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Title:

Replacing Investment treaty arbitration? Problems, reform, and transformation

Subtitle

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Abbreviation

ITA	Investment Treaty Arbitration
ISDS	Investor-State Dispute Settlement
ICS	Investment Court System
CETA	The EU-Canada Comprehensive Economic and Trade Agreement
MIC	Multilateral Investment Court
BIT	Bilateral Investment Treaty
EU	European Union
UNCTAD	United Nations Conference on Trade and Development
ECT	Energy Charter Treaty
IIA	International Investment Agreement
FTA	Free Trade Agreement
ICSID	International Centre for the Settlement of Investment Disputes
UNCITRAL	United Nations Commission for International Trade Law Rules
TTIP	Transatlantic Trade and Investment Partnership
EESC	European Economic and Social Committee
EFILA	European Federation for Investment Law and Arbitration
ADR	Alternative Dispute Resolution

TPP	Trans Pacific Partnership
CJEU	Court of Justice of the European Union
EIPA	European Institute of Public Administration
ACIL	Advisory Centre on Investment Law
ACWL	Advisory Centre of WTO Law
WTO	World Trade Organization
ICJ	International Court of Justice
FDI	The Foreign Direct Investments
AM	Appellate Mechanisms

Abstract:

With ISDS/ITA mechanisms, foreign investors can bring disputes with host states (as another contracting party) before independent international arbitral tribunals. Despite the efforts of this system in resolving disputes, recently, there have been theories and decisions about the uncertain future of ISDS/ITA. ISDS or investor-state dispute settlement is a method which enables foreign investors to resolve disputes with the government of the host state by arbitration. Criticisms of this system (duration of proceedings, inconsistency, arbitral independence, lack of transparency and impartiality, and lack of attention to human rights) have raised to the reform of the Investor-State Dispute Settlement (ISDS) regime or its replacement. In this thesis, firstly, the feasibility of the reform options will be analysed. The first question is whether it is possible to modify this system? Secondly, assuming the end of an era for investor-state disputes, a second question will arise: what are the replacements for that system? In this thesis, the criticism of the system will be reviewed, and the possible alternatives will be examined.

Keywords:

ISDS, ITA, Reform proposal, Transformative proposal, MIC, ICS.

1- Introduction

1-1- Background

It is a generally held view that in order to facilitate, promote, and protect the international investments in the form of the Foreign Direct Investments ("FDI"), it is of crucial importance to establish a legitimate and effective framework for dispute settlement between investors and states, A compelling case can and has been made for ISDS. Foreign investors and their investments are nowadays typically protected through a web of International Investment Agreements ("IIAs")—both Bilateral Investment Treaties ("BIT") and Multilateral Investment Treaties ("MIT"). These IIAs offer what is known to be international investment law.

In these treaties, ISDS clauses are oftentimes found to settle disputes between investors and the host-state with respect to the formers investment. ISDS dealing with investment protection found in IIAs is referred to as investment treaty arbitration ("ITA"). The crux of the matter for this thesis is to analyse and elucidate the pros and cons with such a regime. Is it a workable dispute resolution mechanism? Should it be reformed? Should it be transformed? These questions are analysed at the backdrop of the legitimacy crisis as currently perceived and in light of new alternatives presented, e.g. the Multilateral Investment Court system ("MIC").

ISDS is facing many challenges. Since the early 2000s, there have been concerns and debates about this system. Although ISDS has been an optimal dispute resolution system for several years, it has been argued that this system does not "fit for purpose".[1]

It has been said that ITA has substantial costs with difficulties and there are some concerns about the integrity of international arbitrators and challenges about its

[1] 'A Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration, Consistency, Efficiency and Transparency in Investment Treaty Arbitration Report' (2018): <https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.> accessed 15 May 2022.

legitimacy. All of these concerns and some other criticisms have been introduced as a legitimate crisis of ISDS. Therefore, there has been a suggestion that this system replaces with a more transparent, consistent, predictable appeal system, or it has been said that instead of ISDS, there should be a permanent court. Another suggestion is that there should be an appellate system along with ISDS.

All of these proposals are under two approaches which are transformative and reforms. In the first approach, there have been some suggestions that instead of the ISDS, there should be a permanent court or new system for resolving disputes. On the contrary, in the reform approach, there are some proposals that can amend the current system, such as the Energy Charter Treaty (ECT) modernisation and a new generation of BITs. In the meantime, some more balanced reforms are mentioned with a more moderate view.

Therefore, in this thesis, the most concerns about the legitimacy of ISDS, resulting in a legitimacy crisis,[2] will address through a comprehensive study in this thesis. First, the current backlash movements and significant criticisms of the legitimacy crisis will be examined. The most important criticisms are lack of transparency, inconsistency, concerns regarding of human rights, public policy and impartiality, which will be discussed in section 2.

In section 3, some reform proposals will be studied. Subsequently, proposals according to the transformative approach will be mentioned in the next section. The question is whether we should think of a new and different system, or can we believe in reforming the existing system?

Some ideas about replacement and some reforms work, such as the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"), ECT modernisation, new generation IIAs/ BITs, Investment Court System ("ICS") and MIC, Investor-state Mediation, which can be replaced with ITA or ISDS, will also consider. In contrast to

[2]David Drakopoulos, 'Appeal Mechanisms and Investment Court Systems in Investor-State Dispute Settlement: An Analysis of AM and ICS Suggestions, in Light of Contemporary Reform' 49.

these two views, in the next part, some reform proposals with moderate approach will be expressed that can correct the problems in the system to some extent.

1-2- Research Questions

This research aims to answer the question of what are the current backlash movement and legitimacy crisis raised against ITA and ISDS?

What are the proposed solutions to these criticisms? What do the reform and transformative approaches offer instead of ISDS?

What are the problems of reform and transformative approaches? And how ISDS can be improved?

