
Nicole Anne Stubbs. 'Chapter 4 Regional Economic Integration: A Comparison of NAFTA and the EU'. University of Washington, n.d. https://depts.washington.edu/canada/nafta/98chapters/4stubbsnafta98.htm.
NYU Law Library. 'Law Library Basics: Legal Research - Secondary Sources'. NYU Law, n.d. https://nyulaw.libguides.com/c.php?g=773842&p=5551762.
OECD. 'Multilateral Agreement on Investment', n.d. https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.
———. 'Regional Trade Agreements Are Evolving – Why Does It Matter?' Regional trade agreements, n.d. https://www.oecd.org/trade/topics/regional-trade-agreements/.
Ohio State University Libraries. '4. Primary, Secondary & Tertiary Sources'. Pressbooks, Choosing & Using Sources: A Guide to Academic Research, n.d. https://ohiostate.pressbooks.pub/choosingsources/chapter/primary-secondary-tertiary-sources/.
Ononogbu, Ijeoma. 'The New World Order in Dispute Resolution: Brexit and the Trump Presidency'. *International Journal of Online Dispute Resolution* 4, no. 1 (2017): 40–47.
Oxford Languages. 'Oxford Languages and Google', n.d. https://languages.oup.com/google-dictionary-en/.
Oxford Learner's Dictionaries. 'Definition of Bias Noun from the Oxford Advanced Learner's Dictionary'. In *Oxford Learner's Dictionaries*, n.d. https://www.oxfordlearnersdictionaries.com/definition/english/bias_1.
Parliament of Australia. 'Chapter 10 - Bilateral or Multilateral Agreements?' Parliament of Australia, n.d. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/2004-07/china/report01/c10.
Patricia Wruuck. 'What Future for EU Trade Policy and Free Trade Agreements?' European Investment Bank, 2019. http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter4_Wruuck_Future_EU_Trade_Agreements.pdf.
Patrick H. Glenn. 'Comparative Legal Families and Comparative Legal Traditions'. In *Mathias Reimann, and Reinhard Zimmermann (Eds), The Oxford Handbook of Comparative Law*, 2nd ed., 2019.
Paul Börsting and Maximilian Heimstädt. 'A Step-by-Step Guide for Using Wikipedia for Research Communication'. *London School of Economics* (blog), 22 October 2021.

https://blogs.lse.ac.uk/impactofsocialsciences/2021/10/22/a-step-by-step-guide-for-using-wikipedia-for-research-communication/.
Peter Malanczuk. 'Some Remarks on International Arbitration in China: My Experience with the Shenzhen Court of International Arbitration (SCIA)'. *Shenzhen Court of International Arbitration*, 20 August 2020. https://www.scia.com.cn/en/index/newsdetail/id/3628.html.
Philip J. Stern. 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations'. *Seattle University Law Review* 39, no. 2 (2016). https://digitalcommons.law.seattleu.edu/sulr/vol39/iss2/10/.
Philippe Benoit and Kevin J.Tu. 'Is China Still a Developing Country? And Why It Matters for Energy and Climate'. Columbia SIPA Centre on Global Energy Policy, 23 July 2020. https://www.energypolicy.columbia.edu/research/report/china-still-developing-country-and-why-it-matters-energy-and-climate.
Richard Bilder. 'International Law in the New World Order: Some Preliminary Reflection'. *Florida State University of Transnational Law and Policy*, Univ. of Wisconsin Legal Studies Research Archival Collection, 1 (1992): 1–21.
Roderick Abbott, Fredrik Erixon, and Martina Francesca Ferracane. 'Demystifying Investor-State Dispute Settlement (ISDS)'. ECIPE Occasional Paper. Brussels: European Centre for International Political Economy, 2014. https://www.econstor.eu/bitstream/10419/174728/1/ecipe-op-2014-5.pdf.
Roger P. Alford. 'The Convergence of International Trade and Investment Arbitration' 35, no. 12 (2013). https://scholarship.law.nd.edu/law_faculty_scholarship/1072.
Roland R. Foulke. 'Definition and Nature of International Law'. *Columbia Law Review* 19, no. 6 (December 1919): 429–66.
Rudolf B. Schlesinger. *Comparative Law: Cases, Text, Materials*. 2nd ed. Brooklyn: Foundation Press, 1959.
———. 'The Past and Future of Comparative Law, The American Journal of Comparative Law' 43, no. 3 (Summer 1995): 477–81. https://doi.org/10.2307/840650.
Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer. *Principles of International Investment Law*. 3rd ed. Oxford University Press, 2022.
Sabine Weyand, Director General, DG Trade, European Commission. Understanding the new EU-China investment agreement. CEPS webinar, 27 January 2021. https://www.ceps.eu/ceps-events/understanding-the-new-eu-china-investment-agreement/.
Samuel K. B. Asante. 'International Law and Foreign Investment: A Reappraisal'. *The International and Comparative Law Quarterly* 37, no. 3 (1988): 588–628.
Sergio Puig and Anton Strezhnev. 'The David Effect and ISDS'. *European Journal of International Law* 28, no. 3 (August 2017): 731–61. https://doi.org/10.1093/ejil/chx058.
Shai Dothan. 'As If: Why Legal Scholarship Needs Assumptions'. *Seton Hall Law Review* 51, no. 3 (2021). https://scholarship.shu.edu/shlr/vol51/iss3/2.
Stephan W. Schill. 'Comparative Public Law Methodology in International Investment Law'. *The European Journal of International Law* (blog), 3 January 2014. https://www.ejiltalk.org/comparative-public-law-methodology-in-international-investment-law/.
———. 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?' n.d. https://www.biicl.org/files/5630_stephan_schill.pdf.
———. *International Investment Law and Comparative Public Law*. Oxford University Press, 2010.
———. 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework'. *Journal of International Economic Law* 20, no. 3 (September 2017): 649–72. https://doi.org/10.1093/jiel/jgx023.
Stone, Irving. 'British Direct and Portfolio Investment in Latin America Before 1914'. *The Journal of Economic History* 37, no. 3 (1977): 690–722.

Susan D. Franck. ‘Between Myth and Reality: The 9th John E.C. Brierly Memorial Lecture (July 6, 2018)’. *McGill Journal of Dispute Resolution* 5, no. 1 (2019 2018). https://ssrn.com/abstract=3222792.

———. ‘Development and Outcomes of Investment Treaty Arbitration’. *Harvard International Law Journal* 50, no. 2 (2009): 435.

Tarcisio Gazzini. ‘The Role of Customary International Law in the Field of Foreign Investment’. *The Journal of World Investment & Trade* 8, no. 5 (2007): 691–715. https://doi.org/doi: https://doi.org/10.1163/221190007X00143.

Tarcisio Gazzini and N. Skoutaris. ‘Multilateralizing Investment Dispute Settlement: The European Union’s Radical Proposal’. *European Journal of International Law* 31, no. 1 (2020): 141–63. https://doi.org/doi: 10.1093/ejil/chz045.

Tariq Khokhar and Umar Serajuddin. ‘Should We Continue to Use the Term “Developing World”?’ *World Bank* (blog), 16 November 2015. https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world.

Taylor St John. *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences*. Oxford University Press, 2018.

Terry Hutchinson and Nigel J.Duncan. ‘Defining and Describing What We Do: Doctrinal Legal Research’. *Deakin Law Review* 17, no. 1 (2012): 83–119. https://doi.org/DOI:10.21153/dlr2012vol17no1art70.

The American Society of International Law. ‘Using Old Tools in New Ways: The New Economic World Order’. 114th Annual Meeting. The American Society of International Law, 25 June 2020. https://www.asil.org/events/using-old-tools-new-ways-new-economic-world-order.

The Council of Canadians. ‘Canada-China Free Trade Agreements’, n.d. https://canadians.org/tag/canada-china-free-trade-agreements/.

The Effectiveness of International Law,. 108th Annual Meeting, 2014. https://www.youtube.com/watch?v=g7J7RnQJxM0&list=PL0KFz82Oj8Rbiyr5o8RzJ3pDw9YK9jW8d&index=1&t=3904s.

The George Washington University Law School Jacob Burns Law Library. ‘An Introduction to International Legal Research’. Legal Research Guide Series, Specialized Research Guide #7, n.d. www.law.gwu.edu/.../Research/.../Guides/International%20Law.

The Office of Trade Agreements Negotiation and Compliance (TANC). ‘List All Trade Agreements’. Enforcement and Compliance. The Office of Trade Agreements Negotiation and Compliance (TANC), n.d. https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp.

The University of Melbourne. ‘International Investment Law’. The University of Melbourne Library, n.d. https://unimelb.libguides.com/c.php?g=929887&p=6719574.

The World Bank. ‘About Deep Trade Agreements-What Are Deep Trade Agreements’. Deep Trade Agreements: Data, Tools and Analysis, n.d. https://datatopics.worldbank.org/dta/about-the-project.html.

The World Bank Public-Private Partnership Legal Resource Center (PPPLRC). ‘Key Features of Common Law or Civil Law Systems’. The World Bank IBRD-IDA, The World Bank Group, n.d. https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law.

Thembi Madalane. ‘China-Africa “Legal Cooperation” on Investment Dispute Settlement: Current Practice and the Role of Europe’. Research Brief. China, Law and Development (University of Oxford), 22 November 2022. https://cld.web.ox.ac.uk/files/finalrbthembipdf.

———. ‘Exiting International Joint Ventures between Chinese and South African Banks’. In *Matthew S. Erie (Ed), China’s BRI Has Led to Numerous Investment Agreements with Countries Involved in This Initiative, Promoting Infrastructure and Development Projects across Asia, Africa, and Europe.* Cambridge University Press, (forthcoming).

Thembi Pearl Madalane. ‘EU DCFTAs: Carrot- and-Stick?’ In *Zoltán Víg (Ed), Challenges of International Trade and Investment in the 21st Century*. Ankara Yıldırım Beyazıt University, University of Szeged, State University of Moldova, 2022.
———. ‘Reconceptualising International Economic Law: Towards Comprehensive Agreements on Investment and Trade (CAITs)’. In *International Doctoral and Postdoctoral Conference in the Law and Law Related Fields - Splitlaw 2024, Book of Proceedings*. Split: Faculty of Law, University of Split, 2024.
———. ‘Western Europe Immigration Laws on Diversity in International Arbitration A Historical Perspective on Africa and the Influence of English Law’. *Journal on European History of Law* 14, no. 2 (2023): 128–36.
Thomas Dietz, Marius Dotzauer, and Edward S. Cohen. ‘The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System’. *Review of International Political Economy* 26, no. 4 (2019): 749–72. https://doi.org/DOI: 10.1080/09692290.2019.1620308.
Tomer Broude. ‘Investment and Trade: The 'Lottie and Lisa” of International Economic Law?’ *Cambridge University Press, 2012, Hebrew University of Jerusalem Legal Studies Research Paper* 10–11 (10 November 2011).
Ugo Mattei, Teemu Ruskola, and Antonio Gidi. *Schlesinger's Comparative Law: Cases, Text, Materials*. 7th ed. New York: Foundation Press, 2009.
UNCITRAL. ‘UNCITRAL Methods of Work’, n.d. https://uncitral.un.org/en/content/working-groups.
UNCTAD. ‘Lessons from the MAI’. UNCTAD Series on Issues in International Investment Agreements. UNCTAD, 1999. https://unctad.org/system/files/official-document/psiteiitm22.en.pdf.
United Nations. ‘UN Development System Reform 101’. United to Reform, n.d. https://reform.un.org/content/un-development-system-reform-101.
———. ‘World Economic Situation and Prospects’. New York: United Nations, 2020. https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf.
United Nations General Assembly. ‘Draft Conclusions on Identification of Customary International Law and Commentaries’. Report of the International Law Commission. Seventieth Session (30 April-1 June and 2 July-10 August 2018), 2018. https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf.
———. ‘Identification of Customary International Law’. Resolution adopted by the General Assembly on 20 December 2018. Seventy-Third Session Agenda Item 82, 11 January 2019. https://documents.un.org/doc/undoc/gen/n18/457/41/pdf/n1845741.pdf?token=tACqqoxnUXl4adB9Pw&fe=true.
———. ‘Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Thailand’. United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-Seventh Session New York, 1–5 April 2019. United Nations General Assembly, 8 March 2019. https://documents.un.org/doc/undoc/gen/v19/013/91/pdf/v1901391.pdf?token=b0jdGnNByfWVBQJv7a&fe=true.
———. ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session’. Fifty-Second Session. Vienna: United Nations Commission on International Trade Law, 8 July 2019. https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf.
———. ‘Workplan to Implement Investor-State Dispute Settlement (ISDS) Reform and Resource Requirements’. Fortieth Session (Resumed). Vienna: United Nations Commission on International Trade Law, 4 May 2021. https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_wp_206_adavace_copy.pdf.
United Nations General Assembly Secretariat. ‘Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China’. United Nations Commission on

International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-Eighth Session. Vienna, 14 October 2019. https://uncitral.un.org/sites/uncitral.un.org/files/wp_177_wgiii.pdf .
United Nations Treaty Collection. 'Definition of Key Terms Used in the UN Treaty Collection'. United Nations Treaty Collection, n.d. https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.
University Libraries-University of Washington. 'Integrated Social Sciences Program: Primary and Secondary Sources-Guide for the Online Integrated Social Sciences Program'. University Libraries-University of Washington, n.d. https://guides.lib.uw.edu/research/iss/sourcetypes.
University of Minnesota Crookston Library. 'Primary, Secondary, and Tertiary Sources'. University of Minnesota Crookston, n.d. https://crk.umn.edu/library/primary-secondary-and-tertiary-sources#:~:text=Sources%20of%20information%20or%20evidence,of%20the%20source%20or%20origin.
University of Ottawa. 'Rethinking WTO Dispute Settlement'. Conference Report, 27 July 2023. https://www.uottawa.ca/faculty-law/sites/g/files/bhrskd406/files/2023-08/Ottawa_Rethinking%20WTO%20Dispute%20Settlement_1Aug2023.pdf.
Vittorio Hösle. 'The Third World as a Philosophical Problem'. *Social Research* 59, no. 2 (1992): 227-62.
Walther Hug. 'The History of Comparative Law'. *Harvard Law Review* 45, no. 6 (1932): 1027–70. https://doi.org/10.2307/1332143.
Wenhua Shan and Lu Wang. 'The China–EU BIT and the Emerging "Global BIT 2.0"'. *ICSID Review - Foreign Investment Law Journal* 30, no. 1 (Winter 2015): 260–67.
———. 'The China-EU BIT: The Emerging "Global BIT 2.0"?' In *Columbia FDI Perspectives*, 2014. https://ssrn.com/abstract=2893107.
William H. McNeill. 'What We Mean by the West'. *Orbis* 41, no. 4 (1997). https://doi.org/10.1016/S0030-4387(97)90002-8.
WilmerHale. 'Model Bilateral Arbitration Treaty Released for Public Comment'. WilmerHale, 13 March 2015. https://www.wilmerhale.com/insights/news/2015-03-13-model-bilateral-arbitration-treaty-released-for-public-comment.
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): 455–86.
Wolfgang Friedmann, Florentino P. Feliciano, and A. A. Fatouros. 'The Relevance of International Law to the Processes of Economic and Social Development'. In *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, 60:8–28, 1966. http://www.jstor.org/stable/25657679.
Wolfgang Koeth. 'The "Deep and Comprehensive Free Trade Agreements": An Appropriate Response by the EU to the Challenges in Its Neighbourhood?' *EIPASCOPE*, 2014. https://www.eipa.eu/wp-content/uploads/2022/01/EIPASCOPE_2014_WKO.pdf.
World bank. 'World Bank Country and Lending Groups', n.d. https://datahelpdesk.worldbank.org/knowledgebase/articles/906519#High_income.
World Development Movement and Friends of the Earth. 'Investment and the WTO – Busting the Myths'. Briefing, June 2003. https://www.citizen.org/wp-content/uploads/invandwtomyths.pdf.
World Trade Organization. 'Doha Development Agenda'. Understanding the WTO, n.d. https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.
———. 'Understanding on Rules and Procedures Governing the Settlement of Disputes- Annex 2 of the WTO Agreement'. Dispute Settlement: Legal Text, n.d. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.
Xiaoyu Fan. 'Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI): Negotiation and the ISDS Reform'. *The Chinese Journal of Comparative Law* 8, no. 3 (December 2020): 635–38. https://doi.org/10.1093/cjcl/cxaa003.

