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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Урегулирование споров между инвесторами и государством

Макане Моиз Мбенге

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Investor-State Dispute Settlement

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Настоящее издание содержит материалы лекций Макане Моиз Мбенге по теме «Урегулирование споров между инвесторами и государством», прочитанных им в рамках Летней Школы по международному публичному праву 2021 года.

The present publication contains the text of lectures by Makane Moïse Mbengue on the topic “Investor-State Dispute Settlement”, delivered by him within the frames of the Summer School on Public International Law 2021.

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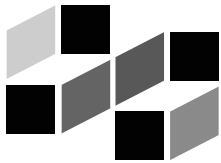

ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ

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В 2021 году Летняя Школа состоялась в четвёртый раз. Как и в 2020 году, в связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Международное инвестиционное право». Их прочитали Самуэль Вордсворт («Международное инвестиционное право: история, настоящее, перспективы»), Анна Жубан-Брет («Материально-правовые стандарты защиты в международном инвестиционном праве»), Катарина Тити («Право на регулирование в международном инвестиционном праве»), Сергей Усоскин («Иностранные инвестиции и инвесторы»), Макане Моиз Мбенге («Урегулирование споров между инвесторами и государством»). Общий курс международного публичного права прочёл Рюдигер Вольфрум.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову, С. В. Усоскину — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

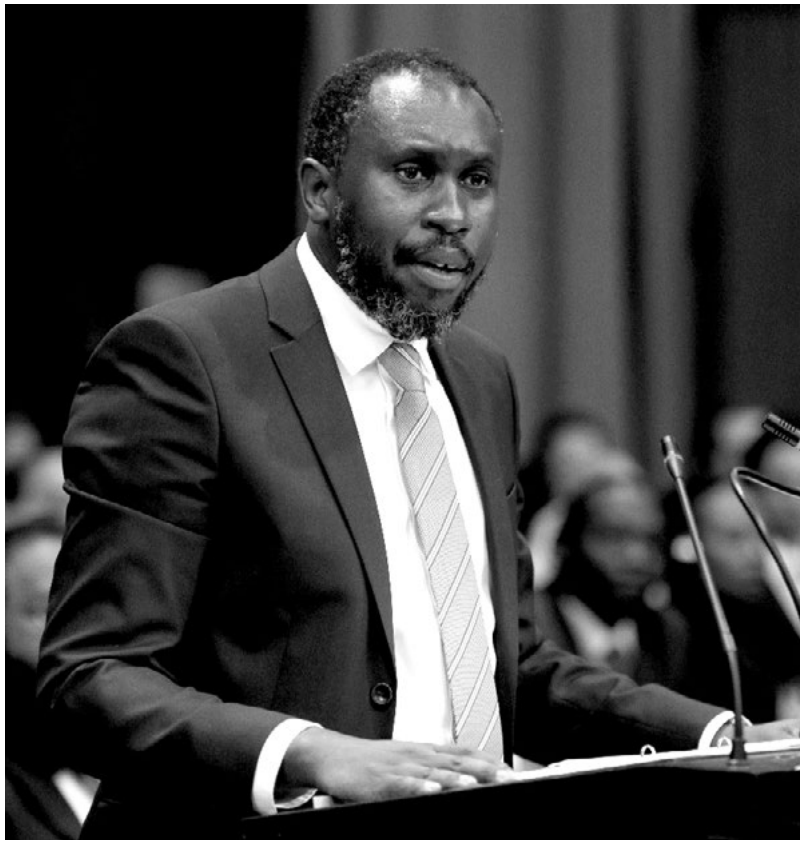
Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2021, the Summer School was held for the fourth time. As in 2020, due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "International Investment Law". The courses were delivered by Samuel Wordsworth ("International Investment Law — History, Present, Perspectives"), Anna Joubin-Bret ("Substantive Standards of Protection in International Investment Law"), Catharine Titi ("The Right to Regulate in International Investment Law"), Sergey Usoskin ("Foreign Investments and Investors"), and Makane Moïse Mbengue ("Investor-State Dispute Settlement"). The General Course on Public International Law was delivered by Rüdiger Wolfrum.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, Bakhtiyar Tuzmukhamedov, and Sergey Usoskin — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.



Макане Моиз Мбенге

Макане Моиз Мбенге — профессор международного права и заведующий кафедрой международного публичного права и международных организаций юридического факультета Женевского университета, а также ассоциированный профессор в Институте политических наук в Париже (Школа права). Он получил докторскую степень в области международного публичного права в Женевском университете. Профессор Мбенге выступает в качестве эксперта для ряда международных организаций, в том числе Африканского союза, Генерального секретаря ООН, Экономической комиссии ООН для Африки, Программы ООН по окружающей среде, Всемирной организации здравоохранения, Всемирного банка, Международной организации труда, ЮНКТАД, Управления Верховного комиссара ООН по правам человека. Он также выступает в качестве консультанта и арбитра в спорах, рассматриваемых международными судами и трибуналами (в частности, в Международном Суде и трибуналах по инвестиционным спорам), а также в качестве советника государств. В феврале 2021 года профессор Мбенге был избран членом куратория Гаагской академии международного права. Автор ряда публикаций в области международного права, ассоциированный член Института международного права и Президент Африканского общества международного права с 2017 года.

Makane Moïse Mbengue

Makane Moïse Mbengue is a Professor of international law and Head of the Department of Public International Law and International Organization at the Faculty of Law of the University of Geneva. He is also an Affiliated Professor at Sciences Po Paris (School of Law). He holds a Ph.D. in Public International Law from the University of Geneva. Professor Mbengue acts as an expert for international organizations, including the African Union, the Secretary-General of the United Nations, the United Nations Economic Commission for Africa, the United Nations Environment Programme, the World Health Organization, the World Bank, the International Labour Organization, the United Nations Conference on Trade and Development, the UN Office of the High Commissioner on Human Rights, and others. He also acts as counsel and arbitrator in disputes before international courts and tribunals (in particular, before the International Court of Justice and in investment cases) and as an advisor for governments. Professor Mbengue was elected a Member of the Curatorium of The Hague Academy of International Law in February 2021. He is the author of several publications in the field of international law. Professor Mbengue is an Associate Member of the Institut de Droit International and the President of the African Society of International Law since 2017.

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1.

Introduction: The Development of Investor-State Dispute Settlement

The international investment law regime is currently undergoing a process of reform. At the core of this reform process is ISDS, or rather, a focus on the resolution of investment disputes, which may not necessarily involve an investor-state approach.

The development of international investment law, and specifically investor-state dispute settlement ("ISDS"), is relatively recent in the timeline of the development of international law. While the origins of international law can be traced back to the seventeenth century,[1] and foreign investment protection provisions could be found in international conventions,[2] treaties incorporating ISDS originated only in the second half of the twentieth century.[3]

In the years following the Second World War, the US started incorporating investment protection provisions in treaties of Friendship Commerce and Navigation ("FCN treaties"). However, these provisions lacked means of enforcement.[4] The post-war years were also the years of decolonisation. The newly decolonised and newly sovereign nations, with the goal of economic independence, sought to nationalise their assets such as natural resources to a large extent. This led to a wide-scale expropriation of foreign

[1] A. Clapham, "The Origins of International Law", in A. Clapham (ed), *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, OUP 2012) 1.
[2] K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 19.
[3] T. St John, "The Creation of Investor-State Arbitration", in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 808.
[4] K.J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017) 179–223.

assets within their territory, without payment of any compensation. These actions coincided with, or rather led to the proposal, in 1974, of the New International Economic Order ("NIEO") by these newly decolonised developing states.[5] The United Nations General Assembly adopted two resolutions that constitute the pillars of this NIEO.[6] General Assembly Resolution 1803 (XVII), titled "Permanent Sovereignty over Natural Resources", adopted on 14 December 1962,[7] emphasised the need for states and international organisations to "strictly and conscientiously respect the sovereignty of peoples and nations" over the use, management, and disposal of their natural resources. Resolution 3281 (XXIX), meanwhile, titled "Charter of Economic Rights and Duties of States", adopted on 12 December 1974,[8] stressed each state's right to regulate and oversee the activities of transnational corporations within its national jurisdiction, as well as to "take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic policies". It was further emphasised that relations among states should be governed by, *inter alia*, respect for human rights and fundamental freedoms.

Among other things, the NIEO asserted the right of states to expropriate foreign assets, to pay compensation according to domestic laws, and to arbitrate disputes in domestic courts.[9] The NIEO thus became a source of concern for those who invested in foreign countries. A large number of these foreign investors came from Europe.

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[5] UNGA Res 3201 (S-VI) "Declaration on the Establishment of a New International Economic Order" (1 May 1974) GAOR 6th Spec Session Supp 1.

[6] M.M. Mbengue, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law" (2019) 34 ICSID Review 455, 457.

[7] Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962).

[8] Charter of the Economic Rights and Duties of States, UNGA Res 3037 (XXVII) (19 December 1972).

[9] F.V. Garcia-Amador, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation" (1980) 12 University of Miami Inter-American Law Review 1, 41.

West Germany, however, due to its history of seizure of overseas assets by Allied powers, had already taken steps to reassure investors that their future investments would be protected. This was through a government-backed expropriation insurance scheme, along with a network of bilateral investment treaties ("BITs"), which were similar to the FCN treaties that came before them. The first BIT in the world was signed between Pakistan and West Germany in 1959. Thereafter, in the wake of the NIEO, the UK, France, and other European countries followed West Germany's lead and started participating in BITs too. At present, more than 2800 BITs have been signed worldwide, though only 2270 are in force.[10]

It must be noted, however, that ISDS did not develop with this proliferation of BITs. The very first Germany-Pakistan BIT does not contain ISDS provisions. It envisages the settling of disputes between the two contracting states. Indeed, originally investors had to rely on their state of nationality to espouse their claim through diplomatic protection, if recourse to domestic courts in the host state failed.[11]

The arbitral award in *Texaco v Libya*[12] was a landmark shift from national jurisdiction over investment law towards accepting the internationalisation of concession contracts, thereby influencing future ISDS practice.[13] For the first time in the history of international arbitration, a sovereign state was obliged to specifically perform its contractual obligations with foreign investors, and the injured investors were entitled to restitution.

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[10] UNCTAD Investment Policy Hub, "International Investment Agreements Navigator" <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 19 October 2021.

[11] See *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (2nd Phase), [1970] ICJ Rep 3.

[12] *Texaco Overseas Petroleum Company v Libya* (1979) Ybk Comm Arb 177.

[13] See J. Cantegreil, "The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law" (2011) 22 EJIL 441, 442.

ISDS further developed and expanded through the efforts of the World Bank in creating the International Centre for the Settlement of Investment Disputes ("ICSID") and a number of other arbitral institutions[14] providing services for investors and host states to settle their disputes in a neutral forum.

The ICSID was established by the ICSID Convention in 1965, under the aegis of the World Bank. There are at present 156 Contracting States.[15] The primary purpose, with which this Convention and the Centre were conceived, was the promotion of foreign investment. It also aimed to facilitate a system of settlement of investment disputes that would be agreed upon by a large number of states — a neutral forum for dispute settlement amenable both to investors wary of domestic courts of host states and to host states wary of the actions of foreign investors. This was a novel system — the first time that non-state entities, whether corporations or individuals, could sue states directly, a system in which State immunity was restricted, international law could be applied directly to the relationship between the investor and the host state, the operation of the local remedies rule was excluded, and the tribunal's award would be directly enforceable within the territories of the state parties.[16] Affiliation to the World Bank is also said to be a factor in the enforcement of ICSID awards — there is a perception that failure to respect an ICSID award would have indirect political consequences in terms of credibility with the World Bank.[17]

[14] See eg the Permanent Court of Arbitration, the Stockholm Chamber of Commerce, and the International Chamber of Commerce.
[15] ICSID, "Database of ICSID Member States" <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 14 October 2021.
[16] C. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) ix.
[17] L. Reed, J. Paulsson et al, *Guide to ICSID Arbitration* (2nd edn, Kluwer Law International 2010) 16.

Resort to ICSID as a mode of dispute settlement has increased considerably in the past few decades,[18] especially due to the proliferation of BITs and other similar multilateral investment agreements, providing for ICSID as a forum for investor-state dispute resolution.

However, a few prominent states are not parties to the ICSID Convention. These include Canada, Brazil, Russia, Mexico, and India. A number of states have also withdrawn from the Convention, starting with Bolivia in 2007. Bolivia's withdrawal signalled the start of the trend of hostility towards ISDS, which spread to Ecuador, Venezuela, and others over the years.[19] Of course, this ICSID withdrawal has to be seen in the light of other conduct of these states, such as the existing number of BITs and other investment-related treaties they are party to. Even without ICSID, the possibility of ISDS remains through other fora such as UNCITRAL arbitration, NAFTA[20] (now being phased out and replaced by the United States — Mexico — Canada Agreement), and other multilateral treaties. Moreover, several BIT provisions have sunset clauses of up to 20 years, allowing for ICSID arbitration even a few decades after a state has denounced the Convention.[21]

Apart from these sunset clauses, many investment treaties also include minimum periods of application, ranging typically from five to twenty years. Some investment agreements even combine

[18] ICSID, "The ICSID Caseload — Statistics" (Issue 2021-2) <http://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf> accessed 20 December 2021, 7–8.

[19] Ecuador has, however, signed the ICSID Convention again this year, 12 years after denouncing it: ICSID, "Ecuador signs the ICSID Convention" <http://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention> accessed 20 December 2021.

[20] North American Free Trade Agreement, 17 December 1992 (32 ILM 289, 605 (1993)) ("NAFTA").

[21] UNCTAD, "Denunciation of The ICSID Convention And BITS: Impact on Investor-State Claims" IIA Issues Note No. 2 (December 2010) <http://unctad.org/system/files/official-document/webdiaeia20106_en.pdf> accessed 20 December 2021, 2.

clauses of a minimum period of application with provisions of automatic renewal.[22] Along with the sunset or survival clauses, these provisions aim to guarantee that investors who have committed capital to the host country are not suddenly deprived of the benefit of an investment treaty following termination.[23] An example of a survival clause can be found in the Energy Charter Treaty ("ECT"),[24] providing for a twenty-year survival period in respect of existing investments.[25]

By the 1990s, ISDS fanned out across the globe, with governments eager to attract foreign investment. BITs turned from being informal focal points for diplomatic negotiation, with ISDS as a minor technical addition, to treaties that primarily serve as instruments to legally bind states into certain policies. Multilateral treaties including investment provisions also included ISDS.[26] It is only after that, that a dramatic growth in the number of investor-state disputes was seen, robust use of the system of ISDS, whether in ICSID or outside it. The greater part of these developments was shaped by capital-exporting countries in Europe and North America. This growth was immediately followed by the backlash against ISDS, either through withdrawal from ICSID or termination of BITs. India is one such country that put a moratorium on signing new BITs in 2012 and formulated a new Model BIT in 2015, which restricted a number of substantive obligations.[27] South Africa moved towards excluding ISDS in its investment agreements.

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[22] Agreement between Belgium and Indonesia on the Encouragement and Reciprocal Protection of Investments, 15 January 1970, Art 12(2).

[23] J. Harrison, "The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties" (2012) 13 JWIT 928, 930.

[24] Energy Charter Treaty (1994) 2080 UNTS 100 (ECT), Article 47(3).

[25] ECT (ibid) Article 45(3)(b) provides for a similar survival period with respect to provisional application of the ECT.

[26] See eg NAFTA (n 20) Chapter 11; ECT (n 24) Article 26.

[27] Model Text for the Indian Bilateral Investment Treaty (2015) <http://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 19 December 2021.

These events in the past few decades have paved the way for a rethinking of how the ISDS system works, and a call for reforms. The US, Mexico, and Canada, through NAFTA, led an important step towards regionalism in ISDS, which is also reflected in the regional responses to reform in the field.

However, the newly drafted US-Mexico-Canada Agreement (USMCA, CUSMA, or T-MEC), which entered into force only in 2020 and replaces the NAFTA, shows a marked departure from NAFTA in terms of ISDS provisions. Canada chose not to apply the ISDS chapter to itself, thus ISDS claims cannot be asserted against Canada or by Canadian investors against either the US or Mexico. As for disputes between the US and Mexico, there is a requirement to exhaust remedies in local courts or wait for thirty months to elapse before bringing an international claim.

The concerns regarding ISDS stem from the increasing number of disputes with tribunals expansively interpreting provisions around investment protection. Thus, there is increasing unease regarding the balance between the rights and obligations of states and those of investors, along with concerns about the predictability, legitimacy, and transparency of the system of ISDS. This ongoing legitimacy crisis[28] in international investment law, particularly in ISDS, has triggered a comprehensive attempt at multilateral reform.

The rejection of ISDS is evidenced in withdrawal from treaties allowing for ISDS — by developing states such as Bolivia, Ecuador and South Africa. This was subsequently followed by declarations

[28] S. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521; C.N. Brower and S.W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009) 9 Chicago J Intl Law 473; M. Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

by developed countries as well — Germany,[29] Italy,[30] and France[31] renouncing their support in various ways for ISDS.

ISDS has been perceived as a threat to general societal interests giving special procedural rights to foreign investors.[32] The traditional investment arbitral system has been set up like a private dispute settlement mechanism that is modelled on how disputes between private parties are settled in commercial arbitration. However, arbitral tribunals review regulatory acts and policy, and thus rather fulfil public governance functions.[33] The private character of investment arbitration plays a major part in the legitimacy crisis of the system as a whole as it is for many not the proper mechanism for reviewing regulatory measures.[34] Efforts at reform with respect to the ISDS mechanism have thus tried to move from the arbitration model and to render the procedure more like a public law dispute settlement system, taking inspiration from domestic court systems.

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[29] S. Donnan and S. Wagstyl, "Transatlantic Trade Talks Hit German Snag" *Financial Times* (14 March 2014).

[30] A. De Luca, "Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom" (2015) 3 Transnational Dispute Management <http://www.transnational-dispute-management.com/article.asp?key=2232> accessed 20 December 2021.

[31] Euractiv, "France and Germany to form united front against ISDS" (15 January 2015) <http://www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds/> accessed 20 December 2021.

[32] S. Schacherer, "The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development" (2017) 1 Geneva Jean Monnet Working Paper <http://www.ceje.ch/files/9715/1057/7250/Schacherer_Stefanie_FINAL.pdf> accessed 10 September 2021.

[33] S. Schill, "Authority, Legitimacy and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals", in S. Griller, W. Obwexer and E. Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).

[34] J. Wouters and N. Hachez, "The Institutionalization of Investment Arbitration", in M.C. Cordonier Segger, M. Gehring and A. Newcombe (eds), *Sustainable Development and World Investment Law* (Kluwer Law International 2011) 615, 627.

The following sections first explore the key criticisms levelled against ISDS in its current form — some specific contentious issues in the context of ISDS reform (**2**). This is followed by discussions surrounding ISDS reform first at the global level, including at UNCITRAL and the ICSID (**3**), followed by talks at the regional level (**4**). Thereafter, the manuscript concludes with observations on the way forward in settling investment disputes (**5**).

2.

Criticisms Levelled at ISDS: Reasons for the Call for Reforms

ISDS in its current form, while largely treaty-based and thus rooted in public international law and thus involving a public interest angle, is considered by most practitioners and arbitrators settling disputes to be akin to private arbitration. This perspective is at the root of many calls for reform.[35]

One of the criticisms of ISDS can be seen in the report of the UN Human Rights Council's Independent Expert at the 33rd session of the Human Rights Council in 2015. At this session, the Expert reported on the impact of international investment law on human rights,[36] and his focus in one section was on the challenge posed to democracy and the rule of law by ISDS. He observed that critics "question the legitimacy of tribunals where the investor can sue the State but not vice versa".[37]

The growing wave of investor-state disputes has further fuelled the heightening perception of structural imbalances in BITs that give foreign investors an unfair advantage, both through substantive provisions and procedural ones such as ISDS. Investor-state arbitral tribunals, it is alleged,[38] with no oversight by domestic

[35] G. Vidigal and B. Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) 19 JWIT 475.
[36] UN Human Rights Council, Thirtieth Session, Agenda item 3, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas" UN Doc A/HRC/30/44 (14 July 2015).
[37] Ibid 9, para 16.
[38] See eg H.T. Shin and L. (K.H.) Chung, "Korea's Experience with International Investment Agreements and Investor-State Dispute Settlement" (2015) 16 JWIT

courts, tend to favour the private interests of foreign investors rather than the public interests of host states. The outcome is also often a declaration of a large sum of compensation payable by the host state to the investor. Some commentators are of the view that obligations under BITs are owed to investors; while some others believe that they are owed jointly to the home State and their investors.[39] The perception of ISDS as akin to private, contractual dispute resolution has nevertheless been criticised. The resulting view of investors being protected ISDS, and that this protection was being abused by the investors, is what has primarily led to the "backlash"[40] against it. While this kind of dispute resolution aims to balance the imbalance of power between an investor and a host state, it is said to ignore the importance of arranging ISDS as "part of a comprehensive governance system meant to ensure justice and the rule of law in one aspect of international economic relations".[41] These criticisms have led to attempts to better balance the right of states to regulate with the rights of foreign investors.[42]

The criticisms levelled at the current system of ISDS have been myriad. Building up over a few decades, the slowly intensifying voices of discontent have arisen from states, international organisations, institutions, legal practitioners, and academics. It is only by understanding these criticisms that one can proceed to examine and assess the proposals for reform. Some of the key criticisms of ISDS

952, 968; D. de Andrade Levy and R. Moreira, "ICSID in Latin America: Where Does Brazil Stand?", in D. de Andrade Levy, A. Gerdau de Borja and A. Noemi Pucci (eds), *Investment Protection in Brazil* (Kluwer 2014) 22–26.

[39] A. Roberts, "State-to-State Investment Treaty Arbitration: A Theory of Independent Rights and Shared Interpretive Authority" (2014) 55 Harv Intl L J 1, 18; Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) paras 13–23.

[40] M. Waibel and others, "The Backlash Against Investment Arbitration. Perceptions and Reality", in M. Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010).

[41] F.J. Garcia and others, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18 JIEL 861, 874.

[42] Vidigal and Stevens (n 35) 481.

in its present form are thus considered in this section. These are the stretching of consent (**2.1**), conflicting decisions of investment arbitral tribunals (**2.2**), issues of compensation (**2.3**), and third-party funding (**2.4**).

2.1. Stretching Consent

Investment arbitration, like all other forms of international dispute settlement, is based on consent. The competence of tribunals to adjudicate derives from the consent of the parties — the host State and the foreign investor. However, in this kind of arbitration, consent often has one degree of separation from the investment transaction. This consent may be expressed in a variety of ways. Investors and host States can negotiate arbitration clauses to be included in their investment contracts. Alternatively, host States may offer arbitration in their domestic legislation, often in investment codes. Finally, the host State's consent to arbitrate may be set out in BITs or multilateral investment treaties. It has thus been described as "arbitration without privity".[43] This is because, in a number of the situations described above, the investor does not have a direct contract with, and thus is not in privity with the host state. The domestic legislation is a unilateral offer to arbitrate, or the BIT is signed between the host state and the investor's state of nationality.

Thus, it can be seen that, even with a new theory of consent in ISDS, there are strict requirements and procedures in place to identify the existence of consent, on the part of both parties, when a dispute arises. This is paramount, since consent is the cornerstone of international adjudication, protecting a state's sovereignty. However, through judicial interpretation, consent in ISDS has often been stretched, extending jurisdictional clauses in other BITs to

[43] J. Paulsson, "Arbitration without Privity" (1995) 10 ICSID Rev–FILJ 232.

the dispute in question, through the application of Most-Favoured-Nation ("MFN") clauses.