1-3- Method and Source

In this thesis, l utilise most available resources, such as doctrines, articles and research papers, working papers, and law journals. The most important sources in this area have been studied, and the most famous cases related to the subject have also been studied and used. Moreover, articles and books, some related reports such as the United Nations Conference on Trade and Development ('UNCTAD') or sessions of The Working Group which have made some reform proposals regarding ISDS, have also been mentioned in the research. Other resources are websites. There are reports and comments on the subject on some sites which have also been used.

This thesis is basic in legal study. The legal research method analyses the ISDS, ITA. Through the "De lege lata" approach, firstly, I mention the current situation of the ISDS and its functions. Meanwhile, some of the challenges of the system will be explained. Secondly, by the "de lege ferenda" approach, how this system could or should be reformed will be analysed.

1-4- Delimitation

In the thesis, I will briefly talk about criticisms of ISDS, but not all of them. For example, lacking legal validity, concerns about the lack of predictability and high fees of arbitrations. Then, the most important criticism is mentioned. Besides, I will not analyse any of the criticisms in depth. Due to the limited pages, they are mentioned briefly.

In the following structural reform of the ISDS/ITA mechanism, suggested proposals for structural modifications are introduced for ISDS. Other reform proposals are not mentioned, and only the most critical issues will be analysed.

1-5- Structure

In this research, after the introduction, in chapter 2, I will describe the current backlash movements and the major criticisms of the legitimacy crisis of ISDS.In the third chapter, some proposed solutions will be introduced and explained, such as a "reform" of the system and the possibility of modifying ISDS with some suggestions, including CETA, ECT modernisation, and New generation IIAs/ BITs, ICS.

In the other part of the research, strategies and transformative methods, MIC and Investor-state Mediation, are discussed, explaining how and with which options we can replace this system instead of reforming, and the possibility of its replacement is examined. After transformative proposals, I will talk about some moderate suggestions for ISDS improvement, such as establishing an advisory centre. In conclusion, the researcher's suggestion will be expressed.

2- Backlash and legitimacy concerns

The lack of a regulatory body, the absence of a formally recognised hierarchical structure amongst tribunals, the lack of uniform rules on transparency, and inconsistent and broad interpretations of investment principles by multiple tribunals raise particular concerns about the illegitimacy of ISDS.[3] These problems even result in the termination of treaties with ISDS provisions.[4] In this part, some of the legitimacy crises which ISDS suffers from will be discussed. Some elements for evaluating the legitimacy of a dispute resolution system are consistency, transparency, impartiality, and experience.[5] However, it has been said that these factors in ISDS are missing. Now, it will be discussed what the backlash movement is and what are those concerns? Can ISDS/ITA handle the concerns?

2-1- ISDS Backlash movement and legitimacy concern definition

Some states, civil society actors, and scholars refer to a 'legitimacy crisis'[6]resulting in retreat or rejecting the investment arbitration mechanism. Legitimacy crisis at the end of the first decade of the 21st century by the Latin American States started to be known when some states have encountered the most significant number of claims by foreign investors, which led to the termination of BITs or adoption of domestic legislation.[7]

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[3]Neriman Kilic, 'Legitimacy Concerns in Investor-State Dispute Settlement' (PhD Thesis, University of Warwick 2019) 11.

[4]Michael Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' (2015) 5 Am. U. Bus. L. Rev. 429, 429.

[5]Daniel Bodansky, Jeffrey L Dunoff and Mark A Pollack, 'Legitimacy in International Law and International Relations' [2013] Interdisciplinary perspectives on international law and international relations: The state of the art 321, 59.

[6]Cecilia Olivet and Pia Eberhardt, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (2012) 27 Transnational Institute 48.

[7]R Polanco Lazo, 'Transnational Dispute Management' (2014) 111.

https://www.wti.org/media/filer_public/6c/7e/6c7e7212-f47f-4a07-9bc9-5854f237ba0d/tv11-1-article14_is_there_a_life_after_icsid_denunciation.pdf.

More recently, this backlash against investment arbitration in environmental, health, labour rights was raised by Ecuador, Bolivia, and Venezuela.[8] The criticisms against ISDS led to the idea of illegitimate ISDS, and the European Union ("EU") concluded that ISDS is not neutral and consistent.

A critical case in this area is the case of Slovak Republic v. Achmea, known as the Achmea case[9] which the European Court of Justice ("ICJ") found an arbitration clause in a bilateral investment treaty between two EU member states incompatible with the EU law. Some believe that the interpretation of investment agreements should be in light of the obligations of the EU member states and concerning their obligations under competition law (such as the Micula case).[10] In the case of inconsistency, BITs should terminate, as the Commission requests member states to terminate their intra-EU bilateral investment treaties or "intra-EU BITs". Regardless of whether the Commission has the authority to terminate these agreements,[11] the question of what the status of investment protection will be or whether the rules governing the EU law can cover the standards in investment agreements or not remains unanswered.

This concern resulted in the reluctance of the United States of America, Canada, and the Australian Government to include the ISDS in future IIAs.[12] Finally, in 2014 the

[8]Sergey Ripinsky, 'Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve. Investment Treaty News, 13 April 2012' at:
<http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-fromICSID-what-it-does-and-does-not-achieve/> accessed 1 May 2022.

[9]Achmea BV v The Slovak Republic, UNCITRAL, PCA Case No 2008-13 (formerly Eureko BV v The Slovak Republic).

[10]Kai Struckmann, Genevra Forwood and Aqeel Kadri, 'Investor-State Arbitrations and EU State Aid Rules' (2016) 15 European State Aid Law Quarterly 258, 269.

[11]Dr Ahmad Ghouri, 'Interaction and Conflict of Treaties in Investment Arbitration' [2015] International Arbitration Law Library, Kluwer Law International, Forthcoming 101.

