REFORMATION OF THE INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) SYSTEM: KEY STRATEGIES AND RECOMMENDATIONS

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ABSTRACT

The Investor–State Dispute Settlement (ISDS) system has long served as a cornerstone of international investment protection, yet its legitimacy has come under increasing scrutiny due to concerns regarding transparency, consistency, impartiality, and cost. This article examines the historical evolution of the ISDS framework and analyzes its structural deficiencies through doctrinal and case-based inquiry. It advances two complementary reform strategies. The first – *the targeted approach* – focuses on incremental treaty-level improvements such as exhaustion of local remedies, statutes of limitation, anti-treaty-shopping provisions, and case consolidation mechanisms. The second – *the institutional approach* – advocates for systemic reform through the creation of an appellate body or a permanent multilateral investment court under the auspices of UNCITRAL or the European Union. Drawing upon recent jurisprudence and policy developments, the paper argues that both approaches are indispensable for restoring the credibility, coherence, and sustainability of the ISDS regime. Ultimately, it contends that a balanced and rules-based reform process can reconcile investor protection with states' regulatory sovereignty and public accountability.

KEYWORDS: Investment Court, Arbitration Reform, Local Remedies, Regulatory Sovereignty

LIST OF ABBREVIATIONS

BIT Bilateral Investment Treaty
EU European Union
DOB Denial of Benefits
ECT Energy Charter Treaty
FDI Foreign Direct Investment
FTA Free Trade Agreement
ICJ The International Court of Justice
ECJ European Court of Justice
ECHR European Court of Human Rights
ICSID International Centre for Settlement of Investment Disputes
ICSID Convention Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)
IIA International Investment Agreement
ISDS Investor-State Dispute Settlement
NAFTA North American Free Trade Agreement
UNCITRAL United Nations Commission on International Trade Law
USMCA United States-Mexico-Canada Agreement
UNCTAD United Nations Conference on Trade and Development

1. INTRODUCTION

Investor–State Dispute Settlement (ISDS) refers to a legal framework that allows foreign investors to bring claims directly against sovereign states for governmental measures alleged to adversely affect their foreign direct investments (FDI).[1] This process is typically conducted under bilateral investment treaties (BITs) or broader trade and investment agreements, such as the North American Free Trade Agreement (NAFTA), collectively referred to as International Investment Agreements (IIAs), and is carried out in *ad hoc* arbitral proceedings pursuant to the procedural rules of institutions such as the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).[2]

ISDS often involves the enforcement of private rights in matters of public interest.[3] Extractive industries, such as mining and hydrocarbons, have historically represented a large portion of ISDS activity.[4] By June 2024, states have paid out over US$113 billion to investors as a result of different arbitral awards, with most of the funds benefiting fossil fuel companies.[5] The average amount of states ordered to pay is US$437.5 million.[6]

1 Compare. Van Harten, G., 2020. Origins of ISDS Treaties. In: The Trouble with Foreign Investor Protection. Oxford: Oxford University Press, p. 1.
2 Howse, R., 2017. International Investment Law and Arbitration: A Conceptual Framework. IILJ Working Paper 2017/1, MegaReg Series. NYU School of Law p.1.
3 Compare. Foster, G., 2011. Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration. Columbia Journal of Transnational Law, 49, p. 254.
4 Behn, D., 2015. Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art. Georgetown Journal of International Law, 46, p. 389.
5 Neslen, A., 2024. Secretive court system has awarded over $100 billion public money to corporations, finds new analysis. The Guardian, 6 June. [Online] available at: <https://www.theguardian.com/environment/article/2024/jun/06/investors-awarded-billions-of-dollars-for-losses-related-to-climate-laws-analysis-finds> [Accessed 05.10.2025].
6 Columbia Center on Sustainable Investment (CCSI), 2022. Primer on International Investment Treaties and Investor-State Dispute Settlement. [Online] available at: <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> [Accessed 05.10.2025].

The expansion of ISDS through IIAs showcases the importance of this mechanism. However, at the same time, it has revealed challenges that foreign investors and states face while resorting to this mechanism. Many politicians, lawyers, and academics have expressed their dissatisfaction with the ISDS framework due to its deficiencies, such as favoritism towards large corporations.[7] It was even described as an opaque "shadow" legal system, controlled by a small group of elite arbitrators who prioritize financial gain over justice, often allowing multinational corporations to impose staggering financial burdens on developing nations.[8]

Given this frustration, some of the states have decided to withdraw from BITs or renegotiate the key clauses of IIAs that may potentially adversely affect their interests.[9]

In this essay, I will touch upon the main criticisms that exist in this field and possible steps that the stakeholders may take to contribute to the promotion of reliability, coherence, and systematicity of the ISDS regime.

2. HISTORICAL REVIEW AND THE DEVELOPMENT OF THE ISDS SYSTEM

The development of the ISDS system started at the beginning of the 1960s with the conclusion of the ICSID Convention and the first wave of bilateral investment treaties.[10] In the 1980s the number of IIAs grew seemingly mainly due to the efforts of capital-exporting countries.[11] For instance, the UK signed more than ten such treaties in Margaret Thatcher's tenure in the early 1980s.[12] Unsurprisingly, the US took a leading role by negotiating NAFTA in 1992 and numerous IIAs with Vietnam, Chile, Morocco, and other nations.[13] As of 1990, approximately 500 investment treaties had been signed.[14] In the following decades, the network of these treaties surged to around 3,000.[15] As of now, Switzerland and Germany are the states with the largest web of BITs throughout the entire world.[16] The bar chart below showcases the dynamic of proliferation of IIAs from

7 Senator Elizabeth Warren and Representative Doggett, 2023. Press Release: Senator Warren & Representative Doggett Call for Elimination of Investor-State Dispute Settlement System (2 February 2023). [Online] available at: <https://www.warren.senate.gov/oversight/letters/senator-warren-representative-doggett-call-for-elimination-of-investor-state-dispute-settlement-system-action-on-behalf-of-honduran-government> [Accessed 06.10.2025].