The MFN obligation is a treaty-based obligation, most often found in the trade and investment contexts. It essentially implies, in the BIT context, that if two states have signed a BIT with an MFN provision, the host state would accord a foreign investor who is national of the other state party a treatment that is no less favourable than that it accords to a foreign investor from a third state.

With some notable exceptions, arbitral tribunals have generally been cautious in importing substantive provisions from other treaties, particularly when the same was absent from the basic treaty or when altering the specifically negotiated scope of application of the treaty.[44] However, with respect to procedural provisions such as those relating to ISDS in other treaties, arbitral tribunals have reacted in divergent ways. While a series of tribunals have accepted the argument that an MFN provision can be used to override a procedural requirement that constitutes a condition (of admissibility) to bring a claim to arbitration, other tribunals have ruled on the issue of jurisdictional requirements that jurisdiction cannot be formed simply by incorporating provisions from another treaty by means of an MFN provision. A brief overview of these two approaches is provided below.

In the case of *Maffezini v Spain*,[45] the BIT between Spain and the state of nationality of the investor, Argentina, contained a requirement of an 18-month waiting period before permitting recourse to arbitration. However, Spain's BIT with Chile contained no such provision. The claimant argued that since the Spain-Chile

[44] UNCTAD, "Most-Favoured Nation Treatment" (UNCTAD Series on Issues in International Investment Agreements II), (United Nations 2010) <https://unctad.org/system/files/official-document/diaeia20101_en.pdf> accessed 30 September 2021.
[45] *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

BIT did not contain this onerous requirement, thus the ISDS clause in this treaty was less restrictive than the one in the Argentina-Spain BIT. Using the MFN clause in the Argentina-Spain BIT, the claimant argued, this less onerous condition of admissibility could be imported into the current dispute. The tribunal agreed with the claimant, finding that "there were good reasons to conclude that dispute settlement arrangements were inextricably related to the protection of foreign investors".[46] The third-party treaty would however have to relate to the same subject matter as the basic treaty, which was the case here — both dealt with investment protection and promotion. The tribunal also went on to note certain exceptions in terms of provisions that could not be imported through an MFN clause — these were the exhaustion of local remedies rule, fork-in-the-road clauses, the establishment of a particular forum such as the ICSID, and the agreement to arbitrate under a highly institutionalised system of arbitration such as NAFTA, or similar arrangements. A number of tribunals broadly followed in the footsteps of the *Maffezini* tribunal.[47]

On the other hand, a number of cases went in the opposite direction, reasoning that treaty parties were unlikely to have reasonably intended that jurisdiction was to be formed through incorporation by reference unless such intent had been explicitly reflected in the relevant ISDS provisions of the basic BIT.[48] This

[46] Ibid, para 54.

[47] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004); *Gas Natural SDG v Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005); *Camuzzi v Argentina*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (11 May 2005); *National Grid PLC v Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006); *AWG Group v Argentina*, UNCITRAL, Decision on Jurisdiction (3 August 2006).

[48] *Salini Construttori SpA v Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004); *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005); *Telenor Mobile Communications v Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006).

trend was brought to an end in *RosInvestCo v Russia*, where the tribunal relied on *Mafezzini* to extend the scope of jurisdiction through an MFN clause.[49] However, it did not go as far as accepting the possibility of importing consent to ICSID Arbitration.

An MFN clause has almost never been successfully invoked to replace the arbitral forum or rules, for ISDS.[50] Indeed, a number of tribunals have emphasised that MFN clauses cannot be used to import an arbitral forum from another BIT.[51]

In *Garanti Koza v Turkmenistan*, the ICSID tribunal was split on its decision, and the majority decision demonstrates a marked departure from the MFN-related ISDS awards mentioned above. The basic treaty relating to the dispute, the UK-Turkmenistan BIT, provided for a number of options in terms of dispute settlement under the treaty. These options were arbitration under the ICSID, UNCITRAL arbitration, or ICC arbitration. Moreover, Article 8 of the BIT included a default option in case the parties to a dispute could not agree on any of the options listed in that Article. That default option was UNCITRAL arbitration. This seemed to clearly indicate a need for specific consent to initiate arbitration under the UNCITRAL arbitration rules, as opposed to either ICSID or the ICC. However, the majority of the tribunal, applying the MFN clause in the UK-Turkmenistan BIT, imported a more favourable provision from the Switzerland-Turkmenistan BIT, which gave free choice to a Swiss investor, between ICSID and UNCITRAL arbitration.

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[49] *RosInvestCo. UK Ltd v Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (1 October 2007) para 128.

[50] See: UNCTAD, Most-Favoured Nation Treatment (UNCTAD Series on Issues in International Investment Agreements II) (United Nations 2010) 73-84 <http://unctad.org/en/Docs/diaeia20101_en.pdf> accessed 20 December 2021.

[51] See eg *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction and Separate Opinion of Dr. Kamal Hossain (21 December 2012) paras 182–186.

The dissenting arbitrator, relying on *Daimler v Argentina*,[52] noted that an MFN clause can only be invoked if a tribunal has the requisite jurisdiction to hear the claim.[53] Given that Turkmenistan had not consented to ICSID arbitration in the UK-Turkmenistan BIT, the claimant could not invoke the MFN clause to establish jurisdiction in the first place. The dissent also goes on to deny the possibility of importing consent to ICSID arbitration from a separate BIT by applying an MFN clause in the original treaty. The majority decision, however, did not agree with this line of reasoning.

This position is in stark contrast to the general principle of consent in international adjudication, as mentioned already. Acceptance of jurisdiction of any kind of international dispute settlement forum requires specific consent by the state. This is a necessary prerequisite to the exercise of the international judicial function.[54] That need for specific consent was effectively discarded by the majority in *Garanti Koza*, by importing consent from an entirely different treaty.

As noted by some scholars, creative findings of jurisdiction such as in this case may also be counterproductive to the system of ISDS. In light of the "backlash" against the system, including denunciations of the ICSID Convention, of several BITs, and general criticism of the system (as discussed in this monograph), there is a greater need for tribunals to adhere to general principles governing consent of states to international adjudication.[55]

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[52] *Daimler Financial Services AG v Argentina*, ICSID Case No. ARB/05/1, Award (22 August 2012), Dissenting Opinion of Judge Charles N Brower (15 August 2012), and Opinion of Professor Domingo Bello Janeiro (16 August 2012), para 200.

[53] See also *Anglo-Iranian Oil Company Case (UK v Iran)*, Preliminary Objections, Judgment of 22 July 1952, [1952] ICJ Rep 93.

[54] *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction (Dissent by Laurence Boisson de Chazournes) (3 July 2013) para 5.

[55] E. de Brabandere, "Importing Consent to ICSID Arbitration? A Critical Appraisal of *Garanti Koza v Turkmenistan*" (IISD Investment Treaty News, 14 May 2014) <http://www.iisd.org/itn/en/2014/05/14/importing-consent-to-icsid-arbitration-a-critical-appraisal-of-garanti-koza-v-turkmenistan/> accessed 20 December 2021.

2.2. Conflicting Decisions

The above discussion is one example of the kind of conflict decisions that may emerge from arbitral awards rendered by different unrelated tribunals, not answerable to one central authority. Investment arbitration tribunals are *ad hoc* panels, which are established under the aegis of various arbitral institutions and apply different rules. They have been found to issue contradictory decisions, even when faced with the same or similar legal or factual issues.[56] It is clear why consistency in decision-making would be desirable — it would aid in ensuring the legitimacy of the system and increase the credibility of the arbitral awards.

One example of inconsistency in decision-making, as already discussed above, is reflected in the varying approaches to MFN clauses, and their use in importing ISDS clauses. Other inconsistencies range from jurisdictional issues such as defining the term "investment",[57] to the meaning and scope of substantive commitments such as the fair and equitable treatment standard.[58] There have also been situations where multiple tribunals have been

[56] D. Gaukrodger and K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community" OECD Working Papers on International Investment, 2012/03 (OECD Publishing 2012) 58 <https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf> accessed 20 December 2021.

[57] *Salini Construttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001); *Consortium Groupement LESI-DIPENTA v Republic of Algeria*, ICSID Case No. ARB/03/08, Award (10 January 2005); *Romak SA (Switzerland) v Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 November 2009); *Abaclat and Others v Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplun v Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012); *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Final Award (13 March 2009).

[58] Franck (n 28) 1576 (discussing three NAFTA cases, "which considered the application of the same substantive standard within the same investment treaty, came to radically different decisions about how the standard of 'fair and equitable treatment' should be interpreted and applied").

established in parallel to adjudicate over the same set of facts and led to differing outcomes.[59]

It is indeed true in general international law that previous decisions are not binding on subsequent ones.[60] However, a standing tribunal is likely to follow its past decisions, unless there are compelling reasons not to do so. Arbitral tribunals established for a particular dispute do tend to refer to earlier decisions on the same issue, but following the same approach is less likely when the adjudicators are completely different.[61] A reasoned decision is likely to be followed for its reasoning, not just because it was decided before.

The option exists to annul ICSID arbitral awards, through the establishment of *ad hoc* annulment committees established to decide on each annulment application. Moreover, there are limited grounds for annulling an ICSID award, listed in Article 52 of the ICSID Convention. One such ground for annulment is that the tribunal manifestly exceeded its powers. Under this requirement, some annulment committees have interpreted the term "manifest", and its scope in determining a tribunal's excess of powers. These annulment committees have concluded that it would

[59] S.R. Ratner, "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law" (2008) 102 Am J Int'l L 475, 519 (stating that the *Lauder v Czech Republic* and *CME v Czech Republic* decisions are "impossible to reconcile").

[60] See eg Statute of the International Court of Justice 1945 (33 UNTS 993), Article 59 ("ICJ Statute"); United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) (1833 UNTS 3), Annex VI: Statute of the International Tribunal for the Law of the Sea, Article 33(2).

[61] See eg *Saipem SpA v Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67, and Award (30 June 2009) para 90 (although "not bound by previous decisions", the tribunal "must pay due consideration to earlier decisions of international tribunals"). See also *SGS Société Genérale de Surveillance SA v Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 97 (ICSID tribunals "should in general seek to act consistently with each other", but "in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State").

not be a manifest excess of powers if an arbitral tribunal took one among a number of inconsistent positions that have been held by different tribunals on a particular jurisdictional issue. Thus, none of the inconsistent positions is deemed to be incorrect, and the inconsistencies keep perpetuating.[62]

A consequence of these conflicting decisions and the ensuing unpredictability in the system is also the increase in costs. Lengthy pleadings are submitted before tribunals, with counsel making all possible arguments, since it cannot be predicted whether an argument accepted or rejected by previous tribunals would be well-received before that particular tribunal.[63]

While a degree of interpretive inconsistency is endemic to any legal order, systemic inconsistency tends to undermine the basic purposes of the investment treaty regime — namely protecting and promoting foreign direct investment through predictable international legal rules and institutions.[64]

2.3. Compensation

The issue of compensation in ISDS awards has not been given as much attention as other pressing matters in this field. Large sums

[62] See *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) (on umbrella clauses); *Impregilo SpA v Argentina*, ICSID Case No. ARB/07/17, Award (21 June 2011) (on MFN clauses and dispute settlement), *Kilic v Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (7 May 2012) (on requirement of recourse to domestic courts); and *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) (on the definition of investment).

[63] A. Roberts and Z. Bouraoui (eds), "UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness" (EJIL Talk, 5 June 2018) <http://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/> accessed 20 December 2021.

[64] J. Arato, C. Brown, and F. Ortino, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement" (2020) 21 JWIT 336.

are often awarded as compensation in investment treaty arbitration, and the jurisprudence remains inconsistent with respect to the principles governing this, and the methods of valuation that should be used. It is argued that there are discrepancies between the amounts invested and the sums awarded in compensation, as well as discrepancies between the benefit derived by the host state from the investment and the compensation awarded.[65]

In particular, there are inconsistencies in terms of the circumstances in which it is appropriate to calculate compensation based on the expected future income from an investment, the quality of evidence required to substantiate multi-year future business projections that underpin any calculation of compensation based on expected future income, and the way in which tribunals account for various foreseeable and unforeseeable risks to the expected income stream from an investment, across its entire life cycle.[66]

2.4. Third-Party Funding

One of the key issues discussed for reform in the ISDS context is third-party funding. Devised originally as a mechanism to enable individuals that may not be able to afford the exorbitant costs involved in dispute resolution, it is now, especially in the context of ISDS, used extensively by companies in capital-intensive industries as a means to avoid financing their own disputes. Essentially, third-party funding entails financial support to one of the parties engaged in dispute resolution by an unrelated third party with no prior interest in the dispute. In return for the financing, the third-party

[65] J. Bonnitcha and S. Brewin, "Compensation Under Investment Treaties" (IISD Best Practice Series — November 2020) <http://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf> accessed 20 December 2021.
[66] Ibid 4.

funder would eventually receive a share in the compensation received, if any, by the funded party.[67]

Third-party funding has seen a considerable increase in recent times in ISDS. This increase has given rise to a variety of challenges, many of which are still unaddressed. While a number of domestic jurisdictions have tried to regulate third-party funding in international arbitration, it largely remains unregulated. Only a few domestic jurisdictions have adopted laws in this regard. Singapore's Civil Law Amendment Act, enacted in 2017, permits third-party funding for international arbitration and related proceedings.[68] Hong Kong also approved third-party funding for arbitration in the same year by adopting the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act in 2017.[69] The Singapore International Arbitration Centre's ("SIAC") new Investment Arbitration Rules, also from 2017,[70] expressly allow the tribunal to order disclosure of the existence of third-party funding and the funder's identity, and also, where appropriate, details of the funder's interest in the outcome of the proceedings, and whether the third-party funder has committed to undertake adverse costs liability. Moreover, when deciding on the allocation of costs, the tribunal may take into account any third-party funding arrangement. In the same year, the China International Economic and Trade Arbitration Commission ("CIETAC") adopted new

[67] International Council for Commercial Arbitration, "Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration" (ICCA Reports No. 4) 18 (April 2018) <http://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 20 September 2021 ("ICCA-QMUL Report").

[68] Civil Law (Amendment) Act, 2017 (Singapore) <http://sso.agc.gov.sg/Acts-supp/2-2017/> accessed 20 December 2021.

[69] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act, 2017 (Hong Kong) <http://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf> accessed 20 December 2021.

[70] Investment Arbitration Rules of the Singapore International Arbitration Centre (2017) <http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf> accessed 20 December 2021.

International Investment Arbitration Rules,[71] which provide that the party accepting the funding must notify the other parties, the tribunal, and CIETAC of the existence and nature of the funding agreement and the name and address of the funder. Additionally, the arbitral tribunal may consider the existence of third-party funding as a factor when allocating costs. In 2019, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") issued a policy document, encouraging the parties to disclose the "identity of any third party with a significant interest in the outcome of the dispute, including but not limited to funders, parent companies, and ultimate beneficial owners".[72] The stated purpose of this new policy is to enable arbitrators to check for potential conflicts of interests based on information about third parties that they would generally not be able to identify through usual due diligence. On the other hand, the Argentina-UAE BIT expressly banned third-party funding.[73]

It is useful to have an overview of how third-party funding operates, to understand the criticisms levelled against it, and in later sections (sections **3** and **4**), the proposals for reform.

2.4.1. The Process

Usually, third-party funding consists of an individual or company seeking financial assistance from a funder, to cover the legal costs or liability or both, arising out of a dispute that the

[71] China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (2017) < http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en> accessed 20 December 2021.
[72] Arbitration Institute of the Stockholm Chamber of Commerce, "SCC Policy: Disclosure of Third Parties with an Interest in the Outcome of the Dispute" (11 September 2019) <http://sccinstitute.com/media/1035074/scc-policy-re-third-party-interests-adopted.pdf> accessed 20 December 2021.
[73] Agreement for the Reciprocal Promotion and Protection of Investments between Argentina and United Arab Emirates (2018) <http://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download> accessed 20 December 2021.

individual or company is involved in.[74] In return, the funded party could receive a percentage of the award, in case of a favourable decision. In the event of an unfavourable decision, the liability of these parties would depend on the terms of the Third-Party Funding Agreement. Third-party funders find this an attractive area of investment due to the high value of claims, low evidentiary costs, speed of conducting the proceedings, and the industry expertise of decision-makers.[75] The high probability of enforcement of awards also attracts funders to finance arbitral proceedings.

Third-party funders have an interest in concealing their identity from the opposing party and the tribunal in order to protect their interest with regards to the terms of the funding agreement and also to prevent a delay in proceedings that may arise from a conflict of interest between the funder and the arbitrator that could potentially result in challenges being made to the appointment of the arbitrator. These factors that make financing lucrative to third-party funders are also some of the aspects of third-party funding that have attracted criticism.

Parties seek financing, on the other hand, primarily to mitigate losses in the dispute. Not just parties in dire need of monetary assistance, but also large corporations and even sovereign states may seek funding for this reason.[76] Thus, third-party funders are not necessarily financing claimants, they may also finance respondents.[77]

During the arbitral proceedings, it is natural that the funded party would want to have maximum control over the management of the proceedings and take decisions relating to matters such as settlement.[78] At the same time, it is possible that the third-party

[74] L.B. Nieuwveld and V.S. Sahani, *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017) 1–5.
[75] Ibid 5–6.
[76] Ibid.
[77] Ibid 2.
[78] ICCA-QMUL Report (n 67) 20.

funder would want to retain some control, make important financial decisions such as concerning settlement, or the right to retain or terminate counsel, or the right to terminate the funding agreement, and this could negatively impact the bargaining power of the funded party, undermining their interests.[79] Sometimes, the funder may wish to terminate the financing agreement because of decisions that the funded party took in the context of the proceedings, such as accepting an offer of settlement from the opposing party. In such a situation, the (formerly) funded party, having already invested in the claim, would have no financial means left to pursue it. Therefore, one of the primary interests of the party receiving third-party funding remains the ability to maintain autonomy in decision-making, to a certain extent. This party would try to ensure that the funder would not have the right to arbitrarily terminate funding.

A dispute is financed typically through one or more of various arrangements — insurance (either liability insurance or legal expenses insurance, obtained before the dispute or after), contingency fee arrangements, or even loans. The usual path for third-party funding is however through the assignment of claims.

Since the opposing party may seek disclosure of the identity of the third-party funder in order to ensure that no potential conflict-of-interest lies between the funder and any member of the arbitral tribunal, and all members of the tribunal remain independent and impartial,[80] third-party funding generally consists of a transfer of the proceeds of a successful claim rather than the right to pursue the claim. This helps in complying with relevant ethical and other obligations.[81]

As a non-party to the agreements and treaties underlying the arbitral proceedings, a third-party funder cannot be brought

[79] Ibid 28.
[80] P.V. Kamnani and A. Kaushal, "Regulation of Third Party Funding of Arbitration in India: The Road Not Taken" (2019) 8 Ind J Arb L 155.
[81] Nieuwveld and Sahani (n 74) 4–6.

within the ambit of the dispute, and within the jurisdiction of the tribunal, given the absence of consent. Thus, a tribunal is unable to pass orders such as those relating to costs against a third-party funder, even if it were more practicable for the other party to receive the costs awarded in this manner. There is no legal provision that envisages such a scenario: costs cannot be ordered against a third-party funder, nor can an order against a funded party mandate that costs be paid by the funder. Thus, at present, a third-party funder cannot be held liable in ISDS for claims that it funds, due to the strict requirements of jurisdiction and consent.

Various issues have come up for adjudication before investor-state arbitral tribunals, concerning third-party funding. These include issues of jurisdiction and admissibility, the allocation of costs, the possibility of obtaining security for costs, and disclosure requirements that relate to transparency and conflict of interests. These issues are highlighted below, with examples of cases where they were brought up.

2.4.2. Jurisdiction and Admissibility Issues

At the outset, objections have been raised to the tribunal's jurisdiction or the admissibility of the claim, due to the involvement of third-party funding. Tribunals have generally rejected such arguments. The involvement of a third-party funder in investment arbitration proceedings can vary from case to case. Challenges to jurisdiction have arisen in cases where they have been heavily involved.

In *RosInvestCo UK Ltd v Russia*,[82] the respondent argued that in light of "participation agreements" entered into between the claimant and a company in its group (a form of funding by a third party), the claimant thus did not qualify as an investor for the

[82] *RosInvest v Russia* (n 49).

purposes of the BIT. The tribunal rejected this contention, since the claimant met the BIT definition of an investor, being incorporated in the UK.

In the *Abaclat* case,[83] a proceeding famous for its mass claims nature, an entity called Task Force Argentina, established by the Italian Banking Association, was mandated by a number of claimants to manage their participation in the arbitration on their behalf. One of the arguments regarding the claimants' consent to arbitration posited that their consent to ICSID arbitration was vitiated by an alleged conflict of interest of Task Force Argentina. A second challenge, this time to the admissibility of the claims, argued that Task Force Argentina abused the ICSID process to pursue hidden interests, separate from the interests of the Claimants. The tribunal rejected both these contentions, ruling that the claimants "consciously accepted" this limitation of their individual procedural rights "in order to benefit from the collective treatment of their claims before an ICSID tribunal".[84]

A related case with different issues was *Ambiente Ufficio v Argentina*.[85] The claimants here (not as numerous as *Abaclat*) were funded by an entity called NASAM. The respondent objected to NASAM having a connection with the claimants, whereas genuine third-party funders should have no connection with the parties or tribunal. The respondent also alleged that NASAM was the real party in interest, having full control over the proceedings. The tribunal dismissed these objections, finding that financing and coordinating the proceedings did not put the third-party funder in a position to control the proceedings.

[83] *Abaclat v Argentina* (n 57).
[84] Ibid, para 546.
[85] *Ambiente Ufficio SpA and Others v Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

This same funding entity can be found in *Giovanni Alemanni v Argentina*,[86] where the same respondent, Argentina, did not complain about third party funding *per se*. Rather, it challenged aspects of NASAM's mandate relating to consent. The tribunal, however, recognising the existence of third-party funding in international investment arbitration, ruled that it in itself could not pose a bar to admissibility of a dispute.

A more direct confrontation with third-party funding was seen by the tribunal in *Quasar de Valors v Russia*.[87] The arbitration was brought by holders of American Depositary Receipts (ADRs) in the Yukos company, who argued that they had been expropriated of their investment in violation of the Spain–Russia BIT. The claimants were funded by Group Menatep, which had its own separate arbitration against Russia in respect of its former Yukos shareholding, with much higher stakes. Russia thus alleged that the claimants had no real control over the arbitration, they were not in charge of selecting counsel, witnesses, experts, or strategic alternatives in the prosecution of the claims. The tribunal rejected this argument on the ground that the claimants were entitled to receive the assistance of third parties while pursuing the rights available to them under a BIT. The motives of this third party were irrelevant to the dispute.