[12]Jürgen Kurtz, 'Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' [2013] The Foundations of International Investment Law: Bridging Theory Into Practice (Oxford University Press, 2013, Forthcoming, U of Melbourne Legal Studies Research Paper No. 670 5.

European Commission (EC) announced that ISDS transformation is needed because of its illegitimacy and, in 2015, proposed a new and transformed system such as MIC.[13]

It has been argued that there should be some factors in this system to be called a legitimate system. They are reliable, predictable, consistent and transparent elements. Legitimacy crisis or backlash means that this system allegedly suffers from a lack of these requirements.[14]

In some studies, the reason for the legitimate crisis is organised into two main factors one of them is procedural issues, lack of predictability and inconsistent judgments, preferential treatment and biased arbitrators, lack of transparency and a facility for appeal in arbitration, and other is the substantive challenges about state sovereignty and balance between investor and national public policy relations.[15] In other words, this current ISDS has some substantive and procedural challenges, defined as a legitimacy crisis.

2-2- Concerning examples of the legitimacy crisis of ISDS

Increased concerns around ISDS procedures point out some challenges that this system faces. This system's most significant weaknesses are mentioned below.

2-2-1- Transparency

Given the unique position of the principle of transparency in international arbitration, any arbitration process should ensure that it observes this factor. Transparency in ISDS for accountability, good governance, sustainable development, and the rule of law is

[13]Jose Manuel Alvarez Zarate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible' (2018) 59 BCL Rev. 2765, 2768.

[14]Kilic (n 6) 5.

[15]Tran Thi Huong, 'The Legitimacy Crisis in Investor-State Dispute Settlement' (2021): <https://uhertslawblog.wordpress.com/2021/04/08/the-legitimacy-crisis-in-investor-state-dispute-settlement> accessed 1 May 2022.

an essential factor.[16] On the contrary, a lack of transparency doubts the legitimacy and credibility of the dispute resolution bodies, limits scrutiny of government decisions by the public and increases the corruption of investors and government officials. With transparency and accountability of parties in the dispute settlement process, effective compliance and implementation of ISDS will be realised.[17] However, one of the most significant challenges of ISDS is the lack of transparency.[18]

In 2015 the European Commission Cecilia Malmström said that there is a fundamental lack of trust by the public in the traditional ISDS system and emphasised that there should be a system in which citizens trust their domestic courts. He, who introduced the ICS, affirmed that we need transparency.[19] Others also said that ISDS does not have this crucial feature, resulting in the legitimacy crisis of that system. At the same time, some think about increased transparency in the ISDS.[20] For example, the EU has been

[16]Nathalie Bernasconi-Osterwalder and Diana Rosert, 'Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes, the International Institute for Sustainable Development' (IISD 2014) 11:
<https://ccsi.columbia.edu/content/promoting-transparency-investor-state-arbitration> accessed 15 May 2022.

[17]Fola Adeleke, 'The Role of Law in Assessing the Value of Transparency and the Disconnect with the Lived Realities under Investor-State Dispute Settlement' (2015) 6 SECO/WTI Academic Cooperation Project Working Paper Series 1.

[18]Marc Bungenberg and August Reinisch, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement (Springer Nature 2020) 16.

[19]Colin Trehearne and Herbert Smith Freehills, 'Transparency, Legitimacy, and Investor-State Dispute Settlement: What Can We Learn from the Streaming of Hearings?' (Kluwer Arbitration Blog, 6 September 2018):
<http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings>.

[20]Ylli Dautaj, 'Between Backlash and the Re-Emerging "Calvo Doctrine": Investor State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism' (2021) 41 Northwestern Journal of International Law & Business 273, 321.

mentioned that this system suffers from a lack of transparency; and proposed replacing ISDS with a system that could guarantee transparency.[21]

2-2-2- Inconsistency

One of the criticisms against the legitimacy of investment treaty arbitration is that awards are inconsistent. Any legitimate arbitration process needs predictability and objectivity, and similar cases should be treated the same. If the processes in the same cases are different, it will be unfair.[22]

Inconsistency of ISDS drags the attention of the United Nations Commission for International Trade Law Rules ("UNCITRAL") Working Group III.[23] The reason for criticism is that whithout any formal doctrine of precedent in public international law, ISDS tribunals do not have to follow the decisions and awards of other ad hoc tribunals. This issue results in inconsistency in the dispute resolution structure in the investment treaty regime.[24]

This problem can lead to various interpretations of legal directives and unjustifiable rulings in particular cases. Even this issue can lead to a long process and expensive costs of arbitral proceedings, which can even reduce FDI flows in the long run.[25] These issues are against the principles of attracting investment, but it is also contrary to the

[21]'Directorate-General for Trade, Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution, European Commission':
<https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 21 May 2022.

[22]Ian Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J. App. Prac. & Process 285, 294.

[23]Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 The Journal of World Investment & Trade 336, 2.

[24]Stephan W Schill, The Multilateralization of International Investment Law, vol 2 (Cambridge University Press 2009) 12.

[25]Arato, Brown and Ortino (n 28) 5.

principles outlined in the investment treaties. The Lauder cases,[26] SGS cases,[27] Metalclad v. Mexico[28] and others are examples of this inconsistency where different tribunals deal with the same factual background with contradictory approaches.

2-2-3- Human rights and public interest concerns

Another concern about arbitration under ISDS is trample values of democracy, the rule of law, and fundamental human rights. As a result, this will decrease the legitimacy of the regime.[29] This issue happens because it has been said that tribunals sacrifice human rights claims in favour of international investment law.[30]

Even though there are some proposals, such as the 2011 United Nations Guiding Principles on Business and Human Rights and the 2015 UNCTAD Investment Policy Framework for sustainable development, some describe the relationship between ISDS and international human rights, such as oil and water, which they cannot be mixed.[31] The ISDS regime recognises property rights, access to justice, and due process only available to foreign investors. However, this system does not focus on second and third-generation human rights.[32]

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[26] Lauder v Czech Republic, Final Award, IIC 205 (2001) (UNCITRAL).