8 Howse, R., 2017, p. 1.

9 Peinhardt, L. and Wellhausen, R. L., 2016. Withdrawing from Investment Treaties but Protecting Investment. University of Durham & John Wiley & Sons, Ltd., p. 4. [Online] available at: <https://www.rwellhausen.com/uploads/6/9/0/0/6900193/10.1111_1758-5899.12355.pdf> [Accessed 07.10.2025].

10 Newcombe, A. and Paradell, L., 2009. Law and Practice of Investment Treaties. The Hague: Kluwer Law International, pp. 44–46, para. 1.31. Compare. Miles, K., 2013. The Origins of International Investment Law. Oxford: Oxford University Press, pp. 86–87.

11 Van Harten, G., 2020, p. 18.

12 Ibid.

13 Ibid. p. 29.

14 United Nations Conference on Trade and Development (UNCTAD), n.d. International Investment Agreements Navigator. [Online] available at: <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search?> [Accessed 07.10.2025].

15 Ibid.

16 Ibid.

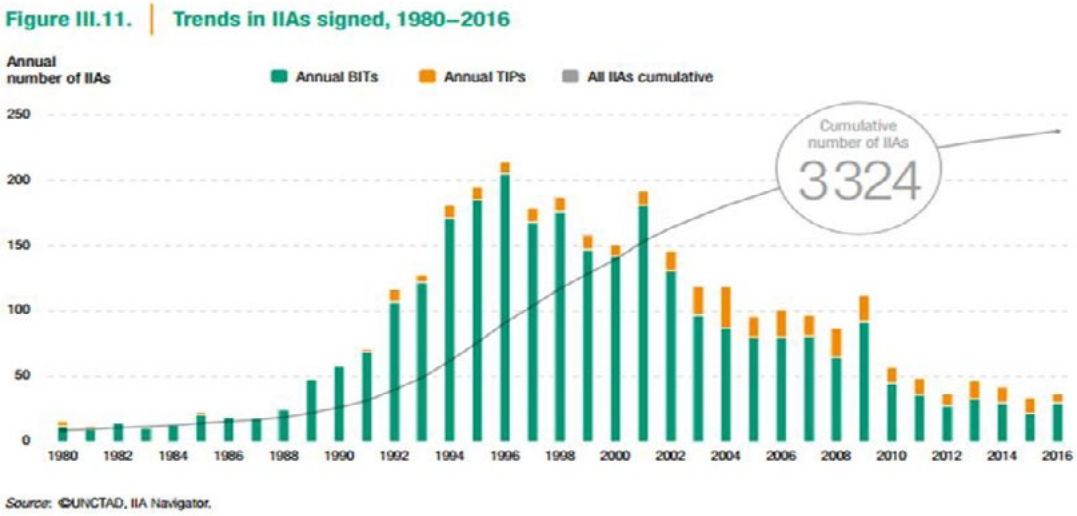

Fig.1

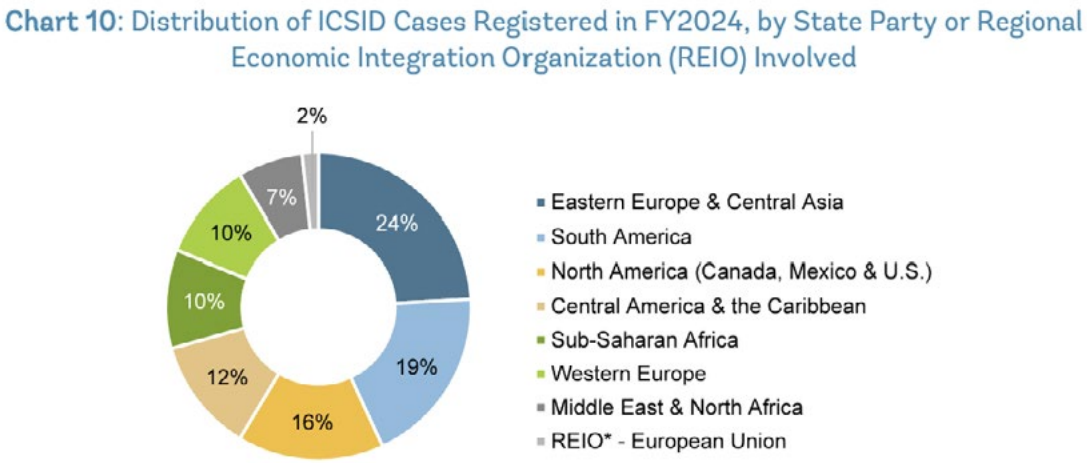

Fig.2

1980 to 2016 (See Fig. 1).[17]

The most common explanation behind signing IIAs is the promotion of economic development within the host country.[18] The UN studies support this idea by illustrating that generally, investment treaties have promoted the flow of foreign direct investments.[19] However, some studies also point out that IIAs may not necessarily be the underlying factor of economic success, taking into account different variables and specifics that may exist within a particular state.[20]

17 United Nations Conference on Trade and Development (UNCTAD), 2017. World Investment Report 2017. Geneva: United Nations Publication, p. 111.

18 Roberts, A., 2010. Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States. American Journal of International Law, 104, p. 179.

19 United Nations Conference on Trade and Development (UNCTAD), 2014. IIA Issue Note – Working Draft: The Impact of International Investment Agreements on FDI – An Overview of Empirical Studies 1998–2014. Geneva: United Nations, p. 5.