In *Teinver v Argentina*,[88] the respondent objected to the admissibility of the claims on the grounds that the claimant's funding agreement required them to use specified lawyers selected by the third-party funder, and that the agreement entitled the funder

[86] *Giovanni Alemanni and Others v Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014).
[87] *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections (20 March 2009).
[88] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012).

to terminate the agreement if the power of attorney of the specified lawyers was modified or terminated and to receive substantial compensation. Moreover, the funding agreement required the insolvent claimant company to pay any award proceeds directly to the funder, rather than its creditors. Thus, the respondent argued that the third-party funder was a vulture fund that would primarily benefit from any award. The tribunal majority found that the power of attorney remained valid since the Spanish bankruptcy court had approved the funding agreement, which was publicly available, and thus known to all the interested parties, such as the creditors. The dissenting arbitrator, agreeing that the funder was the primary beneficiary of the arbitration, was of the opinion that the BIT did not intend to enable payment of awards to such third-party funders who were not investors and who did not make an investment for the purposes of the BIT.[89] The respondent even applied to annul the award, arguing that the tribunal had manifestly exceeded its powers by entertaining a claim made in bad faith and through fraud on the respondent's rights. The annulment committee did not agree with the respondent either, ruling that the funding agreement did not provide for any assignment of the interests in the dispute or of the proceeds of the award in favour of the third-party funder, such that the funder would become the owner of the claims and the real claimant in the arbitration. The claimants' agreement to pay the funder did not affect their standing in the arbitration or their right to enforce the award and to collect the damages and costs against the respondent. The respondent had also argued that the funding agreement amounted to "undue interference in the arbitration" by the third-party funder by requiring the claimants to accept a settlement under certain conditions, by establishing a duty of cooperation, by limiting the claimants' right to commence other legal proceedings, and by giving the funder a right to access

[89] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, Separate Opinion of Dr Kamal Hossain (21 December 2012).

information relating to the case. The annulment committee however found that Argentina had not identified any fundamental rule of procedure that these provisions would violate, and that none of the provisions of the funding agreement had been shown to result in improper interference in the arbitration by the third-party funder.

Tribunals thus appear reluctant to find that conferring economic rights upon non-parties in exchange for financing raises serious questions about jurisdiction or admissibility.[90] Given the confidentiality of the majority of funding agreements, it is hard to foresee the kind of issues that may arise in the future in this context.

2.4.3. Allocation of Costs

Another issue related to third-party funding that has arisen on a few occasions in ISDS is the allocation of costs, and tribunals have been quite consistent in this respect too. In *Kardassopoulos and Fuchs v Georgia*,[91] the respondent argued that the claimants did not have a right to be indemnified for their legal costs because they received funding from a third party. The tribunal rejected this argument, emphasising that there was no need for third party funding arrangements to be taken into consideration in determining the amount of recovery of costs by the claimant. It considered that a third-party funding arrangement should be treated in the same manner as an insurance contract.

In an interesting situation in *RSM Production Corporation v Grenada*,[92] the annulment committee discontinued the annulment proceedings, since the claimant who had applied for annulment refused to bear the costs for the respondent state. This was because, the claimant argued, the respondent was funded by a third party,

[90] ICCA-QMUL Report (n 67).

[91] *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010).

[92] *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Annulment Proceeding and Decision on Costs (28 April 2011).

and thus did not truly incur any of the costs claimed. The annulment committee did not agree with this contention.[93]

In *Bahgat v Egypt*,[94] although finding the respondent in breach of its treaty obligations, the tribunal ruled that the claimant should bear his own third-party funding costs. Reasonable costs for legal representation and assistance were however awarded to the claimant. It was not clarified whether funding costs would be considered a part of legal costs.

2.4.4. Security for Costs

With respect to security for costs, in *Guaracachi America, Inc and Rurelec plc v Bolivia*,[95] the respondent requested security from the claimants, on the basis of the claimants receiving third party funding, and thus an eventual possibility that they would not be able to pay the costs if awarded against them. The tribunal disagreed and refused to grant security. First, the claimant company seemed to be a going concern with sufficient assets, and second, the respondent did not establish a causal link to demonstrate that the mere existence of third-party funding would make the claimant unable to pay the costs.

In light of this, it is interesting to note the case of *RSM Production Corporation v Saint Lucia*.[96] This was probably the first ISDS case where a tribunal did grant security for costs. However, the tribunal's reasoning for granting this was based on this claimant's past actions in other arbitrations, where it had not respected costs

[93] See also *ATA Construction, Industrial and Trading Company v Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Annulment Proceeding (11 July 2011).
[94] *Mohamed Abdel Raouf Bahgat v Egypt*, PCA Case No. 2012-07, Final Award (23 December 2019).
[95] *Guaracachi America, Inc and Rurelec PLC v Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14 (11 March 2013).
[96] *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons (13 August 2014).

orders in two previous instances. Thus, the fact that the claimant in this case too was funded by a third party did not feature in the tribunal's reasoning. However, third-party funding did feature in the Assenting Opinion of Dr Griffith.[97] In his opinion, the majority's decision should have been based on the issue of third-party funding. Specifically, the burden of proof should be reversed once it appears that there is third-party funding of an investor's claims — the onus should then be on the claimant to disclose all relevant factors and to make a case as to why orders for security for costs should not be made. This opinion was based on the reasoning that third-party funders "should remain at the same real risk level for costs as the nominal claimant".[98]

However, the tribunal in *EuroGas Inc and Belmont Resources Inc v Slovakia*[99] found that financial difficulties of the claimant or the existence of third-party funding did not necessarily justify the granting of an order for security of costs. Thus, it can be seen that tribunals are generally not in favour of awarding security for costs, save for exceptional circumstances. The proposal for reserving the burden of proof for granting security for costs in the event that there is third-party funding is a novel one, and one that could potentially significantly increase the cost of funding for claimants.

This approach was used by the two identical tribunals in *Manuel García Armas v Venezuela* and *Luis García Armas v Venezuela*,[100]

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[97] *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Assenting Reasons of Gavan Griffith (12 August 2014).

[98] Ibid. See also J. Hepburn, "ICSID Tribunal Orders Serial Claimant to post Security for Costs in *St Lucia* Case, but also Opens Third-Party Funding Can of Worms" (*Investment Arbitration Reporter*, 27 August 2014).

[99] *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures) (23 June 2015).

[100] *Luis García Armas v Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, Decision on Jurisdiction (24 July 2020).

which noted, while ordering security for costs, that while normally the burden of proof would rest on the respondent as the one making the request, in this case, it was proper to shift it to the claimants because their claims were financed in their entirety by the third-party funder; the funding agreement explicitly excluded coverage of adverse costs, and the claimants had refused to provide any reasonable explanation of why they had obtained third-party funding. Moreover, there was a risk of the claimant being insolvent, thus causing irreparable prejudice to the respondent.

Interestingly, in the *Herzig v Turkmenistan* case,[101] it was accepted that neither the presence of third-party funding nor a party's lack of funds alone was sufficient to be considered as exceptional circumstances for the awarding of security for costs. Nevertheless, these two factors combined, and in addition to the fact that the third-party funding agreement expressly excluded liability for an adverse award on costs, constituted exceptional circumstances for the awarding of security.

In *South American Silver v Bolivia*,[102] the tribunal noted that the existence of third-party funding was not the decisive factor in granting or rejecting a request for security for costs — since it was not evidence of insolvency of the party or otherwise difficulty of payment. If that were the case, the existence of funders could systematically involve security for costs and sometimes block legitimate claims.

In *Eskosol v Italy*,[103] however, since the claimant was bankrupt, the respondent argued that an order for security for

[101] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No. ARB/18/35, Decision on Security for Costs (27 January 2020).
[102] *South American Silver Ltd v Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (11 January 2016).
[103] *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (Decision on Respondent's Request for Provisional Measures) (12 June 2017).

costs was warranted, given that the tribunal would have no power over a third-party funder to pay the costs, if any. The claimant contended that imposing a further financial burden on it would be unjust, especially when its bankruptcy was due to the respondent's wrongdoing, and the respondent would be benefitting from its own misconduct. The tribunal accepted that the claimant's bankruptcy made it unlikely that it could pay an eventual costs award directly from its own funds, and that its third-party funding agreement might not require the funder to meet an eventual costs award rendered against the claimant. Nevertheless, since the claimant had obtained an insurance policy to protect it from potential adverse costs, the tribunal rejected the respondent's request.

The exceptional circumstances in which a tribunal would award security for costs have been summarised by the *Orlandini v Bolivia* tribunal:[104] a claimant's track record of non-payment of cost awards in prior proceedings, a claimant's improper behaviour in the proceedings at issue, such as conduct that would interfere with the efficient and orderly conduct of the proceedings; evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or other evidence of a claimant's bad faith or improper behaviour.

2.4.5. Disclosure Requirements

A more important question is that of disclosure of the identity of third-party funders. An appendix to the report of a task force jointly created by the ICCA and Queen Mary University London ("ICCA-QMUL"), titled "Principles Regarding Disclosure and Conflicts of Interest",[105] notes that that parties should, "on their own initiative", disclose the existence of a funding arrangement

[104] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs (9 July 2019).
[105] ICCA-QMUL Report (n 67), Appendix.

and the identity of the funder. According to a survey by this task force, arbitral practitioners generally agree that only disclosure of funding arrangements would enable arbitral tribunals to assess and make disclosures on any possible conflicts of interest. The report also provides that arbitrators and arbitral institutions, in any event, "have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third-party funder and, if so, the identity of the funder".[106] Even without express legal rules providing for the same, ISDS tribunals have generally required the disclosure of the existence and identity of any third-party funders. Some have even gone a step further, requiring disclosure of certain information about the nature of the funding arrangement or even disclosure of the entire funding agreement.

This issue arose in *EuroGas Inc and Belmont Resources Inc v Slovakia*,[107] where the tribunal ordered the claimant to disclose the identity of its third-party funder. This was in order to check for conflicts of interest with the members of the tribunal. Disclosure of the terms of the funding agreement does not seem to have been required.[108]

By contrast, the tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*[109] did order disclosure not only of the identity of the third-party funder but also of the terms of the funding arrangement. More specifically, the tribunal sought to know the nature of the arrangements concluded with the third-party funders, including whether and to what extent they would share in any success that claimants might achieve in

[106] Ibid.
[107] *Eurogas v Slovakia* (n 99).
[108] See *South American Silver v Bolivia* (n 102), where the tribunal also ordered disclosure of the funder, but not the details of the funding agreement.
[109] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 2 (23 June 2014).

the arbitration.[110] The reasons for requiring such disclosures could be several, as the tribunal itself noted: avoidance of conflict of interest with the arbitrators, transparency and identification of the true party to a case, a fair decision on cost allocation, decision on security for costs, and to ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives. On the respondent's application for disclosure, the tribunal based its decision on four factors. The first was the importance of ensuring the integrity of the proceedings and determining whether any of the arbitrators were affected by the existence of the third-party funder. The second reason was the respondent's impending application for security for costs. Third, the order for costs had not been complied with in a separate arbitration, where the claimant had funded the annulment proceedings, and finally, the claimant had not denied that it was funded in the arbitration by a third party.

More recently, in *Tennant Energy v Canada*,[111] the tribunal ordered the confidential disclosure by the claimant (to both the tribunal and the respondent) of the identity of any third-party funder and any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the claimant in the arbitration. The claimant was required to state the complete terms in its disclosure. This decision was based on the importance of determining whether there was any conflict of interests, and the potential relevance of the existence of third-party funding to the assessment of the respondent's application for security for costs.

In the parallel arbitrations of *Manuel García Armas et al. v Venezuela* and *Luis García Armas v Venezuela*, the tribunal ordered disclosure of the text of the funding agreement. The tribunal

[110] See also *Eskosol v Italy* (n 103), where the claimant disclosed the existence of a third-party funder and that the funder had paid for an after-the-event insurance policy in respect of potential adverse costs of up to €1 million.

[111] *Tennant Energy LLC v Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 (Interim Measures) (27 February 2020).

accepted a redacted form of the agreement that the claimants produced, since this protected the legitimate interest of the respondent in knowing the provisions of the funding agreement, in particular in respect of the event of an order of adverse costs to the claimants, as well as the equally legitimate interest of the claimants that certain information be protected by having been omitted from the documents communicated to the tribunal.

Situations such as these do not yet come up frequently in ISDS, and these cases could be considered as a landmark in that respect. However, caution must be exercised while going forward with disclosures of terms of funding arrangements. The opposing party may use dilatory tactics and increase the length and thereby the cost of proceedings if it has prior knowledge of a party's budget in the arbitration. Disclosure is also important to ensure an absence of conflicts of interest. Situations that may give rise to conflicts of interest include where arbitrators act as advisors to funders and where an arbitrator or an arbitrator's law firm has a recurring relationship with a third-party funder, which is involved in arbitration before the arbitrator, and the arbitrator or the firm receives an income from this relationship.[112] Another question that may arise in the future but is not yet settled is whether an arbitrator who has a relationship with a third-party funder involved in the arbitration should continue to sit on the tribunal.

2.4.6. Conclusion

The above discussion of arbitral awards and annulment committee reports highlights how the jurisprudence on third-party funding is evolving, and how much still remains uncertain. Objections to jurisdiction and admissibility based on alleged control by a third-party funder have largely been rejected. In the allocation

[112] UNCITRAL Working Group III Note by the Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Third-Party Funding" (37th Session of the Working Group, New York, 1–5 April 2019) UN Doc A/CN.9/WG.III/WP.157, para 18.

of costs, too, tribunals tend to disregard the existence of third-party funding. In deciding to order security for costs, the decisions show the same trends, but with recognised exceptional circumstances that may warrant ordering security for costs. Finally, in ordering disclosure relating to third-party funding, the orders extend to ordering disclosure of the existence of funding, and sometimes even information about the funder's rights and obligations or supporting documentation such as the funding agreement.

While there are valid criticisms of the way it operates, third-party funding has the paramount justification of providing access to justice for those claimants who have a legitimate, meritorious claim but are unable to fund the claim. There are also instances of cases where investors funded by third parties put forth inflated claims or had engaged in illegal or at least improper activities and did not come to the arbitration with "clean hands". In *South American Silver v Bolivia*, the tribunal found that the claimant company had acted wrongfully in its engagement with local indigenous communities, threatening critics and inflaming tensions and violence. Nevertheless, since the host state had breached treaty obligations, the investor was awarded damages, albeit far below the amount claimed.[113] In *Churchill Mining and Planet Mining v Indonesia*, the tribunal dismissed the investors' claims based on concerns regarding fraudulent conduct in the operation and expansion of the investment.[114] More recently, in *Infinito Gold v Costa Rica*, the tribunal while finding the respondent liable for breach, rejected the claimant's request for damages. The case also involved allegations of corruption against the claimant.[115]

Cases such as these serve to weaken the above-mentioned justification for third-party funding as a tool to empower the

[113] *South American Silver Ltd v Bolivia*, PCA Case No. 2013-15, Award (22 November 2018).
[114] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016).
[115] *Infinito Gold v Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021).

financially weaker parties and enable access to justice. They further fuel the critics who allege that third-party funding is driving speculative and high-stakes claims that, even when unsuccessful, are still costly to respondent host states.[116] Involving a third party as a funder in a dispute could also increase the potential situations of conflict of an arbitrator with a party. Without a procedural obligation of disclosure of third-party funding, often the potential for conflict of interest goes untested. While disclosure of third-party funding may be welcomed from various quarters, the funders themselves, as well as the funded parties, have raised objections to making disclosure mandatory. It has been argued that the source of financing for a particular proceeding is irrelevant to the substance of the dispute and arguments advanced, therefore third-party funding could be treated the same way as a loan meant for financing a legal proceeding.[117] Disclosing third-party funding could also indicate adequate financial resources for the funded party and expose them to orders for security for costs or excessive costs orders.[118] Third-party funders themselves are also concerned about exposure to tribunal enquiries, cross-examination, and the like, if funding is disclosed.[119]

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[116] In *Churchill Mining and Planet Mining*, although the claimant had to cover the majority of the respondent's legal fees and expenses, the respondent state still had large sums to pay; in *Infinito Gold* and *South American Silver*, the respondent states had to each bear large sums in defense costs. See J. Hepburn, "Analysis: Unreasonable 'Wilful Blindness' as to Business Partner's Fraudulent Misconduct Stymies Mining Claim in Indonesia" (*Investment Arbitration Reporter*, 9 December 2016) <http://www.iareporter.com/articles/analysis-unreasonable-wilful-blindness-as-to-business-partners-fraudulent-misconduct-stymies-mining-claims-against-indonesia/> accessed 21 December 2021.

[117] ICCA-QMUL Report (n 67) 85; A. Crivellaro and L. Melchionda, "Disclosure and Conflicts of Interest in Relation to Third-Party Funding", in N.G. Ziadé (ed), *BCDR International Arbitration Review* (Kluwer Law International 2018) Volume 5 Issue 2, 281, 285.

[118] Crivellaro and Melchionda (n 117) 292; J.A. Trusz, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration" (2013) 101 Geo L J 1649, 1675.

[119] W.H. van Boom, "Third-party Financing in International Investment Arbitration" (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114> accessed 21 December 2021, 56.

From the above examination of legal texts and arbitral awards, it appears that third-party funding of claims will continue to be a regular part of ISDS. Efforts are underway, however, to safeguard the integrity of the proceedings in the presence of third-party funding. With the rapid and largely unregulated increase in third-party funding in ISDS, states have been eager to put this on the reform agenda before various fora. Proposals for reform are considered in section **3** below. Several issues for reform identified by the UNCITRAL Working Group (see section **3.1** below) are closely linked to third-party funding. These include conflicts of interest, the number and nature of claims, costs involved in arbitration, and the high amounts of damages claimed and awarded.[120] These issues are addressed in the following section.

[120] M. Hodgson, Y. Kryvoi, and D. Hrcka, "Empirical Study: Costs, Damages and Duration in Investor-State Arbitration" (BIICL and Allen & Overy 2021) 26.

3.

Talks on Reform at a Global Level

The growing criticisms of the various aspects of ISDS, some of which were highlighted in section **2** above, led to plans for comprehensive reform on a global scale. For example, the International Bar Association ("IBA") revised its Guidelines on Conflicts of Interest in International Arbitration in 2014, addressing, among other issues, third-party funding.[121] A third-party funder is referred to as a "legal entity, any legal and physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration".[122] Such an entity "may be considered to bear the identity" of the party in the dispute.[123] The explanatory comments make it clear that the legal entity described here is a third-party funder. The comments note that third-party funders may have a direct economic interest in the award and thus may be considered to be equivalent to the party.[124] Under these Guidelines, parties are also directed to disclose any relationships, including that of the funders, that may create a conflict of interest with any member of the arbitral tribunal.[125] The explanatory notes clarify that the parties' duty of disclosure of any direct or indirect relationship between the party and any arbitrator has extended relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing

[121] International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014, as updated 2015 <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 21 December 2021.
[122] Ibid, General Standards 6, 7.
[123] Ibid, General Standard 6.
[124] Ibid, Explanation to General Standard 6.
[125] Ibid, Non-Waivable Red List.

funding for the arbitration,[126] or in other words, a third-party funder. This limited responsibility of checking for conflicts goes to the extent of revealing the identity of the funder, but not to the extent of revealing the terms and details of funding agreements.

In different international fora, discussions are ongoing with the aim of reforming ISDS. These fora give opportunities for multi-stakeholder discussions, including states, international organisations, and other experts, to submit their comments, weigh in on and shape the rules for investor-state arbitration in the future. This involvement of multiple and diverse stakeholders is expected to contribute to greater predictability and confidence in the investor-state arbitration system.

One such forum for discussion on reform is the United Nations Commission on International Trade Law ("UNCITRAL"), which is involving diverse stakeholders in its ongoing talks on ISDS reform (**3.1**). On a much smaller scale, the ICSID is another forum that is carrying out procedural reforms, amending its own rules, with repercussions for ISDS as well (**3.2**).

3.1. UNCITRAL Level Talks on Reform

In 2017, at the fiftieth session of the UNCITRAL, Working Group III of UNCITRAL was mandated by its member states to examine the perceived legitimacy of the ISDS regime and work on the possible reforms of ISDS.[127] Its mandate is broad, open-ended, and problem-driven.[128] In discharging its mandate, the Working Group is

[126] Ibid, Explanation to General Standard 7(a).

[127] See eg UN Information Service, "Press Release: UNCITRAL to Consider Possible Reform of Investor-State Dispute Settlement" (14 July 2017) UNIS/L/250; UNCITRAL Note by the Secretariat, "Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)" (50th Session, Vienna, 3–21 July 2017) UN Doc A/CN.9/917 (20 April 2017).

[128] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November — 1 December

required to ensure that the deliberations would be government-led, with high-level input from all governments, consensus-based and completely transparent, and benefit from a wide range of expertise from all stakeholders.[129] It aims to identify particular concerns currently plaguing ISDS, such as excessive costs and lengthy proceedings, inconsistent and incorrect decisions, certain aspects of third-party funding, and a lack of arbitral diversity and independence. Then it would consider whether reform was desirable in the light of these concerns, and, if so, develop solutions and make proposals to UNCITRAL for reform.[130]

The Working Group is composed of all States members of UNCITRAL. Its sessions also include observers from the ICSID, other international organisations such as the OECD, and several arbitral institutions.[131]

The scope of work of the UNCITRAL has traditionally been issues of private commercial law. Thus, it is not immediately considered as the ideal forum for a discussion on reforms in the realm of international investment law and dispute settlement, which is more in the domain of public law and concerns matters of general public interest. However, its work on ISDS can still be meaningful with the right kind of stakeholder involvement in its proceedings, and appropriate delimitation of its proposed work.[132]

2017)" UN Doc A/CN.9/930/Rev.1 (19 December 2017).

[129] 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)" UN Doc A/CN.9/970 (9 April 2019).

[130] See United Nations, "Report of the United Nations Commission on International Trade Law, Fiftieth Session" (3 July — 21 July 2015), Official Records of the General Assembly, Seventy Second Session, Supplement No 17, UN Doc A/72/17, paras 263–64.

[131] UNCITRAL Working Group III Report (n 129).

[132] N. Angelet, "CETA and the Debate on the Reform of the Investment Regime", in M.M. Mbengue and S. Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer Nature 2019) 1, 12.

The UNCITRAL reform process is focused on procedural reforms and excludes any examination of reforms on substantive investment law. This exclusion has drawn some criticism,[133] yet a considerable range of procedural reforms have taken the place of a discussion on substantive reforms. These include a multilateral investment court, an appellate mechanism, and alternatives to ISDS. However, it is also argued that many of the core concerns with the system of ISDS that the Working Group has identified cannot be addressed without carrying out reforms to the substantive rules, in addition to procedural ones.[134] Some others also argue that exclusion of substantive treaty reform is not implicit from the mandate given to this Working Group.[135] Finally, it is said that sometimes the lines also blur between procedural and substantive rules[136] and that procedural ISDS rules have a transformative effect on substantive

[133] G. Dimitropoulos, "The Conditions for Reform: A Typology of 'Backlash' and Lessons for Reform in International Investment Law and Arbitration" (2020) 19 LPICT 416.

[134] See A. Roberts and T. St John, "UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting" (*EJIL: Talk*, 20 September 2019) <http://www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting/> accessed 21 December 2021. See also UNCITRAL Working Group III Note by the Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa" (38th Session of the Working Group, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.176 (17 July 2019) para 20: the "Working Group would not be fully discharging its mandate if discussions on the substantive reforms were excluded".

[135] See eg UNCITRAL Report (n 130) para 257: "It was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements"; G. Van Harten, J. Kelsey and D. Schneiderman, "Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter" (2019) Osgoode Legal Studies Research Paper 2 (for a discussion of legal interpretation of the mandate).