[27]SGS Societe Generale de Surveillance SA v Pakistan (ICSID Case No ARB/01/13), Decision on Jurisdiction, Aug 6 (2003) 8 ICSID Rep 406. Pakistan and SGS v Philippines (2004) 5 J world investmen & trade 555.

[28]Metalclad Corp v United Mexican States, ICSID Case No ARB (AF)/97/1, Award (2000) 5 ICSID Rep 209.

[29]Crina Baltag and Ylli Dautaj, 'Promoting, Regulating, and Enforcing Human Rights through International Investment Law and ISDS' (2021) 45 Fordham Int'l LJ 1, 28.

[30]Suez, Sociedad Gen de Aguas de Barcelona, SA and Vivendi Universal, SA v Arg, ICSID Case No ARB/03/19, Award (ICSID).

[31]Siddharth S Aatreya, 'Human Rights and the ISDS Regime-Rethinking the Bipartisan Structure of International Investment Arbitrations' (2019) 22 Gonz. J. Int'l L. 19, 2.

[32]Nicholas J Diamond, 'arbitration, proceedings, human rights, ICSID amendments, international arbitration, investment arbitration, reform, working group III, ISDS Reform and Advancing All "Generations" of Human Rights' (Kluwer Arbitration Blog, 17 June 2020):

In ISDS, human rights counterclaims will be rejected because of a narrow reading of counterclaims requirements, meaning that tribunals allege they do not have jurisdiction over counterclaims because of the narrow construction of the dispute resolution clause.[33] In the Spyridon Roussalis case, the tribunal rejected jurisdiction over a counterclaim based on the argument that the dispute resolution clause is limited to the investor's claims, not host states.[34]

Besides that, critics point out that IIAs and ISDS are not in favour of the host state's public interest and sovereign prerogatives, and they threaten the state sovereignty while the state has the right to regulate.[35] On the contrary, it said that investors are vulnerable to the arbitrary exercise of state power and upholding the rule of law; however, opponents say that the state should have the ability to implement public interest regulation,[36] and the ISDS system jeopardises this right of states.

2-2-4- Impartiality

In ISDS, the party to the dispute can appoint its 'own' arbitrator, who can be 'loyal' to the appointee party, while the arbitrators should be unbiased.[37] Even though there are some rules which act as control mechanisms to ensure the impartiality and

<http://arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights> accessed 12 May 2022.

[33]Nicholas J Diamond and Kabir AN Duggal, 'Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?' (2021) 53 Case W. Res. J. Int'l L. 117, 125.

[34]Spyridon Roussalis v Romania (ICSID Case No ARB/06/1) [2011] ICSID Rep.

[35]Sebastian Sampallo, 'Investor-State Dispute Settlement in the TTIP-A Fair Dispute Resolution Mechanism or the Bane of Democracy?' 65.

[36]Arseni Matveev, 'Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty' (2015) 40 UW Austl. L. Rev. 348, 350.

[37]Christian Tietje, Freya Baetens and Ecorys Rotterdam, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' 86: <https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf> accessed 15 May 2022.

independence of these arbitrators, ISDS is accused of being an investor-oriented organ[38] and impartial.

Some said that ISDS removes judges from the adjudicative marketplace and puts them into a stable institution[39] that calls to question the legitimacy of ISDS. Moreover, critics said that an arbitrator could defend the party who appoints an arbitrator biasedly, meaning that the arbitrator could vote in its favour and advocate for the appointee party for reduced awards or costs of the process.

Another issue is" Double-hatting or "role confusion", which means that either arbitrator serves as counsel for or against one of the parties in another investment arbitration or other matters, or an arbitrator also acts as counsel in investment arbitration matters generally".[40] This situation can result in conflicts of interest because of the arbitrator's relationship with the parties and with the issues in the case.

This dispute resolution system is criticised because of the pro-investor bias approach as well. In most cases, investors act as claimants, creating a "one-way" party structure.[41] That criticism is a structural issue, meaning that in most investment contracts, what is mentioned is the obligation of states and investors' rights. In other words, state rights are not mentioned often.

[38]Dautaj (n 24) 276.

[39]Gus Van Harten and Pavla Křístková, 'Comments on Judicial Independence and Impartiality in ISDS: A Paper Prepared for the UNCITRAL Working Group III' [2018] Available at SSRN 3323010 5.

[40]Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel', IV Annual Forum for Developing Country Investment Negotiators (2010) 17:
<https://www.iisd.org/sites/default/files/publications/dci_2010_arbitrator_independence.pdf> accessed 12 May 2022.

[41]Chiara Giorgetti and others, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21 The Journal of World Investment & Trade 441, 20.

Even though investors or companies who operate internationally are not immune from international law rules and obligations,[42] most of the time, the acts of the state are questionable. Besides, according to the hourly paid system of arbitration and compensation system, most arbitrators motivate to advantage investors and disadvantage states, and there is a trend that arbitrators tend to decide in favour of investors.[43]

[42]Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic,case no ARB/07/26 (ICSID).

[43]Harm Schepel, 'M. Sornarajah. Resistance and Change in the International Law on Foreign Investment' 647.

3- Reform proposals

Instead of transforming and establishing a new system instead of ISDS, another suggestion is that reforms the current system. Apart from the scenario of Carlos Calvo by applying the national law or ISDS constraint by restricting the claims that can be submitted to investment or some prerequisites to investment arbitration,[44] in this part, some important suggestions will be discussed.