20 Compare. Tobin, J. and Rose-Ackerman, S., 2005. Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties. Yale Law & Economics Research Paper No. 293. New Haven: Yale University, p. 23.

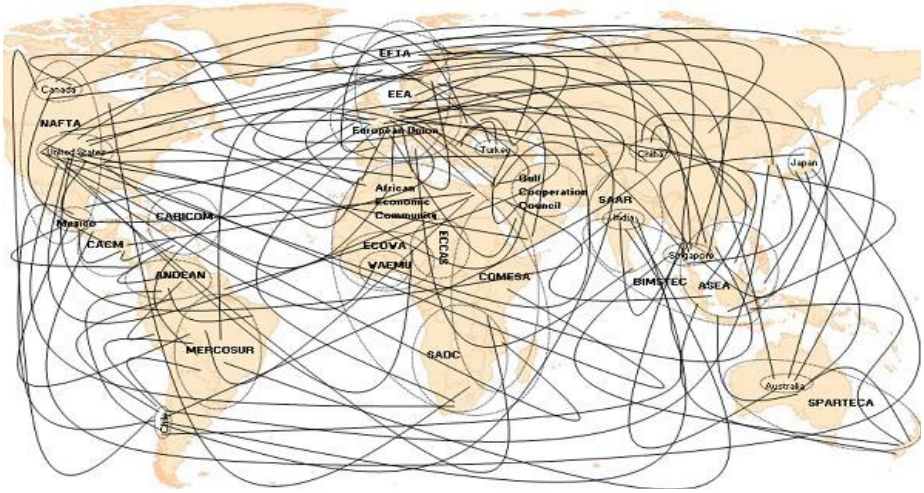

Fig.3

As of December 31, 2024, ICSID had registered a total of 991 cases.[21] The largest number of cases registered in 2024 stems from Eastern Europe & Central Asia, followed by North America (See Fig. 2).[22]

Nowadays, there are mixed assessments about the efficiency of ISDS. However, the fact that the ISDS system has become increasingly complex is rarely contested. The "spaghetti bowl" below illustrates how complicated and intertwined the multilateral and bilateral investment treaties network has become over the years (See Fig. 3).[23]

3. CRITICISM SURROUNDING THE ISDS SYSTEM

3.1 Transparency

Although well-known permanent adjudication institutions such as ICSID and Energy Charter Secretariat frequently publish their arbitral awards, the ISDS regime has still been criticized for its lack of transparency. To be more specific, commentators point out that most of the decisions remain unpublished and that disputing parties typically opt for keeping affairs confidential, regardless of the right of a respondent state's population to be informed.[24] Arbitral proceedings are kept private, even though most investment disputes are essentially public in their own sense.[25] This concern is particularly alarming, as arbitrators are tasked with judging regulatory measures adopted by sovereign states, and any award rendered against a state inevitably affects its population as a whole. Moreover, such decisions may exert far greater influence on third parties than ordinary commercial arbitration disputes between private entities.[26]

21 International Centre for Settlement of Investment Disputes (ICSID), 2024. The ICSID Caseload – Statistics, Issue 2024-2. Washington, D.C.: ICSID, p. 2. [Online] available at: <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> [Accessed 12.10.2025].

22 Ibid. p.9.

23 United Nations Conference on Trade and Development (UNCTAD), 2005. Investment Provisions in Economic Integration Agreements. Geneva: United Nations Publication, p. 10 (based on World Bank data).

24 Howard, D., 2017. Creating Consistency Through a World Investment Court. Fordham International Law Journal, 41, pp. 22–23.

25 Ibid.

26 Compare. Fry, J. D. and Repousis, O. G., 2016. Towards a New World for Investor-State Arbitration Through Transparency. New York University Journal of International Law and Politics, 48, pp. 804–805.

3.2 Independence

The independence and impartiality of arbitrators is another key issue that is regarded as a weakness of ISDS. Critics argue that there is significant bias on the side of party-appointed arbitrators in *ad hoc* arbitration proceedings[27] and that the codes governing the conduct of arbitrators are often vague and unclear.[28]

Concerns have been voiced about the possible conflicts of interest arising from "double-hatting" – a practice in which lawyers switch sides and show up as counsels in one case and as arbitrators in another.[29] Additionally, arbitrators have also been accused of purported ghost-writing of awards, even in high-profile cases such as *Yukos*.[30]

Some scholars contend that the community of ISDS adjudicators is too narrow and insular, suggesting the influence of personal material benefits over the intended service obligations.[31]

3.3 Inconsistency Between the Awards

Given that foreign investments are governed by a large number of IAAs and disputes are resolved by diverse tribunals, in the absence of the formal doctrine of *stare decisis*, anticipating consistency may run counter to the nature of this system.[32] While such a set-up can be viewed from the lens of flexibility, it comes with a major drawback. Namely, due to the fragmented nature of the ISDS network, identical treaty provisions and facts of a similar nature are oftentimes interpreted and evaluated by tribunals differently, which obviously threatens the legitimacy of not only the respective awards in question, but the ISDS system in a whole.[33]

For instance, in Argentina-US arbitrations, five American enterprises filed their claims against Argentina for extraordinary government measures aimed at stabilizing the economy. In three cases, arbitral tribunals ruled that Argentina did not meet the criteria for emergency defense under the Argentina-US Bilateral Investment Treaty (*Sempra Energy International v. Argentine Republic),*[34] while the other two tribunals determined that the respondent state had indeed fulfilled the necessary conditions for such defense (*Continental Casualty*

27 Giorgetti, C., 2013. Who Decides Who Decides in International Investment Arbitration?. University of Pennsylvania Journal of International Law, 35, p. 454-455.