Xue Hanqin. *Chinese Contemporary Perspectives on International Law*. Vol. 15. The Pocket Books of The Hague Academy of International Law / Les Livres de Poche de l'Académie de Droit International de La Haye. The Netherlands: Brill | Nijhoff., 2012.

Yannick Radi. *Rules and Practices of International Investment Law and Arbitration*. Cambridge University Press, 2020.

Yuwen Li and Cheng Bian. 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options'. *Netherlands International Law Review* 67, no. 3 (2020): 503–51. https://doi.org/DOI:10.1007/s40802-020-00182-3.

Yuwen Li, Tong Qi, and Cheng Bian (eds). *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement*. 1st ed. Routledge, 2019.

Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds). 'Rational Design or Accidental Evolution? The Emergence of International Investment Law'. In *The Foundations of International Investment Law: Bringing Theory into Practice*, Online. Oxford: Oxford Academic, 2014.

Zoltán Víg. 'International Economic and Financial Organizations'. In *Zsuzsanna Fejes, Márton Sulyok, Anikó Szalai (Eds), Interstate Relations*. Szeged: Iurisperitus Kiadó, 2019.

中华人民共和国中人民. '中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要', 13 March 2021. http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm.

APPENDICES

APPENDIX 0: Literature Review Synthesis Matrix

APPENDIX IA: Investment dispute resolution in EU new generation FTAs

APPENDIX IB: EU new generation FTAs investment dispute resolution provisions

APPENDIX IIA: Investment dispute resolution in China comprehensive FTAs

APPENDIX IB: China Comprehensive FTAs investment dispute resolution provisions

APPENDIX III: EU-China Position on ISDS

**These appendices are compiled and adapted by the author of this dissertation, from EU New Generation Agreements and China Comprehensive Agreements*

APPENDIX 0: Literature Review Synthesis Matrix

Dissertation research question:

What effect does the position the EU and China on ISDS have on their interaction in a new generation of investment agreements?[816]

	Methods	**Concept 1: ISDS**	**Concept 2: EU position**	**Concept 3: China Position**	**Gaps, Problems, Unresolved Questions, Notes on Sources**
Source 1: Salacuse, J.W., The Law of Investment Treaties, Oxford University Press ,Third edition, 2021.	Provides a systematic overview of the field of investment treaty law and analysis of major developments in investment treaty law such as the conclusion of the CPTTP, and the replacement of the NAFTA with the USMCA. The book examines the various	The book concludes that the investment dispute settlement process seems to be in a state of flux and is open to various options for reform.			**Lack of Comparative Approach:** Specific regional nuances or differences in practice, across different regions and jurisdictions.

[816] This is the overarching research question of the dissertation. It is informed by and connected to existing research.

	means provided by investment treaties to resolve conflicts.				
Source: 2 Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, Principles of International Investment Law, Oxford University Press, Third Edition, 2022.	Analyses the dispute settlement mechanisms at work in State-to-State and Investor-State Arbitration. Covers new treaties such as the CPTPP, USMCA, and CETA.	Notes that the gaps left by the traditional methods of dispute settlement (diplomatic protection and action in domestic courts) has led to the idea of offering investors direct access to effective international procedures, especially arbitration.			**Lack of Comparative Approach:** Specific regional nuances or differences in practice.
Source: 3 Bermann, George A. "Chapter 12: GENERAL ASPECTS OF INVESTOR-STATE DISPUTE SETTLEMENT". In International Arbitration and EU Law, (Cheltenham, UK: Edward Elgar Publishing, 2021) https://doi.org/10.4337/9781788974004.00024.	The book tracks the scope of the EU's competence regarding foreign direct investments and the ISDS system as it has been developed in particular by the CJEU. It also analyses the tension of investment law and EU law regarding the intra-EU BITs and the Achmea judgment of the CJEU. It also			The question is discussed whether, and if so, to what extent the internal market provisions of the EU Treaties already provide a sufficient level of investment protection.	**Lack of Comparative Approach:** Comparative analysis between EU and non-EU ISDS practices. Understanding the roles of national courts in enforcing or reviewing ISDS awards.

	focuses on illustrations by CETA and the UNCITRAL Working Group III.				
Source 4: Sauvant, Karl P., and Lisa E. Sachs, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows (New York, 2009; online edn, Oxford Academic, 1 May 2009), https://doi.org/10.1093/acprof:oso/9780195388534.001.0001.	Comprehensive examination of various international investment agreements (IIAs).				**A Focus BITs:** A narrow emphasis might result in an incomplete understanding of the broader dynamics within international investment law.
Source 5: Van Harten, Gus, *A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA* (April 10, 2015). Osgoode Legal Studies Research Paper No. 16/2015, Available at SSRN: https://ssrn.com/abstract=2595189 or http://dx.doi.org/10.2139/ssrn.2595189.	The paper elaborates on the flaws with proposals for ISDS in the 'trade deals known by the acronyms TTIP and CETA'.	Potential limitations of the ISDS process. Complexities of ISDS mechanisms in FTAs.	Written from a European perspective, the scholar considers that most European countries and the European Union have not agreed to ISDS in any past treaty with the U.S. or Canada.		**Diversity of Reform proposals.** Focus primarily on identifying flaws and shortcomings in the proposed ISDS mechanisms of TTIP and CETA. This overlooks other aspects of the trade agreements or alternative perspectives on ISDS. **Affiliation Bias:**

Source 6: Van Harten, Gus, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law* (July 19, 2010). INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, Chapter 20, Schill, ed., Oxford University Press, Forthcoming, Available at SSRN: https://ssrn.com/abstract=1658523 or http://dx.doi.org/10.2139/ssrn.1658523.					The scholar raises suspicions of bias, not on the part of individual arbitrators but, more appropriately, institutional and procedural aspects of the adjudicative process. This may also raise suspicion of bias of scholars. This raises questions about potential biases and imbalances that may affect the perspectives of those closely associated with ISDS.
Source 7: Rogers, Catherine A. and Drahozal, Christopher R., *Does International Arbitration Enfeeble or Enhance Local Legal Institutions?* (June 15, 2019). Legitimacy in Investment Arbitration (forthcoming Cambridge University Press 2019), Available at SSRN:	The work draws on historical developments and current trends to propose analytical frameworks for addressing existing problems and reifying the legitimacy of international arbitration into the future.	Advantages and limitations of different approaches highlighting scenarios where arbitration might be more appropriate. International arbitration is a "better test case" for various legal theories.			**The Emphasis on other dispute resolution methods over Arbitration:** The work proposes that, to access local elites demonstrate their support for international arbitration by introducing into their local legal systems reforms that benefit international arbitration.

https://ssrn.com/abstract=3404615.					Under this view, investment arbitration and local systems work in tandem, complementing each other. **Lack of Comparative Approach:** Gaps might include a lack of comprehensive comparative studies across different jurisdictions. That is, studies on the evolution of domestic legal institutions influenced by arbitration, and the effectiveness of reforms in various legal contexts.
Source 8: Jan Paulsson, *The Idea of Arbitration*, Oxford University Press (2013).					**The Emphasis on other dispute resolution methods over Arbitration:** **Lack of Comparative Approach:** Need for more comparative studies between different arbitration regimes globally.

					Lack of in-depth analysis of cultural and social factors influencing arbitration practices.
Source 9: Emmanuel Gaillard, *Legal Theory of International Arbitration*, Martinus Nijhoff Publishers (2010).	Examines the legal principles underlying international arbitration.				**The Emphasis on other dispute resolution methods over Arbitration:** **Lack of Comparative Approach:** More empirical studies analyzing trends, efficiency, and outcomes in international arbitration. The interplay between common law and civil law traditions in arbitration and the potential for harmonizing practices. Integration and recognition of non-Western local dispute resolution mechanisms in the global arbitration framework.

Source 10: José E. Alvarez, *Is Investor-State Arbitration 'Public'?*, Journal of International Dispute Settlement, Volume 7, Issue 3, November 2016, Pages 534–576, https://doi.org/10.1093/jnlids/idw019. **Source 11:** José E Alvarez, *ISDS Reform: The Long View*, ICSID Review - Foreign Investment Law Journal, Volume 36, Issue 2, Spring 2021, Pages 253–277, https://doi.org/10.1093/icsidreview/siab036. **Source 12:** Alvarez, José E, *The Once and Future Foreign Investment Regime*, IN: Looking to the Future, (Leiden, The Netherlands: Brill | Nijhoff, 2011) doi: https://doi.org/10.1163/9789047427070_034. **Source 13:** Alvarez, José E, *The Multilateralization of*	The work scrutinises the reasons most commonly advanced for concluding that the ISDS is public. Surveys the criticisms directed at IIAs and their reliance on ISDS. Reexamines the rise and evolution of the contemporary international legal regime governing international investment in light of an approach that stresses that international law could not be insulated from inter-national politics and requires an interdisciplinary analysis.	It concludes with lessons, many of which indicate why ISDS is best viewed as a 'hybrid' between public and private. It argues that the international investment regime's reliance on ISA will not be wholly displaced by any of the alternatives under active discussion – from national courts to mediation to a MIC.			**Lack of Comparative Approach:** Comparative analysis of different ISDS reform models (e.g., EU's ICS vs. traditional arbitration) Perspectives from developing countries on the public nature of ISA and how it affects their sovereignty and public policies. The role of rising regional arbitration centres in shaping the public aspect of ISA. **Stakeholder Perspectives:** Research incorporating the perspectives of a broader range of stakeholders, including smaller states, civil society organizations, and local communities. **The Emphasis on other dispute resolution methods over Arbitration:** Comparative studies between ISA and other forms of dispute resolution.

International Investment Law. By Stephan W. Schill. Cambridge, New York: Cambridge University Press, 2009. Pp. Xxxvii, 451. Index.$99, American Journal of International Law 105, no. 2 (2011): 377–84. https://doi.org/10.5305/amerjintelaw.105.2.0377.					Analysis of ISDS provisions in newer international agreements. On the argument that ISA will not be wholly displaced by the alternatives discussed such as national courts, mediation or the MIC, the gap is a proposal on their intergration. **Non-Normative Approach:** Insights of the New Haven school that holds that law is a policy-oriented process of decision-making rather than a set of rules. It holds that that law is embedded in society.
Source 14: Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, Journal of International Economic	Argues that many reform efforts focus on changes to ISDS. The reform proposals, however, diverge widely and do not proceed on the basis of a normative framework that is globally consented.	Suggests that reform proposals should be developed by reference to principles of (comparative and international) constitutional law. Such a framework			**ISDS Mechanisms in FTAs:** Analysis of the impact of new international investment agreements and reforms introduced post-2017 on ISDS, such as those incorporating the EU's Investment Court.

Law, Volume 20, Issue 3, September 2017, Pages 649–672, https://doi.org/10.1093/jiel/jgx023. **Source 15:** Stephan Schill, Comparative Public Law Methodology in International Investment Law, Blog of the European Journal of International Law at: https://www.ejiltalk.org/comparative-public-law-methodology-in-international-investment-law/. **Source 16:** Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford: Oxford University Press, 2010. **Source 17:** Schill,Stephan W., 2009, *The Multilateralization of International Investment Law,* Cambridge Books, Cambridge University	Stresses the history and origins of BITs and FTAs. A historical account of the New International Economic Order and ISDS. The book aims to bring open-ended concepts of investment treaties so far only sporadic and not fully developed ad-hoc references to comparative and international administrative law concepts together in order to form a deeper theoretic and systematic framework.	can be used to formulate a number of concrete proposals for ISDS reform.			**The Emphasis on other dispute resolution methods over Arbitration:** Examination of changes in national arbitration laws and policies that influence the practice and reform of ISDS. **Lack of Comparative Approach:** Analysis of how shifting geopolitical landscapes, such as the rise of new economic powers and changing trade relationships, impact ISDS reform and constitutional principles. Examination of how economic inequalities between states influence ISDS outcomes and reform debates within a constitutional framework. Notes that comparative public law analysis is increasingly seeping into investor-State arbitration. **Non-Normative Approach:**

Press, number 9780521762366, November.					A historical account of BITs and FTAs. Notes that attention needs to be paid in particular to the choice of comparative legal orders in order to avoid selectiveness and Euro-centric bias. The 'bridge' between treaty-based international investment arbitration and comparative administrative law on both the theoretical and practical level.
Source 18: August Reinisch*, The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, IN: Centre for International Governance Innovation (CIGI), Investor State Arbitration Series, Paper No. 2 – March 2016, available at https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlementinvestor-state-arbitration-permane.	Analyses in detail the development of the EU's position toward the use of ISA.		The EU calls for an investment court that draws inspiration from the WTO. From its initial preference for state-to-state dispute settlement following the WTO paradigm, the European Commission as the EU's external trade actor which also litigates disputes before the WTO's DSU institutions, has endorsed ISA and has reintroduced		Diversity of ISDS Reform Proposals. Lack of comprehensive analysis of new generation agreement provisions of different countries.