3-1- Investment Court System

One of the suggestions for reforming the current ISDS system is a new dispute settlement mechanism in the CETA. As a gold standard, this system considers ICS for disputes arising under (CETA). This system wants to reform ISDS with a permanent multilateral investment court.

This court-like system with establishing an appellate tribunal, the ethics of arbitrators, the transparency of proceedings, information sharing, the status of non-disputing parties, and enforcement with creating an appellate mechanism wants to assure the stability of decisions. Besides, open up hearing and participation of third parties intends to increase transparency.[45]

This suggestion is mentioned in the CETA and recommended in the draft text of the Transatlantic Trade and Investment Partnership ("TTIP"), the EU-Vietnam Free Trade Agreement ("FTA"), and the EU-Singapore Investment Protection Agreement.

Apart from the different process of appointment of a panel of permanent members and appellate tribunal, which makes the structure of ICS different from ISDS, this system

[44]Jose E Alvarez, 'ISDS Reform: The Long View' (2021) 36 ICSID Review-Foreign Investment Law Journal 253, 23.

[45]Thanapat Chatinakrob, 'Possible Reforms of ISDS: Some Considerations on the ICS in CETA' [2019] Cambridge International Law Journal: <http://cilj.co.uk/2019/01/29/possible-reforms-of-ISDS-some-considerations-on-the-ics-in-CETA/> accessed 19 May 2022.

is looking to achieve consistent and predictable case law.[46] As a new approach to investment protection, this system focuses on an international investment court system instead of ISDS, which consists of a tribunal and appellate body.[47]

This organ does not immune to criticism. It has been said that government-appointed judges in this system can have a biased view, or the appellate body can have political consequences and even be considered a duplication of the arbitral process.[48]

Therefore, the establishment of ICS raises the risk that states or governments can lobby in the appointments of a judge, then shifting from this existing system would be a dramatic move.[49] For example, when member states may object to the primary award and take it to the appeal stage solely for political reasons, the permanent tribunal member will be just political appointees instead of experts.[50] This issue can lead to awards that will not have the required quality.

Also, the long process because of appeal and the two-tiered system costs more and undermines the certainty of the awards. Establishing a new system takes too much time,

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[46]Juan Pablo Charris-Benedetti, 'The Proposed Investment Court System: Does It Really Solve the Problems?' [2019] Revista Derecho del Estado 83, 106.

[47]Laura Puccio and Roderick Harte, 'From Arbitration to the Investment Court System (ICS), European Union', (2017) 9:
<https://www.europarl.europa.eu/RegData/etudes/Idan/2017/607251/Eprs_Ida(2017)607251_En.pdf> accessed 15 May 2022.

[48]Jaemin Lee, '20 Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks', Reshaping the Investor-State Dispute Settlement System (Brill Nijhoff 2015) 483.

[49]Paul Stothard, Katie McDougall and Cloudesley Long, 'The EU's Proposed Reform of ISDS Investment Court Systems: The Future or a Fiasco?' (2017) 8:
<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-8.pdf?revision=ca56e1c3-6ae0-4a32-91fa-9dfc53e07dba&revision=ca56e1c3-6ae0-4a32-91fa-9dfc53e07dba> accessed 11 May 2022.

[50]Wolfgang Koeth, Can the Investment Court System (ICS) Save TTIP and CETA? (European Institute of Public Administration 2016) 3<http://publications.eipa.eu/en/details/&tid=1860> accessed 16 April 2022.

which also costs money and funding. Even if aid states help with the funding, then the independency of the system will be questionable.[51]

Another drawback of the ICS would be an imbalance in the tribunal's composition. The ICS, as a dispute settlement between investors from all 28 EU Member States and the US, Canada or Vietnam, respectively, and vice-versa, solve the problem between the EU as a union of states and the other states as a single country each. Moreover, third-country nationals can be appointed as "nationals" in CETA. In this case, Canada can present its nationals as candidates on its own, while each single EU Member State does not have that opportunity.[52]

3-2- ECT Modernisation

The ECT was established in 1994 as a multilateral framework for cooperation in the energy sector; it is a treaty for promoting energy security through the operation of open and competitive energy markets with observing some principles such as sustainable development and energy resources sovereignty.

It is a multilateral framework of cooperation in the energy sector. However, this international investment agreement and especially the ISDS mechanism of the ECT is facing some criticism, resulting in reforms in investment dispute settlement provisions (under Article 26 of the ECT)[53] and the ECT modernisation process. Subsequently, the EU replaced the existing ISDS methods under the ECT with a multilateral dispute settlement mechanism.[54]

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[51]Ariel Anderson, 'Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks' (2017) 49 Geo. J. Int'l L. 1143, 1156.

[52]Wiesner-Lameth (n 2) 181.

[53]Article 26 provides for investor-state dispute settlement (ISDS).

[54]Dario Ribicic, 'The Relationship between EU Law and the Energy Charter Treaty: Possible Implications of EU Membership on the Jurisdiction of Arbitral Tribunals in Intra-EU Investor-State Disputes under the ECT' 46.

Process of reforming and updating the provisions of the ECT in late 2017 with a high level of investment protection and in a sustainable way; instead of the ISDS system, intended to set up a multinational court to resolve disputes. Even though the violation of the principle of autonomy of EU law with the ECT's current ISDS mechanism[55]brought the idea of modernisation of ECT, this idea is facing the question of compatibility and time-consuming.

Besides, the modernisation process does not consider one of the biggest challenges in the ECT, which is climate change.[56] "This ongoing modernisation process of the ECT has guidance to arbitral tribunals; it can be sued in international arbitration for implementing progressive climate measures. While. This process should be used as an opportunity to transform the ECT into a positive force for the clean energy transition; it can be a barrier to EU and the Member States climate action".[57]

3-3- New generation IIAs/ BITs

The evolution of the "new generation" of IIAs or BITs to promote more transparent and innovative ISDS procedures considers a more significant safeguard than old

[55]Steffen Hindelang, 'The Price for a Seat at the ISDS Reform Table – CJEU's Clearance of the EU's Investment Protection Policy in Opinion 1/17 and Its Impact on the EU Constitutional Order' (Social Science Research Network 2020) SSRN Scholarly Paper 3548204 17:
<https://papers.ssrn.com/abstract=3548204> accessed 15 April 2022.