28 Compare. Giorgetti, C. and others, 2020. Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options. Journal of World Investment & Trade, 21, pp. 457; 460.

29 Langford, M., Behn, D. and Lie, R. H., 2017. The Revolving Door in International Investment Arbitration. Journal of International Economic Law, 20, p. 1-2.

30 Howse, R., 2017. The Fourth Man: An Intriguing Sub-Plot in the Yukos Arbitration. International Economic Law & Policy Blog, 29 March. [Online] available at: <https://ielp.worldtradelaw.net/2017/03/the-fourth-man-an-intriguing-sub-plot-in-the-yukos-arbitration/> [Accessed 14.10.2025].

31 Ibid. at 63.

32 Arato, J., Brown, C. and Ortino, F., 2020. Parsing and Managing Inconsistency in Investor-State Dispute Settlement. Brooklyn Law School, Legal Studies Paper, 631, King's College London Law School Research Paper 2020-43, p. 2.

33 Compare. Burke-White, W. W. and von Staden, A., 2010. Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations. Yale Journal of International Law, 35, p. 299.

34 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007), para. 388; Enron Corporation v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007), paras. 313, 321, 339; CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 331.

Company v. The Argentine Republic; LG&E Energy Corp. v. Argentine Republic).[35]

Likewise, in *CME Czech Republic B.V. (Neth.) v. Czech* and *Lauder v. Czech,* investors contended that the BIT provisions were violated by the Czech government imposing restrictive regulatory regimes over the TV stations. Although in both cases the factual circumstances were substantially identical, tribunals came to different conclusions. In *CME,* the tribunal found the indirect expropriation and the breach of the other key provisions of the BIT by the Czech government, whereas in *Lauder,* it did not.[36] Both of these cases further illustrate the inconsistency and unpredictability problem that the ISDS faces, even when arbitrators decide cases that are vastly similar in their makeup.

3.4 Costs and Time

Costs associated with ISDS represent another substantial problem. On average, tribunal fees constitute 18% of the total arbitration costs and often exceed $8 million per case, which far surpasses the litigation fees of, *e.g.* World Trade Organization (WTO) and the European Court of Human Rights.[37]

For illustration purposes, in *Philip Morris v. Uruguay,* the aggregate legal fees and tribunal costs amounting to approximately $27 million exceeded the base value of the claim itself.[38]

Other than that, ISDS is also criticized for its time-consuming nature. It has been shown that, on average, ICSID proceedings last almost 3 times longer compared to WTO's.[39]

4. KEY STRATEGIES AND RECOMMENDATIONS:

There are several approaches that ISDS stakeholders may adopt to address the existing challenges within the system. The first scenario envisions a targeted approach, focusing on specific reforms aimed at revitalizing the ISDS framework and enhancing its overall effectiveness. The second involves a more demanding effort – the modification of the institutional architecture itself, which would require a higher degree of political will and consensus among sovereign states.

4.1 Targeted Approach

4.1.1 Exhaustion of Local Remedies

While the exhaustion of local remedies is a requirement widely relied upon by various international dispute settlement bodies, the prevailing majority of IIAs does not set such a standard.[40] Mostly IIAs and their dispute settlement provisions allow investors to directly file claims against the host state, irrespective of the capabilities of its domestic justice system.[41] This holds true even in relation to the

35 Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award (5 September 2008), paras. 219, 222, 266; LG&E Energy Corporation v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), paras. 266–267.

36 CME Czech Republic B.V. (Netherlands) v. Czech Republic, Case No. 403/VERMERK/2001/CME, Partial Award, 0709/spe (UNCITRAL, 13 September 2001; Lauder v. Czech Republic, Final Award (UNCITRAL, 3 September 2001).

37 Gaukrodger, D. and Gordon, K., 2012. Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. OECD Working Papers on International Investment, No. 2012/3. Paris: Organisation for Economic Co-operation and Development, p. 71.

38 Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016), paras. 583 and 590.

39 Ibid.

40 Porterfield, M. C., 2015. Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?. Yale Journal of International Law, 41, p. 3.

41 Van Harten, G., 2010. Five Justifications for Investment Treaties: A Critical Discussion. Trade Law & Development, 2, pp. 13-14.

countries whose judiciary is considered reliable and well-established.[42]

The proponents of this approach suggest that by avoiding domestic courts, investors save time and costs.[43] Those who support a greater emphasis on local remedies before turning to international arbitration contend that the requirement to exhaust such remedies would enhance the rule of law in host states.[44]

In the *Interhandel*, the International Court of Justice (ICJ) noted that the country in which the breach of legal norms has taken place should have the opportunity to rectify them by its own means within the scope of its internal capabilities.[45] On the other hand, there is a perception that where domestic remedies would be futile or provide no reasonable possibility of effective redress, they should be treated as inapplicable. For instance, in *Ambiente Ufficio S.p.A. v. Argentine Republic* the tribunal determined that the requirement in the Argentina-Italy BIT to seek local remedies for eighteen months was not applicable to the bondholders' claims. The tribunal concluded that since Argentine law failed to provide a realistic opportunity for meaningful relief, pursuing the matter in domestic courts would have been a futile exercise.[46]

Having said that, it may be reasonable to rectify the asymmetric approaches scattered within the various IIAs and agree on a uniform rule, which would give a chance to the domestic courts to resolve disputes before investors bring up the extra-state claims, provided that pursuing such local remedies would not be futile or rendered unreasonable by existing judicial practice.