[136] A. Arcuri and F. Violi, "Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same?" (2019) 3 Diritti umani e diritto internazionale 579.

provisions.[137] The Working Group has been clear thus far that it would continue to focus on its mandate of the procedural aspects of ISDS reform "as well as concerns that had already been identified by the Working Group as deserving reform by UNCITRAL".[138] However, an examination of substantive issues of international investment law would be outside the purview of ISDS, unless they were relevant to and interacted with procedural issues.[139] While the Working Group continues its work, it remains to be seen whether the agenda develops towards including more substantive provisions.

Among the above-mentioned concerns, at first six were identified in the Working Group's November 2018 meeting as necessary to address in the reform process — these are excessive legal costs, duration of proceedings, legal consistency, the correctness of decisions, arbitral diversity, and arbitral independence and impartiality.[140] Over time, other issues of concern have emerged in the process, such as third-party funding, calculation of damages, and the prevention of investment disputes.[141]

Deliberations on ISDS reform in UNCITRAL Working Group III have thus been taking place over the past few years, while at the same time several countries and regions (see section **4** below) are re-examining the ISDS regime from their own perspectives. This reassessment comes in the form of ideas for new mechanisms and approaches to dispute settlement, trying to find means of

[137] M. Langford, M. Potesta, G. Kaufmann-Kohler, and D. Behn, "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions — An Introduction" (2020) 21 JWIT 167.
[138] UNCITRAL Working Group III Report (n 129).
[139] Ibid.
[140] UNCITRAL Working Group III, "Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat" (36th Session, 29 October — 2 November 2018) UN Doc A/CN.9/WG.III/ WP.149 (5 September 2018).
[141] M. Langford, "UNCITRAL and Investment Arbitration Reform: A Little More Action" (*Kluwer Arbitration Blog*, 21 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/21/uncitral-and-investment-arbitration-reform-a-little-more-action/?doing_wp_cron=1590699000.8345720767974853515625> accessed 21 December 2021.

preventing disputes altogether, as well as negotiation of alternate kinds of bilateral and regional treaties or renegotiating or terminating existing ones. Indeed, as will be explored further below, several states are keen to explore alternatives to the traditional ISDS arbitration model, at the domestic, regional, or otherwise multilateral level, including the possibility of a permanent more judicialised form of dispute settlement.

In the first few stages, the Working Group's process involved collecting and organizing views, concerns, and proposals from states and other stakeholders with a view to structuring discussion.[142] In discharging this mandate, the Working Group has been given a broad range of discretion, and it plans to take into account the ongoing work of relevant international organisations in devising solutions, in agreement with the states.[143] Indeed, discussions on some topics could advance more quickly if they were already under talks for reforms in other fora. For example, while discussing the desirability and scope of potential new rules or model clauses concerning third-party funding in investment arbitration, the Working Group could build on the work done at the ICSID, which is going through a process of amendment of its arbitration rules (see section **3.2** below). Given the advanced stage of consideration of such topics by states and other stakeholders at ICSID, the Working Group could build on the work done under the aegis of ICSID.[144]

To discharge the first and second stages of its mandate, the UNCITRAL Working Group had sought to identify and consider concerns regarding ISDS, as well as the desirability of UNCITRAL undertaking reforms in light of these identified concerns. At its

[142] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session (Vienna, 14–18 October 2019)" (53rd Session, New York, 6–17 July 2020) UN Doc A/CN.9/1004 (23 October 2019) 15–18, paras 79–98.
[143] UNCITRAL Working Group Report (n 129).
[144] UNCITRAL Report (n 142) 18, para 95.

thirty-seventh session in 2019, it devoted its work to considering whether reform was desirable in relation to concerns relating to third-party funding, identifying any other concerns, considering the options available to facilitate the workplan to be developed, as well as proposals for the workplan, as part of discharging the third phase of its mandate.[145]

In light of all these considerations, at the thirty-seventh session, the Secretariat was asked to conduct preparatory work on a few topics under the broad umbrella of ISDS reforms. The first was relating to a code of conduct, which could address how such a code could be implemented in the current ISDS regime and in the context of structural reform, how obligations in such a code would be enforced, particularly when the function or term of an arbitrator was terminated. The UNCITRAL Working Group would collaborate with ICSID on this topic. The next topic for consideration is indirect claims, claims by shareholders, and reflective loss. This could take into account the work carried out by the OECD and complement the work already undertaken on the topic of multiple proceedings.[146] The selection and appointment of arbitrators is another topic for commencing preparatory work and could include compiling, summarizing, and analysing relevant information as one of the important topics for structural reform, in cooperation with the Academic Forum on ISDS.[147] Another interesting issue on which preparatory work could commence is the establishment of an advisory centre on international investment law. This could include information on the kind of assistance that could be provided to developing States

[145] UNCITRAL Working Group Report (n 129).
[146] UNCITRAL, "Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration — Note by the Secretariat" (50th Session, Vienna, 3–21 July 2017) UN Doc A/CN.9/915 (24 March 2017).
[147] This is a forum where academics active in the field of ISDS can exchange views, explore issues, test ideas and solutions, and make a constructive contribution to ISDS reform, particularly (though not exclusively) in the context of the UNCITRAL Working Group.

and questions to be addressed in establishing such an advisory centre, as a part of structural reform. Finally, as discussed at length above, preparatory work could also start on third-party funding, a topic to which some consideration has already been given.[148]

At its thirty-eighth session, the UNCITRAL Working Group proceeded towards developing relevant solutions for the concerns in ISDS that had already been identified in its previous sessions.[149] These solutions would then be recommended to UNCITRAL. In considering the various options for reform, the Secretariat noted that the Working Group should take into account the policy objectives of the ISDS regime and the United Nations Sustainable Development Goals ("SDGs"). With these goals in mind, reforms should thus be aimed at promoting and attracting investment, while at the same time reducing poverty and hunger, empowerment of indigenous peoples, promoting decent work, access to affordable energy and water, and reversing environmental degradation and climate change.[150] Other goals to consider, as suggested by states, were that: investment policies should provide legal certainty, as well as effective and equal protection to investors and investments, both tangible and intangible; there should be access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures; dispute settlement procedures should be fair, open, and transparent, with appropriate safeguards to prevent abuse, and decision-makers should reflect geographical, cultural, and gender diversity. With the above goals in mind, a number of proposed reforms were discussed, which are briefly described below.

[148] UNCITRAL Secretariat Note (n 112).
[149] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.166.
[150] Ibid 5.

3.1.1. Third-Party Funding

States participating in Working Group III proposed to regulate third-party funding of ISDS, but they differed on regulation versus full restriction of for-profit, commercial funding of claims against states. One state, for example, favoured a narrow focus on increased transparency and emphasised the importance of consulting the third-party funding industry in developing any regulations.[151]

The Working Group thus dedicated some time to third-party funding at its thirty-seventh session, to decide whether it would be desirable for UNCITRAL to develop reforms to address concerns on the topic, following up from the concerns expressed on this subject at its thirty-sixth session.[152] At the outset, it was emphasised that the phenomenon of third-party funding was one of great concern and the necessity of developing reforms in that area was underlined, particularly in light of the current lack of transparency and of regulation of third-party funding. A number of the concerns previously raised about third-party funding were reiterated, and concerns raised earlier were also noted.[153] The work on this topic started at the thirty-fifth session of UNCITRAL Working Group III.[154] The issues raised in relation to third-party funding were: potential conflicts of interest, third-party control and influence on the ISDS proceedings, impact on confidentiality, on costs and security for costs, as well as on speculative, marginal, and/or frivolous claims.[155] These issues have been discussed in section **2.4** above.

[151] See UNCITRAL Working Group III, 37th and 38th Sessions, Oral Submissions by states (on this topic): <https://uncitral.un.org/en/audio#03> accessed 21 December 2021.
[152] See UNCITRAL Secretariat Note (n 112).
[153] UNCITRAL Working Group III Report (n 129).
[154] See UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session (New York, 23–27 April 2018)" (51st Session, New York, 25 June — 13 July 2018) UN Doc A/CN.9/935 (14 May 2018) para 89.
[155] UNCITRAL Secretariat Note (n 112), para 16.

Suggestions for reforming the system of third-party funding in ISDS include the following. First, there is a suggestion to prohibit third-party funding entirely. A less extreme position is the proposal to regulate third-party funding in ways such as the introduction of mechanisms to ensure a degree of transparency, including through disclosures, also helping in ensuring the impartiality of arbitrators, imposing sanctions for failure to disclose, and by providing rules on third-party funders and on when they could provide funding. A clear definition of third-party funding was also warranted, since there was no uniform definition across statutes, rules, and treaties. Any attempt at effective reform would require all participants to agree on a definition before moving forward. This would also delineate the scope of work and help streamline the process in future discussions. Any solution would need to take a balanced approach (not completely limiting third-party funding) so that the interests and access to justice of small and medium-sized enterprises could also be safeguarded. As noted before, since issues concerning third-party funding overlap with other concerns in the ISDS system, these issues could also be resolved by finding solutions for those other concerns. Thus, for example, frivolous claims (whether or not funded by third parties) could be addressed by a mechanism for early dismissal.

In considering reforms and developing solutions, the UNCITRAL Working Group is also taking cognisance of the work of other organisations such as ICSID and the ICCA-QMUL Task Force, and any reforms made by states.

Draft provisions on third-party funding have already been circulated by the Secretariat.[156] In these draft provisions, the Secretariat defines third-party funding as “any provision of direct

[156] UNCITRAL Working Group III, “Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Third-Party Funding” <http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506_tpf_initial_draft_for_comments.docx> accessed 21 December 2021.

or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding".[157] This draft also sets forth the various models for regulating third-party funding, for the consideration of the Working Group — prohibition models and restriction models. The legal consequences of a party entering into or being provided with third-party funding that is not permitted would differ depending on the regulation model. Thus, a draft provision also envisages the legal consequences and possible sanctions for impermissible third-party funding agreements. Other provisions, no less important, include those on disclosure requirements, allocation of costs, security for costs, and a proposal for a code of conduct for third-party funders.[158] This code of conduct could address requirements of disclosure, particularly of any conflict of interest, transparency with respect to the conduct of their business, limitation on the amount or percentage of return to be paid to the funder, limitations on the control that the funder could have over the proceedings, limiting the number of claims that a funder could provide to support claims against a single state, and due diligence on claims to prevent the funding of frivolous claims.[159]

3.1.2. Third Parties in ISDS

An issue that needs to be discussed, however, is the involvement of third parties in ISDS, including the participation of the general public and local communities affected by the investment or the dispute at hand, and the need to ensure the same. This is an issue that warrants discussion because at present there is very little opportunity for interested third parties to take part in ISDS proceedings. Participation of third parties in ISDS could allow the representation of relevant interests before the arbitral tribunal,

[157] Ibid 2.
[158] Ibid 9–13.
[159] Ibid 13.

such as those relating to the environment, human rights, and investor obligations, which the tribunal could then consider. This relates to the public interest aspect of ISDS. The Working Group found that to enhance the legitimacy of the ISDS system, the participation of affected communities and individuals and public interest organisations is essential, apart from making submissions as third parties. The starting points for a discussion on this topic were two existing international legal texts — the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration.[160] Both these instruments already addressed submissions by a third person[161] and by a non-disputing party to the relevant treaty.[162] Only if these provisions were insufficient would the UNCITRAL Working Group need to develop guidance for tribunals on the ways and means of applying the requirements for third-party submissions and to ensure that such submissions would be duly considered when rendering their decisions. It was felt in the Working Group that some of those aspects could be addressed as the Group dealt with other related issues, that is, concerns about the inconsistency and incorrectness of awards, and as the Working Group developed means to give the treaty Parties more control over the ISDS process.

3.1.3. Investor Obligations

The subsequent proposals considered by the Working Group were related to the obligations of investors, such as in relation to human rights, the environment, as well as corporate social responsibility. This topic was closely related to the question of allowing counterclaims by respondent states, as well as claims by third parties against investors, and it was generally understood that

[160] UNCITRAL Working Group III Report (n 129).
[161] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) Article 4 <http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> accessed 21 December 2021.
[162] Ibid, Article 5.

any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so.[163]

In its 39th session, the Working Group considered counterclaims in their procedural and substantive aspects. With respect to the procedural aspect, rules applicable to ISDS generally contemplate the possibility of the respondent state raising counterclaims, and recent investment treaties include explicit provisions for counterclaims. Nevertheless, the Working Group considered that further consideration was required for issues such as jurisdiction and admissibility of counterclaims.

On the latter point, it was stated that the obligations of investors or the legal basis for counterclaims would not be addressed in this series of reform, since substantive aspects of investment law were outside the scope of work of the Working Group. However, a trend can already be seen, for example, in a number of African treaties that insist on including investor obligations,[164] in the EU-China Comprehensive Agreement on Investment (CAI),[165] and even in a joint report by UNCTAD, the

[163] UNCITRAL Working Group III Report (n 129).

[164] See eg SADC Protocol on Finance and Investment 2006 (requiring investors to abide by the laws, regulations, administrative guidelines, and policies of the host state), COMESA Investment Agreement 2007 (requiring investors to comply with all applicable domestic measures and expressly allowing counterclaims by the host State), ECOWAS Supplementary Act 2008 (including investor obligations to conduct environmental and social impact assessments and to abide by labour, human rights and corporate governance standards while expressly allowing the host State to raise a counterclaim or to initiate a unilateral claim against the investor), Morocco-Nigeria BIT 2016 (including investor obligations such as maintenance of an environmental management system), and the Pan-Africa Investment Code (PAIC) (including numerous investor obligations).

[165] This Agreement dedicates a chapter to sustainable development, which includes provisions on corporate social responsibility, environment, and labour, although couched in terms of obligations of China and the EU: <http://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159346.pdf> accessed 11 December 2021.

African Union, the UN Economic Commission for Africa, and the African Development Bank.[166]

At the same time, negotiations have been underway at the United Nations on the subject of imposing human rights obligations on multinational companies (sometimes referred to as corporate social responsibility, or CSR).[167] The decision in *Urbaser v Argentina*[168] was also significant in this respect, with an ISDS tribunal asserting jurisdiction over a counterclaim based on human rights, though it was later rejected on the merits.[169] This tribunal, construing host state rights in the BIT in question, recognised the possibility of holding investors accountable for their international law obligations, within the mechanism of ISDS. Moreover, it went on to categorically state that foreign investors could be subjected to international law obligations. This line of reasoning was supported,[170] among other things, by the CSR standard, that has gained prominence in discussions at the UN.[171] All these parallel yet related developments on the international legal plane indicate

[166] These four institutions have endorsed the adoption of investor obligations as one of the four pillars of an African investment protocol currently under negotiation: "Assessing Regional Integration in Africa: Next Steps for the Continental Free Trade Area" <http://euagenda.eu/upload/publications/aria9_report_en_4sept_fin.pdf> accessed 11 December 2021.

[167] See eg Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy'" Framework, United Nations Office of the High Commissioner for Human Rights 13 (2011), <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 13 December 2021.

[168] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012).

[169] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No. ARB/07/26, Award (8 December 2016) para 1221.

[170] Ibid, para 1195.

[171] UN Human Rights Council, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (17th Session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development) UN Doc A/HRC/17/31 (21 March 2011).

that investor obligations may play a more prominent part in the resolution of investment-related disputes in the future.

3.1.4. Damages and Compensation

The determination of damages was raised as another aspect requiring the consideration of the Working Group. However, since concerns about the incorrect calculation of damages by tribunals could be linked to other concerns such as those about incorrect decisions by arbitral tribunals, "damages" would be dealt with as a sub-topic, part of a broader subject for discussion.

The UNCITRAL Secretariat therefore prepared a Note on possible reform in ISDS on the assessment of damages and compensation.[172] In this Note, the Secretariat outlined some issues that it considered useful for the attention of the Working Group, to propose reforms, develop relevant provisions, possibly with binding effect, on procedural issues related to the assessment of damages and compensation to be included in investment treaties, arbitration rules or a multilateral instrument on procedural reform, and to develop guidelines and standards to provide to arbitral tribunals on the legal framework for the assessment of damages and compensation and the application of calculation methods. In particular, suggested changes in this topic relate to (i) the compensation standard and clarification of the applicable standard for cases of non-expropriatory breaches, (ii) the valuation method to be applied by the tribunal, (iii) the valuation date, (iv) potential limitations to awarding compensation, in particular the consideration of the claimant's conduct before the breach, (v) standards of causation, (vi) evidentiary requirements including the standard of proof, (vii) the issue of pre-and post-award interests by clarifying issues on defining the valuation date, the interest rate

[172] UNCITRAL, "Possible Reform of Investor-State Dispute Settlement (ISDS): Assessment of Damages and Compensation — Note by the Secretariat" <http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/assessment_of_damages_and_compensation_0.pdf> accessed 21 December 2021.

to be applied, and the mode of calculation, especially on whether compounding interest should be allowed, (viii) expert selection and their ethical obligations, (ix) allocation of costs and the various factors to consider in that context, such as the outcome of the case and the parties conduct, and (x) the primacy of restitution over compensation.[173]

One topic decisively not on the Working Group's agenda at present is the "regulatory chill" effect of ISDS — that is, the threat or use of ISDS, combined with the costs associated with the proceedings and the possibility of a high amount of damages payable, that resulted in discouraging states from undertaking measures aimed to regulate economic activities and to protect economic, social, and environmental rights.[174] However, the potential impact of ISDS on the regulatory policy of States would guide the Working Group's work on ISDS reform.

3.1.5. Advisory Centre on Investment Law

The multilateral advisory centre on international investment law was suggested following the model of the Advisory Centre on WTO Law ("ACWL").[175] It has been proposed that the advisory centre would be tasked to provide legal advice on investment law before a dispute arises and act as counsel when there is a dispute. This centre could also help States in capacity-building and the sharing of best practices. Another suggestion was to establish a mechanism for supporting and assisting developing and least developed countries in dealing with ISDS cases so as to enable them to better prepare for, handle and manage disputes relating to international investment. The advisory centre could also be tasked with providing low-cost legal advice and advocacy support particularly for developing and least developed countries and small and medium-sized enterprises.

[173] Ibid.
[174] UNCITRAL Working Group III Report (n 129) 7.
[175] UNCITRAL Working Group III Secretariat Note (n 149).

In establishing this centre, a number of issues need to be ironed out, such as the possible form the centre would take — whether as a stand-alone body, as part of an institution, as an intergovernmental or non-governmental organisation, or as a trust fund, established with a seat in one location or on a regional basis. Its possible functions and services would also need to be considered, including assistance in organizing the defence, support during dispute settlement proceedings, advisory services, alternative dispute resolution (ADR) services, as well as capacity-building and sharing of best practices. The beneficiaries of this centre would also need to be clarified, in terms of the states that would qualify for assistance or the size of enterprises. This reform option could be implemented on its own or in conjunction with any other options.[176]

3.1.6. Review or Appeal Mechanism

Another preliminary proposal relates to a stand-alone review or appellate mechanism.[177] Since most rules used in investment arbitration do not provide for a quality control procedure to review an award before it becomes final, it was suggested to establish a procedure for the prior scrutiny of arbitral awards, similar to the procedure used by the International Court of Arbitration of the International Chamber of Commerce ("ICC"). Such a procedure would allow the parties to a dispute to submit written comments to the arbitral tribunal on all aspects of the award before it becomes final. Further, it is suggested that the prior scrutiny of arbitral awards could be carried out by an independent body under one of the existing arbitration organisations. A separate, related proposal is the creation of a stand-alone appellate mechanism.[178] Such a mechanism would be regarded as a higher judicial authority tasked

[176] See UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Advisory Centre — Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.168.
[177] UNCITRAL Working Group III Secretariat Note (n 149).
[178] Ibid 6.

with ensuring consistency in the interpretation of BIT provisions and in rectifying errors in awards that could have a significant impact on public funds. A reform of this nature could also enhance the legitimacy of ISDS. A review or appellate mechanism may be set up to be effective in conjunction with different reform frameworks. For instance, an appellate mechanism could be tasked to review awards and decisions made by arbitral tribunals, a standing investment court (discussed further below), regional investment courts, international commercial courts, and domestic courts in case of denial of justice. Enforcement of the decisions of these review or appellate courts or tribunals would also need to be considered as part of the reforms.

There has been a separate proposal for a standing first instance and appeal investment court, with full-time judges.[179] This proposal considers a standing mechanism with full-time adjudicators and two levels of adjudication. A first instance tribunal would hear disputes. Just as arbitral tribunals at present, it would conduct fact-finding and then apply the relevant law to the facts. It would also deal with cases remanded to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal could be an error of law (including serious procedural shortcomings) or manifest error in the appreciation of the facts. It should not undertake a *de novo* review of the facts. Mechanisms for ensuring that the possibility to appeal is not abused should be included such as requiring security for cost. This suggestion for reform could be combined with, and work well in conjunction with other reform proposals, such as the appellate mechanism mentioned above. More details on a multilateral investment court are described in section **4.1** below.

The UNCITRAL Secretariat has also released a Note on draft provisions covering the selection and appointment of ISDS tribunal

[179] Ibid 7.

members, as well as interrelated topics on the establishment and functioning of a standing multilateral mechanism.[180] This Note includes provisions on the establishment, jurisdiction, and governance structure of such a tribunal, number of tribunal members, selection and appointment of adjudicators, their terms of office, appointment renewal and removal from office, and conditions of service.

3.1.7. Conduct of Adjudicators

The appointment methods and ethical obligations of arbitrations and other adjudicators are also an important topic for reform, coupled with a possible code of conduct.[181] On the issue of selection, appointment, and challenge of tribunal members that the Working Group considered, suggested reform options include the regulation of the current party-appointment mechanism, the establishment of a roster, the involvement of institutions (appointing authorities), and/or the creation of a standing first instance and appeal investment court. An appellate mechanism (as already discussed above) may also have an impact on the method for selecting and appointing adjudicators. All of these reform options would need to be considered in the context of the framework in which they would be developed. A code of conduct could be used as a means to address issues regarding the independence and impartiality of arbitrators and other adjudicators, and to more generally address ethical standards required from tribunal

[180] UNCITRAL, "Possible Reform of Investor-State Dispute Settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters — Note by the Secretariat" <http://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> accessed 21 December 2021.

[181] UNCITRAL Working Group III (ISDS Reform), "Possible reform of investor-State dispute settlement (ISDS): Background information on a code of conduct — Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.167 (31 July 2019).

members.[182] As discussed by stakeholders in the Working Group, this code of conduct should refer to independence and impartiality, integrity, diligence and efficiency, confidentiality, competence, general disclosure obligations, consequences of the failure to meet the obligations set out in the code of conduct, and the means of implementing this proposed reform.

Indeed, the third iteration of a draft code of conduct has been published by this Working Group in September 2021. This reflects the written comments received and discussions conducted in meetings convened jointly by the UNCITRAL and ICSID Secretariats. Important issues considered through the drafting process include double hatting,[183] issue conflicts,[184] and repeat appointments[185] of adjudicators in international investment disputes. Some issues are of course unique to *ad hoc* tribunals, for example, repeat appointments are irrelevant to judges of permanent courts or tribunals.

A Note by the UNICITRAL Secretariat lays out the means of implementation of the code of conduct.[186] It could be incorporated in investment treaties (whether bilateral or multilateral), or parties could agree to apply the code on a voluntary basis when a specific dispute arises. Procedural rules such as the ICSID Arbitration Rules or the UNCITRAL Rules could incorporate this code of conduct as

[182] UNCITRAL Working Group Report (n 142) 11–15.