[56]Michèle Knodt and Jörg Kemmerzell, Handbook of Energy Governance in Europe (Springer 2019) 13.

[57]Client Earth 'Towards-a-More-Diligent-and-Sustainable-System-of-Investment-Protection-Ce-En.Pdf' 7:
<https://www.clientearth.org/media/aeykzgen/towards-a-more-diligent-and-sustainable-system-of-investment-protection-ce-en.pdf> accessed 21 May 2022.

generation BITs regarding the use of the ISDS system.[58] This new generation wants to balance investment protection and the host state's right to regulate.[59]

States should have the right to regulate. In this regard, this generation of IIAs mentions these rights. Along with recognising these rights, they also consider states' environmental and socially responsible in the investment law.[60]

Under these IIAs, jurisdiction clauses are so comprehensive that the tribunal can resolve any dispute between the parties, hear states' counterclaims on the investor's breaches of its human rights obligations, and acknowledge more broad human rights issues. Some of these new models, such as Brazil's new model of investment treaties, use state-to-state dispute settlement without ISDS.

One of the progress in the new BIT or ITA is to recognise human rights within ISDS in some efforts. As in new IIAs, these rights are considered; for example, in the First-Generation Rights (as in ISDS reform proposals) and Second- and Third-Generation Rights (as in new IIAs) reforms, human rights mentioned and meaningful change in this regard toke place.[61]

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[58]World bank group 'Comparative-Gap-Analysis-Indonesia-s-Current-Obligations-Under-International-Investment-Agreements-IIAs-vs-The-Obligations-Under-the-Investment-Chapter-of-the-Trans-Pacific-Partnership-Agreement-TPP.Pdf' 15: <https://documents1.worldbank.org/curated/ar/202111540822026864/pdf/Comparative-Gap-Analysis-Indonesia-s-Current-Obligations-Under-International-Investment-Agreements-IIAs-vs-The-Obligations-Under-the-Investment-Chapter-of-the-Trans-Pacific-Partnership-Agreement-TPP.pdf> accessed 21 May 2022.

[59]Ranjan, Prabhash; Singh, Harsha Vardhana; James, Kevin; Singh, Ramandeep 'India's-Model-Bilateral-Investment-Treaty-2018.Pdf' 7: <https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf> accessed 8 May 2022.

[60]Issam Hallak 'Multilateral Investment Court.Pdf' 7: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf> accessed 11May 2022.

[61]Diamond and Duggal (n 38) 160.

The purpose of these new treaties is to improve investment dispute settlement by dressing the legitimacy crisis of the current system of ISDS, which can be done in two ways; one method is that the current system will be fixed by improving the arbitral process. In this way, independence and impartiality requirements, lack of conflicts of interest, and affordable dispute settlement process will be considered.

Another method of fixing involves reducing states' legal and financial risks in ISDS by refining investors' access to investment arbitration. Exclusion claims arising from contractual obligations or the lapse of a limitation period requirement. Another solution for fixing the system of ISDS is to have local litigation; in that way, first, investors use domestic courts and then, without any success, can bring the case to the ISDS.[62]

Apart from fixing the old version of ISDS in the BITs, another method is to add new elements to the ISDS. One of these elements is a review of arbitral tribunals' decisions by adding the appellate system to the ISDS. Another suggestion is that instead of ISDS, countries at the national or international levels should use the alternative dispute resolution ("ADR") mechanisms or special courts.[63] As in the 39 sessions of The Working Group, they consider mediation, conciliation and other forms of alternative dispute settlements.[64]

3-4- Appellate Mechanisms (AM)

The establishment of Appellate Mechanisms (AM) instead of ICS as a reform method is another option for the reformation of ISDS. There should be an appellate system for

[62]Joerg Weber and Catharine Titi, 'UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement' (2015) 21 New Zealand Business Law Quarterly 321.

[63]Ibid 323.

[64]United Nations Commission on International Trade Law Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation -Means of Alternative Dispute Resolution, by the Secretariat' (2020) Thirty-ninth session <https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_intersessional_report_mediation_rev.pdf> accessed 13 May 2022.

ISDS to correct the decisions.[65] It is said, of course, that it cannot address all concerns arising from 'incorrect' decisions. It can result in the integrity and fairness of the process.[66] As a reshipment of ISDS through an Appellate Review Mechanism,[67] this reform progresses coherence and consistency, which can review mistakes in the interpretation and application of treaty law.[68]

By undertaking a substantive review of awards, this appeals body can improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals, and enhance the predictability of the law. In this regard, some permanent members appointed by States as an authoritative body would rectify the legitimate concerns of the ISDS regime.[69]

As I mentioned according to some doctorine, there should be a appellate body in the ISDS which helps transparency as well.[70] However, this Suggestion has some critics. First of all, it doubles the cost of arbitration. Secondly reduces arbitration speed which prolongs public exposure[71] and can lead to uncertainty.

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[65]Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are They Differences?', Annulment of ICSID Awards: a Joint IAI-ASIL Conference (Stämpfli 2004) 220.

[66]Albert Jan van den Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions' (2019) 34 ICSID Review-Foreign Investment Law Journal 156, 3.

[67]Alan M Anderson and Ben Beaumont, The Investor-State Dispute Settlement System: Reform, Replace or Status Quo? (Kluwer Law International 2020) 528.