This approach would give greater legitimacy to the ISDS and ease the concerns of states expressing their fears about circumventing their domestic courts.[47] In this regard, it's noteworthy that in 2011, the European Parliament adopted a resolution on the European Union's (hereafter EU) international investment policy, which stated that changes ought to be made within the present ISDS framework and emphasized the importance of exhausting local judicial remedies where they are reliable enough to guarantee due process.[48]

4.1.2 Statute of Limitations

The vast majority of the IIAs are silent about a statute of limitations.[49] In *Gavazzi v. Romania, the tribunal* clarified that in the

42 Ibid.

43 Tietje, C. and Baetens, F., 2014. The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership. Study prepared for the Minister for Foreign Trade and Development Cooperation and the Ministry of Foreign Affairs of the Netherlands, p. 95. [Online] available at: <https://www.europarl.europa.eu/doceo/document/TA-7-2011-0141_EN.html> [Accessed 15.10.2025].

44 Porterfield, M. C., 2015, p. 5.

45 Interhandel (Switzerland v. United States), Preliminary Objections, Judgment, 1959 I.C.J. Reports 6, (21 March), p. 27.

46 Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), para. 620.

47 Compare. Amerasinghe, C. F., 2004. Local Remedies in International Law. 2nd ed. Cambridge: Cambridge University Press, pp. 7 and 22.

48 European Parliament, 2011. Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), P7_TA(2011)0141, para. 31. [Online] available at: <https://www.europarl.europa.eu/doceo/document/TA-7-2011-0141_EN.html> [Accessed 15.10.2025].

49 Martinez-Fraga, P. J. and Pampin, J. M., 2018. Reconceptualizing the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies. New York University Journal of International Law and Politics, 50, p. 876.

absence of an explicit legal mandate within the ICSID Convention, the applicable Bilateral Investment Treaty (BIT), or general international law, a claim cannot be barred by a time-limit.[50]

On the other hand, certain agreements do establish clear temporal boundaries; for example, the Austria-Kazakhstan BIT stipulates that disputes must be submitted within a five-year window from the moment an investor becomes aware, or reasonably should have become aware, of the circumstances triggering the claim.[51]

Although somewhat different from a traditional statute of limitations, certain bilateral investment treaties (BITs) also include so-called *sunset clauses*. The primary purpose of these provisions is to serve as a **protective mechanism** for investors by extending the treaty's substantive protections for a specified period after its termination. In essence, sunset clauses function as a safety net, ensuring that investments made prior to the treaty's expiry remain covered for a defined duration, even after the treaty itself has ceased to be in force.[52] This is particularly relevant for investments designed to generate long-term returns, such as those in the energy and infrastructure sectors.[53]

Having said that, states may consider amending IIAs to include provisions that render certain disputes time-barred and establish a defined "window" period to ensure a smooth transition as treaty-based protections phase out. Such measures would promote uniformity, enhance predictability, and enable both states and investors to save time and finances.[54]

4.1.3 Eradicating the Abusive Treaty-Shopping Practice

Treaty-shopping, also known as "nationality planning," has no universal definition.[55] However, this term most commonly describes a situation in which an investor incorporates its business in a country that has an advantageous IIA with the state where such business is supposed to operate.[56]

In reality, there are two types of treaty-shopping – permissible and abusive.[57] In

50 Gavazzi, M. and Gavazzi, S. v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015), para. 147, p. 52.

51 Agreement for the Promotion and Reciprocal Protection of Investment Between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan (1994), art. 13.

52 Magyar Farming Company Ltd., Kintyre Kft. and Inicia Zrt. v. Hungary, ICSID Case No. ARB/17/27, Award (13 November 2019), paras. 222–223.

53 Jus Mundi, 2024, "Sunset-Clause" (document on Jus Mundi), para. 2. [Online] available at: <https://jusmundi.com/en/document/publication/en-sunset-clause> [Accessed 16.10.2025].

54 Martinez-Fraga, P. J. and Pampin, J. M., 2018. Reconceptualizing the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies. New York University Journal of International Law and Politics, 50, p. 876.

55 Compare. Chaisse, J., 2015. The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration. Hastings Business Law Journal, 11, p. 228.-

56 Compare. United Nations Conference on Trade and Development (UNCTAD), 2005. Investor–State Disputes Arising from Investment Treaties: A Review. In UNCTAD Series on International Investment Policies for Development. Geneva: United Nations Publication, pp. 21–22.

57 Baumgartner, J., 2016. The Role of the Principle of Good Faith in Treaty Shopping. In Treaty Shopping in International Investment Law. Oxford: Oxford University Press, p. 279.

abusive treaty-shopping, investments are restructured between different jurisdictions with the sole intention of benefiting from a favorable IIA before a potential dispute emerges.[58]

One of the most prominent cases regarding treaty shopping is *Tokios Tokelles v. Ukraine,* decided by the ICSID tribunal.[59] In this case, the dispute arose over jurisdiction. The respondent state, Ukraine, argued that the plaintiff did not have a genuine link with Lithuania, as the legal entity in question was owned by Ukrainian nationals[60] and that allowing the claim to continue would essentially mean giving the green light to Ukrainian citizens to initiate an international arbitration dispute against their homeland, which the respondent contended would violate the nature of the BIT and the ICSID Convention.[61]