Source 19: 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*. 2nd ed. 2020. Berlin, Heidelberg: Springer Nature. https://doi.org/10.1007/978-3-662-59732-3.	Presents the first comprehensive legal analysis of the feasibility of creating a MIC. A "feasibility study" is presented with the intention to contribute to a broader discussion on the options for a new international court specialised in investment protection.		WTO features into ISDS.		
Source 20: Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options*, Springer, 2020.	Represents the first comprehensive study on the relationship between ISDS and national courts.	The study concludes that in certain areas of interactions between domestic courts and international investment tribunals, the "division of labor" between the two types of dispute settlement bodies is not always optimal.			**The Emphasis on other dispute resolution methods over Arbitration:** It identifies a need for improvement by providing for 'a more fruitful allocation of tasks' among domestic and international courts**.**

Source 21: Joost Pauwelyn, *The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform*. Proceedings of the Annual Meeting (American Society of International Law) 108 (2014): 255–58. https://doi.org/10.5305/procannmeetasil.108.0255**.**	Confronts questions in relation to the convergence of trade and investment.	There are overlapping ISDS and WTO disputes.			**A Focus on BITs & ISDS Mechanisms in FTAs:** The work explores the integration of ISDS in FTAs, emphasizing how FTAs are increasingly incorporating investment protection mechanisms. It communicates the need for coherence and consistency within these intertwined legal frameworks of trade and investment. The work asks the question whether it make sense to have private standing in dispute settlement for some chapters (investment) and not for other chapters (trade) within the same agreement? This suggests the need for investment dispute resolution that will best serve the needs of the new generation of 'comprehensive' international agreements (trade and investment) that go beyond trade in goods and covers investment issues within a single agreement.

Source 22: Tomer Broude, *Investment and Trade: The 'Lottie and Lisa" of International Economic Law?*, Cambridge University Press, 2012, Hebrew University of Jerusalem Legal Studies Research Paper 10–11 (10 November 2011).	Employs a comparative analysis of the regulatory frameworks governing international trade and investment. Traces the historical and political separation of trade and investment laws.				**Non-Normative Approach:** The work suggests that the continued distinction between trade and investment law is derived from historical and political causes that may no longer be relevant. This presents research opportunity to investigate historical and political reasons and to evaluate their current relevance. **ISDS Mechanism in FTAs:** The work indicates a gap in research on developing a cohesive framework or unifying principles that could guide the integration of trade and investment law.
Source 23: Gisela Grieger, *EU–China Comprehensive Agreement on Investment Levelling the playing field with China*, European Parliament BRIEFING, European Parliamentary Research Service, March 2021.	The 'International Agreements in Progress' briefings analyse the progress of legislative proposals. They are updated at key stages throughout the legislative process, from initial		The EU has negotiated FTAs and IPAs with various countries, with a reformed approach. The EU has replaced the traditional ISDS with a new two-instance ICS, which it seeks to	China has also concluded FTAs with investment provisions. China has borrowed some features of the NAFTA template for the BIT template it uses with	**ISDS Mechanisms in FTAs & Diversity of Reform proposals:** The work identifies challenges for the EU-China CAI, such as the lack of a comprehensive framework to remedy shortcomings in EU-China investment ties. Moreso,

	discussions through to ratification.		substitute with a MIC.	developing countries. Some other features are borrowed from the Europea`n model BIT and some from the US model BIT	what was originally supposed to be a 'comprehensive' agreement has become a 'partial' agreement that does not cover investment protection and the related investment dispute settlement mechanism.
Source 24: Yuwen Li, Tong Qi and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge 2020).	The book analyses subjects negotiated in the EU-China CAI, in three parts. It focuses on the pathway of reforming ISDS from both Chinese and European perspectives.			One of the major elements featured in the reformed approach taken by EU is replacing the private nature of investment arbitration with the public nature of an investment court, which is modelled on international trade dispute settlement. An academic analysis of the ICS proposal and China's possible attitude is provided, in particular with a view to the development of ISDS in general. Some of the	**Diversity of ISDS Reform Proposals:** Lack of comprehensive analysis of new generation agreement provisions of different countries.

				authors in the book write that although the inclusion of ISDS in the China–EU CAI is quite certain, any forecast of the ICS in the negotiations of the EU-China CAI would be tentative. The book claims that the experience of China in the WTO dispute settlement may provide some leads and lessons for its position at the ongoing UNCITRAL work on the reform of ISDS. It is also claimed that China's experience in a mix of 'arbitration + mediation' may contribute to ISDS reform.	

Source 25: Congyan Cai, Huiping Chen, Yifei Wang(ed.), *The BRICS in the New International Legal Order on Investment: Reformers or Disruptors*, BRILL, Mar 31, 2020**.**	The book discusses whether the BRICS countries, which include China, can develop a common approach to investment treaties as well as a contribution to the investment treaty regime in the future. It provides perspectives on how emerging powers engage in the international legal order.			The book claims that China seeks to reform its own ISDS.	**Diversity of ISDS Reform proposals & Non-Normative Approach:** The work suggests for scholarship to address the New International Legal Order.
Source 26: Sornarajah, M. *The International Law on Foreign Investment*. 5th ed. Cambridge: Cambridge University Press, 2021. **Source 27:** Sornarajah, Muthucumaraswamy, *Evolution or revolution in international investment arbitration? The descent into normlessness*, IN: C. Brown and K. Miles (eds.), Evolution in Investment Treaty Law and Arbitration. Cambridge:	Provides analysis of not only law but developments in history, economics and political sciences.				**Non-Normative Approach:** Analysis of ISDS in historical, political and economic contexts.

Cambridge University Press (2011).					
Source 28: Makane Moïse Mbengue, 'Somethin' ELSE': African Discourses on ICSID and on ISDS—An Introduction , ICSID Review - Foreign Investment Law Journal, Volume 34, Issue 2, Spring 2019, Pages 259–269, https://doi.org/10.1093/icsidreview/siz033 **Source 29:** Makane Moı¨se Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law,* ICSID Review,Vol.34,No.2(2019), pp.455–481 doi:10.1093/icsidreview/siz029.	Explores the various facets of Africa's contribution to the ISDS. Explores new avenues that are provided through the 'Africanization' of international investment law and their impact on the current redesign of the investment regime.	Suggests ways to reinforce synergies between ICSID and the African Union (AU)			**Non-Normative Approach:** Analysis of ISDS in historical, political and economic contexts.

Source 30: Franck, Susan, *Between Myth and Reality: The 9th John E.C. Brierly Memorial Lecture* (July 6, 2018), McGill Journal of Dispute Resolution, Vol. 5, No. 1, 2018-2019..	Explores existing empirical research on international arbitration.	Argues that international investment arbitration is 'caught within a larger geo-political maelstrom'.			**Non-Normative Approach:** Analysis of ISDS in a political context.
Source 31: Konrad Zweigert et Hein Kötz, *An Introduction to Comparative Law*, 3e éd., trad.par Tony Weir, Oxford, Oxford University Press,1998 [Einführung in die Rechtsvergleichung, 3e éd.,Tübingen, J.C.B.Mohr,1996].	Discusses the nature of Comparative Law, its functions, aims, methods and history, then surveys the main features of the major legal families of the world.				**Lack of Comparative Approach:**
Source 32: Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, The American Journal of Comparative Law, Volume 43, Issue 3, Summer 1995, Pages 477–481, https://doi.org/10.2307/840650.	Examines the historical development and future directions of comparative law.				**Lack of Comparative Approach:** A key limitation noted by scholars is its focus on the academic implications of comparative law, with less emphasis on its practical applications in legal practice and international relations.

APPENDIX IA: Investment dispute resolution in EU new generation FTAs & IPAs*

**See APPENDIX IB for provisions*

	EU-South Korea[817]	EU-Canada(CETA)[818]	EU-Mexico[819]	EU-Japan[820]	EU-Singapore[821]	EU-Vietnam[822]	EU-New Zealand [823]
Date signed	October 15, 2009	October 30, 2016	April 21, 2018	July 17, 2018	October 19, 2018	June 30, 2019	9 July 2023
Ratified [824]	2011	2019	2020	2019	2019[825]	2020	
In Force [826]	2015	2017[827]	2000[828]	2019	2019	2020	1 May 2024
Recourse to ISDS							
Traditional ISDS		Art 8.23	Art 7		Art 3.6		Art 26.4

[817] Chapter 14, "EU-South Korea Free Trade Agreement." European Commission, 20 May 2011, https://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/.
[818] Chapter 8, "EU-Canada Comprehensive Economic and Trade Agreement (CETA)." European Commission, 14 February 2022, https://ec.europa.eu/trade/policy/in-focus/ceta/.
[819] Reached an agreement in principle on the trade part in April 2018, complemented by commitments on public procurement in April 2020. Section C (Resolution of Investment Disputes and Investment Court System), "EU-Mexico Free Trade Agreement: Mexico." European Commission, 20 April 2020, https://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/. The agreement, once ratified, replaced the EU-Mexico Global Agreement. See: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en .
[820] Chapter 21, "EU-Japan Economic Partnership Agreement." European Commission, 1 February 2022, https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/japan/eu-japan-agreement_en.
[821] Chapter 3, "EU-Singapore Free Trade Agreement (EUSFTA) & Investment Protection Agreement (IPA)." European Commission, 18 November 2019, https://ec.europa.eu/trade/policy/in-focus/eu-singapore-free-trade-agreement-eusfta/. And see: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements_en.
[822] Chapter 3, "EU-Vietnam Free Trade Agreement." European Commission, 8 June 2020, https://ec.europa.eu/trade/policy/in-focus/eu-vietnam-free-trade-agreement/.
[823] Chapter 26, EU-New Zealand Free Trade Agreement, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en.
[824] European Commission, Negotiations and agreements, at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.
[825] Partly ratified.
[826] European Commission, Negotiations and agreements, Agreements in place at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.
[827] Provisionally applied in 2017.
[828] Since 2000.

ICS		Art 8.27	Art	*[829]	Art 3.9	Art 8.23	
MIC		Art 8.28	Art 14		Art 3.12		
Appeal Tribunal		Art 8.28	Art 12		Art 3.12		Art 23.6
Recourse to SSDS							
Mutual Solution	Art 14.13	Art 29.19	Art 33(c)	Art 21.26	Art 3.39	Art 3.19	Art 26.26
Consultations	Art 14.3	Art 29.4	Art 3	Art 21.5	Art 3.26	Art 3.3	Art 26.3
Mediation	*ANNEX 14A*[830]	Art 29.5	Art 4	Art 21.6	Art 3.27	Art 3.4	Art 26.25
Domestic courts			Art 6.6				
Quasi-WTO Mechanism							
Relation with WTO obligations and other agreements	Art 14.19	Art 29.3		Art 21.27	Art 3.45	Art 3.24	Art 1.5

[829] Negotiations are being hold for its inclusion in the EU-Japan Economic Partnership Agreement.
[830] Mediation on non-tariff measures.

APPENDIX IB: EU new generation FTAs & IPAs investment dispute resolution provisions*

* Refer to APPENDIX IA for official details of the agreements

	EU-South Korea	EU-Canada(CETA)[831]	EU-Mexico[832]	EU-Japan EPA[833]	EU-Singapore IPA[834]	EU-Vietnam IPA[835]	EU-New Zealand [836]
Objective	Art 14 (1). The objective of this Chapter is ... to arrive at, where possible, a mutually agreed solution.	Art 8.18 1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under: (a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or (b) Section D, where the investor claims to have suffered loss or damage as a result of the alleged breach. 2. Claims under subparagraph 1(a) with respect to the expansion		Art 21.1 The objective of this Chapter is ...with a view to reaching a mutually agreed solution.		Art 3.1 The objective of this Chapter is ...with a view to arriving at a mutually agreed solution.	ARTICLE 26.1 The objective of this Chapter is...with a view to reaching, where possible, a mutually agreed solution.

[831] Section F Resolution of investment disputes between investors and states.
[832] SECTION [X]: RESOLUTION OF INVESTMENT DISPUTES
[833] CHAPTER 21 DISPUTE SETTLEMENT
[834] CHAPTER THREE DISPUTE SETTLEMENT...& SECTION B Resolution of Disputes between Parties
SECTION A Resolution of Disputes between Investors and Parties & SECTION B Resolution of Disputes between Parties
[835] CHAPTER 3 DISPUTE SETTLEMENT, SECTION A RESOLUTION OF DISPUTES BETWEEN PARTIES
[836] Chapter 26

		of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment. 3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process. 4. A claim with respect to restructuring of debt issued by a Party may only be submitted under this Section in accordance with Annex 8-B. 5. The Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.					
Scope	Article 14(2) This Chapter applies to any dispute concerning the interpre tation and application of the provisions of this Agreement unless otherwise provided.		Art 2(1).This Section shall apply to disputes between a Party and a claimant of the other Party arising from an alleged breach of...Section B (Investment Protection) which allegedly causes loss or damage to the claimant or its locally established company.	Art 21.2 Unless otherwise provided for in this Agreement, this Chapter applies with respect to the settlement of any dispute between the Parties concerning the interpretation and application of the provisions of this Agreement.	Article 3.1 1. This Section shall apply to a dispute between a claimant of one Party and the other Party concerning treatment alleged to breach the provisions of Chapter Two (Investment Protection) ..	ARTICLE 3.2 This Chapter applies with respect to the avoidance and settlement of any dispute between the Parties regarding the interpretation or application of the provisions of this Agreement, except as otherwise provided for in this Agreement.	ARTICLE 26.2 1. This Chapter applies, subject to paragraph 2, with respect to any dispute between the Parties concerning the interpretation and application of this Agreement and of the Sanitary Agreement (hereinafter referred to as "covered provisions").