[183] ICSID, "Code of Conduct — Background Papers: Double-Hatting" (25 February 2021) <http://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf> accessed 21 December 2021.

[184] ICSID, "Code of Conduct — Background Papers: Issue Conflict" (26 February 2021) <http://icsid.worldbank.org/sites/default/files/Background_Papers_Issue_Conflict_Final_2.26.2021.pdf> accessed 21 December 2021.

[185] ICSID, "Code of Conduct — Background Papers: Repeat Appointments" (25 February 2021) <http://icsid.worldbank.org/sites/default/files/Background_Papers_Repeat_Appointments_final_25.2.2021.pdf> accessed 21 December 2021.

[186] UNCITRAL Working Group III, (Investor-State Dispute Settlement Reform), "Draft Code of Conduct: Means of Implementation and Enforcement — Note by the Secretariat" (41st Session, Vienna, Online, 15–19 November 2021) UN Doc A/CN.9/WG.III/WP.208 (2 September 2021).

well. However, some limitations are foreseen when using this code in conjunction with ICSID Arbitration Rules. To the extent that provisions of the code conflict with those in the ICSID Convention or the Rules (such as those on arbitrator disqualification), these would prevail over the code. Finally, if a standing tribunal were established for investment disputes, this code could also be included as part of the applicable rules and regulations of the standing mechanism, whether at first instance or at the appellate level.

3.1.8. Strengthening Domestic Systems

One of the reforms suggested was the strengthening of domestic state machinery, with the aim of addressing concerns of inconsistent interpretations of investment treaty provisions, the absence of, or limited, mechanisms in many existing treaties to address inconsistency and incorrectness of decisions, as well as the cost and duration of ISDS proceedings, including frivolous claims and abuse of process.[187] This reform could be carried out by establishing or strengthening the framework for preliminary state-to-state consideration of issues, including technical consultations, decisions by the respective state authorities, setting up a joint review committee by the treaty Parties, a review or appellate mechanism, or a state-to-state body to which application could be made if the claim cannot be settled at the technical level in a given time period. Implementation of this reform could take place through various means — by developing a legal standard for inclusion in investment treaties or setting up a multilateral framework, also applicable to existing treaties, such as an appellate mechanism or a body to allow for an appeal from decisions of joint state authorities. These implementation measures could be used alternatively or in combination, or in combination with other reform options such as those aiming at enhancing the control of treaty Parties over their investment treaties, or those aiming at establishing review or appellate mechanisms (as discussed above).

[187] UNCITRAL Working Group Report (n 154) para 43.

3.1.9. Dispute Prevention

Proposals have also been put forth for dispute prevention and mitigation.[188] Under this head of proposals, suggestions have been made for strengthening dispute settlement methods other than arbitration, that is, mediation, or the use of an ombudsman, exhaustion of local remedies, a procedure to address frivolous claims including summary dismissal, multiple proceedings, reflective loss, and counterclaims by respondent States.

Various submissions to the Working Group indicate the global trend in emphasising the need for such mechanisms as means of avoiding recourse to investor-state arbitration.[189] The primary

[188] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)" (54th Session, Vienna, 28 June — 16 July 2021) UN Doc A/CN.9/1044 (10 November 2020) 5.

[189] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Morocco — Note by the Secretariat" (37th Session, New York, 1–5 April 2019) UN Doc A/CN.9/WG.III/WP.161 (4 March 2019) para 14; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Thailand" (37th Session, New York, 1–5 April 2019) UN Doc A/CN.9/WG.III/WP.162 (8 March 2019) para 25; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Submission from the Government of Costa Rica" (37th Session, New York, 1–5 April 2019) UN Doc A/CN.9/WG.III/WP.164 (22 March 2019) Annex I; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Costa Rica — Note by the Secretariat" (38th Session, Vienna, 14-18 October 2019) UN Doc A/CN.9/WG.III/WP.178 (31 July 2019) Annex II; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Brazil — Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.171 (11 June 2019); Submission from the Government of South Africa (n 134) paras 47, 48; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China — Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.177 (19 July 2019) 5; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of the Republic of Korea — Note by the Secretariat" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.179 (31 July 2019) 5; UNCITRAL Working Group

reasons behind this are efficiency in terms of costs, swift resolution of investor grievances, and retention of investments in the host state.[190]

To address investor grievances, "investment aftercare" has been suggested, to ensure that the investment environment is appropriate.[191] In order to prevent a complaint from escalating into a dispute, an early detection mechanism has been proposed, to allow the lead state agency to be informed of any grievance at the earliest stage possible.[192] Thereafter, state capacity to address investment disputes should also be strengthened, especially that of the lead agency involved in grievance redressal, drawing on the institutional knowledge gained by the lead agency through its involvement in the early stages of the conflict.

An existing early warning and tracking system in this context has already been developed by the World Bank — the Systemic Investor Response Mechanism (SIRM). Through this mechanism, data are collected and patterns of political risk that affect investments are identified. The SIRM also quantifies investment lost or gained as a result of these factors, and this forms a basis for potential reform or steps to minimise the recurrence of investment-related problems.

III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Mali" (38th Session, Vienna, 14–18 October 2019) UN Doc A/CN.9/WG.III/WP.181 (17 September 2019) section F; UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Governments of Chile, Israel, Japan, Mexico and Peru — Note by the Secretariat" (38th Session, Vienna, 14-18 October 2019) UN Doc A/CN.9/WG.III/WP.182 (2 October 2019) footnote 20.

[190] Submission from Brazil (n 189); Submission from Chile, Israel, Japan, Mexico and Peru (n 189) footnote 20; Submission from Republic of Korea (n 189) 5.

[191] Submission from Brazil (n 189) para 5.

[192] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Dispute Prevention and Mitigation — Means of Alternative Dispute Resolution — Note by the Secretariat" (39th Session, New York, 30 March — 3 April 2020) UN Doc A/CN.9/WG.III/WP.190 (15 January 2020) para 22.

With specific adaptations in line with the political and economic circumstances of each country, the SIRM operates broadly in the following manner. A lead government agency is empowered to implement and coordinate the system; an early alerting mechanism and tracking tool exist to communicate problems to this lead agency; the lead and other agencies use problem-solving methods available to them to find a solution, including exchanges of information, consultations, or legal opinions; and in the event that the lead agency is unable to recommend a solution, the grievance is to be redressed through political decision-making at higher levels. A system such as this, or building on this mechanism, could be established through the work of the UNCITRAL Working Group.

An alternative means of dispute resolution that has received much attention, not only from the UNCITRAL Working Group but also the ICSID, is mediation.[193] Mediation is already envisaged within several international institutions or treaty frameworks.[194] Most recently, the UNCITRAL itself adopted its Mediation Rules in 2021,[195] which are broad in scope and may be used for the settlement of investment disputes.

Nevertheless, the UNCITRAL Working Group considered it important to collaborate with interested organisations, particularly the ICSID, in developing or modifying mediation rules in the ISDS context, drafting model mediation clauses that could be used in investment treaties, and preparing guidelines for effectively using

[193] See section 3.2 below.

[194] See United Nations Convention on International Settlement Agreements Resulting from Mediation, GA Res 73/198 (December 2018) ("Singapore Mediation Convention"); IBA Rules for Investor-State Mediation 2012; Energy Charter Conference, Guide on Investment Mediation 2016 <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf> accessed 13 December 2021; ICC Mediation Rules 2014; SCC Mediation Rules 2014; ICSID Mediation Rules; COMESA Court of Justice Rules; EU-Canada FTA; EU-Vietnam FTA; EU-Singapore FTA.

[195] UNCITRAL Mediation Rules 2021, UN Doc A/76/17.

mediation for dispute resolution.[196] Given that the ICSID already adopted its own mediation rules, a joint approach may be useful in order to determine whether new specific mediation rules or standards need to be developed, or whether reform efforts should focus on model clauses and guidelines.

Towards this end, the ICSID and UNCITRAL Secretariats have already engaged in the exchange of information on investment mediation, with the ICSID contributing to the UNCITRAL Working Group's discussions on the development of mediation as an ISDS reform option. The current iteration of the ICSID Rules incorporates the formal requirements of the Singapore Mediation Convention, while at the same time providing a flexible, party-driven process with tailor-made solutions. Since the process is entirely voluntary and consent-based (even requiring ongoing consent), it would be more attractive to potential disputants and thus easier to incorporate into international legal instruments as a means of ISDS. The strength of the ICSID Rule-drafting process is also the extent of consultations with member states, a step that is an integral part of the UNCITRAL Working Group's process.

3.1.10. Costs and Security for Costs

It has been suggested that in the context of cost management and related procedures, the Working Group considers principles or guidelines on the allocation of cost and security for costs. With respect to security for costs, the Working Group noted that ISDS tribunals seldom ordered security for cost and had done so in very exceptional circumstances, despite the fact that certain arbitration rules provided for that possibility. It was also suggested during those deliberations that the availability of security for cost might assist in the early dismissal of frivolous claims.[197] A submission to

[196] UNCITRAL Report of the Working Group (n 188) paras 36–40.

[197] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session (Vienna, 29 October — 2 November

the Working Group nevertheless suggested that security for costs should be proportionate and reasonable, taking into account various factors, such as the amount of the claim. Requirements for security for costs could dissuade claimants from initiating meritless, abusive, and frivolous claims, and thus, it was suggested that it should be a mandatory requirement in cases involving third-party funding.

3.1.11. The Way Forward

In the report of the Working Group on its resumed fortieth session in May 2021,[198] it noted that the target date for the conclusion of the project would be 2025. The Working Group revised its workplan to include cross-cutting issues and the question of damages and their assessment. The proposals for reform would be considered by the UNCITRAL on a rolling basis, thus it could decide on the appropriate action to be taken for each reform option.[199]

The Working Group had decided that it would discuss, elaborate on, and develop multiple potential reform solutions simultaneously.[200] One of the means of conducting these simultaneous implementations could be through an opt-in treaty, on the lines of 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.[201] Creating such an opt-in treaty would ensure the application of the reforms to the existing

2018)" (52nd Session, Vienna, 8–26 July 2019) UN Doc A/CN.9/964 (6 November 2018) paras 128–133; see also UNCITRAL Working Group Report (n 154) para 92.

[198] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Fortieth Session (Vienna, 4 and 5 May 2021)" (54th Session, Vienna, 28 June — 16 July 2021) UN Doc A/CN.9/1054 (27 May 2021).

[199] Ibid 7.

[200] UNCITRAL Working Group III Report (n 129) para 81.

[201] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), "Possible Reform of Investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS Reform — Note by the Secretariat" (39th Session, New York, 30 March — 3 April 2020) UN Doc A/CN.9/WG.III/WP.194 (16 January 2020) 5–7.

investment treaties. However, not all reforms may be amenable to inclusion in such a treaty, and other specific instruments may need to be developed for some of the reform proposals. It may be possible to then implement these specific instruments through an opt-in treaty mechanism.

3.2. ICSID Reform

In 2016, the ICSID launched its process of amending its rules and regulations for the fourth time since its inception. Member states as well as the general public were invited to comment on topics that they thought were in need of reform. In 2018, the ICSID secretariat published its first Working Paper, containing proposals to amend the ICSID Convention arbitration and conciliation rules so as to improve the ISDS process, making it time- and cost-effective while maintaining due process and a balance between investors and states.[202] Most recently, in June 2021, the Secretariat published its fifth Working Paper, with proposals for amendments to the rules. The current drafts of the proposed new ICSID Arbitration Rules and ICSID (Additional Facility) Arbitration Rules each contain new provisions defining third-party funding and establishing a disclosure obligation, as well as requirements for security for costs.[203] This and earlier Working Papers are the outcome of extensive consultations with ICSID Member states and members of the general public including lawyers, arbitrators, private sector representatives, and stakeholder groups. The Working Papers explain the basis for a proposed change, note the relevant considerations, and suggest the potential wording or structure of amendments. It is expected that this is the last round of amendments and the last Working Paper on

[202] See ICSID, "About the ICSID Rule Amendments" <http://icsid.worldbank.org/resources/rules-and-regulations/amendments/about> accessed 21 December 2021.
[203] ICSID Working Paper 6, "Proposals for Amendment of the ICSID Rules" (November 2021) (draft ICSID Arbitration Rules 14 and 53 and draft ICSID (Additional Facility) Arbitration Rules 23 and 63) <http://icsid.worldbank.org/resources/rules-amendments> accessed 21 December 2021.

the subject and that these proposals may be adopted for use by early 2022. Apart from proposing amendments to various existing rules, there are also proposals for new standalone rules on fact-finding and mediation.

Indeed, the importance of mediation as an important alternative mode of dispute resolution has been highlighted even in the most recent ICSID annual report.[204] Drawing from the Singapore Convention on Mediation[205] and the growing number of international investment agreements specifically referring to mediation, the ICSID Secretariat recognised a growing interest of the international community in mediation. This led to the development of the ICSID investor-State mediation rules, combined with the creation of practical guidelines and draft mediation model clauses for future investment treaties, and a capacity-building programme for government representatives. This is the first institutional attempt to settle investor-state disputes through mediation. The rules have a broad scope of application, allowing the ICSID to administer any mediation proceeding that relates to investment and involves a state or a regional economic integration organisation ("REIO") where the parties have given their consent.

Other than these new standalone rules, amendments to the various ICSID rules have aimed at reducing time and costs in ISDS. The institutional rules include a checklist of instructions for filing a case. This would need to include information such as a description of the investment involved and a statement of its ownership and control.[206] The arbitration rules are the ones undergoing the most comprehensive reform. Proposed changes include the obligation

[204] ICSID, "2021 Annual Report" (7 September 2021) 34–35 <http://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf> accessed 8 November 2021.
[205] Singapore Mediation Convention (n 194).
[206] ICSID, "Updated Backgrounder on Proposals for Amendment of the ICSID Rules" (15 June 2021) <http://icsid.worldbank.org/sites/default/files/Backgrounder_WP_5.pdf> accessed 8 November 2021.

to disclose third-party funding, challenging and disqualification of arbitrators, reasoned orders and decisions, detailed rules on costs, expedited proceedings, and enhanced transparency.[207] A number of these changes are interrelated, and some of these proposals are described in detail below.

Concerns regarding third-party funding find their way to the proposed amendments. While states generally recognised it as a useful tool for enhancing access to arbitration for small and medium enterprises, some states nevertheless remained concerned regarding the existence and potential impact of third-party funding.[208] Third-party funding is defined as the receipt by a party of funds, directly or indirectly, for the pursuit or defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.[209] According to the ICSID Secretariat, this simple, and one may say, broad, definition accommodates the various forms of such funding and emphasises the rule on avoidance of conflict.[210] Thus, parties are not obligated to disclose any contingency fee arrangements that they may enter into with their counsel, since counsel would be identified on the record and their identities would therefore be made known to the arbitrators.[211]

According to the latest position in Working Paper 5, the parties will have an obligation to disclose the name and address of any non-party from which they received funding, directly or

[207] Ibid.
[208] ICSID Working Paper 3, "Proposals for Amendment of the ICSID Rules" Volume 1 (August 2019) 295 <http://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf> accessed 21 December 2021.
[209] ICSID Working Paper 4, "Proposals for Amendment of the ICSID Rules" Volume 1 (February 2020) 37–38, 58–59, 130, 151–152 (draft ICSID Arbitration Rules 14 and 53 and draft ICSID (Additional Facility) Arbitration Rules 23 and 63) <http://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf> accessed 21 December 2021.
[210] ICSID Working Paper 2, "Proposals for Amendment of the ICSID Rules" Volume 1 (March 2019) 121, 491 <http://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf> accessed 21 December 2021.
[211] Ibid.

indirectly. Representatives of a party are also not excluded from this disclosure obligation, in the event that they receive third-party funding. This disclosure obligation continues throughout the ISDS proceedings.[212] Potential arbitrators, before appointment in a case, are to be provided with the names of any and all funders involved in that case, to avoid potential conflicts of interest. The arbitrator declaration requires disclosure of any relationship between the arbitrator and any third-party funder.[213] If parties require further information concerning third-party funding, the tribunal may order further disclosure, pursuant to the usual rules on disclosure of information.[214] These proposals are no doubt an outcome of the efforts to enhance transparency in the process and reduce the risk of conflicts, and the third-party funder disclosure requirement can also be found in the proposed amendments to the ICSID conciliation rules.[215]

Regarding costs, it has been proposed that in exercising their discretion to award costs, tribunals must consider the outcome of the proceeding or any part of it; the conduct of the parties including the extent to which they acted in a cost-effective manner and complied with the rules, orders, and decisions; the complexity of the issues; and the reasonableness of the costs claimed.[216] If the tribunal rules in an award that a claim manifestly lacks legal merit, then the winning party would be awarded reasonable costs, except if special circumstances justify otherwise.[217] A new article has been proposed that would allow a tribunal to order security for costs.[218] Under this

[212] ICSID Working Paper 4 (n 209) 37 (draft ICSID Arbitration Rule 14(1) and (3), draft ICSID (Additional Facility) Arbitration Rule 23(1) and (3)).
[213] ICSID Working Paper 3 (n 208) 295.
[214] ICSID Working Paper 4 (n 209) (draft ICSID Arbitration Rule 14(4), 14(5) and 36(3), draft ICSID (Additional Facility) Arbitration Rule 23(5)).
[215] ICSID Working Paper 3 (n 208) 129, 354 (draft ICSID Arbitration Rule 21and draft ICSID Conciliation Rule 13).
[216] Draft ICSID Arbitration Rule 52.
[217] Draft ICSID Arbitration Rule 52(2).
[218] Draft ICSID Arbitration Rule 53, formerly Article 52 in Working Paper 3 (n 208) 295.

rule, the tribunal would need to consider the party's ability and willingness to comply with an adverse decision on costs, the effect of providing security on a party's ability to claim or counterclaim, the conduct of the parties, and any other relevant circumstances.[219] These "relevant circumstances" include the existence of third-party funding and all evidence presented before the tribunal.[220] However, the mere existence of third-party funding alone is not sufficient to justify an order for security for costs, without relevant evidence of an inability to comply with an adverse decision on costs.[221]

The Secretariat gave considerable thought to enhancing transparency in the ISDS process. The proposed changes remain constrained by the ICSID Convention, which requires the consent of both parties to publish an arbitral award. However, working around this treaty provision, a new proposed provision deems that a party has given consent to publish awards unless it objects in writing within sixty days.[222] Even with a party's objection, under the proposed rules the ICSID can publish legal excerpts of the award, with an established process and within a certain timeline.[223] Under the ICSID Additional Facility Arbitration Rules, it is proposed that orders, decisions, and awards will be published after redacting confidential information.[224] In any case, under both these sets of rules, redactions will be agreed to by the parties or decided by the tribunal.[225] The ICSID will also publish any written submissions

[219] ICSID Working Paper 4 (n 209) 58-59, 151-152 (draft ICSID Arbitration Rule 53(3)), draft ICSID (Additional Facility) Arbitration Rule 63(3)).
[220] ICSID Working Paper 5, "Proposals for Amendment of the ICSID Rules" Volume 1 (June 2021) <http://icsid.worldbank.org/sites/default/files/publications/WP%20 5-Volume1-ENG-FINAL.pdf> accessed 21 December 2021.
[221] ICSID Working Paper 4 (n 209) 59, 152 (draft ICSID Arbitration Rule 53(4), draft ICSID (Additional Facility) Arbitration Rule 63(4)).
[222] ICSID Working Paper 1, "Proposals for Amendment of the ICSID Rules" Volume 3 (August 2018) <http://icsid.worldbank.org/sites/default/files/publications/WP1_ Amendments_Vol_3_WP-updated-9.17.18.pdf> accessed 21 December 2021.
[223] Draft ICSID Arbitration Rule 62.
[224] Draft ICSID (Additional Facility) Arbitration Rule 73.
[225] Draft ICSID Arbitration Rule 63, draft ICSID (Additional Facility) Arbitration Rule 73.

or supporting documents with the consent of the parties. A party may also request publication of a written submission (but not a supporting document)[226] that it filed in a proceeding. Either party may request the tribunal to decide any disputed redactions in such a submission, and the ICSID would publish this written submission according to the tribunal's decision. Another measure to enhance transparency is the requirement of open hearings, unless either party objects.[227] There is an exception for protected personal information[228] that cannot be publicly disclosed.[229]

The ICSID Secretariat has also been working with UNCITRAL on a Code of Conduct for adjudicators in international investment disputes. This has been discussed above, in the context of UNCITRAL level reform (section **3.1**).

[226] Draft ICSID Arbitration Rule 64.
[227] Draft ICSID Arbitration Rule 65.
[228] Draft ICSID Arbitration Rule 66 defines confidential or protected information for the purposes of publication.
[229] ICSID Working Paper 5 (n 220).

4.

Regional Approaches to Reform

In parallel, and sometimes overlapping with, reform efforts at a global level described above in section **3**, discussions or even state practice in certain regions can also be seen, aiming to reform the system of ISDS at a continental level. In this section, the most extensive progress in terms of ISDS reform is examined, the reform that has been taking place at the European (**4.1**) and African (**4.2**) levels, with a brief look at other regions as well (**4.3**).

4.1. Europe

At the European level, the EU, through its exclusive competence over foreign direct investment, has become a significant actor in the sphere of international investment law governance. The EU was already an actor in investment law before the entry into force of the Treaty on the Functioning of the European Union ("TFEU" or the Lisbon treaty) in 2009, through the conclusion of a number of FTAs containing provisions on investment. However, the inclusion of foreign direct investment ("FDI") in Article 207(1) of the TFEU redefined its importance as an international actor in the field of investment law. The Court of Justice of the European Union ("CJEU") has clarified that the EU has exclusive competence over FDI, though not over other indirect foreign investments.[230] For the latter, competence is shared with Member States. Moreover, not only the admission of FDI but also the protection of FDI falls within the scope of the EU's competence.[231] The Court has also ruled that ISDS in the form of arbitration falls not within the exclusive

[230] CJEU, *Opinion 2/15*, ECLI:EU:C:2017:376 (16 May 2017) paras 81, 243.
[231] Ibid, para 87.

competence of the EU, but within the shared competence of the EU and its Member States. The main reason for this conclusion is the nature of the dispute settlement mechanism that provides direct access to investment arbitration, thus allowing an investor to bypass the jurisdiction of Member States.[232] Such a regime, according to the CJEU, cannot be considered ancillary and must therefore not fall within the same competence as the related substantive provisions.[233]

4.1.1. Third-Party Funding

The texts of a number of investment treaties signed over the past few years contain provisions specifically regulating third-party funding in investor-state arbitration. Responding to these developments coupled with the calls for regulation of third-party funding, a number of changes can be seen in the realm of treaty negotiations involving the EU. The Comprehensive Economic and Trade Agreement ("CETA") concluded by the EU with Canada in 2016 makes disclosure of third-party funding of claims arising under this treaty mandatory. It also contains a detailed definition of third-party funding, stating that "third-party funding means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute".[234] This formulation is however not unique. Similar definitions can be found in the EU's 2015 Negotiation Text for the EU-US Transatlantic Trade and Investment Partnership ("TTIP")[235] and the 2018 EU-Singapore Investment Protection

[232] Ibid, paras 292–293.
[233] Ibid, paras 276, 292.
[234] EU — Canada Comprehensive Economic and Trade Agreement 2017 (CETA), Article 8.1.
[235] EU Draft Text of Transatlantic Trade and Investment Partnership, Chapter II, Section 3, Article 1 <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 21 December 2021.