It is evident that the primary purpose of the investment protection regime is to facilitate the flow of foreign capital.[62] Consequently, referring disputes to international investment arbitration for matters that are essentially domestic in nature does not align with the interests of the host state.[63] However, in *Tokios Tokelés,* the tribunal has upheld the textual reading of the BITs[64] and disregarded the dissenting opinion that the whole purpose of the BIT was to promote the flow of external capital and that the scope of the BIT should have been limited to "*only the genuinely international investments*".[65] Similarly, in *The Rompetrol Group N.V. v. Romania,* the tribunal has concluded that the primary inquiry is the original intent of the two states as expressed through their mutual agreement. Consequently, it held that the specific criteria for national status defined within the Netherlands-Romania BIT served as the final authority for determining the tribunal's jurisdiction.[66] In *Saluka Investments B.V. v. The Czech Republic,* the tribunal has also underlined that the contracting states possessed complete discretion to define the term "investor" and that it was beyond the tribunal's powers to add requirements that contracting parties could themselves have considered while working on the draft agreement.[67] Consequently, it can be inferred that the states retain the sovereign right to define the qualifying criteria for investors in IIAs, and tribunals will primarily rely on the treaty's express language when adjudicating disputes involving allegations of treaty shopping.[68]

58 Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), para. 545.
59 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004); Ascensio, H., 2014. Abuse of Process in International Investment Arbitration. Chinese Journal of International Law, 13, p. 771.
60 Ibid. para. 21.
61 Ibid. para. 22.
62 Roberts, A., 2010. Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States. American Journal of International Law, 104, p. 179.
63 Lee, J., 2015. Resolving Concerns of Treaty Shopping in International Investment Arbitration. Journal of International Dispute Settlement, 5, p. 359.
64 Compare. Kjos, H. E., 2004. Case Comments & Awards: Tokios Tokelés v. Ukraine, Decision on Jurisdiction of 29 April 2004. Transnational Dispute Management, 1(3), p. 6.
65 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion of Professor Weil (29 April 2004), paras. 3 and 24.
66 The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008), para. 83.
67 Saluka Investments B.V. v. Czech Republic, UNCITRAL/PCA, Partial Award (17 March 2006), paras. 229, 241.
68 Compare. Kjos, H. E., 2004. pp. 6-7.

Commentators suggest that at the stage of signing off the BITs, states likely did not comprehend the possibility of the establishment of treaty-shopping as a practice.[69] Many countries have also expressed their concern that they have never given their assent to such practice, especially given the flood of claims that it has generated.[70]Although it may be a challenge to prevent abusive treaty-shopping primarily because of the necessity to reach a mutual agreement between the respective contracting states, there are some solutions that might turn out to be effective.

4.1.3.1 Denial of Benefits

One way to cover up the negative side of treaty shopping is to give consideration to the "Denial of Benefits" (DOB) clauses in IIAs, which would enable the host state to deprive the claimant of the protection granted by a particular IIA for the reason of lacking an authentic link with such state.[71] For example, Article 1113(2) of NAFTA allows a state party to withhold treaty protections from an enterprise if that entity is owned or controlled by individuals from a non-party state and lacks significant business operations within the country where it is legally established. This mechanism is subject to requirements for prior notification and consultation between the involved parties.[72]

However, tribunals have rendered seemingly inconsistent judgments regarding the circumstances, methods, and consequences of invoking DOB clauses.[73] Normally, it's on the state's side to assert that the preconditions for the application of the DOB clause are met *i.e.* the investor has no substantial business in the country in question, and should be denied the protection under the IIA.[74]

4.1.3.2 Conditions Governing a Corporate Restructuring

It is possible to include, either in domestic investment legislation or within investor–state agreements, a requirement that any planned transfer of shares be subject to prior approval by the competent authorities of the host state.[75]

For instance, in *Aucoven v Venezuela*, where the Concession Agreement concluded between the Parties contained such a

69 Compare. Van Os, R. and Knottnerus, R., 2011. Dutch Bilateral Investment Treaties: A Gateway to "Treaty Shopping" for Investment Protection by Multinational Companies. Centre for Research on Multinational Corporations (SOMO), Amsterdam, p. 11; Lee, J., 2015. Resolving Concerns of Treaty Shopping in International Investment Arbitration. Journal of International Dispute Settlement, 5(2), p. 360.

70 Compare. Lee, J., 2015. Resolving Concerns of Treaty Shopping in International Investment Arbitration. Journal of International Dispute Settlement, 5(2), p. 360.

71 Collins, D., 2017. An Introduction to International Investment Law. Cambridge: Cambridge University Press, pp. 87–88.

72 North American Free Trade Agreement, (1994), article 1113 (2).

73 Compare. Gastrell, L. and Le Cannu, P-J., 2015. Procedural Requirements of "Denial-of-Benefits" Clauses in Investment Treaties: A Review of Arbitral Decisions. ICSID Review – Foreign Investment Law Journal, 30, p. 78.

74 Compare. Feldman, M., 2012. Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration. ICSID Review – Foreign Investment Law Journal, 27, p. 296. For example, in Petrobart Limited v. Kyrgyz Republic, the tribunal ruled that the Respondent had the burden to establish relevant facts regarding the Claimant Company's ownership structure and business activities. Similarly, the tribunal in AMTO v. Ukraine placed the burden of proof on the state. See Petrobart Limited v. Kyrgyz Republic, SCC Case No. 126/2003, Award (29 March 2005); Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (16 September 2003); and Liability Company AMTO v. Ukraine, SCC Case No. 080/2005, Final Award (26 March 2008), para. 65.