							2. The covered provisions shall include all provisions of this Agreement and of the Sanitary Agreement with the exception of: (a) Sections B (Anti-dumping and countervailing duties) and C (Global safeguard measures) of Chapter 5 (Trade remedies); (b) Chapter 15 (Competition policy); (c) Article 16.6 (Consultations); (d) Chapter 20 (Māori trade and economic cooperation); (e) Chapter 21 (Small and medium-sized enterprises); (f) Chapter 22 (Good regulatory practice and regulatory cooperation); and (g) provisions of te Tiriti o Waitangi / the Treaty of Waitangi, with respect to its interpretation, Including as to the nature of the rights and obligations arising under it.
ISDS							
Traditional ISDS		Art 8.23	Art 7.		Article 3.6		ARTICLE 26.4

		1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by: (a) an investor of a Party on its own behalf; or (b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly. 2. A claim may be submitted under the following rules: (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; (c) the UNCITRAL Arbitration Rules; or (d) any other rules on agreement of the disputing parties. 3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c). 4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention. 5. The	1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by: (a) an investor of a Party on its own behalf; or (b) an investor of a Party, on behalf of a locally established company which it owns or controls directly or indirectly. For greater certainty, a locally established company may not submit a claim against the Party in which it is established under this Section. 2. A claim may be submitted under the following rules: (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; (c) the UNCITRAL Arbitration Rules; or (d) any other rules on agreement of the disputing parties.		Submission of Claim to Tribunal 1. No earlier than three months from the date of the notice of intent delivered pursuant to Article 3.5 (Notice of Intent), the claimant may submit the claim to the Tribunal under one of the following dispute settlement rules4: (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (hereinafter referred to as the "ICSID Convention") provided that both the respondent and the State of the claimant are parties to the ICSID Convention; (b) the ICSID Convention in accordance with the Rules on the Additional Facility for the Administration of Proceedings by		1. The Party that sought consultations may request the establishment of a panel, if: (a) the Party complained against does not respond to the request for consultations within 10 days after the date of its delivery; (b) consultations are not held within the time periods set out in Article 26.3(3) and (4)(Consultations) respectively; (c) the Parties agree not to have consultations; or (d) consultations have been concluded and no mutually agreed solution has been reached. 2. The request for the establishment of a panel (hereinafter referred to as "panel request") shall be made by means of a written request delivered to the other Party, and to any external body entrusted pursuant to paragraph 4, if applicable. The complaining Party shall identify the measure at issue in its panel request, and explain how that measure constitutes a breach of the covered provisions in a manner sufficient to

		investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium- sized enterprise or the compensation or damages claimed are relatively low. 6. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article 8.44.3(b). 7. A claim is submitted for dispute settlement under this Section when: (a) the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID; (b) the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID; (c) the notice under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or (d) the request or notice initiating proceedings is received by the respondent in	3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c). 4. Where a claim is submitted pursuant to subparagraphs 2(b), (c) or (d), the disputing parties may agree on the legal place of the proceedings. If the disputing parties fail to reach an agreement, the division of the Tribunal hearing the claim shall determine the place in accordance with the applicable dispute settlement rules, provided that the place shall be in the territory of a State that is a Party to the New York Convention.		the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as “ICSID Additional Facility Rules”), provided that either the respondent or the State of the claimant is a party to the ICSID Convention; (c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or (d) any other rules if the disputing parties so agree. 2. Paragraph 1 of this Article shall constitute the consent of the respondent to the submission of a claim under this Section. The consent under paragraph 1 and the submission of a claim under this Section shall be		present the legal basis for the complaint clearly. 3. Each Party shall ensure that the panel request is promptly made public. 4. The Trade Committee may decide to entrust an external body with assisting panels under this Chapter, including providing administrative and legal support. The Trade Committee's decision shall also address the costs arising from such entrustment.

		accordance with the rules agreed upon pursuant to subparagraph 2(d). 8. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.	5. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section, subject to the specific rules set out in this Section. The Joint Council may adopt rules supplementing the applicable dispute settlement rules and any such rules shall be binding on the Tribunal and the Appeal Tribunal. 6. A claim is submitted for dispute settlement under this Section when the request or notice initiating proceedings is received in accordance with the applicable dispute settlement rules. 7. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.		deemed to satisfy the requirements of: (a) Chapter II of the ICSID Convention, and the ICSID Additional Facility Rules, for written consent of the disputing parties; and (b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (hereinafter referred to as "New York Convention") for an "agreement in writing".		
ICS		Article 8.27			Article 3.9	Art 8.23	

		1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23. 2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada (1) and five shall be nationals of third countries. 3. The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2. 4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment			1. A Tribunal of First Instance ("Tribunal") is hereby established to hear claims submitted pursuant to Article 3.6 (Submission of Claim to Tribunal). 2. The Committee shall, upon the entry into force of this Agreement, appoint six Members to the Tribunal. For the purposes of this appointment: (a) The EU Party shall nominate two Members; (b) Singapore shall nominate two Members; and (c) The EU Party and Singapore shall jointly nominate two Members, who shall not be nationals of any Member State of the Union or of Singapore. 3. The Committee may decide to increase or to decrease the number of the Members by multiples of three. Additional appointments shall be made on	1. The Committee shall, no later than six months after the date of entry into force of this Agreement, establish a list of at least 15 individuals who are willing and able to serve as arbitrators. The list shall be composed of three sub-lists: (a) one sub-list for Viet Nam; (b) one sub-list for the Union and its Member States; and (c) one sub-list of individuals who are not nationals of either Party and do not have permanent residence in either Party and who shall act as chairperson of the arbitration panel. 2. Each sub-list shall include at least five individuals. The Committee shall ensure that the list is always maintained at that minimum number of individuals. 3. Arbitrators shall have demonstrated expertise and experience of law and international trade. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of	

		or international trade agreements. 5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term. In principle, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued. 6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country. 7. Within 90 days of the submission of a claim pursuant to Article 8.23,			the same basis as provided for in paragraph 2. 4. The Members shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have specialised knowledge of, or experience in, public international law. It is desirable that they have expertise, in particular, in international investment law, international trade law, or the resolution of disputes arising under international investment or international trade agreements. 5. The Members shall be appointed for an eight-year term. However, the inaugural terms of three of the six persons appointed immediately after the entry into force of this Agreement, to be determined by	the Parties, and shall comply with the Code of Conduct in Annex 8 (Code of Conduct for Arbitrators and Mediators). 4. The Committee may establish an additional list of 10 individuals with demonstrated expertise and experience in specific sectors covered by this Agreement. Subject to the agreement of the Parties, such an additional list shall be used to compose the arbitration panel in accordance with the procedure set out in Article 3.7 (Establishment of the Arbitration Panel).	

		the President of the Tribunal shall appoint the Members of the Tribunal composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve. 8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and shall be appointed for a two-year term and shall be drawn by lot from among the Members of the Tribunal who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the CETA Joint Committee. The Vice-President shall replace the President when the President is unavailable. 9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic considera tion to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the			lot, shall extend to twelve years. A Member's term of appointment may be renewed by decision of the Committee upon expiry. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. A person who is serving on a division of the Tribunal when his or her term expires may, with the authorisation of the President of the Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Tribunal. 6. There shall be a President and Vice-President of the Tribunal who shall be responsible for organisational issues. They will be appointed for		

		claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal. 10. The Tribunal may draw up its own working procedures. 11. The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Section. 12. In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee. 13. The fees referred to in paragraph 12 shall be paid equally by both Parties into an account managed by the ICSID Secretariat. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears by a Party shall remain payable, with appropriate interest. 14. Unless the CETA Joint Committee adopts a decision pursuant to paragraph 15, the amount of the fees and expenses of the Members of the Tribunal on a division constituted to hear a claim, other than the fees referred to in paragraph 12, shall be			a four-year term and shall be drawn by lot from among the Members who have been appointed pursuant to paragraph 2(c). They shall serve on the basis of a rotation drawn by lot by the Chair of the Committee. The Vice-President shall replace the President when the President is unavailable. 7. The Tribunal shall hear cases in divisions consisting of three Members, of whom one each shall have been appointed pursuant to paragraphs 2(a), 2(b), and 2(c), respectively. The division shall be chaired by the Member who had been appointed pursuant to paragraph 2(c). 8. Within 90 days of the submission of a claim pursuant to Article 3.6 (Submission of Claim to Tribunal), the President of the Tribunal shall		

		those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 8.39.5. 15. The CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions. 16. The ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support. 17. If the CETA Joint Committee has not made the appointments pursuant to paragraph 2 within 90 days from the date that a claim is submitted for dispute settlement, the Secretary General of ICSID shall, at the request of either disputing party appoint a division consisting of three Members of the Tribunal, unless the disputing parties have agreed that the case is to be heard by a sole Member of the Tribunal. The Secretary General of ICSID shall make the appointment by random selection from the existing nominations. The Secretary-General of			appoint the Members composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve. 9. Notwithstanding paragraph 7, the disputing parties may agree that a case be heard by a sole Member. This Member shall be selected by the President of the Tribunal from amongst those Members who had been appointed pursuant to paragraph 2(c). The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.		

		ICSID may not appoint as chair a national of either Canada or a Member State of the European Union unless the disputing parties agree otherwise.			Such a request should be made at the same time as the filing of the claim pursuant to Article 3.6 (Submission of Claim to Tribunal). 10. The Tribunal shall draw up its own working procedures. 11. The Members of the Tribunal shall ensure that they are available and able to perform the functions set out in this Section.		
MIC		Article 8.29 The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.	Art 14 1. The Parties should cooperate for the establishment of a multilateral mechanism for the resolution of investment disputes. 2. Upon the entry into force between the Parties of an international agreement providing for such a multilateral mechanism applicable to disputes under this Agreement, the relevant parts of this Section shall be suspended and the Joint Council may adopt a decision		Article 3.12 The Parties shall pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes. Upon establishment of such a multilateral mechanism, the Committee shall consider adopting a decision to provide that		

			specifying any transitional arrangements.		investment disputes under this Section will be resolved pursuant to that multilateral mechanism, and to make appropriate transitional arrangements.		
Appeal Tribunal		Article 8.28 1. An Appellate Tribunal is hereby established to review awards rendered under this Section. 2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b). 3. The Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in paragraph 7. 4. The Members of the Appellate Tribunal shall meet the requirements of Article 8.27.4 and	Art 12 1. A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal. 2. The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Mexico and two shall be nationals of third countries. 3. The Joint Council, shall, upon the entry into force of this Agreement, appoint the members of the Appeal Tribunal. For this purpose, each Party shall propose three candidates, two of which may be nationals of that		Article 3.10 1. A permanent Appeal Tribunal is hereby established to hear appeals from provisional awards issued by the Tribunal. 2. The Committee shall, upon the entry into force of this Agreement, appoint six Members to the Appeal Tribunal. For the purposes of this appointment: (a) The EU Party shall nominate two Members; (b) Singapore shall nominate two Members; and (c) The EU Party and Singapore shall jointly nominate two Members, who shall not be nationals of any Member State of		ARTICLE 23.6 Appeal and review 1. Each Party shall establish or maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and, if warranted, correction of administrative decisions with respect to any matter covered by this Agreement. Each Party shall ensure that its judicial, arbitral or administrative tribunals carry out procedures for appeal or review in a non-discriminatory and impartial manner. Such tribunals shall be impartial and independent of the authority entrusted with administrative enforcement powers.

		comply with Article 8.30. 5. The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal. 6. Articles 8.36 and 8.38 shall apply to the proceedings before the Appellate Tribunal. 7. The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisa tional matters regarding the functioning of the Appellate Tribunal: (a) administrative support; (b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate; (c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case; (d) remuneration of the Members of the Appellate Tribunal; (e) provisions related to the costs of appeals; (f) the number of Members of the Appellate Tribunal; and (g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal. 8. The Committee on Services and Investment	Party and one shall be a non-national, for the Joint Council to thereafter jointly appoint the Members. 4. The Joint Council may agree to increase the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 3. 5. The Appeal Tribunal Members shall be appointed for a five-year term. However, the terms of three of the six persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to seven years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's		the Union or of Singapore. 3. The Committee may decide to increase or to decrease the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2. 4. The Appeal Tribunal Members shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have specialised knowledge of, or expertise in, public international law. It is desirable that they have expertise, in particular, in international investment law, international trade law, or the resolution of disputes arising		

		shall periodically review the functioning of the Appellate Tribunal and may make recommendations to the CETA Joint Committee. The CETA Joint Committee may revise the decision referred to in paragraph 7, if necessary. 9. Upon adoption of the decision referred to in paragraph 7: (a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance; (b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section; (c) an award rendered pursuant to Article 8.39 shall not be considered final and no action for enforcement of an award may be brought until either: (i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated; (ii) an initiated appeal has been rejected or withdrawn; or (iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal; (d) a final award by the Appellate Tribunal shall be considered as a final	term. A person who is serving on a division of the Appeal Tribunal when his or her term expires may, with the authorization of the President of the Appeal Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appeal Tribunal. 6. The Appeal Tribunal shall have a President responsible for organisational issues, who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. The Presidents shall serve on the basis of a rotation drawn by lot by the Chair of the Joint Council. The Working procedures adopted pursuant to paragraph 10 shall foresee the necessary rules for		under international investment or international trade agreements. 5. The Appeal Tribunal Members shall be appointed for an eight-year term. However, the inaugural terms of three of the six persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to twelve years. A Member's term of appointment may be renewed by decision of the Committee upon expiry. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. A person who is serving on a division of the Appeal Tribunal		

		award for the purposes of Article 8.41; and (e) Article 8.41.3 shall not apply.	addressing a temporary unavailability of the President. 7. The Members of the Appeal Tribunal shall possess the qualifications required for appointment as a judge to the International Court of Justice, or be jurists of recognised competence. They shall have demonstrated expertise in public international law and in the subject matter covered by this Chapter. It is desirable that they have expertise in international trade law and the resolution of disputes arising under international investment or international trade agreements. 8. The Appeal Tribunal shall hear appeals in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Mexico and one a national of a third country. The division shall be		when his or her term expires may, with the authorisation of the President of the Appeal Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appeal Tribunal. 6. There shall be a President and Vice-President of the Appeal Tribunal who shall be responsible for organisational issues. They will be appointed for a four-year term and shall be drawn by a lot from among the Appeal Tribunal Members who have been appointed pursuant to paragraph 2(c). They shall serve on the basis of a rotation drawn by lot by the Chair of the Committee.		