Agreement.[236] The formulation seen in the CETA may well be followed in arbitral practice across the world.

The disclosure requirement under CETA mentioned above obligates a disputing party to disclose the name and address of any funder to the other disputing party and the tribunal.[237] The EU-Singapore Investment Protection Agreement follows the CETA in this regard.[238] The 2019 Dutch model BIT similarly obligates claimants to disclose the name and address of any third-party funder.[239] The EU-Vietnam Investment Protection Agreement goes a step further, requiring in addition the disclosure of the "nature of the funding agreement".[240] It also addresses the allocation of costs and security for costs in the context of third-party funding. Under this treaty, a tribunal is required to take into account the existence of third-party funding when deciding whether to order security for costs. Moreover, in deciding on the allocation of costs, the tribunal should consider whether the disclosure requirements regarding third-party funding had been respected.[241]

Ongoing discussions on the policy options for modernising the Energy Charter Treaty ("ECT") also include proposed provisions on third-party funding.[242]

[236] EU-Singapore Investment Protection Agreement 2018, Article 3.1.
[237] EU — Canada Comprehensive Economic and Trade Agreement, Article 8.26.
[238] EU-Singapore Investment Protection Agreement 2018 (EU-Singapore IPA), Article 3.8.
[239] Netherlands Model Investment Agreement 2019, Article 19.8.
[240] EU — Vietnam Investment Protection Agreement 2019 (EU-Vietnam IPA), Article 3.37(1)-(2).
[241] Ibid, Article 3.37(3).
[242] Energy Charter Secretariat, "Decision of the Energy Charter Conference" CCDEC 2019 08 STR (Brussels, 6 October 2019) <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf> accessed 21 December 2021.

4.1.2. Investment Court System

Apart from issues of third-party funding, anti-ISDS sentiment generally arose in Europe after an increasing number of ISDS cases involved European states as respondents. Particularly after the *Vattenfall* award,[243] there were strong campaigns against the inclusion of ISDS provisions in the TTIP, during its negotiations between the EU and the US. Although the EU initially commenced the negotiations with the goal of including ISDS, the EU Parliament eventually voted to replace ISDS with an investment court system.

The EU, in 2015, had initially proposed an Investment Court System ("ICS"), which was characterised by a two-tier court system with a standing tribunal and a permanent appellate tribunal, to adjudicate investment disputes. This was the EU's response to the crisis of legitimacy of ISDS. The CETA,[244] the EU-Vietnam Investment Partnership Agreement,[245] the EU-Mexico Global Agreement,[246] as well as the EU-Singapore Investment Protection Agreement,[247] already contain this mechanism, though at their respective bilateral levels.[248] In both treaties, the ICS includes the two-tier court mechanism.[249] The tribunal of first instance is composed of a set of permanent members[250] elected by a joint committee. The CETA Joint Committee is the main organ of the CETA comprising representatives of the EU and Canada.[251] The committee

[243] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Order of the Tribunal taking note of the Discontinuance of the Proceeding (9 November 2021).
[244] CETA (n 234) Article 8.29.
[245] EU-Vietnam IPA (n 240) Article 3.41.
[246] EU-Mexico Global Agreement, Section: Resolution of Investment Disputes, Article 14.
[247] EU-Singapore IPA (n 238) Article 3.12.
[248] See also S. Schacherer, "TPP, CETA and TTIP Between Innovation and Consolidation — Resolving Investor–State Disputes under Mega-Regionals" (2016) JIDS 628 (for further details on the CETA ICS).
[249] CETA (n 234) Articles 8.27, 8.28; EU-Vietnam IPA (n 240) Articles 3.38, 3.39.
[250] There are total fifteen under CETA and nine under the EU-Vietnam IPA.
[251] See CETA (n 234) Article 26.1.

takes decisions based on mutual consent.[252] A third of the tribunal members are to be nationals of an EU Member State, one third are to be nationals of the other state party (Canada/Vietnam) and another third are to be nationals of third countries.[253] Cases will be heard in divisions of three members.[254] The chairperson of the division has to be a third-country national.[255] Members of the tribunal shall be available and be able to perform their functions.[256]

Under the CETA (and similarly for other treaties containing reference to an ICS), in the two-tiered permanent tribunal (or the ICS system), investors do not have the right to be involved in the selection of tribunal members, or judges, who would decide their claim. In other words, they have no say in the election process of the tribunal members (whether in the first instance or at the appellate level), or in the appointment or assignment of any number of these judges to a division deciding a dispute. In the event that an investor makes a claim under one of these treaties, the President of the tribunal is competent to assign cases to the members of the tribunal on a rotating basis, while ensuring that the composition of a division is random and unpredictable, and giving equal opportunity to all tribunal members to serve.[257] This is a useful requirement, safeguarding judicial independence by ensuring the absence of a link between members of the tribunal and the disputing parties, as well as the issues in dispute. This mechanism serves to eliminate presumptions of bias that may arise in ISDS taking the form of arbitration, where a tribunal is established to hear a particular dispute, and includes arbitrators appointed by parties from both sides. The requirement for the tribunal members to not act as counsel or party-appointed expert or witness in any

[252] CETA (n 234) Article 26.3.
[253] CETA (n 234) Article 8.27(2); EU-Vietnam IPA (n 240) Article 3.38(2).
[254] CETA (n 234) Article 8.27(6). This also the case for the Appellate Tribunal, see CETA Article 8.28(5); EU-Vietnam IPA (n 240) Articles 3.38(6) and 3.39(8).
[255] Ibid.
[256] CETA (n 234) Article 8.27(11); EU-Vietnam IPA (n 240) Article 3.38(14).
[257] CETA (n 234) Article 8.27(7); EU-Vietnam IPA (n 240) Article 3.38(7).

ISDS dispute also avoids a related issue affecting independence — double-hatting.[258] This phenomenon where an individual acts as counsel in one proceeding and as arbitrator in another, is said to affect (or be perceived to affect) their independence and impartiality as arbitrators,[259] perhaps by way of their role and interactions with certain parties or individuals in one case informing their actions and decisions in another.[260] Further strengthening the legitimacy of the tribunal members (including the members of the appellate tribunal)[261] are the various qualifications and ethical obligations required from them, as provided in the CETA and similar treaties. These are the qualifications required in the members' home countries for appointment to judicial office, or alternatively being jurists of recognised competence.[262] This provision is reminiscent of the requirements in the statute of the International Court of Justice, which requires the Court's judges to "possess the qualifications required in their respective countries for appointment to the highest judicial offices" or to be "jurisconsults of recognized competence in international law".[263] Interestingly, ICS judges are also expected to demonstrate expertise in public international law, along with the desired expertise in international investment law, in international trade law, and the resolution of disputes arising under international investment or international trade agreements.[264] These requirements are an innovative departure from existing

[258] CETA (n 234) Article 8.30(1); EU-Vietnam IPA (n 240) Article 3.39(1).
[259] P. Sands, "Conflict of Interests for Arbitrator and/or Counsel", in M. Kinnear and others (eds), *Building International Investment Law — The First 50 Years of ICSID* (Wolters Kluwer 2016) 655. See also P. Sands, "Reflections on International Judicialization" (2017) 27 EJIL 885, 894; European Commission, "Report: Online Public Consultation on Investment Protection and investor-To-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)" (Brussels, 13 January 2015) 103 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 20 September 2021.
[260] Sands, "Conflict of Interests" (n 259) 655-56.
[261] CETA (n 234) Article 8.28(4).
[262] CETA (n 234) Article 8.27(4); EU-Vietnam IPA (n 240) Article 3.38(4).
[263] ICJ Statute (n 60) Article 2.
[264] Ibid; CETA (n 234) Article 8.27(4).

practice, emphasising the public nature of ISDS and the fundamental character of investment treaties as inter-state agreements.[265]

The appellate tribunal envisaged under the ICS has jurisdiction over decisions (awards) of the tribunal of first instance.[266] This appellate tribunal has the power to uphold, modify, or reverse the award of the first instance tribunal, only on the satisfaction of one or more of three specified grounds.[267] These grounds are first, error in the application or interpretation of applicable law, second, manifest error in the appreciation of facts including relevant domestic law, and third, all the grounds for annulment listed in the ICSID Convention. The grounds in the ICSID Convention are the improper constitution of the tribunal, manifest excess of powers by the tribunal, corruption on the part of the members of the tribunal, a serious departure from a fundamental rule of procedure, or failure to state reasons in the award.[268]

The above provisions related to the novel proposal of an ICS demonstrate the proactive response by the EU to the "legitimacy crisis" that seems to be plaguing ISDS. The ICS institutionalises the arbitral process, makes it more transparent, and enhances the legitimacy of the ISDS process through strengthening the perception of independence and impartiality of the tribunal members. This mechanism of ISDS has also received the seal of approval of the CJEU in terms of its compatibility with EU law.[269]

The European Federation for Investment Law and Arbitration ("EFILA") was established to promote the knowledge of international investment law and to serve as a platform for "merit-based

[265] I. Venzke, "Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication" (2016) JWIT 374, 393–394.
[266] CETA (n 234) Article 8.28(1)-(2); EU-Vietnam IPA (n 240) Article 3.39(1).
[267] CETA (n 234) Article 8.28(2); EU-Vietnam IPA (n 240) Article 3.54(1).
[268] CETA (n 234) Article 8.28(2)(c); EU-Vietnam IPA (n 240) Article 3.54(1)(c); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) 575 UNTS 159 ("ICSID Convention") Article 52.
[269] CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341 (30 April 2019).

discussion" and foster an "objective debate" on investment arbitration.[270] Its pro-ISDS stance is evidenced in a report wherein it responded to criticism against ISDS, aiming to address the "most often voiced myths" against ISDS and "balancing the currently rather one-sided debate by providing an in-depth analysis, based on arbitration practice and literature".[271] EFILA also created a task force to examine the ICS proposal[272] and concluded that this "clearly breaks with the current party-appointed, *ad hoc* ISDS as provided for in practically all BITs and FTAs". As a result, a claimant would be deprived of a role in appointing judges at the expense of a state's exclusive authority to do so (although in advance of a particular case). This selection of judges, even at the appellate stage, by states, has drawn the criticism of carrying the inherent risk of selecting "pro-State" judges.[273] This criticism has itself been criticised, with a comparison to judges of regional human rights courts. If human rights courts' state-appointed judges were not considered at risk of being "pro-State", the same consideration should extend to judges of an ICS.[274]

It can be argued that the ICS addresses the issues regarding independence and impartiality of adjudicators, and the appellate mechanism fits the public law components of investment disputes.

4.1.3. Multilateral Investment Court

Now, the ICS that the EU has incorporated into a number of BITs or similar bilateral international agreements is eventually

[270] European Federation for Investment Law and Arbitration (EFILA), "Aim of EFILA" <http://efila.org/about-efia/> accessed 4 September 2021.
[271] EFILA, "A Response to the Criticism against ISDS" (17 May 2015) <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf>, accessed 4 September 2021.
[272] EFILA, "Task Force Paper Regarding the Proposed International Court System (ICS), Draft Dated 1.2.2016" <http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf> accessed 4 September 2021.
[273] Ibid 59–60, paras 4–5.
[274] See Angelet (n 132).

bilateral and will be restricted to disputes arising out of a particular treaty. However, in March 2018, the EU Commission received a mandate from the EU Council to negotiate a Multilateral Investment Court ("MIC").[275] It may be recalled that this proposal is also under discussion in the UNCITRAL Working Group III (see section **3.1.6** above). In the context of the discussions on this topic at the EU level, Bungenberg and Reinisch have considered in great detail the feasibility of creating two kinds of multilateral ISDS mechanisms.[276] These are the option of a two-tiered MIC and a multilateral investment appellate mechanism ("MIAM"). Common to both these options is a standing judicial body composed of permanent judges (for their term of appointment).

In comparison to the ICS mechanism that appears in a number of bilateral EU treaties,[277] the multilateral court proposals present a new approach. A standing investment court has already received praise from the United Nations Conference on Trade and Development ("UNCTAD"): it has been considered that a standing investment court would serve the interest of all stakeholders, including both states and investors; it would address most of the issues that have been raised in the context of ISDS (such as those discussed in section **2** above); and most importantly, it would go a long way towards ensuring the legitimacy and transparency of the ISDS system, and the facilitation of consistent and accurate decisions.[278]

[275] Council of the EU, "Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes" 12981/17, ADD 1 DCL 1 (Brussels, 20 March 2018).
[276] M. Bungenberg and A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, European Yearbook of International Economic Law (2nd edn, Springer 2020).
[277] See section 4.1.2 above.
[278] UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap" (IIA Issues Note No. 2, June 2013).

By its very nature, a multilateral permanent court system would lead to coherence, predictability, and legal certainty in ISDS, thereby overall strengthening the legitimacy of the system, through increased acceptance of the decisions of the MIC (or MIAM). The current network of bilateral relationships in international investment law and ISDS through BITs can be institutionalised and multilateralised through this court system, though the BITs and the substantive protections they provide would remain. This is thus a step forward from the ICS mechanism that is already present in a number of bilateral treaties involving the EU.

The purpose of the MIC proposal is not to consolidate substantive standards — that could be the subject of a later project or a future multilateral treaty.[279] Bungenberg and Reinisch are of the opinion that it may be easier to combine such an opt-in convention on standards of protection with an MIC or MIAM than with a standalone appellate mechanism.[280]

Further, they are of the opinion that a two-tiered court system would have advantages in comparison to a mere appellate mechanism in terms of the implementation of rule of law considerations and systemic coherence.[281] This is because there would not be a shift from investment arbitration in the first instance to an international court in the second instance. They also prefer a two-tiered MIC to a MIAM as an MIC, since that would lead to a complete overhaul and holistic and coherent reform of the current system of ISDS in the form of investment arbitration. It is still useful to know a bit about the MIAM and how it would function, since there would be several significant improvements over the current system, if the MIAM were to be implemented.

[279] See, however, earlier discussions on a Multilateral Agreement on Investment at the OCED: <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> accessed 11 November 2021.
[280] Bungenberg and Reinisch (n 276) 2.
[281] Ibid.

In terms of organisational structure, the MIC or MIAM could take the form of an independent international organisation on the basis of a treaty, with its own organs and with a separate legal personality. It would need a statute laying out its constitutive elements and procedures, but to truly ensure its successful implementation as a multilateral dispute settlement body, the statute should come into force only after a certain minimum number of ratifications.[282]

Drawing perhaps from the proposal for an Advisory Centre on Investment Law (see section **3.1.5** above), an Investment Advisory Centre has been suggested as an independent organ within the umbrella of the MIC or MIAM, to support small and medium-sized enterprises and developing countries in settling and preventing disputes and to provide legal advice when disputes arise.

Similar to the ICS, it has been suggested that judges on this court be independent, highly qualified, particularly in international law, economic law, and public/constitutional law, and, as fulltime judges, be available on a permanent basis. Appropriate procedures for the election and appointment of judges must reflect these qualifications. The MIC or MIAM Statute should contain a code of conduct for the judges.[283]

In terms of the procedure of the MIC, it has been suggested that the procedure should be two-tiered, similar to that of administrative courts, and conducted in an inquisitorial manner.[284] An application procedure should be mandatory, with the parties having a right to an efficient and expedient procedure. The rules of procedure of the court(s) should incorporate the transparency requirements laid out in the UNCITRAL Transparency Rules and in the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention).[285] In that way, procedural

[282] Bungenberg and Reinisch (n 276) 3.
[283] Ibid 4.
[284] Ibid 5.
[285] Ibid.

documents can and should generally be published as long as it does not prejudice essential interests like business secrets or the security interests of the parties. In the same vein, hearings should be open to the public, with the opportunity given to third parties to deliver statements if they so wish.[286]

It has also been proposed that a maximum duration should be imposed for judicial proceedings in both the first and second instance, with extensions permitted only in exceptional cases. Relatively shorter proceedings, as compared to investment arbitration, should be possible in the case of the MIC/MIAM since judges in this court would be sitting full-time.[287]

Apart from the usual power of an international tribunal to rule on its own jurisdiction (*compétence de la compétence*), the MIC should derive its jurisdiction *rationae personae* and *rationae materiae* from BITs and similar treaties under which the investor is making a claim.[288] The situation would be different if a multilateral treaty on substantive rights and obligations, as briefly mentioned above, is also formulated and then widely ratified. In the present circumstances, given that both investor and state need to submit to the jurisdiction of the MIC, the investor's acceptance of jurisdiction is straightforward and can be inferred from its submission of the claim before this forum. The respondent state's agreement to jurisdiction can derive from BITs or other international investment agreements which would explicitly provide for the jurisdiction of the MIC.[289] Alternatively, jurisdiction over existing investment treaties may be specifically included in the statute of the MIC, as long as the respondent state has ratified the statute of the MIC and the home state of the investor has ratified it as well. Provision may also be made (optionally) for the jurisdiction of the MIC to extend

[286] Ibid.
[287] Ibid.
[288] Ibid.
[289] Ibid.

to claimants (investors) that are not from states parties to the MIC. It needs to be decided and should be explicitly stated whether the MIC's jurisdiction would extend to claimants not from MIC state parties and whether the jurisdiction of the MIC can be established *ad hoc*, in the event that neither the investor is from a state party to the MIC, nor the respondent is an MIC member state.[290]

The statute of the MIC could also lay down rules aimed at preventing abuse of process or treaty shopping.[291] This would not only protect the respondent states but also prevent the court from getting overburdened and increase cost-efficiency. Thus, negative admissibility requirements should be incorporated in the statute, to enable dismissal of claims without merit.[292]

It is important that decisions of the MIC, apart from being in written form, include detailed reasoning to make them fully comprehensive to future reviewers, and increase the legitimacy of the decisions as well. In this two-tiered system, a decision would become binding and enforceable if not appealed by either of the parties. In the event of an appeal, the binding effect of a decision of the first instance court would be suspended.[293]

It is important to define the power of the appellate chamber of the MIC. It has been proposed that this chamber could review the facts, as well as the legal reasoning of decisions. Further, its competence should extend beyond the power to annul decisions, on grounds beyond those listed in the ICSID Convention.[294] It has been considered preferable for the appellate chamber to have more extensive powers of review rather than merely sending decisions back to the court of the first instance for it to decide again.[295] As

[290] Ibid.
[291] Ibid.
[292] Ibid 70–71.
[293] Ibid 5.
[294] ICSID Convention (n 268) Article 52.
[295] Bungenberg and Reinisch (n 276) 6.

mentioned earlier for the court of the first instance, even at the appellate stage it is recommended that judges should sit in chambers. An application to have an appeal heard by the entire appellate court could remain an option as an exception.

Secondary rules of procedure could be drafted to complement the statute, in order to regulate the admissibility of counterclaims, provisional measures, preliminary injunctions, and other interim relief, as well as mass actions.[296] Other rules and principles governing transparency, accelerated proceedings, public disclosure and efficiency, an inquisitorial model, rules on procedural costs, and rules against abuse of process may even be included in the statute, rather than the rules.[297]

An important aspect to consider while establishing an MIC is the applicable substantive law. This law should be the applicable investment treaties in a particular dispute and standards of protection enshrined in them.[298] Despite a plurality of treaties serving as the applicable law in different disputes before this court, the presence of permanent judges (as opposed to different arbitrators appointed to *ad hoc* tribunals) is very likely to lead to increased consistency in the application of these standards of protection.[299] The statute of the MIC could also include provisions requiring the judges to apply the protection standards in a consistent manner, as well as instructing judges to take into account the general principles of international law in their decision-making. An explicit reference to the right to regulate could also be included in the MIC statute.[300] Since this is an EU project, it may need to be clarified that general EU law should not apply as substantive law of the MIC, unless some specific treaties are specified as applicable.[301]

[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.

An essential component of formulating any international court is the consideration of the legal effects of its decisions and the mode of enforcement of such decisions. It has been proposed that the decisions of the MIC be limited to declaratory findings of violations of international investment agreements that may be applicable in a particular dispute, along with the award of damages and/or compensation.[302]

In terms of enforcement of the decisions, given that the system of enforcement under the ICSID Convention would not apply, one option is using the mechanism under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.[303] This would require that decisions of the MIC be considered as arbitral awards as defined by the New York Convention.[304] However, this Convention cannot be relied on to enforce judgments of international courts. Even if the MIC statute provides that decisions of the court would be considered as awards for the purposes of the New York Convention (as done in the context of the ICS in the CETA),[305] it is unclear whether domestic courts in various national jurisdictions where enforcement is sought would accept such a provision as valid, particularly if enforcement is sought in states that are not parties to the MIC statute. For these reasons, with the goal of legal certainty, an enforcement mechanism for MIC decisions should be developed within the MIC itself. This would naturally work better and be more effective as larger numbers of states become parties to the MIC.[306]

A quick means of enforcing relatively smaller claims could be through the establishment of an enforcement fund, which would be financed through contributions from all states parties to the

[302] Ibid.
[303] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 UNTS 3.
[304] Bungenberg and Reinisch (n 276) 6–7.
[305] CETA (n 34) Article 8.41(5).
[306] Bungenberg and Reinisch (n 276) 7.

MIC. This fund could therefore serve as a quick means of satisfying final claims of up to a certain amount. Claims against the losing party arising from an MIC decision would be subrogated to the fund, and the fund or another organ of the MIC could then enforce these subrogated claims against the party owing payment.[307]

A lot of practical considerations also come into play when planning the implementation of an investment court, and especially a two-tiered one. Significant financial costs could be incurred in managing and administering large and complex investment disputes. Sharing premises and staff with an existing international tribunal (such as the International Tribunal for the Law of the Sea) or administering institution (such as the Permanent Court of Arbitration or the ICSID) could help in reducing and managing potentially high administrative fees.[308]

Further, the statute should provide for the financing of procedural costs and legal aid. The modalities of such financing could be decided through secondary rules, guidelines, or practice directions.[309]

Apart from a two-tier MIC, a second related proposal, as mentioned above, has been the establishment of a standalone multilateral investment appellate mechanism. This MIAM would consist of only a single-tier court system within a new independent international organisation,[310] with organs and structure akin to those of the MIC. Appeals to this body would arise from arbitral awards rendered under the ICSID, UNCITRAL Rules, or other similar international rules.[311] This appellate court would be modelled on the Appellate Body of the World Trade Organization ("WTO"),[312]

[307] Ibid.
[308] Ibid 2–3.
[309] Ibid 6.
[310] Ibid 7.
[311] Ibid 197.
[312] Ibid.

and with a standing body of judges, would ensure consistency and stability of decision-making. The applicable administrative and procedural law and the enforcement of MIAM decisions could be designed similarly to what has been suggested for the MIC.[313] Such a system may be easier to implement, since it would bring fewer changes to the system.

4.2. Africa

The contribution of African states to the development of international investment law, including ISDS through their participation in ICSID, has been critical yet understated. The current "legitimacy crisis" of international investment law has served as a springboard for Africa's more recent and active involvement in shaping the field's contours. As the international investment law regime is under scrutiny, the continent is actively reclaiming the narrative of its revision and development. By fostering their own approach to the reform of international investment law aligned with their circumstances and needs, African countries are effectively "Africanising" the development of international investment rules and the reform of the ISDS system.[314]

Investment law is currently in a state of flux throughout the continent of Africa. Various African states have adopted a number of multi-layered continental initiatives to overhaul the field of international investment law, in line with their developmental and policy objectives. A spotlight on developments in this regard in Africa is important since the continent (or its component nations) has not usually been recognised as a lawmaker in the field of investment law. Yet, the process of transformation of international investment law is currently at its peak on the continent.