75 Baumgartner, J., 2016. p. 273.

requirement.[76] A similar requirement was included in the shareholders' agreement between the original investor and the competent Venezuelan authority in *Vannessa Venture v Venezuela*.[77]

Therefore, host states should clearly define, in their domestic legislation or investor–state contracts, the conditions under which corporate restructuring is deemed acceptable, as part of the rules governing the admission of foreign investments.[78] In addition, states are encouraged to require disclosure of ownership structures, particularly prior to the initiation of a potential investment claim, to enable both the host state and, in the event of a dispute, the arbitral tribunal to determine the nationality of the beneficiary shareholder or ultimate controller.[79]

4.1.3.3 "Foreseeable Dispute" Standard

Another innovative approach seeking to address potentially abusive changes of nationality can be found in the Investment Chapter of the EU–Singapore FTA, which provides that a tribunal must decline jurisdiction if the dispute had already emerged or was highly probable at the time the investor acquired the investment. If the tribunal determines that the primary motive for acquiring ownership or control was to gain access to arbitration under this treaty, the claim must be dismissed.[80]

The drafters of the said FTA have incorporated the essence of the judicial line that distinguishes whether, at the time of a change in nationality, there were indications of a pending dispute or whether a future dispute was reasonably foreseeable. This approach appears to reflect the contracting states' intention to guide arbitral tribunals in their interpretation of such circumstances.[81]

4.1.4 Convergence of Similar Cases

States may incorporate specific clauses into International Investment Agreements (IIAs) allowing for the consolidation into a single proceeding of similar cases that are initiated separately against the same respondent state. Such an approach would not only foster uniform interpretation of applicable laws and facts but also enhance judicial economy.[82]

This method has been applied in previous ICSID proceedings, such as in *Lao Holdings N.V. v. Lao PDR (II)* and *Sanum Investments Limited v. Lao PDR (II)*, where the parties agreed to converge the cases.

However, ideally, consolidation should not be contingent upon the parties' consent. Instead, a dispute settlement body should have the authority to merge cases if their subject matter is found to be common. For example, the United States-Mexico-Canada Agreement (USMCA) allows the arbitral tribunal to consolidate claims that "have a question of

76 Autopista Concesionada de Venezuela C.A. (Aucoven) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 September 2001), para. 92.
77 Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6, Award (16 January 2013).
78 Mitchell, A. D., Sornarajah, M. and Voon, T., 2015, Good Faith and International Economic Law. Oxford: Oxford University Press, pp. 88 and 114.
79 Baumgartner, J., 2016. p. 274.
80 European Union-Singapore Free Trade Agreement, (2019), paragraph 9.17 (6).
81 Baumgartner, J., 2016. p. 275.
82 Muchlinski, P., Ortino, F. and Schreuer, C. H., 2008. The Oxford Handbook of International Investment Law. Oxford: Oxford University Press, p. 1039. See also Cambodia Power Co. v. Cambodia and Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011), para. 160.

law or fact in common and arise out of the same events or circumstances."[83]

4.2. Institutional Approach

Under the umbrella of UNCITRAL's ongoing reform, there are two major suggestions for the resolution of inconsistency, independence, and transparency problems. The first one entails the creation of an appellate mechanism,[84] and the second one is the foundation of a multilateral investment court,[85] which is also upheld by the EU and its member countries.[86]

4.2.1 Setting Up an Appellate Body

Given the ongoing concerns about arbitrator neutrality and inconsistencies in both substantive and procedural rulings, the lack of an effective appellate mechanism within the ISDS system is particularly troubling.[87] The situation is further aggravated by the fact that even the ICSID annulment committee is restricted in its *ratione materiae* jurisdiction to review an award and check the proper application of the substantial law.[88] In other words, an award can be annulled only on narrow grounds, for instance, if the tribunal was improperly constituted or acted beyond its powers.[89] The rationale behind annulment is to void an award in whole or in part and refer the case to a newly established arbitration panel.[90] By contrast, the core purpose of appeals is to revise the existing decision and, by issuing the new one, correct the shortcomings encountered in the former.[91] In short, "*annulment can void, while the appeal can modify*."[92] The assumption that the annulment procedure cannot serve as a substitute for the appeals mechanism is further evidenced by its infrequent application. In this regard, it's noteworthy that the number of annulled decisions is extremely low. According to the ICSID's official data, the rate of annulment as of December 31, 2023, is 2.6 percent of all registered cases under the ICSID Convention and 5 percent of all awards rendered.[93]

83 Agreement Between the United States of America, the United Mexican States, and Canada (2020), art. 14.D.12.

84 United Nations Commission on International Trade Law (UNCITRAL), 2019, Submission from the Government of China. U.N. Doc. A/CN.9/WG.III/WP.166, pp. 6-7. [Online] available at: <https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf> [Accessed 16.10.2025].

85 Ibid.

86 European Parliamentary Research Service, 2021. Investor-State Dispute Settlement (ISDS): Evolving Reforms and the Role of the European Union. Briefing PE 690.642. European Parliament. [Online] available at: <https://www.europarl.europa.eu/RegData/etudes> [Accessed 17.10.2025].

87 Compare. Eliason, A., 2018. Evidence Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform. Georgetown Journal of International Law, 50, p. 12.

88 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (2006), art. 52, para. 1.

89 Ibid.

90 Compare. Webster, T., 2015. Annulment of Awards for Arbitral Bias. Dispute Resolution International, 9 (1), p. 2.

91 Caron, D. D., 1992. Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal. Foreign Investment Law Journal, 7, pp. 23–24.

92 Ibid.

93 International Centre for Settlement of Investment Disputes (ICSID), 2024. ICSID Publishes Updated Background Paper on Annulment. [Online] available at: <https://icsid.worldbank.org/news-and-events/news-releases/icsid> [Accessed 19.10.2025].

Having that said, while the principle of finality traditionally has been viewed as one of the key advantages of ISDS,[94] it may now be time to place greater emphasis on justice and substantive fairness. Reassessing the balance between finality and correctness within the ISDS system could justify exploring the establishment of an appellate mechanism.