			chaired by the Member who is a national of a third country. 9. The composition of the division hearing each appeal shall be established in each case by the President of the Appeal Tribunal, in accordance with the Working Procedures adopted pursuant to paragraph 10, on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to be selected. 10. The Appeal Tribunal shall draw up its own working procedures, after consulting with the Parties. 11. All persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement. 12. The Members of the Appeal Tribunal shall be paid a monthly retainer fee and		The Vice-President shall replace the President when the President is unavailable. 7. The Appeal Tribunal shall hear cases in divisions consisting of three Members, of whom one each shall have been appointed pursuant to paragraphs 2(a), 2(b), and 2(c), respectively. The division shall be chaired by the Member who had been appointed pursuant to paragraph 2(c). 8. The President of the Appeal Tribunal shall appoint the Members composing the division of the Appeal Tribunal hearing the appeal on a rotation basis, ensuring that the		

			receive a fee for each day worked as a Member, to be determined by decision of the Joint Council. The President of the Appeal Tribunal shall receive a fee for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section. 13. The remuneration of the Members shall be paid by both Parties taking into account their respective levels of development into an account managed by the Secretariat of ICSID. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest. The Sub-Committee on Services and Investment shall regularly review the amount and repartition of the retainer fee and may recommend relevant		composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve. 9. The Appeal Tribunal shall draw up its own working procedures. 10. The Appeal Tribunal Members shall ensure that they are available and able to perform the functions set out in this Section. 11. In order to ensure their availability, the Members shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the Committee. The President of the Appeal Tribunal and, where		

			adjustments for decision by the Joint Council. 14. Upon a decision by the Joint Council, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the Joint Council shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal. 15. The Secretariat of ICSID shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be allocated among the disputing parties in accordance with Article 29,		applicable, the Vice-President, shall receive a fee for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section. 12. The retainer fee and the daily fees for the President or Vice-President of the Appeal Tribunal when working in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section shall be paid equally by both Parties into an account managed by the Secretariat of ICSID. In the event that one Party fails to pay the retainer fee or the daily fees, the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.		

			paragraph 5 (Award).		13. Upon a decision by the Committee, the retainer fee and the daily fees may be permanently transformed into a regular salary. In such an event, the Appeal Tribunal Members shall serve on a full-time basis and the Committee shall fix their remuneration and related organisational matters. In that event, the Appeal Tribunal Members shall notbe permitted to engage in any occupation, whether gainful or not, unless exemption is Exceptionally granted by the President of the Appeal Tribunal. 14. The Secretariat of ICSID shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be		

					allocated by the Tribunal among the disputing parties in accordance with Article 3.21 (Costs).		
SSDS							
Mutual Solution	Article 14.13 The Parties may reach a mutually agreed solution to a dispute under this Chapter at any time. They shall notify the Trade Committee of any such solution. Upon notification of the mutually agreed solution, the procedure shall be terminated.		Art 33(1) (c) The Sub-Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Chapter, including: upon request of either Party, the implementation of any mutually agreed solution as regards a dispute under this Section.	Art 21.26 1. The Parties may reach a mutually agreed solution at any time with respect to any dispute referred to in Article 21.2. 2. If a mutually agreed solution is reached during panel proceedings or a mediation procedure, the Parties shall jointly notify the agreed solution to the chairperson of the panel or the mediator. Upon such notification, the panel proceedings or the mediation procedure shall be terminated. 3. Each Party shall take the measures necessary to implement the mutually agreed solution within the agreed time period. 4. No later than the date of expiry of the agreed time period, the implementing Party shall inform the other Party in writing	Article 3.2 Any dispute should as far as possible be resolved amicably through negotiations and, where possible, before the submission of a request for consultations pursuant to Article 3.3 (Consultations). An amicable resolution may be agreed at any time, including after dispute settlement proceedings under this Section have been commenced.	ARTICLE 3.19 The Parties may reach a mutually agreed solution to a dispute under this Chapter at any time. They shall jointly notify the Committee and the chairperson of the arbitration panel, where applicable, of any such solution. If the solution requires approval pursuant to the relevant domestic procedures of either Party, the notification shall refer to this requirement and the dispute settlement procedure shall be suspended. If such approval is not required, or if the completion of any such domestic procedures is notified, the dispute settlement procedure shall be terminated.	ARTICLE 26.26 1. The Parties may reach a mutually agreed solution at any time with respect to any dispute referred to in Article 26.2 (Scope). 2. If a mutually agreed solution is reached during the panel procedures or mediation procedure, the Parties shall jointly notify that mutually agreed solution to the chairperson of the panel or the mediator, as applicable. Upon such notification, the panel procedures or the mediation procedure shall be terminated. 3. Any mutually agreed solution reached by the Parties shall be made available to the public. 4. Each Party shall take any measure necessary to implement the mutually agreed solution within the agreed time period. 5. No later than at the expiry of the agreed time period the implementing Party shall

				of any measures it has taken to implement the mutually agreed solution.			inform the other Party, in writing, of any measure it has taken to implement the mutually agreed solution.
Consultations	Article 14.3 1. The Parties shall endeavour to resolve any dispute regarding the interpretation and application of the provisions referred to in Article 14.2 by entering into consultations in good faith with the aim of reaching a mutually agreed solution. 2. A Party shall seek consultations by means of a written request to the other Party identifying any measure at issue and the provisions of the Agreement that it considers applicable. A copy of the request for consultations shall be delivered to the Trade Committee. 3. Consultations shall be held within 30 days of the date of the submission of the	Article 8.19 Consultations 1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 8.23. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4. 2. Unless the disputing parties agree otherwise, the place of consultation shall be: (a) Ottawa, if the measures challenged are measures of Canada; (b) Brussels, if the measures challenged include a measure of the European Union; or (c) the capital of the Member State of the European Union, if the measures challenged are exclusively measures of that Member State. 3. The disputing parties may hold the consultations through videoconference or other means where appropriate, such as in the case where the	Art 3. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 7 (Submission of a Claim to the Tribunal). Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4. 2. Unless the disputing parties agree otherwise, the place of consultation shall be: (a) Mexico City, if the measures challenged are measures of Mexico; (b) Brussels, if the measures challenged include a measure of the European Union; or (c) the capital of the Member State of the European	Art 21.5 1. The Parties shall endeavour to resolve any dispute referred to in Article 21.2 through consultations in good faith with a view to reaching a mutually agreed solution. 2. A Party may seek consultations by means of a written request to the other Party. In the request for consultations, the Party which requested consultations shall give the reasons for the request, including identification of the measure at issue and an indication of its factual basis and its legal basis specifying the relevant covered provisions.	Article 3.3 1. Where a dispute cannot be resolved as provided for under Article 3.2 (Amicable Resolution), a claimant of a Party alleging a breach of the provisions of Chapter Two (Investment Protection) may submit a request for consultations to the other Party. 2. The request for consultations shall contain the following information: (a) the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address, and place of incorporation of the locally established company;	ARTICLE 3.3 1. The Parties shall endeavour to resolve any dispute referred to in Article 3.2 (Scope) by entering into consultations in good faith with the aim of reaching a mutually agreed solution. 2. A Party shall seek consultations by means of a written request to the other Party, copied to the Committee established pursuant to Article 4.1 (Committee), identifying the measure at issue and the relevant provisions of this Agreement. 3. Consultations shall be held within 30 days of the date of receipt of the request referred to in paragraph 2 and take place, unless the Parties agree otherwise, in the territory of the Party to which the request is made. The consultations shall be deemed concluded within 45 days of the date of receipt of the request, unless both Parties agree to continue consultations.	ARTICLE 26.3 1. The Parties shall endeavour to resolve any dispute referred to in Article 26.2 (Scope) by entering into consultations in good faith, with the aim of reaching a mutually agreed solution. 2. A Party shall seek consultations by means of a written request delivered to the other Party identifying the measure at issue and the covered provisions that it considers applicable. 3. The Party to which the request for consultations is made (hereinafter referred to as "the Party complained against") shall reply to that request for consultations promptly, but no later than 10 days after the date of its delivery. Unless the Parties agree otherwise, consultations shall be held within 30 days after the date of delivery of the request for consultations, and take place in the territory of the Party complained against. The

	request and take place, unless the Parties agree otherwise, in the territory of the Party complained against. The consultations shall be deemed concluded within 30 days of the date of the submission of the request, unless the Parties agree to continue consultations. All information disclosed during the consultations shall remain confidential. 4. Consultations on matters of urgency, including those regarding perishable or seasonal goods (87) shall be held within 15 days of the date of the submission of the request, and shall be deemed concluded within 15 days of the date of the submission of the request. 5. If consultations are not held within the time frames laid down in paragraph 3 or 4 respectively, or if consultations have been	investor is a small or medium-sized enterprise. 4. The investor shall submit to the other Party a request for consultations setting out: (a) the name and address of the investor and, if such request is submitted on behalf of a locally established enterprise, the name, address and place of incorporation of the locally established enterprise; (b) if there is more than one investor, the name and address of each investor and, if there is more than one locally established enterprise, the name, address and place of incorporation of each locally established enterprise; (c) the provisions of this Agreement alleged to have been breached; (d) the legal and the factual basis for the claim, including the measures at issue; and (e) the relief sought and the estimated amount of damages claimed. The request for consultations shall contain evidence establishing that the investor is an investor of the other Party and that it owns or controls the investment including, if applicable, that it owns or controls the locally established enterprise on whose behalf the request is submitted. 5. The	Union, if the measures challenged are exclusively measures of that Member State. 3. The disputing parties may agree to hold the consultations through videoconference or other means where appropriate. 4. The claimant shall submit to the other Party a request for consultations setting out: (a) the name and address of the claimant and, if such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company; (b) the provisions referred to in Article 2 (Scope) alleged to have been breached; (c) the legal and the factual basis for each claim, including the measure or measures alleged to be inconsistent with the provisions referred to in Article 2 (Scope); (d) the relief sought and the estimated amount of damages claimed; and (e)		(b) the provisions of Chapter Two (Investment Protection) alleged to have been breached; (c) the legal and factual basis for the dispute, including the treatment alleged to breach the provisions of Chapter Two (Investment Protection); and (d) the relief sought and the estimated loss or damage allegedly caused to the claimant or its locally established company by reason of that breach. 3. The request for consultations shall be submitted: (a) within 30 months of the date on which the claimant or, as applicable, the locally established company, first acquired, or should have first acquired, knowledge of the treatment alleged to breach the provisions of Chapter Two (Investment Protection); or	Consultations, in particular all information disclosed and positions taken by the Parties, shall be confidential and without prejudice to the rights of either Party in any further proceedings. 4. Consultations on matters of urgency, including those regarding perishable goods, seasonal goods or seasonal services, shall be held within 15 days of the date of receipt of the request referred to in paragraph 2. The consultations shall be deemed concluded within 20 days, unless both Parties agree to continue consultations. 5. The Party that sought consultations may have recourse to Article 3.5 (Initiation of the Arbitration Procedure) if: (a) the other Party does not respond to the request for consultations within 15 days of the date of its receipt; (b) the consultations are not held within the timeframes provided for in paragraphs 3 or 4; (c) the Parties agree not to have consultations; or (d) the consultations have been concluded without a mutually agreed solution.	consultations shall be deemed concluded within 30 days after the date of delivery of the request for consultations, or within 90 days after that date for disputes under Chapter 19 (Trade and sustainable development), unless the Parties agree to continue consultations.

	concluded and no mutually agreed solution has been reached, the complaining Party may request the establishment of an arbitration panel in accordance with Article 14.4.	requirements of the request for consultations set out in paragraph 4 shall be met with sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defence. 6. A request for consultations must be submitted within: (a) three years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor or, as applicable, the locally established enterprise, has incurred loss or damage thereby; or (b) two years after an investor or, as applicable, the locally established enterprise, ceases to pursue claims or proceedings before a tribunal or court under the law of a Party, or when such proceedings have otherwise ended and, in any event, no later than 10 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby. 7. A request for consultations	evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company. Where a request for consultations is submitted by more than one claimant or on behalf of more than one locally established company, the information in subparagraphs a) and e) shall be submitted for each claimant or each locally established company, as the case may be. Modernisation of the Trade part of the EU-Mexico Global Agreement Without Prejudice 4 5. The requirements of the request for consultations set out in paragraph 4 shall be met with sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defense. 6. A request for consultations must		(b) in the event that local remedies are being pursued when the time period referred to in subparagraph (a) elapses, within one year of the date on which the claimant or, as applicable, the locally established company, ceases to pursue those local remedies; and, in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired, knowledge of the treatment alleged to breach the provisions of Chapter Two (Investment Protection). 4. In the event that the claimant has not submitted a claim pursuant to Article 3.6(Submission of Claim to Tribunal) within eighteen months of submitting the request for consultations, the claimant shall be		

		concerning an alleged breach by the European Union or a Member State of the European Union shall be sent to the European Union. 8. In the event that the investor has not submitted a claim pursuant to Article 8.23 within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the respondent, and shall not submit a claim under this Section with respect to the same measures. This period may be extended by agreement of the disputing parties.	be submitted within three years after the date on which the claimant or, as applicable, the locally established company, first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the claimant or, as applicable, the locally established company, has incurred loss or damage thereby. 7. Notwithstanding paragraph 6, in the event that the request for consultations concerns a measure or measures of the European Union or a Member State of the European Union and the time period referred to in paragraph 6 has elapsed while the claimant or, as applicable, the locally established company pursued claims or proceedings relating to the same measure or measures before a tribunal or court under the domestic law of a Party, the request for consultations must be submitted: (a) within two years of		deemed to have withdrawn its request for consultations, any notice of intent and to have waived its rights to bring such a claim. This period may be extended by agreement between the parties involved in the consultations. 5. The time periods referred to in paragraphs 3 and 4 shall not render a claim inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim, as the case may be, is due to the claimant's inability to act as a result of actions deliberately taken by the other Party, provided that the claimant acts as soon as it is reasonably able to act. 6. In the event that the request for consultations concerns an alleged breach of this Agreement by the Union, or by		

			the date on which the claimant or, as applicable, the locally established company ceases to pursue such claims or proceedings before a tribunal or court under the domestic law of a Party; and (b) in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired, knowledge of the measures or measures alleged to be inconsistent with the provisions referred to in Article 2 paragraph 1 (Scope) and of the loss or damage alleged to have been incurred thereby. 8. A request for consultations concerning an alleged breach by the European Union or a Member State of the European Union shall be sent to the European Union. Where the claimant identifies treatment afforded by a Member State of the European Union within its request for		any Member State of the Union, it shall be sent to the Union. 7. The disputing parties may hold the consultations through videoconference or other means where appropriate, such as in the case where the investor is a small or medium-sized enterprise. Article 3.26 1. The Parties shall endeavour to resolve any difference regarding the interpretation and application of the provisions referred to in Article 3.25 (Scope) by entering into consultations in good faith with the aim of reaching a mutually agreed solution. 2. A Party shall seek consultations, by means of a written request to the other Party copied to the Committee, and		