[313] Ibid 7.
[314] Mbengue, "Africa's Voice" (n 6) 480.

African States have actively participated in rule-making on investment protection through their participation in the creation of the ICSID system, as well as through their involvement in ICSID proceedings. Today, the "legitimacy crisis" of ISDS serves as a springboard for the continent's more recent and active involvement in shaping the contours of the field, according to their policy and development priorities.

Africa has had a long-standing relationship with investment protection and the investor-State dispute resolution system. Beginning with the decolonisation period in the 1960s, newly independent African States consented to be bound by a set of international rules for the treatment of foreign investments, enforceable through investment arbitration, as part of a broader necessity to stimulate the injection of foreign capital into their national economies. For the same reasons, African countries became parties to a number of BITs and other international investment agreements, largely between the 1990s and the early 2000s. As of November 2021, 984 of the 2826 BITs signed worldwide involve African states and 172 are intra-African BITs.[315] Of the 812 agreements concluded with non-African countries, the majority have been concluded with capital-exporting countries from the developed world.[316] Among these are the countries that were the first to start bilateral relations with African countries with the goal of establishing international rules on investment protection.[317] The participation of African countries in these processes was largely passive, following BIT models of their contracting partners, and following the lead of the capital-exporting countries, driven by colonial linkages and

[315] UNCTAD, "International Investment Agreement Database" <http://investmentpolicyhub.unctad.org/IIA> accessed 13 November 2021 (UNCTAD IIA Database).
[316] A. Crosato and others, "Africa's Investment Regime: Assessing International Investment Agreements in the Light of Current Trends and Needs in Africa" (The Graduate Institute: Trade and Investment Law Clinic Papers 2016) 26.
[317] UNCTAD IIA Database (n 315).

heritage.[318] They soon realised that these treaties were drafted to favour the investors, without imposing any obligations on them, and without consideration for factors such as human rights. Thus, these instruments were not tailored to meet African States' own circumstances and developmental needs.[319]

During the negotiations that led to the drafting of the ICSID Convention, African states played a significant role. These states had wanted ICSID jurisdiction not to be limited to disputes between investors and host States but to also include those arising between investors and State-controlled corporations and development boards. Moreover, certain African delegates also pushed for a suitable definition of "investment" to be devised so as to further clarify ICSID jurisdiction.[320]

Consent to ISDS among African countries can be seen through widespread ratification of the ICSID Convention,[321] agreement to submit disputes to ICSID in their investment contracts,[322] and also providing for recourse to ICSID in their national investment laws. A wide acceptance of ISDS can be seen, for example, in the national law of the Democratic Republic of the Congo, which expressed

[318] L. Paez, "Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?" (2017) 18 JWIT 381–82; Mbengue (n 314) 457.
[319] Mbengue (n 314) 458.
[320] ICSID, "History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" Volume II Part 1 (1968) 240 <http://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> accessed 21 December 2021.
[321] A.A. Agyemang, "African States and ICSID Arbitration" (1988) 21 Comp Intl Law J South Africa 177.
[322] Countries that have incorporated international arbitration into their model Product Sharing Agreements include Angola, Equatorial Guinea, Ethiopia, Ivory Coast, Kenya, Liberia, Libya, Mozambique, Tanzania, and Uganda. Countries that have incorporated this method of dispute settlement into their Mine Development Agreements include the Democratic Republic of the Congo, Ghana, and Tanzania.

a general invitation to international arbitration.[323] Even in the Southern African Development Community ("SADC"), through the 2006 SADC Protocol on Finance and Investment, member states collectively consented to investors from anywhere in the world bringing arbitral proceedings against a SADC member State for any dispute concerning an obligation of the latter in relation to an admitted investment of the former, and provided that all available domestic remedies had been exhausted.[324] This instrument was amended in 2016, though the same is yet to enter into force.[325]

The current crisis of legitimacy of ISDS has served as a springboard for Africa's more recent and active involvement in shaping the contours of the field, planting its own seeds for reform.[326] This is evidenced by the development of new investment instruments at the national, bilateral, regional, and continental levels, marking a clear departure from the old European-style investment agreements.[327] More importantly, and relevant to this discussion, the waves of reform are also manifested in the continent's contribution to the reform of the ISDS system.

[323] Law No 004/2002 of 21 February 2002 on the Investment Code (Democratic Republic of the Congo).
[324] See SADC Protocol on Finance and Investment (signed 18 August 2006) Annex 1, Article 28 <http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf> accessed 21 December 2021.
[325] Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment (SADC) <http://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf> accessed 21 December 2021.
[326] See M.M. Mbengue and S.W. Schill (eds), "Special Issue: Africa and the Reform of the International Investment Regime" (2017) 18 JWIT 367; S.W. Schill, "The New (African) Regionalism in International Investment Law" (2017) 18 JWIT 367; M.M. Mbengue, "Special Issue: Africa and the Reform of the International Investment Regime — An Introduction" (2017) 18 JWIT 371.
[327] Mbengue (n 314) 462.

4.2.1. South African Protection of Investment Act of 2015

South Africa unilaterally terminated nine of its old-generation BITs,[328] in response to the inadequacy of traditional international investment agreements. Thereafter, the country enacted the Protection of Investment Act, 2015.[329] The Act does not provide for ISDS as a means of settling disputes between investors and the government of South Africa. In its place, the statute provides for two types of domestic remedies: mediation facilitated by the South African Department of Trade and Industry, and litigation in domestic fora should mediation be unsuccessful. There is still an option for international arbitration, provided that the government of South Africa consents to it, and provided that local remedies are exhausted. However, this option for international arbitration is not ISDS either. If arbitration is opted for, it will be conducted between South Africa and the home state of the applicable investor.[330]

4.2.2. Bilateral and Regional intra-African Agreements

At the bilateral level, African countries have recently started to move away from the classic standards of protection contained in most BITs and towards more balanced investment agreements. The most innovative approaches can be found in intra-African BITs.[331] The 2016 intra-African BIT between Nigeria and Morocco is perhaps

[328] These BITs were with Austria, the Belgium and Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland, and the United Kingdom. South Africa thereby reduced the number of BITs in force to 12 (China, Cuba, Finland, Greece, Italy, Republic of Korea, Mauritius, Nigeria, Russia, Senegal, Sweden, and Zimbabwe). See UNCTAD IIA Database (n 315).

[329] Investment Promotion and Protection Bill (2015), Act No 22 of 2015, Official Gazette, ol 606, No 39514 (South Africa).

[330] Ibid, section 13.

[331] See M.M. Mbengue and S. Schacherer, "Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law 'Africanization'", in J. Chaisse and L. Choukroune (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 2597.

the most pertinent example.[332] Moreover, recourse to ISDS is an option under the BIT only in the event that a dispute cannot be settled within six months by the Joint Committee that is the main (political) body established under the treaty.[333]

Given that regional integration has been a stated priority agenda for African governments since the early years of their independence,[334] a complex web of regional economic communities ("REC") emerged within the continent. The RECs have adopted investment instruments, in the form of international investment agreements as well as model international investment agreements, which they consider to be more suited to the specific needs of African countries.[335] In particular, the most recent instruments elaborated by the Common Market of Eastern and Southern Africa ("COMESA"), Economic Community of Western African States ("ECOWAS"), and Southern African Development Community ("SADC") all seek to combine attracting investors and achieving sustainable development objectives.[336]

The first regional investment agreement to propose an approach that is sensitive to the needs of African countries is the one elaborated in 2007 by COMESA, which was to establish

[332] The Morocco–Nigeria BIT awaits ratification by Nigeria: Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) <http://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed 21 December 2021.
[333] Ibid, Articles 1(3), 26.
[334] Gesellschaft für Technische Zusammenarbeit (GTZ), "Regional Economic Communities in Africa: A Progressive Overview" (2009) 8 <http://www.tralac.org/images/News/Reports/Regional_Economic_Communities_in_Africa_A_Progress_Overview_Atieno_Ndomo_GTZ_2009.pdf> accessed 21 December 2021.
[335] The East African Community also launched investment initiatives by adopting a model investment code in 2006: see EAC Model Investment Code 2006 <http://www.tralac.org/images/Resources/EAC/EAC%20Model%20Investment%20Code%202006.pdf> accessed 12 November 2021.
[336] Crosato (n 316) 26.

the COMESA Common Investment Area.[337] While the investment agreement is yet to enter into force, as the required threshold of ratification by at least six member States has not been met, it has attracted attention because of its innovative features. More recently, COMESA has worked on a Common Investment Agreement ("CCIA") as a revision of the 2007 agreement. The finalised text of 2016 was submitted to the COMESA Committee on Legal Affairs in September 2017.[338] It has been adopted but has not yet been ratified by any member state.[339] The new CCIA Agreement is remarkable in a number of ways. With respect to dispute settlement between the investor and host state, COMESA provides for disputes to be referred to the COMESA Court of Justice (COMESA Court) or to a tribunal constituted under such Court, provided that local remedies have been exhausted and unless otherwise agreed by the disputing parties by specific written agreement.[340] Here too, a departure from the usual form of ISDS can be seen.

Various instruments regulate investment within ECOWAS.[341] Of particular interest is the 2008 ECOWAS Supplementary Act on

[337] See Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007) <http://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download> accessed 21 December 2021 ("CCIA Agreement").

[338] UNCTAD, "World Investment Report 2018 — Investment and New Industrial Policies" (2018) 90 <http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 12 November 2021. For the text, see Revised Investment Agreement for the COMESA Common Investment Area <http://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf> accessed 13 November 2021 ("Revised CCIA Agreement").

[339] M. Gakunga, "Plans Afoot to Publicize Common Investment Area Agreement" <http://www.comesa.int/plans-afoot-to-publicize-common-investment-area-agreement/> accessed 14 November 2021.

[340] CCIA Agreement (n 337), Article 36.

[341] ECOWAS Treaty (revised in 1993); the ECOWAS Protocol on Movement of Persons and Establishment; the ECOWAS Energy Protocol; as well as the ECOWAS Supplementary Act on Investments: <http:// investmentpolicy.unctad.org/international-investment-agreements/groupings/26/ecowas-economic-community-of-westafrican-states-> accessed 12 November 2021.

Investments,[342] under which the Court of Justice of the Economic Community of West African States ("ECCJ") can function as a default mechanism for the settlement of investor-state disputes.[343]

The 2006 SADC Protocol on Finance and Investment (SADC Investment Protocol)[344] is currently the main text relating to investment regulation that is in force in the SADC. Annex 1 to the SADC Investment Protocol (the Annex) encourages SADC member States to create a predictable investment climate in order to attract investment in their territories. With this purpose in mind, the Annex provides for substantive investment protection standards including provisions on expropriation, FET, and ISDS. In its 2006 version, this instrument has become highly controversial as a number of investment claims have been filed against SADC member States.[345] The broad scope of the Annex led a tribunal to deem that it

[342] ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008).

[343] Ibid, Art 33:

"6. Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussion may be submitted to arbitration as follows: (a) a national court; (b) any national machinery for the settlement of investment disputes; (c) the relevant national court of the Member States.

7. Where in respect of any dispute envisaged under this Article, there is disagreement as to the method of dispute settlement to be adopted; the dispute shall be referred to the ECOWAS Court of Justice".

See M. Happold, "Investor-State Dispute Settlement using the ECOWAS Court of Justice: An Analysis and Some Proposals" (2019) 34 ICSID Rev — FILJ 496.

[344] See SADC Protocol on Finance and Investment (n 324). In August 2016, SADC member States adopted an amended version of the Protocol on Finance and Investment, which is yet to be ratified. For more details, see L.E. Peterson, "Investigation: In Aftermath of Investor Arbitration Against Lesotho, SADC Member States Amend Investment Treaty so as to Remove ISDS and Limit Protections" (*Investment Arbitration Reporter*, 20 February 2017) <http://www.iareporter.com/articles/investigation-in-aftermath-of-investor-arbitration-against-lesotho-sadc-member-states-amend-investmenttreaty-so-as-to-remove-isds-and-limit-protections/> accessed 12 November 2021.

[345] Agreement Amending SADC Protocol (n 325).

applied to all foreign investors, as well as domestic ones.[346] Against this backdrop, SADC member States have elaborated an amended version of Annex I to the SADC Protocol on Finance and Investment, which was finalised in August 2016. Among the key changes are the deletion of the FET provision and the complete removal of the ISDS mechanism.[347] It also expressly excludes investors of third states.

Additionally, the SADC region adopted a Model BIT[348] that expresses development concerns even more clearly. It aims to enhance the harmonisation of investment regimes in the region and to provide an effective tool for the future conclusion of IIAs by SADC member States.[349] A first edition of the Model BIT was published in 2012[350] and was updated in 2017 with a second edition.[351] The revised SADC Model BIT differs from its first edition by taking a stronger stand in excluding ISDS as it removes it from

[346] A very broad interpretation was given by the Tribunal in *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v The Kingdom of Lesotho*, UNCITRAL, PCA Case No 2013-29 (First Case), Partial Award on Jurisdiction and Merits (18 April 2016). The award has not been published. For further details, see L.E. Peterson, "Investigation: Lesotho Is Held Liable for Investment Treaty Breach Arising out of Its Role in Hobbling a Regional Tribunal That Had Been Hearing Expropriation Case" (*Investment Arbitration Reporter*, 14 July 2016) <http://www.iareporter.com/articles/investigation-lesotho-is-held-liable-for-investment-treaty-breach-arising-out-of-its-role-in-hobbling-a-regional-tribunal-that-had-been-hearing-expropriation-case/> accessed 12 November 2021.

[347] Agreement Amending SADC Protocol (n 325) Article 25 ("Access to Courts and Tribunals"): "State parties shall ensure that investors gave the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievance in relation to any matter concerning their investment including but not limited to the right for judicial review of measures relating to expropriation or nationalization and determination of compensation in the event of expropriation or nationalization".

[348] SADC, "SADC Model Bilateral Investment Treaty Template with Commentary" (2012) <www.iisd.org/itn/wpcontent/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 12 November 2021 (SADC Model BIT).

[349] Ibid Commentary, 3.

[350] SADC Model BIT (2012) (n 348).

[351] SADC Model Bilateral Investment Treaty Template with Commentary, Second Edition, June 2017 <http://wwwwww.civic264.org.na/images/pdf/SADC_BIT_template_final.pdf> accessed 13 November 2021 (Revised SADC Model BIT).

the actual treaty text.[352] However, upon the request of some SADC members, an appropriate text on ISDS has been annexed to the reviewed model.[353]

At the continental level, African regionalism in investment governance has culminated in the 2015 codification of the first African continent-wide investment code, called the Pan-African Investment Code ("PAIC"),[354] which is currently serving as the main basis for the negotiations on the Investment Protocol to the Agreement establishing an African Continental Free Trade Area ("AfCFTA"). Along with the bilateral, national, and regional initiatives aforementioned, the PAIC demonstrates Africa's ability to not only actively participate in international investment law by shaping international investment agreements to reflect the continent's own context, priorities, and realities, but also be a pioneer in setting innovative investment standards that could potentially be replicated outside the region.[355] The PAIC gives host country governments the discretion to implement ISDS, thereby offering a middle ground solution to African states that are either pro-ISDS or anti-ISDS.

From the post-PAIC African investment instruments such as the Investment Protocol to the AfCFTA, currently under negotiation,

[352] Ibid, Part 5 ("Dispute Settlement").
[353] Revised SADC Model BIT (n 351) Annex 1 ("Investor-State Dispute Settlement").
[354] The author was involved in the elaboration process between 2014 and 2016 and was the lead expert and negotiator for the African Union during this period. Some of the information contained in this manuscript is based on the experience of the author. The PAIC (March 2016) is available at <http://repository.uneca.org/handle/10855/23009> accessed 13 November 2021.
[355] See M.M. Mbengue and S. Schacherer, "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18 JWIT 414; M.M. Mbengue and S. Schacherer, "Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code", in A. Roberts and others (eds), *Comparative International Law* (OUP 2018) 547; M.M. Mbengue and S. Schacherer, "Africa as Investment Rule-Maker: Decrypting the Pan-African Investment Code" (2018) 23 African Yearbook of International Law Online 81.

one can conclude that ISDS and the appropriateness of its alternatives continue to be controversial among African countries. Challenges such as this will characterise the negotiations of the future Investment Protocol of the AfCFTA.

4.2.3. African Regionalism in the Reform of the ISDS System

As the world is entering a new era of international investment law, several commentators have interpreted recent reforms in certain African jurisdictions as an outright rejection of ISDS on the continent.[356] However, a few developments prohibiting recourse to ISDS do not reflect a pan-African trend away from ISDS. In fact, in order to disengage effectively from this mechanism, African states would have to withdraw from all of their investment treaties in order to prevent foreign investors from structuring or restructuring their investments so as to come under the scope of protection of any remaining investment treaty.[357] Such action would be counterintuitive, given their latest efforts to "Africanise" the rules of investment law in the context of their own circumstances. More than 900 BITs today involve African states as signatories and prescribe ISDS as a means of resolving disputes between foreign investors and host States.[358]

Moreover, the initiatives to be undertaken to disengage from ISDS should be nuanced. Notwithstanding its most recent investment law that excludes ISDS, South Africa continues to sign investment agreements with other African States, most of which

[356] See eg W. Kidane, "Alternatives to Investor–State Dispute Settlement: An African Perspective" (GEGAFRICA Discussion Paper, 2018).
[357] S.S. Schill, "Reforming Investor–State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward" (E15 Task force on Investment Policy 2015) 7 <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf> accessed 12 November 2021.
[358] African Union, "Training on the Settlement of Disputes: The African Continental Free Trade Area" <http://au.int/en/newsevents/20190513/training-settlement-disputes-african-continental-free-trade-area> accessed 12 November 2021.

include recourse to ISDS through arbitration.[359] Similarly, the amendment of the SADC Protocol to replace ISDS with domestic remedies cannot be viewed in isolation of the fact that Annex 1 to the Protocol preserves the right of member states to enter into BITs. It is also essential to remember that an appropriate text on ISDS was annexed to the 2017 version of the SADC Model BIT upon the request of certain member states. Indeed, it may be said that for every development that is "anti-ISDS", there exist countervailing African initiatives that introduce unique features to the ISDS mechanism. The positions taken by African countries with respect to reform of the ISDS system may be considered in a three-fold manner. First, they have tailored ISDS reform to their own needs and contexts; second, they have "Africanised" the system of investment arbitration, and third, they have started conducting ISDS through regional judicial organs.[360]

In the first place, a majority of African countries continue to see ISDS as an essential tool to enhance the attractiveness of their economies for foreign investors. The ever-increasing recourse to ICSID arbitration by investors from African states[361] may well be the best indicator of this trend. As a result, the most recently concluded investment instruments of many of these states include detailed dispute resolution provisions that maintain the ISDS mechanism yet significantly depart from its traditional features so as to avoid certain shortcomings of the ISDS system. To better regulate investor access to ISDS, certain instruments have, for instance, sought to reduce the subject-matter scope of ISDS claims. This is true for the 2012 Cameroon–Turkey BIT, which excludes claims relating to real estate from the scope of arbitral

[359] See eg the BITs concluded between South Africa and Algeria, Congo, Egypt, Ethiopia, Equatorial Guinea, Gabon, Ghana, Libya, Senegal, and the United Republic of Tanzania.

[360] Mbengue, "Africa's Voice" (n 6) 473.

[361] P.J. Le Cannu, "Foundations and Innovation: The Participation of African States in the ICSID Dispute Resolution System" (2018) 33 ICSID Rev — FILJ 458.

review.[362] On the other hand, the revised version of the 2007 CCIA Agreement narrows down the range of investors who falls within its scope. The Agreement only applies to investments of COMESA investors that have been specifically registered with the relevant authority of a member State and only covers investments made in accordance with the laws and regulations of the member State in question.[363]

Although rare, the requirement of the exhaustion of local remedies has also been included in several agreements. The 2002 China — Côte d'Ivoire BIT requires foreign investors to exhaust the domestic administrative review procedure specified in the laws and regulations of the host State before it can submit the dispute to arbitration.[364] The revised CCIA Agreement requires COMESA investors to exhaust local remedies in the host member State prior to resorting to ISDS.[365] The PAIC also includes the requirement for foreign investors to first exhaust local remedies in the member State where their investment is located before a request for arbitration can be submitted.[366] Going one step further, the PAIC also subjects the

[362] Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Cameroon Concerning the Reciprocal Promotion and Protection of Investments (signed 24 April 2012, not yet entered into force) Article 4.4(d).
[363] Revised CCIA Agreement (n 338) Article 3(1): "This Agreement shall only apply to investments of COMESA investors that have been registered by relevant authority of the host state as listed in Annex B, and in accordance with the relevant procedures of the host state".
[364] Agreement between the Government of the People's Republic of China and The Republic of Côte d'Ivoire on the Promotion and Protection of Investments (signed 30 September 2002) Article 9(3) <http://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/885/china---c-te-d-ivoire-bit-2002-> accessed 12 November 2021.
[365] Revised CCIA Agreement (n 338) Article 36(3): "COMESA investor or its investment may submit a claim to arbitration pursuant to this Agreement, provided that the COMESA investor or investment, as appropriate: (a) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, and that a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State;".
[366] PAIC (n 354) Article 42.3.

resort to ISDS by investors to the host state's consent to arbitration, which is given on a case-by-case basis, or based on the host state's national law.[367]

To better balance the rights and obligations of investors against their right to bring claims, some agreements have included time limits for bringing claims and introduced "fork in the road" clauses. The revised CCIA Agreement and Annex 1 to the revised SADC Model BIT both envision a three-year limit from the event giving rise to the claim.[368] They are also likely to prevent claimant investors from pursuing their "old" claims in international arbitration.[369] In some treaties or other similar instruments, a specific focus on ADR mechanisms can also be seen. For example, The Rwanda — Turkey BIT requires the foreign investor to settle his dispute with the host State by consultations and negotiations in good faith before resorting to arbitration.[370] The revised CCIA Agreement and Annex

[367] Ibid.

[368] Revised CCIA Agreement (n 338) Art 36(4): "No claim shall be submitted to arbitration if more than three (3) years have elapsed from the date on which the COMESA investor or its investment first acquired, or should have first acquired, knowledge of the breach and knowledge that the COMESA investor or its investment has incurred loss or damage"; Revised SADC Model BIT (n 351) Annex 1(3): "An Investor may submit a claim to arbitration pursuant to this Agreement, provided that the following conditions have been fully complied with: (d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year following the conclusion of the proceedings for local remedies initiated in the domestic courts".

[369] Revised CCIA Agreement (n 338) Article 36(6): "If the COMESA investor elects to submit a claim at one of the fora set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora"; Revised SADC Model BIT (n 351) Annex 1(3): "An Investor may submit a claim to arbitration pursuant to this Agreement, provided that the following conditions have been fully complied with: (c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim in any other forum whatsoever relating to the measures underlying the claim made pursuant to this Agreement, on behalf of both the Investor and the Investment".