[68]Margie-Lys Jaime, 'Could an Appellate Review Mechanism "Fix" the ISDS System? - Kluwer Arbitration Blog' (2 November 2021): <http://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/> accessed 12 May 2022.

[69]United nations conference on trade and development investor-state dispute settlement unctad Series on Issues in International Investment Agreements II united nations New York and Geneva 'Investor-State Dispute Settlement A Sequel.Pdf' 192: <https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf> accessed 21 May2022.

[70]Drakopoulos (n 5) 17.

[71]Koorosh Ameli and others, 'Task Force Paper Regarding the Proposed International Court System (ICS)' [2016] European Federation for Investment Law and Arbitration 23.

China is one of the opponents of the pro theory of establishing a permanent appeal mechanism to resolve the main problems in ISDS. Because through this system, the application of the rule of law to the settlement of disputes between investors and States is promoted, and judges' conduct will be limited. The procedures will be clear, and consequently, the abuse of rights by parties to disputes will be reduced. One of the challenges of China's submissions is that this country does not explain what an appellate mechanism could imply.[72]

[72]Alvarez (n 49) 25.

4- Transformative proposals

Because of the challenges of ISDS, which are analysed in section 2 and other problems that do not mention here, in the doctrine, some suggestions say instead of reforms, the system should be replaced. I will mention the most important of these suggested options and their drawbacks[73].

4-1- Multilateral Investment Court

With this suggestion, the European Economic and Social Committee ("EESC"), the EU and its Member States try to increase the predictability and transparency of decisions and replace arbitration with a permanent court. In this system, based on the principles of the EU trade policy[74], judges appoint signatories to any MIC treaty, not investors and states.

In this system, small and medium-sized enterprises also can solve problems through this method with a predictable and trustworthy mechanism for dispute resolution.[75] Even though there is an appellate body, the constitution of the panel of judges could not be challenged, which put the independence and impartiality of the judges at risk.[76] Therefore, some suggested evolution instead of revolution in the ISDS, meaning that

[73]Roberta Berzero and Horvath Günther J, 'Arbitrator and Counsel: The Double-Hat Dilemma – Journal/TDM Journal' (2013):
<https://www.transnational-dispute-management.com/article.asp?key=1985> accessed 21 May 2022.

[74]'A Multilateral Investment Court: A New System for Resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way' 2:
<https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 16 May 2022.

[75]The European Federation for Investment Law and Arbitration (EFILA) to the UNCITRAL working group no. III on ISDS reforms, ensuring the effective recognition and enforcement of MIC decisions 2020, 4.
<https://UNCITRAL.un.org/sites/UNCITRAL.un.org/files/mediadocuments/UNCITRAL/en/efila_submission_to_UNCITRAL_wg_iii.pdf> accessed 22 April 2022.

[76]Fahira Brodlija and Lidija Simunovic, 'The Path of (R) Evolution of the International Investor State Dispute Settlement Regime' (2020) 4 EU and comparative law issues and challenges series (ECLIC) 815, 834.

instead of replacing one with another, there should be a co-exist between them with two diverging systems of institutional and one ad hoc for solving problems.[77]

Another view is that even though there is no complete harmonisation of investment law without a multilateral investment treaty, and this area needs consistency, consistency could still be achieved in other ways more than ever; this permanent court restricts state sovereignty because the appointment of decision-makers in investment treaty arbitrations demonstrate the control of investment arbitration. They can choose persons who support these states, which could be advantageous.[78]

Another drawback of this reform is that the cost of establishing this court could not be underestimated regarding adjudicators' salaries, staff salaries, funding and maintaining permanent facilities. So this system has financial consequences for states.[79] Moreover, creating a standing international investment court as a replacement for the current ad hoc arbitral tribunals system consists of judges appointed or elected by States permanently. However, it would require coordination by a large number of States and universal consent. Of course, some said that in the beginning, it could start with an "opt-in mechanism", and only States that wish to join can participate.[80]

4-2- Investor-state Meditation (ISM)

On July 19, 2016, the Energy Charter Conference, with the "Guide on Investment Mediation" decision, suggested a voluntary mediation to solve disputes.[81] Later, In

[77]Ibid 838.

[78]Luis González García, '16 Making Impossible Investor-State Reform Possible', Reshaping the Investor-State Dispute Settlement System (Brill Nijhoff 2015) 425.

[79]'Reform of Investor-State Dispute Settlement: in search of a roadmap' (2013) 9: <https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf> accessed 15 May 2022.

[80]United nations conference on trade and development investor-state dispute settlement unctad Series on Issues in International Investment Agreements II united nations New York and Geneva 2014 'Investor-State Dispute Settlement: A Sequel' 230, 192: <https://unctad.org/system/files/officialdocument/diaeia2013d2_en.pdf> accessed 14 May 2022.

[81]'Guide on Investment Mediation' (2016):

August 2018, the International Centre for the Settlement of Investment Disputes ("ICSID") announced a new draft of ICSID Mediation Rules.

In 2019, the United Nations Convention on International Settlement Agreements introduced mediation which can use for ISDS. With investment mediation in the ICSID context, problems related to the investment involving a state, state entity, or other regional organisation without any need for membership or nationality requirements will be solved.[82] This solution, without Judgment, facilitates the discussion of the dispute and conflict through a mutually agreeable solution.[83]

4-3- Moderate suggestions for ISDS improvement

With some criticism of the existing system and through a legitimacy crisis, now it is evident that there is a need for re-evaluation. However, some reforms not only do not solve the problem but also would have more risks. There is some criticism against some of the reform proposals. That is why in this part, some moderate suggestions will be introduced.

Some said that with formers suggestions and reforms (mentioned earlier), the investment regime would be "The complexification of the spaghetti bowl" there will be, on one side, multilateral instrument agreements, and on the other side, MIC's[84] jurisdiction or new regime instead of ISDS which will be more complicated than now. After considering some proposals instead of the ISDS system, which approach should

<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf> accessed 17 May 2022.