			consultations, it shall also be sent to the Member State concerned. 9. In the event that the investor has not submitted a claim pursuant to Article 7 (Submission of a Claim to the Tribunal) within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the respondent pursuant to Article 5 (Request for Determination of the Respondent for Disputes with the European Union or its Member States), and shall not submit a claim under this Section with respect to the same measures. This period may be extended by agreement of the parties involved in the consultations.		shall give the reasons for the request, including identification of the measures at issue, the applicable provisions referred to in Article 3.25 (Scope), and the reasons for the applicability of such provisions. 3. Consultations shall be held within thirty days of the date of receipt of the request and take place, unless the Parties agree otherwise, on the territory of the Party complained against. The consultations shall be deemed concluded within sixty days of the date of receipt of the request, unless the Parties agree otherwise. Consultations shall be confidential, and without prejudice to the rights of either Party in any further proceedings. 4. Consultations on matters of urgency shall be held within fifteen days of the date of receipt of the		

					request, and shall be deemed concluded within thirty days of the date of receipt of the request, unless the Parties agree otherwise. 5. If the Party to which the request is made does not respond to the request for consultations within ten days of the date of its receipt, or if consultations are not held within the timeframes laid down in paragraph 3 or in paragraph 4 respectively, or if consultations have been concluded and no mutually agreed solution has been reached, the complaining Party may request the establishment of an arbitration panel in accordance with Article 3.28 (Initiation of Arbitration Procedure).		
Mediation	*Annex 14-A* to Chapter Fourteen Mediation mechanism for	Article 8.20 1. The disputing parties may at any time agree to have recourse to	Art 4. Mediation 1. The disputing parties may at any time agree to have	Art 21.6 1. A Party may at any time request the other Party to enter into a	Article 3.4 1. The disputing parties may at any time, including	ARTICLE 3.4 The Parties may at any time agree to enter into	ARTICLE 26.25 The Parties may have recourse to mediation

	non-tariff measures.	mediation. 2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c). 3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator. 4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator. 5. If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.	recourse to mediation. 2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, any rules for mediation that may be adopted by the Joint Council. 3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also jointly request the President of the Tribunal to appoint the mediator. 4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator. 5. If the disputing parties agree to have recourse to mediation, the time limits set out in Article 3, paragraphs 6 and 7 (Consultations), 29 paragraph 7 (Award) and 30, paragraph 3 (Appeal Procedure) shall be suspended	mediation procedure with respect to any matter within the scope of this Chapter concerning a measure that adversely affects trade or investment between the Parties. 2. The Parties may at any time agree to enter into a mediation procedure which shall be initiated, conducted and terminated in accordance with the Mediation Procedure to be adopted by the Joint Committee at its first meeting pursuant to subparagraph 4(f) of Article 22.1. 3. If the Parties agree, the mediation procedure may continue while the panel procedures set out in Section C proceed.	prior to the delivery of a notice of intent, agree to have recourse to mediation. 2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party. 3. Recourse to mediation may be governed by the rules set out in Annex 6 (Mediation Mechanism for Disputes between Investors and Parties) or such other rules as the disputing parties may agree. Any time limit mentioned in Annex 6 (Mediation Mechanism for Disputes between Investors and Parties) may be modified by mutual agreement between the disputing parties. 4. The mediator shall be appointed by agreement of the disputing parties or in accordance with Article 3 (Selection of the Mediator) of	a mediation procedure pursuant to Annex 9 (Mediation Mechanism) with respect to any measure adversely affecting investment between the Parties.	with regard to any measure that a Party considers to be adversely affecting trade and investment between the Parties. The mediation procedure is set out in Annex 26-C (Rules of procedure for mediation).

			from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.		Annex 6 (Mediation Mechanism for Disputes between Investors and Parties). Mediators shall comply with Annex 7 (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators). 5. The disputing parties shall endeavour to reach a mutually agreed solution within sixty days from the appointment of the mediator. 6. Once the disputing parties agree to have recourse to mediation, paragraphs 3 and 4 of Article 3.3 (Consultations) shall not apply between the date on which it was agreed to have recourse to mediation, and thirty days after the date on which either party to the dispute decides to put an end to the mediation, by way of a letter to the mediator and the other disputing party.		

					7. Nothing in this Article shall preclude the disputing parties from having recourse to other forms of alternative dispute resolution. Article 3.27 Any Party may request the other Party to enter into a mediation procedure with respect to any Measure adversely affecting investment between the Parties pursuant to Annex 10 (Mediation Procedure for Disputes between Parties).		
Domestic courts		Article 8.22 1. An investor may only submit a claim pursuant to Article 8.23 if the investor: (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a	Art 6 (6). Where the European Union or a Member State of the Union is the respondent, subparagraph 1(f) and (g) shall not prevent the claimant from seeking interim measures of		Article 3.7 1. A claim may be submitted under this Section only if:... (f) the claimant: (i) <u>withdraws any pending claim submitted to the Tribunal, or to any other domestic or</u>		

		breach referred to in its claim; and (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.	protection before the domestic courts or tribunals of the respondent. Where Mexico is the respondent, subparagraph 1(f) and (g) shall not prevent the claimant from seeking interim measures of protection, or from initiating or continuing proceedings for injunctive,		international court or tribunal under domestic or international law, concerning the same treatment as alleged to breach the provisions of Chapter Two (Investment Protection);		
Quasi-WTO							
Relation with WTO obligations and other agreements	Article 14.19 1. Recourse to the dispute settlement provisions of this Chapter shall be without prejudice to any action in the WTO framework, including dispute settlement action. 2. However, where a Party has, with regard to a particular measure, initiated a dispute settlement proceeding, either under this Chapter or under the WTO Agreement, it may not institute a dispute	Article 1.5 The Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are party.		Art 21.27 1. Where a dispute arises with regard to the alleged inconsistency of a particular measure with an obligation under this Agreement and a substantially equivalent obligation under any other international agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. 2. Once a Party has selected the forum and initiated dispute settlement proceedings under this Chapter or under the other	Article 3.45 1. Recourse to the dispute settlement provisions of this Section shall be without prejudice to any action in the WTO framework, including dispute settlement proceedings. 2. Notwithstanding paragraph 1, where a Party has, with regard to a particular measure, initiated dispute settlement proceedings, either under this Section or under the WTO Agreement, it may not institute	ARTICLE 3.24 1. Recourse to the dispute settlement procedure under this Chapter shall be without prejudice to any action in the framework of the World Trade Organization, including dispute settlement action, or under any other international agreement to which both Parties are party. 2. By way of derogation from paragraph 1, a Party shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under this Agreement and under the WTO Agreement or under any other international agreement to which both Parties are party in	ARTICLE 1.5 1. Unless otherwise provided for in this Agreement, the existing international agreements between the European Community, the Union, or the Member States, of the one part, and New Zealand, of the other part, are not superseded or terminated by this Agreement. 2. This Agreement shall be an integral part of the overall bilateral relations as governed by the Partnership Agreement and shall form part of the common institutional framework.

	settlement proceeding regarding the same measure in the other forum until the first proceeding has been concluded. In addition, a Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums. In such case, once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress of the identical obligation under the other Agreement to the other forum, unless the forum selected fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation. 3. For the purposes of paragraph 2: (a) dispute settlement proceedings under the WTO			international agreement with respect to the particular measure referred to in paragraph 1, that Party shall not initiate dispute settlement proceedings in another forum with respect to that particular measure unless the forum selected first fails to make findings on the issues in dispute for jurisdictional or procedural reasons. 3. For the purpose of paragraph 2: (a) dispute settlement proceedings under this Chapter are deemed to be initiated when a Party requests the establishment of a panel in accordance with paragraph 1 of Article 21.7; (b) dispute settlement proceedings under the WTO Agreement are deemed to be initiated when a Party requests the establishment of a panel in accordance with Article 6 of the DSU; and (c) dispute settlement proceedings under any other agreement are deemed to be initiated when a Party	dispute settlement proceedings regarding the same measure in the other forum until the first proceedings have ended. Moreover, a Party shall not initiate dispute settlement proceedings under this Section and under the WTO Agreement, unless substantially different obligations under both agreements are in dispute, or unless the forum selected fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation, provided that the failure of the forum is not the result of a failure of a disputing Party to act diligently. 3. For the purposes of paragraph 2, (a) dispute settlement proceedings	the relevant fora. Once dispute settlement proceedings have been initiated, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement to the other forum, unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the claim seeking redress to that obligation. 3. For the purposes of this Article: (a) dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; (b) dispute settlement proceedings under this Chapter are deemed to be initiated by a Party's request for the establishment of an arbitration panel under paragraph 1 of Article 3.5 (Initiation of the Arbitration Procedure); (c) dispute settlement proceedings under any other international agreement are deemed to be initiated in accordance with that agreement.	3. The Parties affirm their rights and obligations with respect to each other under the WTO Agreement. For greater certainty, nothing in this Agreement requires a Party to act in a manner inconsistent with its obligations under the WTO Agreement. 4. In the event of any inconsistency between this Agreement and any international agreement other than the WTO Agreement to which both Parties are a party, the Parties shall immediately consult with each other with a view to finding a mutually satisfactory solution. 5. Unless otherwise specified, where international agreements are referred to in, or incorporated into, this Agreement, in whole or in part, they shall be understood to include amendments thereto and their successor agreements entering into force for both Parties on or after the date of entry into force of this Agreement.

	Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the Under standing on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement (hereinafter referred to as the 'DSU') and are deemed to be concluded when the DSB adopts the Panel's report, and the Appellate Body's report as the case may be, under Articles 16 and 17.14 of the DSU; and (b) dispute settlement proceedings under this Chapter are deemed to be initiated by a Party's request for the estab lishment of an arbitration panel under Article 14.4.1 and are deemed to be concluded when the arbitration panel issues its ruling to the			requests the establishment of a dispute settlement panel in accordance with the relevant provisions of that agreement. 4. Nothing in this Agreement shall preclude a Party from implementing the suspension of concessions or other obligations authorised by the DSB. A Party shall not invoke the WTO Agreement to preclude the other Party from suspending concessions or other obligations under the covered provisions.	under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement (hereinafter referred to as "DSU") and are deemed to be ended when the DSB adopts the Panel's report, and the Appellate Body's report as the case may be, under Articles 16 and 17(14) of the DSU; and (b) dispute settlement proceedings under this Section are deemed to be initiated by a Party's request for the establishment of an arbitration	4. Nothing in this Agreement shall preclude a Party from implementing the suspension of obligations authorised by the DSB. Neither the WTO Agreement nor the Free Trade Agreement shall be invoked to preclude a Party from taking appropriate measures under Article 3.15 (Temporary Remedies in Case of Non-Compliance).	

	Parties and to the Trade Committee under Article 14.7. 4. Nothing in this Agreement shall preclude a Party from implementing the suspension of obligations authorised by the DSB. The WTO Agreement shall not be invoked to preclude a Party from suspending obligations under this Chapter.				panel under paragraph 1 of Article 3.28 (Initiation of Arbitration Procedure) and are deemed to be ended when the arbitration panel issues its ruling to the Parties and to the Committee under paragraph 2 of Article 3.32 (Arbitration Panel Ruling) or when the parties have reached a mutually agreed solution under Article 3.39 (Mutually Agreed Solution). 4. Nothing in this Section shall preclude a Party from implementing the suspension of obligations authorised by the DSB. Neither the WTO Agreement nor the EUSFTA shall be invoked to preclude a Party from taking appropriate		

					measures under Article 3.36 (Temporary Remedies in Case of Non-compliance) of this Section.		

APPENDIX IIA: Investment dispute resolution in China comprehensive FTAs & IPAs*

**See APPENDIX IIB for provisions*

	China -New Zealand[837]	China – Singapore[838]	Chin-Peru[839]	China -Costa Rica[840]	Chin-Iceland[841]	China-Canada[842]	China-Switzerland[843]	China-Korea[844]	China – Australia[845]	China – Mauritius[846]	China-Cambodia[847]
Date signed	April 7, 2008	October 23, 2008	April 28, 2009	April 8, 2010	April 15, 2013	September 9, 2012	July 6, 2013	June 1, 2015	June 17, 2015	October 17, 2019	October 12, 2020
Ratified											
In Force											
Recourse to ISDS											

[837] Chapter 11, Section 2,China-New Zealand FTA (including upgrade), Ministry of Commerce People's Republic of China, China FTA Network, -New Zealand FTA at: http://gjs.mofcom.gov.cn/accessory/200804/1208158780064.pdf.

[838] Chapter 10, China- Singapore FTA (including upgrade), Ministry of Commerce People's Republic of China, China FTA Network, China-Singapore FTA at: http://fta.mofcom.gov.cn/singapore/doc/cs_xieyi_en.zip. And See: Investment Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN & the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN at: http://fta.mofcom.gov.cn/topic/china_asean_upgrade.shtml.

[839] Chapter 10, China-Peru FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_10_en.pdf.

[840] Chapter 9, China-Costa Rica FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/gesidalijia/xieyi/xieyi_09_en.rar.

[841] Chapter 11, China-Iceland FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/iceland/xieyi/2013-4-17-en.pdf.

[842] Government of Canada, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng.

[843] Chapter 1 & 15, China-Switzerland FTA, Ministry of Commerce People's Republic of China, China FTA Network, China-Switzerland FTA at: http://fta.mofcom.gov.cn/ruishi/xieyi/xieyi_en.rar.

[844] Chapter 12, China-Korea FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

[845] Chapter 9, Section B, China-Australia FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/Australia/annex/xdzw_en.pdf.

[846] Chapter 8, Section A & B, China-Mauritius FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/mauritius/annex/mlqs_xdzw_en.pdf.

[847] Chapter 8, China-Cambodia FTA, Ministry of Commerce People's Republic of China, China FTA Network at: http://fta.mofcom.gov.cn/cambodia/xieyi/xieyizw_en.pdf.

Traditional ISDS	Art 153	Art 14	Art 139		Art 109	Art 20	Art 15.4	Art 12.12	Art 9.12	Art 8.24	X[848]
ICS											
MIC											
Appeal Tribunal									Art 9.23	Art 8.11	
Recourse to SSDS											
Diplomatic protection		Art 14.8	Art 138			Art 15					
Mutual Solution		*DSM Framework*									
Consultations & Negotiations	Art 152	Art 14	Art 138		Art 108	Art 21	Art 15.3	Art 12.12	Art 9.11	Art 8.23	X
Mediation				Art 17			Art 15.2				
Domestic courts		Art 14	Art 139					Art 12.12		Art 8.32	X
Quasi-WTO Mechanism											
Relation with WTO obligations and other agreements		Art 23			Art 107	Art 33	Art 1.3	Art 12.7			

[848] See appendix II B. The relationship with the ASEAN investment agreement is provided for in the China -Cambodia FTA.