For this purpose, states may be willing to amend IIAs and envisage the establishment of a standing body with the competence to review awards of first-level tribunals.[95] Some of the existing versions of IIAs have already upheld this approach. For example, FTA between the US and Chile states that awards of the tribunals rendered under the FTA in question may be examined by the separate appellate body created within the multilateral treaty to which state parties have acceded.[96]

Another important consideration is whether such a mechanism would generate binding precedents. Although ISDS lacks a formal rule of precedent comparable to that in common law systems, arbitral tribunals often rely on prior awards as persuasive authority – a practice sometimes described as a *de facto* system of precedent.[97] In *Corp. v. Argentine Republic,* the ICSID tribunal observed that while general international law lacks a formal rule of precedent, tribunals are not precluded, as a principle, from evaluating the findings or reasoning established by previous ICSID panels.[98] This suggests that, while arbitrators are not legally bound to follow prior decisions, there may exist a certain moral inclination to do so in the interest of consistency.[99]

Nevertheless, despite the potential benefits an appellate mechanism could bring, its introduction might compromise the principle of finality and lead to higher costs and longer timelines for arbitral proceedings. Yet these challenges could be mitigated through the adoption of strict procedural deadlines, similar to the approach of the WTO's appellate body, which is required to render its decisions in 90 days.[100]

4.2.2 Foundation of an International Investment Court

As mentioned above, the final and perhaps most ambitious reform option is the establishment of a multilateral investment court, an idea currently under active discussion within UNCITRAL and the European Union. Proponents argue that a centralized, institutionally managed review mechanism would be the most effective way to mitigate the risk of legal fragmentation and ensure a more cohesive international dispute settlement framework.[101]

Supporters of this reform believe that the foundation of a world investment court will lead to more consistent and predictable deci-

94 Compare. Dolzer, R., Kriebaum, U. and Schreuer, C. H., 2022. Principles of International Investment Law. 3rd ed. Oxford: Oxford University Press, p. 277.
95 Brown, C., Ortino, F. and Arato, J. 2020, p. 26.
96 Free Trade Agreement Between the United States and Chile (2004), art. 10.19, para. 10.
97 Compare. Shishehgar, N., 2023. The Multilateral Investment Court System as a Credible Alternative to Investor-State Dispute Settlement. Ph.D. thesis, The University of Manchester, Faculty of Humanities, p. 131.
98 AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/06, Decision on Jurisdiction (26 April 2005), paras. 17–18.
99 Shishehgar, N. 2023, p. 131.
100 Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO Dispute Settlement Understanding, 1995), art. 17, para. 1.
101 Gleason, E., 2007. International Arbitral Appeals: What Are We So Afraid Of?. Pepperdine Dispute Resolution Law Journal, 7, p. 285.

sions, thereby enhancing the overall legitimacy of the ISDS regime.[102]

Furthermore, to address states' concerns regarding legitimacy and the trade-off between surrendering sovereignty and achieving economic development, it may be reasonable to grant the judge appointment powers to the member states.[103] Judges could serve six-year, non-renewable terms, with one-third of them appointed every other year, following the model of the European Court of Justice.[104] Commentators believe that this approach would alleviate accountability issues associated with party-appointed arbitrators.[105] Moreover, relatively shorter judicial terms may help ensure that adjudicators adopt a balanced approach toward both state and investor interests.[106]

Ideally, the world investment court would also include an appellate chamber empowered to conduct *de novo* review of lower tribunal decisions, focusing on the proper application of law.[107] The appellate body's rulings should possess persuasive authority, providing guidance and judicial coherence for subsequent cases.[108]

Despite considerable academic and institutional support, skeptics question whether sufficient political will exists to realize such an ambitious reform.[109] Ultimately, while the establishment of a permanent international investment court with an integrated appellate mechanism could mitigate fragmentation and enhance consistency within the ISDS system,[110] its **legitimacy will ultimately depend on its long-term effectiveness** and on the extent to which it fulfills its intended goals.

CONCLUSION

Without doubt, the Investor–State Dispute Settlement (ISDS) system has played a pivotal role in safeguarding and promoting investor–state relations. Nevertheless, recent developments and growing concerns demonstrate that the system, in its current form, has become increasingly obsolete and in need of substantial reform. The erosion of legitimacy, coupled with persistent issues of transparency, consistency, and accountability, underscores the urgency of rethinking the investor–state dispute resolution framework.

As discussed above, states retain the discretion to determine their own strategies for addressing ISDS challenges. An analysis of various commentators' proposals reveals that stakeholders can generally pursue two principal directions: (1) a targeted approach that focuses on correcting specific deficiencies within International Investment Agreements (IIAs), or (2) a comprehensive reform aimed at the institutional restructuring of the system itself. Each approach, however, carries distinct advantages and drawbacks.

102 Van Harten, G., 2007. Investment Treaty Arbitration and Public Law. Oxford: Oxford University Press, p. 181.
103 Compare. Howard, D., 2017, pp. 45-46.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid. p. 47.
109 Compare. Giorgetti, C., 2013, p. 463.
110 Compare. Schill, S. W., 2015. Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward. International Centre for Trade and Sustainable Development (ICTSD), p. 8.

If states opt for targeted adjustments, for example, by amending BITs the process may require less time and political coordination. Yet such measures may fail to remedy systemic deficiencies. Moreover, achieving uniformity and predictability across a fragmented regime comprising hundreds of IIAs and ad hoc tribunals remains a formidable challenge.

Conversely, pursuing institutional reform demands greater political will and entails higher risks, but it also offers the potential for more profound and enduring benefits. Should such reform efforts falter, the ISDS system risks stagnation for decades, until states again gather their strength to place the issue on the global agenda.

Ultimately, it is evident that whether through incremental adjustments or bold structural transformation, the reconfiguration of the global investor–state dispute framework is essential to restoring its credibility and legitimacy. The current reform process represents a rare and valuable opportunity for all stakeholders to contribute to the establishment of a more transparent, balanced, and sustainable ISDS regime.

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