[82]'ICSID, Background Paper on Investment Mediation, July 2021' 2: <https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf> accessed 17 May2022.

[83]Dwight Golann, 'Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates' (American Bar Association 2009) 54.

[84]Alvarez (n 49) 37.

be taken? Can we say that reforming the existing system instead of the transformative approach is better?

4-3-1- Code of Conduct and Ethical Standards

I think one of the methods to solve these problems is through dramatic changes. Some disagree with a transformative approach and say that ISDS reform to respond to the needs of host countries and investors increased transparency or ethical standards of arbitrators and counsels, arbitrator intelligence, and establishment of advisory centre standards.[85] For example, the appointment process should be corrected. The Working Group considered that the selection and appointment methods of ISDS tribunal Members should be to guarantee the quality and fairness of the justice, transparency, openness, neutrality, accountability, and appropriate diversity.[86]

Besides, one of the ways to increase ethical standards is that arbitrators must pass an exam about ethics codes during the appointment process to be eligible for an appointment. This kind of mandatory certification increase efficiency of the process. Increasing transparency in ISDS by the 2013 UNCITRAL Transparency Rules can balance current public policy demands and norms of commercial arbitration.[87]

The absence of a universal code of conduct for arbitrators in ISDS cases that is necessary for having a clear understanding of ethical obligations and addressing conflicts of interest besides the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, there should be more rules and

[85]Dautaj (n 24) 273.

[86] General assembly of United Nations Commission on International Trade Law Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment OF ISDS Tribunal Members Bers Annotated Comments from the European Union and Its Member States to the UNCITRAL Secretariat' (202AD) 26:
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf> accessed 22 May 2022.

[87]William Kenny, 'Transparency in Investor State Arbitration' (2016) 33 Journal of International Arbitration 472.

guidance, therefore instead of the MIC and the ICS and other replacements, strict ethics guidelines should be introduced in the arbitration rules. In this way, by reforming the current investment treaty arbitration system, existing legitimacy concerns would be avoided, and guidelines or the ethics requirements and several adjustments can survive ISDS.

4-3-2- Establishment of Advisory Center

Another solution is the establishment advisory centre, by this Investment Advisory Centre (IAC), as an independent organ, can be arranged for small and medium-sized enterprises and developing countries, and legal advice is offered under the arbitration process.[88]

An Advisory Centre on Investment Law ("ACIL") could assist states with legal services as a fashion counsel and complements such as the Advisory Centre of the World Trade Organization ("WTO") Law ('ACWL") and the roster of counsel of WTO.[89] Even such an Advisory Centre can get help from governmental and non-governmental organisations in other matters related to the investment regime and, bypassing the time, extend the area of its activity to other areas of assistance.[90]

This centre is epically for developing states and small- and medium-sized Investors, albeit should not be considered too much, pursue the idea of institutionalising the regime.[91]

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[88]Marc Bungenberg and August Reinisch, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement (Springer Nature 2020) 4.

[89]Andreas R Ziegler, 'Private Counsel and the Proposed Reforms of Investor-State Dispute Settlement (ISDS):
<https://www.academia.edu/78463409/Private_Counsel_and_the_Proposed_Reforms_of_Investor_State_Dispute_Settlement_ISDS_> accessed 15 May 2022.

[90]Karl P Sauvant, 'An Advisory Centre on International Investment Law: Key Features', Academic Forum on ISDS (2019) 371.

[91]Dautaj (n 24) 308.

4-3-3- Improvement of Management tools

Another offer to improve the ISDS system is "additional case management tools".[92] This system should resolve more expeditiously through mandatory rules and guidance.[93] If states have case-management tools and decision-making powers duration and costs of proceeding will be reduced. Some treaties have provisions for bifurcation of claims, expeditious dismissal of frivolous claims, and consolidation of concurrent claims. Another technique is limiting the number of experts appointed in the proceedings to core issues because of the higher cost of ISDS proceeding expertise.[94]

Such tools as rules on cost target "unjustified" time and costs. By increased case management, arbitrators can be trained and adapt to modern technologies and, along with the states, can combat with increasing costs of procedures.[95]

[92]Dautaj (n 24),287.

[93]Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III 'Investor-State Dispute Settlement (ISDS) Reform 2019' 20:
<https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform_0.pdf> accessed 14 May 2022.

[94] Deborah Ruff and Julia Kalinina Belcher, 'The Guide to Investment Treaty Protection and Enforcement - First Edition - Global Arbitration Review' (14 June 2022):
<https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/financing-claim-or-defence> accessed 12 May 2022.

[95] 'Update on the Future of ISDS: The Discussions within UNCITRAL Working Group III – No Apparent Consensus to Date | Arbitration Notes' (19 April 2018):
<https://hsfnotes.com/arbitration/2018/04/19/update-on-the-future-of-isds-the-discussions-within-uncitral-working-group-iii-no-apparent-consensus-to-date/> accessed 13 May 2022.

5- Concluding remarks

In contrast to the critics of the legitimacy of the system of ISDS, many plans and suggestions have been raised, the most important of which were mentioned in previous sections. Some of these suggestions are considering replacing the existing institution with a new dispute resolution system in this area. In contrast, some proposals reform the existing system.

Instead of thinking about a new system that takes too much time, energy, and expenses, reforming the current system would be a better solution. What matters in this area anyway is that any proposals that have addressed the interests of both states and investors and increasing global investment flows should be considered.

ISDS system should stay, but this system needs some substantial reforms. Transparency of ISDS and the independence and impartiality of decision-makers must be enhanced, improving procedures and making them more efficient and cost-effective.

By adding some additional case management tools and adequate ethical standards, it can be hoped that the shortcomings of this system will be eliminated to some extent.

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