APPENDIX IIB: China comprehensive FTAs & IPAs investment dispute resolution provisions*

**Refer to APPENDIX IIA for official details of the agreements*

	China -New Zealand[849]	China – Singapore [850]	Chin-Peru[851]	China - Costa Rica[852]	Chin-Iceland[853]	China-Canada[854]	China-Switzerland[855]	China-Korea[856]	China – Australia [857]	China – Mauritius [858]	Chin-Cambodia [859] *(See China-Singapore FTA in this table)*
Objective											
Scope					Article 106		Art 15.1 1. Unless otherwise provided in this Agreement, wherever a Party			Art 8.22 This section applies to	

[849] Chapter 11, Section 2.
[850] Chapter 10, China- Singapore FTA (including upgrade). Article 84 provides that "1. the provisions of "ASEAN-China Investment Agreement" shall, mutatis mutandis, be incorporated into this Agreement." The ASEAN-China Investment Agreement" provides for ISDS. Hence the articles falling under ISDS in this graph are derived from this agreement. Article 13 also provides that the provisions of the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the ASEAN shall apply to the settlement of disputes between or amongst the Parties under this Agreement. Hence the SSDS provisions in this table are also derived from that agreement. See: Investment Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN & the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN.
[851] Chapter 10.
[852] Chapter 9.
[853] Chapter 11.
[854] Government of Canada, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments.
[855] Chapter 1 & 15.
[856] Chapter 12.
[857] Chapter 9, Section B.
[858] Chapter 8, Section A & B.
[859] Chapter 8, China-Cambodia FTA. Article 8.1: "1. The Parties recognise the importance of the Agreement Between the Government of the People's Republic of China and the Government of the Kingdom of Cambodia for the Promotion and Protection of Investments of 1996 and Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asia Nations and The People"s Republic of China of 2009 in creating favourable conditions for investments between the Parties, and thus reaffirm the commitments under the Agreements and other arrangements related to investment between the Parties.

					Wherever a Party considers that the other Party has failed to carry out its obligations under this Agreement, the dispute settlement provisions of this Chapter shall apply, except if otherwise provided in this Agreement.		considers that a measure of the other Party is inconsistent with the rights and obligations of this Agreement, the dispute settlement provisions of this Chapter shall apply. 2. Disputes regarding the same matter arising u nder both this Agreement and the WTO Agreement may be settled in either forum at the discretion of the complaining Party. The forum thus selected shall be used to the exclusion of the other. 3. For the purposes of paragraph 2, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, whereas dispute settlement proceedings under this Agreement are deemed to be initiated upon a request for arbitration pursuant to paragraph 1 of Article 15.4.			investment disputes between an investor of a Party and the other Party.	
ISDS											
Traditional ISDS	Art 153. 1. If the dispute cannot be settled as provided for in Article 152 within 6 months from the date of request for consultations and negotiations then, unless the parties to the dispute agree otherwise, it shall, by the choice of the	Art 14. 4. Where the dispute cannot be resolved as provided for under Paragraph 3 within six (6) months from the date of written request for	Art 139. 2. If the dispute cannot be settled through negotiations within 6 months from the date on which the disputing investor		Article 109 1. If the consultation referred to in Article 108 fails to resolve a matter within 60 days from receipt of the request for	Article 20 1. An investor of a Contracting Party may submit to arbitration under this Part a claim that the other Contracting Party has	Art 15.4 1. If the consultations referred to in Article 15.3 fail to resolve a matter within 60 days, or 30 days in relation to urgent matters, after the date of the receipt of the request for consultations by the Party complained against, it may be referred to an arbitration panel by	Art 12.12 3. The investment dispute shall on the request of the disputing investor be submitted to either41: (a) a competent court of the	Art 9.12 1. This Section applies where there is a dispute between a Party and an investor of the other Party relating to a covered	Art 8.24 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultations pursuant to Article 8.23	

	investor, be submitted to: (a) conciliation or arbitration by the International Centre for the Settlement of Investment Disputes ("ICSID") under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (b) arbitration under the rules of the United Nations Commission on International Trade Law ("UNCITRAL"); provided that the investor shall give the state party 3 months' notice prior to submitting the claim to arbitration under paragraph 1(a) or 1(b). 2. Upon the receipt of a notice referred to in paragraph 1, the state party may require the investor concerned to go through any applicable domestic administrative review procedures specified by the laws and regulations of the state party, which may not exceed 3 months, before the submission of the claim to arbitration	consultations and negotiations, unless the parties to the dispute agree otherwise, it may be submitted at the choice of the investor: (a) to the courts or administrative tribunals of the disputing Party, provided such courts or administrative tribunals have jurisdiction; or (b) under the International Centre for Settlement of Investment Disputes (ICSID) Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention; or (c) under the ICSID	requested for the consultation or negotiation in writing, and if the disputing investor has not submitted the dispute for resolution to the competent court or any other binding dispute settlement mechanism of the Party receiving the investment, it may be submitted to one of the following international conciliation or arbitration fora by the choice of the investor: (a) conciliation or arbitration in accordance with the International Center for Settlement of Investment Disputes (ICSID), under the Convention on the Settlement of Disputes		consultations, the complaining Party may request in writing the establishment of an arbitral panel to consider the matter. 2. The complaining Party shall state in the request the measure complained of, indicate the provisions of this Agreement that it considers relevant, and deliver the request to the other Party. An arbitral panel shall be established upon receipt of a request.	breached an obligation: (a) under Articles 2 to 7(2), 9, 10 to 13, 14(4) or 16, if the breach is with respect to investors or covered investments of investors to which sub paragraph (b) does not apply, or… Article 22 1. A disputing investor who meets the conditions precedent provided for in Article 21 may submit the claim to arbitration under: (a) the ICSID Convention, provided that both Contracting Parties are parties to that Convention; (b) the Additional Facility Rules of ICSID, provided	means of a written request from the complaining Party to the other Party. 6. If any member of the arbitration panel has not been designated within 30 days after the Receipt of the written request for arbitration in accordance with paragraph 1, at the request of Any Party to the dispute, the Director General of the WTO is expected to designate a member Within a further 30 days. In the event that the Director General of the WTO is a national of Any Party or unable to perform this task, the Deputy Director General of the WTO who is not A national of any Party shall be requested to perform such task. If the Deputy Director General Of the WTO is unable to perform this task as well, the President of the International Court of Justice (ICJ) shall be requested to perform this task. In the event that the President of the ICJ Is a national of either Party, the Vice President of the ICJ who is not a national of a Party shall Be requested to perform this task.	disputing Party; (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available; (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available; (d) arbitration under the UNCITRAL Arbitration Rules; or (e) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules, provided that, for the purposes of subparagraphs (b) through (e): (i) the investment dispute cannot be settled	investment made in accordance with the Party's laws, regulations and investment policies.5 2. In the event that an investment dispute cannot be settled by consultations under Article 9.11 within 120 days after the date of receipt of the request for consultations, (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached an obligation in Article 9.3; and (ii) that the claimant has incurred loss or damage by reason of, or arising out	(Consultations) and 180 days have elapsed since the date of the request for consultations: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached: (A) an obligation under Article 8.3 (National Treatment), Article 8.4 (Most-Favoured Nation Treatment), Article 8.5 (Minimum Standard of Treatment), Article 8.6 (Compensation for Losses), Article 8.7 (Expropriation and Compensation), Article 8.8 (Transfers) and Article 8.10 (Senior Management and Board of	

	under paragraph 1(a) or 1(b). 3. In case a dispute has been submitted to a competent domestic court, it may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic courts before a final judgment has been reached in the case. 4. The arbitration rules applicable under paragraph 1, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Section. 5. The arbitration award shall be final and binding upon both parties to the dispute. Each party shall commit itself to the enforcement of the award.	Additional Facility Rules, provided that either of the disputing Party or no disputing Party is a party to the ICSID Convention; or (d) to arbitration under the rules of the United Nations Commission on International Trade Law; or (e) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules. 6. The submission of a dispute to conciliation or arbitration under Sub-paragraphs 4(b), 4(c), 4(d) or 4(e) in accordance with the provisions of this Article, shall be conditional	between States and Nationals of Other States, done at Washington on March 18th, 1965; (b) conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes so long as the ICSID Convention is not in force between the Parties; (c) arbitration under the arbitration Rules of the United Nations Comission on International Trade Law; and (d) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules.			that one Contracting Party, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules, as supplemented or modified by the rules set out in this Agreement or adopted by the Contracting Parties.		through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Party; and (ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.	of, that breach;6 or (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim: (i) that the respondent has breached an obligation under Article 9.3; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. 4. A claimant may submit a claim referred to in paragraph 2: (a) under the ICSID Convention	Directors); or (B) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim: (i) that the respondent has breached: (A) an obligation under Article 8.3 (National Treatment), Article 8.4 (Most-Favoured Nation Treatment), Article 8.5 (Minimum Standard of	

		upon: (a) the submission of the dispute to such conciliation or arbitration taking place within three (3) years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the investor or its investment; and							and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules, except as modified by this Agreement and the Side Letter on Transparency Rules Applicable to ISDS; or (d) if the claimant and respondent	Treatment), Article 8.6 (Compensation for Losses), Article 8.7 (Expropriation and Compensation), Article 8.8 (Transfers) and Article 8.10 (Senior Management and Board of Directors); or (B) an investment agreement; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach26, provided that a claimant may submit pursuant to subparagraph (a)(i)(B) or (b)(i)(B) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered	

									agree, to any other arbitration institution or under any other arbitration rules.	investment that was established or acquired, in reliance on the relevant investment agreement. 3. Provided that 24 months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing	

										Party is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules27; or (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.	
ICS											
MIC											
Appeal Tribunal						÷			Art 9.23 Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced	Art 8.11 6. (a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by	

									after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.	this Chapter. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter. (b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to: (i) a reasonable opportunity to support or defend their respective positions; and (ii) a decision based on the evidence and submissions of record or, where required by its domestic law, the record	

										compiled by the administrative authority. (c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue. (d) This paragraph shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system. Art 8.28	

										8. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 8.30 (Awards)should be subject to that appellate mechanism.	
SSDS											
Diplomatic protection		Art 14(8). No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and any one of the other Parties	Art 138 1. Any dispute between the Parties concerning the interpretation or application of this Chapter shall, as far as possible, be settled with			Article 15 Disputes between the Contracting Parties 1. Any dispute between the Contracting Parties concerning the interpretatio n or					

		shall have consented to submit or have submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this Paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.	consultation through diplomatic channel. 2. If a dispute cannot thus be settled within 6 months, it shall, upon the request of either Party, be submitted to an ad hoc arbitral tribunal. 3. Such tribunal comprises of 3 arbitrators. Within 2 months of the receipt of the written notice requesting arbitration, each Party shall appoint one arbitrator. Those 2 arbitrators shall, within further 2 months, together select a national of a third State having diplomatic relations with both Parties who, upon approval by the Parties,			application of this Agreement shall, as far as possible, be settled by consultation through diplomatic channels.				

			shall be appointed as Chairman of the arbitral tribunal. 4. If the arbitral tribunal has not been constituted within 4 months from the receipt of the written notice requesting arbitration, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said functions, the Member of the International Court of								

			Justice next in seniority who is not a national of either Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments. 5. The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Parties. 6. The arbitral tribunal shall reach its award by a majority of votes. Such								

			award shall be final and binding upon both Parties. The arbitral tribunal shall, upon the request of either Party, explain the reasons of its award. 7. Each Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Parties.								
Mutual Solution		DSM Framework Art 4. The parties to a dispute shall make every effort to reach a mutually satisfactory resolution of any matter through consultations.									Art 8.23 2. After a request for consultations is made pursuant to this Section, the claimant and the respondent shall enter into consultations with a view to reaching a

											mutually satisfactory solution.
Consultations & negotiations	Art 152. Any legal dispute arising under this Chapter between an investor of one Party and the other Party, directly concerning an investment by that investor in the territory of that other Party, shall, as far as possible, be settled amicably through consultations and negotiations between the investor and that other Party, which may include the use of non-binding third-party procedures, where this is acceptable to both parties to the dispute. A request for consultations and negotiations shall be made in writing and shall state the nature of the dispute.	Art 14. Where the dispute cannot be resolved as provided for under Paragraph 3 within six (6) months from the date of written request for consultations and negotiations. 9. Where an investor claims that the disputing Party has breached Article 8 (Expropriation) by the adoption or enforcement of a taxation measure, the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in	Art 138 1. Any dispute between the Parties concerning the interpretation or application of this Chapter shall, as far as possible, be settled with consultation through diplomatic channel. Art 139 1. Any dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.		Art 108 1. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of any dispute through consultations under this Article or other consultative provisions of this Agreement. 2. The request for consultations shall be submitted in writing and shall set out the reasons for the request, including identification of the measure at issue and an indication of the legal basis for the complaint. The complaining Party shall deliver the	Art 21 1. Before a disputing investor may submit a claim to arbitration, the disputing parties shall first hold consultations in an attempt to settle a claim amicably.	Art 15.3 1. A Party may request in writing consultations with the other Party if it considers that a measure is inconsistent with the rights and obligations of this Agreement. The request for consultations shall set out the reasons for the request, including identification of the measure at issue and a brief summary of the legal basis for the complaint. The other Party shall reply to the request within ten days after the date of its receipt. 2. Consultations shall commence within 30 days from the date of receipt of the request for consultations. Consultations on urgent matters shall commence within 15 days from the receipt of the request for consultations. If the Party to which the request is made does not reply within ten days or does not enter into consultations within 30 days from the date ofreceipt of the request for consultations, or within 15 days for urgent matters, the Party making the request is entitled to request the establishment of an arbitration panel in accordance with Article 15.4. 3. The complaining Party shall provide sufficient information to facilitate finding a solution during the consultations. Each Party shall treat any confidential or proprietary information exchanged in the course of consultations in	Art 12.12 2. Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute (hereinafter referred to in this Article as "disputing investor") and the Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Party"). A written request for consultation shall be submitted to the disputing Party by the disputing investor before the submission	Art 9.11 1. In the event of an investment dispute, after two months since the occurrence of the measure or event giving rise to the dispute, the claimant may deliver to the respondent a written request for consultations.	Art 8.23 1. In the event of an investment dispute, if the claimant intends to submit the dispute to arbitration, it shall deliver a request for consultations to the respondent at least 180 days prior to submission of the dispute to arbitration.	Art 8.23 2. After a request for consultations is made pursuant to this Section, the claimant and the respondent shall enter into consultations with a view to reaching a mutually satisfactory solution.