[370] Agreement between the Government of the Republic of Rwanda and the Government of the Republic of Turkey Concerning Reciprocal Promotion and

1 to the revised 2017 SADC Model BIT also make recourse to ADR mandatory before any investor-State disputes can be submitted to arbitration.[371]

Some investment instruments also make provisions for an interpretative role for state parties, in order to foster a more predictable and coherent reading of the instruments in line with parties' intentions.[372] Novel provisions regarding the arbitral procedure can also be found in several instruments. Concerns about the lack of transparency in ISDS led the 2007 CCIA Agreement to require that all documents relating to the arbitral process, as well as oral hearings on procedural and substantive matters, be made available to the public. This is subject to the tribunal's discretion to take the necessary steps in order to protect confidential business information.[373] The revised version of the Agreement subjects any arbitration between an investor and a State under the agreement to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.[374]

Protection of Investments (signed 3 November 2016, not yet entered into force) Article 10(1) <http://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3714/rwanda---turkey-bit-2016-> accessed 12 November 2021.

[371] Revised CCIA Agreement (n 338) Article 34(1)–(6); revised SADC Model BIT (n 351) Annex 1(1): "In the event of an investment dispute between an investor or its investment (referred to as an 'Investor' for the purposes of the Investor-State dispute settlement provisions) and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation and mediation, in accordance with Article 32, applied mutatis mutandis to the parties to the dispute".

[372] UNCTAD, "Interpretation of IIAs: What States Can Do" (2011) <http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf> accessed 12 November 2021. See eg 2012 SADC Model BIT (n 348) Article 29: "Joint decision of the State Parties, each acting through its representative designated for purpose of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision".

[373] CCIA Agreement (n 337) Article 28(5)–(7).

[374] Revised CCIA Agreement (n 338) Article 8: "The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, as amended from time to time, shall apply to any arbitration between an investor and State under this Agreement".

The second approach taken by African states in an attempt to reform ISDS is the "Africanisation" of the investment arbitration system. Notwithstanding a few developments prohibiting recourse to investment arbitration, it seems that the majority of African States still foresee this method of dispute resolution as an attractive alternative to domestic courts across the continent.[375] This has led to the fostering of African arbitral rules and institutions and the training of African professionals to enhance the continent's attractiveness as a venue for the settlement of investor-State disputes. The PAIC, for instance, provides for arbitration through African arbitration institutions.[376] The revised CCIA Agreement allows disputing parties to submit their dispute to an African international arbitration institution upon a specific written agreement.[377] Efforts in modernizing arbitration laws have led to, for example, Mauritius enacting a new International Arbitration Act in 2009 as part of the Government's objective to "launch [the country] as an international arbitration jurisdiction".[378] Mauritius is also the first country to have ratified the UN Convention on Transparency in Treaty-based Investor-State Arbitration.[379] At the regional level, the Organisation pour l'harmonisation en Afrique du droit des affaires ("OHADA") revamped its Uniform Act of Arbitration to include provisions for investment arbitration reflecting best international practices.[380] It also revised the Rules of Arbitration of the Common Court of Justice and Arbitration ("CCJA") to make

[375] Mbengue, "Africa's Voice" (n 6) 475.
[376] PAIC (n 354) Article 42(d).
[377] Revised CCIA Agreement (n 338) Article 36(2)(i).
[378] The Mauritian International Arbitration Act 2008 Text and Materials, Updated 2016 <http://pca-cpa.org/wpcontent/uploads/sites/6/2016/02/Mauritian-International-Arbitration-Legislation-Handbook.pdf> accessed 12 November 2021.
[379] UNCITRAL, "Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York 2014)" <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 12 November 2021.
[380] OHADA, Acte Uniforme Relatif au Droit de l'Arbitrage (signed 23 November 2017, entered into force 15 May 2018) Article 3 <http://www.ohada.org/attachments/article/2290/Acte-Uniforme-relatif-au-droit-d-arbitrage-2017.pdf> accessed 12 November 2021.

the CCJA arbitration centre more attractive.[381] The CCJA is now also empowered to administer arbitral proceedings based on an investment code, or a bilateral or multilateral investment treaty.[382] This revision is in response to several intra-African BITs, which had already provided the investor with the option to choose the CCJA to bring its claims against the host state.[383] The CCJA administers the dispute by appointing arbitrators, it does not itself settle the dispute. It is kept informed of the progress of the proceedings and reviews the draft award.[384]

New arbitral centres have also been established across Africa. Rwanda launched the Kigali International Arbitration Centre (KIAC) in 2012 as part of its efforts to attract new investments. Among other responsibilities, the KIAC provides arbitration services for both commercial and investment disputes.[385] Moreover, the African Society of International Law (AfSIL) adopted the AfSIL Principles on International Investment for Sustainable Development in Africa,[386]

[381] OHADA, Arbitration Rules of the Common Court of Justice and Arbitration (entered into force 15 March 2018) <https://www.ohada.org/attachments/article/2490/Reglement-Arbitrage_CCJA-English.pdf> accessed 12 November 2021.
[382] Ibid, Article 2.2.1.
[383] See eg Guinea–Chad BIT (signed 2004, not yet in force) Article 9(3)(ii); Guinea–Burkina Faso BIT (signed March 2003, entered into force August 2004) Article 9(2)(b); Benin–Chad BIT (signed May 2001, not yet in force) Article 10(2)(b).
[384] OHADA, Arbitration Rules of the Common Court of Justice and Arbitration (n 381) Art 2.2.2.
[385] See Kigali International Arbitration Centre <http://www.kiac.org.rw/> accessed 12 November 2021.
[386] African Society of International Law, Principles on International Investment for Sustainable Development in Africa (Accra, 29 October 2016) <http://www.unil.ch/investmentafrica/files/live/sites/investmentafrica/files/Events/AfSIL%2028-29.10.2016/2016%20AFSIL%20Principles%20Investment.pdf> accessed 21 December 2021. For an initial analysis, see A. Köppen and J. d'Aspremont, "Global Reform vs Regional Emancipation: The Principles on International Investment for Sustainable Development in Africa" (2017) 6(2) ESIL Reflections <http://esil-sedi.eu/esil-reflection-global-reform-vs-regional-emancipation-the-principles-on-international-investment-for-sustainable-development-in-africa-2/> accessed 21 December 2021.

whose Principle 12 insists on the need for greater involvement of African lawyers in the field of international investment law.

The final way in which Africa has helped make a unique contribution to the reform of ISDS lies in regional initiatives to incorporate ISDS through sub-regional judicial organs. Two examples of these judicial bodies are the COMESA and ECOWAS Courts of Justice.

First, the revised CCIA Agreement incorporates ISDS through the COMESA Court, the judicial organ of COMESA,[387] in line with the 2007 version and as part of a broader objective to increase the attractiveness of COMESA as a destination for FDI. The COMESA Court was established in 1988 with the primary purpose of ensuring adherence to law in the interpretation and application of the COMESA Treaty.[388] Under the revised CCIA Agreement, the investor has the possibility of submitting its unresolved dispute with a member State either to the COMESA Court sitting as a court or to a tribunal constituted under the COMESA Court in accordance with Article 28(b) of the COMESA Treaty. Several conditions must however be fulfilled first. The investor bringing a claim before the COMESA Court must be an investor from another COMESA member State fulfilling the criteria in Article 1(4);[389] attempts at resolving the dispute by resorting to ADR mechanisms such as negotiation and mediation must have failed;[390] and the claim must be brought to the COMESA Court within a three-year timeframe following the date on which "the COMESA investor or its investment first acquired, or should have first acquired, knowledge of the breach

[387] For further information on the COMESA Court, see J.T. Gathii, "The COMESA Court of Justice", in R. Howse and others (eds), *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018) 314.
[388] Treaty Establishing the Common Market of Eastern and Southern Africa (signed 8 December 1993, entered into force 5 December 1994), 2314 UNTS 265, Article 19 (1994 COMESA Treaty).
[389] Revised CCIA Agreement (n 338) Article 1(4).
[390] Ibid, Articles 34 and 35(1).

and knowledge that the COMESA investor or its investment has incurred loss or damage".[391] Further, the COMESA member state does not need to consent. This consent to arbitration is already unilaterally offered under the CCIA.[392] As part of a plea to enhance justice through arbitration, the COMESA Court in 2018 revised its 2003 Arbitration Rules so as to keep pace with best practices in international arbitration.[393] As reported by the Judge President, Honourable Lady Justice Lombe Chibesakunda, this revision process follows the COMESA Court's ambition of achieving effective dispute resolution in the COMESA region by equipping judges and Judicial Staff of the COMESA Court with the skills to efficiently manage arbitral proceedings, from the initial stage of appointment as dispute resolvers.[394]

Turning to the Community Court of Justice of ECOWAS ("ECCJ"), this Court's possibility of providing a forum for ISDS, both within and outside ECOWAS, is less certain, though conceivable, nevertheless. Established in 1991 by the Protocol on the Community Court of Justice,[395] the ECCJ has the power to act as the Arbitration Tribunal of the Community.[396] This Court may have jurisdiction over investor-state disputes in two ways. The first avenue of incorporating ISDS into the ECCJ is in the 2008 ECOWAS Supplementary Act. This Act provides that an intra-ECOWAS dispute between a member state and an investor is to be referred to the ECCJ should there be a disagreement as to the method of dispute settlement to be

[391] Ibid, Article 36(4).
[392] Ibid, Article 36(7).
[393] COMESA Court Arbitration Rules 2018 <http://comesacourt.org/comesa-court-arbitration-rules-2018/> accessed 21 December 2021.
[394] Mbengue, "Africa's Voice" (n 6) 478.
[395] Protocol A/P.l/7/91 on the Community Court of Justice (signed 6 July 1991, entered into force provisionally 6 July 1991, definitively 5 November 1996); now amended by the Supplementary Protocol A/SP.1/01/05.
[396] ECOWAS, Revised Treaty of the Economic Community of West African States (24 July 1993) Article 16.

adopted.[397] A certain reading of the Act suggests that the ECCJ might extend its jurisdiction to non-ECOWAS investors for expropriation claims, as well as those relating to denial of justice.[398] However, this view has not yet been tested in practice, since no such claims have been submitted to the ECCJ to date.[399] The second, and a more certain way of asserting ISDS jurisdiction is through the recently adopted ECOWAS Investment Code ("ECOWIC"). Although not yet in force, the Code explicitly offers ECOWAS investors the possibility of resorting to the arbitration division of the ECCJ, among other forums, to resolve a dispute with an ECOWAS member State when they opt for arbitration.[400] It is also encouraged, in the ECOWIC, for disputing parties to resort to regional and national alternative dispute settlement institutions.[401]

4.2.4. Pan-African Regional Investment Court

The sub-regional approaches proposed by COMESA and ECOWAS to reform the ISDS dispute settlement mechanism are yet to be replicated by the remaining RECs. The SADC, for instance, has recently abandoned the idea of SADC investors having recourse to international arbitration via the SADC tribunal following the controversial *Mike Campbell v Zimbabwe* decision.[402] The East African Community ("EAC"), on the other hand, continues to favour investor access to international arbitration in its Model

[397] Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (signed 19 December 2009, entered into force 19 January 2009) Article 33(7).
[398] M. Happold and R. Radović, "The ECOWAS Court of Justice as an Investment Tribunal" (2017) 19 JWIT 95, 107.
[399] Ibid 108.
[400] ECOWIC Article 54(2) <http://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf> accessed 14 November 2021.
[401] Ibid.
[402] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, SADCT 2 (28 November 2008) <http://www.saflii.org/sa/cases/SADCT/2008/2.html> accessed 12 November 2021.

Investment Code.[403] This complex situation is further complicated by the fact that African States often belong to multiple RECs[404] thereby subscribing to different ISDS regimes. The future outcome of the ongoing negotiations for the AfCFTA Investment Protocol would be instrumental in the harmonisation of these initiatives. At present, it is unclear which investment dispute settlement system will be included in the protocol. It could incorporate ISDS arbitration through a regional investment court,[405] similar to the revised CCIA Agreement, the ECOWIC, and to an extent, the ECOWAS Supplementary Act. Such a proposal would resemble the mechanisms currently incorporated in the CETA and the EU — Vietnam IPA, or the EU proposal for an MIC (see section **4.1** above). However, the fact that ISDS arbitration through sub-regional courts is yet to materialise in practice makes the successful prospect of an integrated regional investment court at the continental level all the more uncertain.[406] A more likely outcome is for the AfCFTA Investment Protocol to subject ISDS to various conditions as was discussed in section **4.2.3** above, or to follow the model of the PAIC by making ISDS possible only in African arbitration centres or institutions (as also discussed in **4.2.3** above).[407]

4.3. Approaches in Other Regions

As opposed to the consolidated regional approaches in Europe and Africa, it is interesting to note specific national or regional initiatives in other world regions, with respect to ISDS.

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[403] EAC Model Investment Code (n 335) Article 15(3).

[404] UNECA, Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration (Addis Ababa, UNECA 2016) 28–33 <http://repository.uneca.org/bitstream/handle/10855/23035/b11559299.pdf?sequence=1&isAllowed=y> accessed 21 December 2021.

[405] See eg C. Nyombi, "A Case for a Regional Investment Court for Africa" (2018) 43 NC J Intl L 66, 109.

[406] Mbengue "Africa's Voice" (n 6) 479.

[407] PAIC (n 354) Article 41.2.

In South America, Brazil is an interesting case study of an outlier in the dense network of ISDS treaties worldwide. While it signed a few BITs in the 1990s, only two of them were ratified, as recently as 2017 and 2018.[408] The slight shift in its approach may be seen with the promotion of Brazil's 2015 model Agreement on Cooperation and Facilitation of Investments (ACFI), as an alternative to traditional BITs. It is under this framework that we see the two BITs currently in force. Notably, these treaties do not provide for ISDS, in line with the model ACFI. The ACFI instead focuses on dispute prevention and bilateral governance, limiting arbitration to the state-to-state level. The dispute prevention mechanism can be accessed by both states and investors.

Two institutional arrangements are provided for successful dispute prevention. The first is a Focal Point or ombudsman, within the government of each contracting party, to address investor concerns. This Focal Point already exists in Brazil, having been established in 2016[409] as the Ombudsman for Direct Investments. Within the structure of the Brazilian Foreign Chamber of Commerce, this Ombudsman is an inter-ministerial body in charge of the trade and investment policy in Brazil. It primarily functions as a forum for addressing concerns of foreign investors and for engaging with other Focal Points. Only investors that are covered within the ambit of the ACFI have access to the Ombudsman procedure. This procedure[410] is triggered whenever a foreign investor has concerns regarding a measure that may affect its investment in the host state, and it submits a request for consultation to the Ombudsman Secretariat. An advisory group and the network of Focal Points will then aid the Ombudsman Secretariat in helping, providing information to,

[408] These two treaties in force are with Mexico and Angola: <http://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> accessed 18 December 2021.
[409] Brazil, Decree no. 8.863 (28 September 2016) <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8863.htm> accessed 22 December 2021.
[410] CAMEX Regulation no. 12 of 2017.

and guiding the investors. The Ombudsman also has the power to establish an Issue Resolution Group to analyse the issue that the investor presented to the Secretariat. Finally, the Ombudsman provides a summary of the issue raised by the foreign investor and any proposals and recommendations that the Issue Resolution Group may have formulated.

The second tool for dispute prevention under the ACFI is the Joint Committee, with representatives of the contracting governments that are responsible for the administration of the agreement. Parties may request the Joint Committee for a meeting, in which they may present their concerns and engage in negotiations. The Joint Committee issues a report with its recommendations with respect to the dispute, after 60 days of the request for a meeting. In the event that the parties are not satisfied by the report of the Joint Committee, they have the option to proceed to the next stage, that is dispute settlement, which can take place through state-to-state arbitration. Alternatively, if they are parties to MERCOSUR, the parties could also resort to dispute settlement mechanisms under the Protocol on Cooperation and Facilitation of Investments.[411]

Dispute settlement mechanisms under the different ACFIs signed by Brazil vary in complexity. Some of them foresee both *ad hoc* and institutional arbitration, mandate deadlines, describe the modes of arbitrator appointment, and requests for clarifications and enforcement, while others provide bare minimum guidance.[412]

[411] Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (signed 7 April 2017, entered into force 30 July 2019) <http://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3772/intra-mercosur-cooperation-and-facilitation-investment-protocol-2017-> accessed 22 December 2021.

[412] See G. Vidigal and B. Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) 19 JWIT 475.

The Brazilian model illustrates a sharp contrast to the usual approach to foreign investors, dispute prevention, and resolution seen worldwide. It also demonstrates the various possibilities, when considering reforms in the present system of ISDS.

Meanwhile, in the Asia-Pacific region, a new free trade agreement, the Regional Comprehensive Economic Partnership (RCEP), signed in 2020 with 15 treaty parties, is about to enter into force in January 2022.[413] This agreement is significant, not least due to the large proportion of world trade, in economic terms,[414] that it represents. The RCEP includes an investment chapter, which does not however include ISDS provisions. There is a unique provision on the obligation to enter into negotiations regarding ISDS, within 2 years of the agreement's entry into force,[415] and conclude the said discussions within 3 years of commencing them.[416] Furthermore, the most-favoured-nation clause in the same investment chapter expressly excludes the applicability of MFN treatment to dispute settlement provisions in other agreements.[417]

Dispute settlement provisions may however be found in another chapter of the RCEP, one dedicated solely to dispute settlement (Chapter 19). This chapter provides for state-to-state dispute settlement, but state parties have the option of selecting a forum from among other investment treaties that they are party to, provided that the dispute concerns substantially equivalent rights and obligations under the RCEP and the relevant investment agreement.[418]

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[413] UNCTAD, "A New Centre of Gravity: The Regional Comprehensive Economic Partnership and Its Trade Effects" (2021) <http://unctad.org/system/files/official-document/ditcinf2021d5_en_0.pdf> accessed 18 December 2021.
[414] Around 30 per cent of world GDP among the 15 parties: Ibid.
[415] Regional Comprehensive Economic Partnership Agreement (signed 15 November 2020) Article 10.18(1) <http://www.mti.gov.sg/Improving-Trade/Free-Trade-Agreements/RCEP> accessed 22 December 2021 ('RCEP').
[416] Ibid, Article 10.18(2).
[417] RCEP (n 415) Article 10.4(3).
[418] Ibid, Article 19.

In establishing this state-to-state dispute settlement mechanism, the RCEP has borrowed liberally from the WTO. Thus, it includes steps such as initial consultation, request for the establishment of a panel, followed by its establishment, and panel proceedings. The panel concludes with an interim and then a final report, and in the event of compliance action, there is also a compliance review panel. At any time during this process, parties may, by agreement, resort to an alternative mechanism for dispute resolution, such as good offices, conciliation, or mediation.[419] Unlike the WTO, there is no dispute settlement body that would need to adopt a panel's report, and there is no appeal mechanism.

While some are of the opinion that the absence of ISDS makes the RCEP a less-attractive international agreement for investors, the current "backlash" against ISDS and the various attempts at reforms suggest that these RCEP provisions may be more in line with the future landscape of investment dispute settlement.

Similar in some respects to the RCEP, the Comprehensive Agreement on Investment (CAI) between Europe and China provides for arbitration between the two contracting parties, instead of ISDS, and also a two-year period for the parties to reach further agreement on ISDS.[420]

[419] Ibid, Article 19.7.

[420] EU — China Comprehensive Agreement on Investment (Agreement in Principle) Section VI sub-section 2, Article 3 <http://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159350.pdf> accessed 22 December 2021.

5.

Conclusion

"There is a huge amount of reform in the air".[421] The above examination of the various reforms in the field of ISDS, whether proposed, ongoing, or recently achieved, all point towards one undeniable conclusion — that certain reforms are necessary, to the way that ISDS functions globally at present.

The preceding sections have looked at some of the current criticisms levelled at the way the system of ISDS functions and the steps taken or proposed to be taken at various multilateral levels, both global and regional. This examination of the discussions on reform at different forums and in different regions demonstrates the points of agreement across the board. It has been interesting to note how reforms at the African regional level may be gravitating towards the proposals for reform and discussions at the European regional level. Of course, all these are tied together and affected in one way or another, whether consciously or unconsciously, by the large-scale discussions on the international plane, in different institutions, such as UNCITRAL and ICSID. The discussions on a global scale are further strengthened by the incorporation of comments and inputs from states and various stakeholders. In this way, any reforms that are proposed will have the backing of a common consensus, and, with greater legitimacy, will have a greater chance of successful implementation. It may also be considered if incremental changes are easier to implement or more acceptable than an overhaul of the entire system.

[421] M. Kinnear, ICSID Secretary General, quoted in R. Houston, H. Sial and L. Sandground, "ISDS: 'reform in the air'" (*Global Arbitration Review*, 29 November 2021) <http://globalarbitrationreview.com/isds-reform-in-the-air> accessed 19 December 2021.

The COVID-19 pandemic has had an impact on every aspect of our lives. It has also affected the way ISDS is conducted, involving greater use of technology, thereby leading to savings in time and costs.[422] It remains to be seen if these measures continue to be favoured beyond the end of the pandemic.

At the same time, there have also been reactions to the risks that the pandemic has posed to ISDS. The first signs of the concerns surrounding the pandemic and ISDS can be seen in an IISD publication calling for states to act to protect themselves against pandemic-related ISDS claims.[423] This was followed by a call for a moratorium on ISDS during the pandemic from a number of civil society organisations,[424] and an open letter to governments, signed by 600 national and international NGOs in more than 90 countries.[425]

The African Union adopted a "Declaration on the Risk of ISDS with respect to COVID-19 Pandemic related measures"[426] towards the beginning of the pandemic, in November 2020. This unique initiative has shown a collective approach to the relationship between ISDS and the pandemic and has also emphasised the

[422] Ibid.

[423] N. Bernasconi-Osterwalder, S. Brewin and N. Maina, "Protecting Against Investor-State Claims Amidst COVID-19: A Call to Action for Governments" (International Institute for Sustainable Development, 14 April 2020) <http://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> accessed 21 December 2021.

[424] Columbia Center on Sustainable Investment, "Call for ISDS Moratorium During COVID-19 Crisis and Response" (6 May 2020) <http://ccsi.columbia.edu/content/call-isds-moratorium-during-covid-19-crisis-and-response> accessed 21 December 2021.

[425] Open Letter to Governments on ISDS and COVID-19 <http://s2bnetwork.org/wp-content/uploads/2020/06/OpenLetterOnISDSAndCOVID_June2020.pdf> accessed 14 May 2021.

[426] For full text, see M.M. Mbengue and S. Brewin, "The African Union Declaration on the Risk of Investor-State Dispute Settlement with Respect to COVID-19 Pandemic Related Measures: Origins, Objectives and Impact", Annex 1, in Y. Levashova and P. Accaoui Lorfing (eds), *Balancing the Protection of Foreign Investors and States' Responses in the (Post) Pandemic World* (Kluwer 2022) (*forthcoming*).

need for a reform of the investment regime, including the steps to be taken to make investment treaties more compatible with sustainable development and public health concerns.[427]

Ultimately, while reforms in ISDS are necessary for a number of reasons, there are varied proposals to achieve the same ends. The goals may also keep shifting, with new challenges emerging in the world order. Therefore, what is important to keep in mind while formulating reforms is the final goal of the process. A useful starting point, and something to be kept in mind throughout the reform exercise, is the criticisms levelled at the current system of ISDS and why reforms are being undertaken. The ideals of impartiality of adjudicators, access to justice, equality of parties, transparency, and, of paramount importance, the consent of states, should be taken into account at every step of the process of amendments. A reformed system of ISDS would only be workable if these characteristics of an international system of dispute settlement are considered at all times.

[427] Mbengue and Brewin (n 426).

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