		question has an effect equivalent to expropriation or nationalisation. Any tribunal that may be established under this Article shall accord serious consideration to the decision of both Parties under this Paragraph. 10. If both Parties fail either to initiate such consultations, or to determine whether such taxation measure has an effect equivalent to expropriation or nationalisation within the period of one hundred eighty (180) days from the date of receipt of the request for consultation referred to in Paragraph 4, the disputing investor shall			request to the other Party. 3. If a request for consultations is made, the Party complained against shall reply to the request within 10 days from the date of its receipt and shall enter into consultations in good faith within a period of not more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Party complained against does not respond within the aforesaid 10 days, or does not enter into consultations within1. The Parties shall make every		the same manner as the Party providing the information. 4. The consultations shall be confidential and without prejudice to the rights of the Parties in any further proceedings.	of the investment dispute to the arbitration set out in paragraph 3.			

		not be prevented from submitting its claim to arbitration in accordance with this Article. DSM Framework Art 4. 1. A party complained against shall accord due consideration and adequate opportunity for consultations regarding a request for consultations made by a complaining party with respect to any matter affecting the implementation or application of the Framework Agreement whereby: (a) any benefit accruing to the complaining party directly or indirectly under the Framework			attempt to arrive at a mutually satisfactory resolution of any dispute through consultations under this Article or other consultative provisions of this Agreement. 2. The request for consultations shall be submitted in writing and shall set out the reasons for the request, including identification of the measure at issue and an indication of the legal basis for the complaint. The complaining Party shall deliver the request to the other Party. 3. If a request for consultations is made, the Party						

		Agreement is being nullified or impaired; or (b) the attainment of any objective of the Framework Agreement is being impeded, as a result of the failure of the party complained against to carry out its obligations under the Framework Agreement			complained against shall reply to the request within 10 days from the date of its receipt and shall enter into consultations in good faith within a period of not more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Party complained against does not respond within the aforesaid 10 days, or does not enter into consultations within the aforesaid 30 days, then the complaining Party may proceed directly to request the establishment of an						

					arbitral panel. 4. The consultations shall be confidential and are without prejudice to the rights of either Party in any further proceedings.						
Mediation				Art 17. Chapter 14 (Dispute Settlement) shall not apply to this Section, except for Article 144 (Good Offices, Conciliation and Mediation). Art144 1. Good offices, conciliation and mediation are procedures undertaken voluntarily if the Parties so agree.			Art 15.2 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the Parties so agree. They may begin and be terminated at any time. They may continue while procedures of an arbitration panel established in accordance with this Chapter are in progress. 2. Proceedings involving good offices, conciliation and mediation shall be confidential and without prejudice to the Parties' rights in any other proceedings.				

				2. Proceedings involving good offices, conciliation and mediation, and in particular the positions taken by the Parties during these proceedings, shall be confidential and without prejudice to the rights of either Party in any further proceedings under this Chapter. 3. Good offices, conciliation or mediation may be requested at any time by either Party. They may begin at any time and be terminated at any time.							

Domestic Courts		Art 14. 4(a)...it may be submitted at the choice of the investor: (a) to the courts or administrative tribunals of the disputing Party, provided such courts or administrative tribunals have jurisdiction... 5. In case a dispute has been submitted to a competent domestic court, it may be submitted to international dispute settlement, provided that the investor concerned has withdrawn its case from the domestic court before a final judgement has been reached in the case. In the case of Indonesia, Philippines, Thailand, and	Art 139. 2. If the dispute cannot be settled through negotiations within 6 months from the date on which the disputing investor requested for the consultation or negotiation in writing, and if the disputing investor has not submitted the dispute for resolution to the competent court or any other binding dispute settlement mechanism of the Party receiving the investment, it may be submitted to one of the following international conciliation or arbitration fora by the choice of the investor:					Art 12.12 7. When the disputing investor submits a written request for consultation to the disputing Party under paragraph 2, the disputing Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Party before the submission to the arbitration set out in paragraph 3. The domestic administrative review procedure shall not exceed four months from the date on which an application for the review is		Art 8.32 Nothing in this Section shall prevent the claimant from resorting to remedies before domestic fora within twenty-four months of the event giving rise to an investment dispute where there has been no amicable settlement of the dispute.	

		Viet Nam, once the investor has submitted the dispute to their respective competent courts or administrative tribunals or to one of the arbitration procedures stipulated in Sub-paragraphs 4(b), 4(c), 4(d) or 4(e), the choice of the procedure is final. DSM Framework Art 5 1. The parties to a dispute may at any time agree to conciliation or mediation. They may begin at any time and be terminated by the parties concerned at any time. 2. If the parties to a dispute agree, conciliation or mediation						filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3. The investor may file an application for the review unless the four months consultation period as provided in paragraph 3 has elapsed.			

		proceedings may continue before any person or body as may be agreed by the parties to the dispute while the dispute proceeds for resolution before an arbitral tribunal appointed under Article 6. 3. Proceedings involving conciliation and mediation and positions taken by the parties to a dispute during these proceedings, shall be confidential, and without prejudice to the rights of any Party in any further or other proceedings. .									
Quasi-WTO											
Relation with WTO rights and bligations		Article 23 Nothing in this Agreement			Article 107 1. Where a dispute arises under	Art 33 7. Any measure adopted by a	Art 1.3 1. The Parties confirm their rights and obligations under the WTO Agreement and the	Art 12.7 1. The provisions of the		.	

and other agreements		shall derogate from the existing rights and obligations of a Party under any other international agreements to which it is a party			this Agreement and under other agreements, including another free trade agreement to which both Parties are parties or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. 2. Once the complaining Party has requested a panel under other agreements referred to in paragraph 1, the forum selected shall be used to exclude application of dispute settlement provisions under this Agreement.	Contracting Party in conformity with a decision adopted by the World Trade Organization pursuant to Article IX:3 of the WTO Agreement shall be deemed to be also in conformity with this Agreement.	other agreements negotiated thereunder to which they are parties and any other international agreement to which they are parties.	Agreement on Trade-Related Investment Measures in Annex 1A to WTO Agreement are incorporated into and made part of this Chapter, mutatis mutandis and shall apply with respect to all covered investments under this Chapter.			

FIGURES

**These figures are compiled by the author of this dissertation, from EU New Generation Agreements and China Comprehensive Agreements*

FIGURE 1: EU-China Position on ISDS*

*See APPENDICES IB & IIB

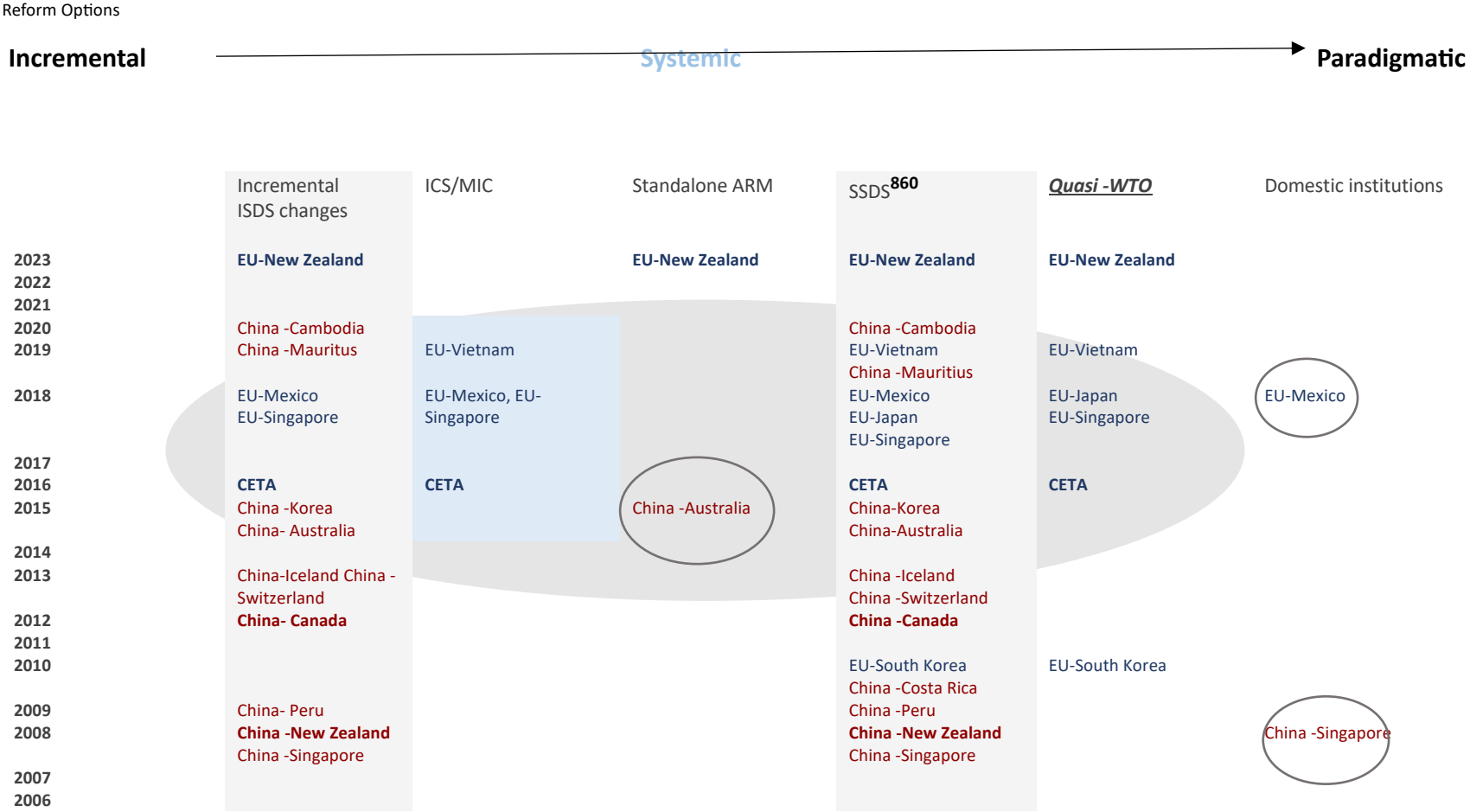


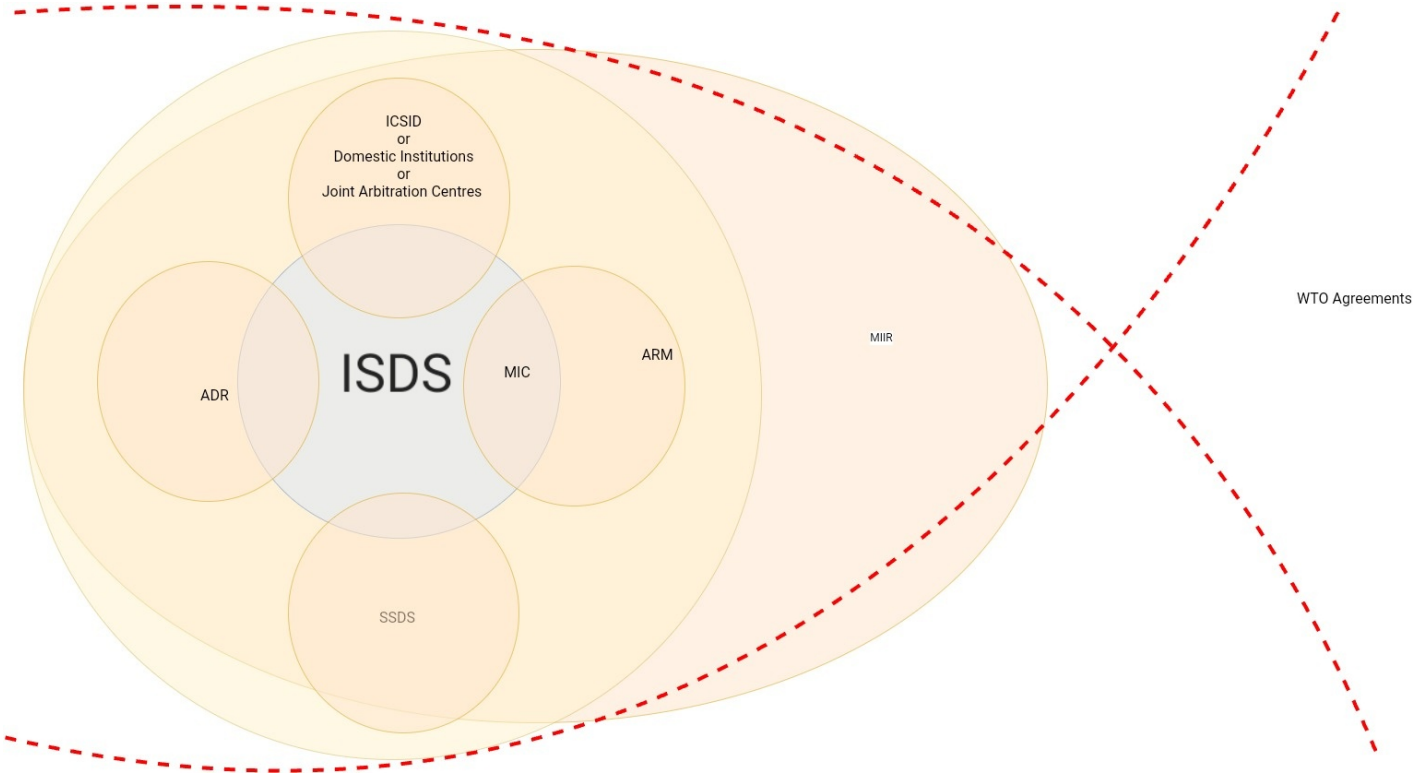
DIAGRAM I: EU-China position on ISDS in a New World Order

[860]Diplomatic protection, mutual solutions, Consultations and Mediation.

EU Agreements in BLUE

China Agreements in RED

FIGURE 2: 'ISDS in a New World Order' Model*[861]



[861]* Compiled with data from investment dispute mechanisms in EU New Generation Agreements and China Comprehensive FTAs, discussed in Chapter Five of the dissertation.