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リサーチペーパー

Review of Recent Reform Efforts to Improve the Investor-State Dispute Settlement (ISDS) Mechanism and Suggestions to Effectively Address Issues in International Investment Law

CHO Hye Ran

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Glossary

ADR	alternative dispute resolution
BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement

CIFA	Cooperation and Investment Facilitation Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Dispute Settlement Understanding
ECT	Energy Charter Treaty
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FTA	free trade agreement
IBA	International Bar Association
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ISDS	investor-state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
MFN	most-favored-nation
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TIPs	treaties with investment provisions
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

1. Overview

IIn 1959, Germany and Pakistan signed the Germany-Pakistan Bilateral Investment Treaty (BIT), which is generally referred to as the first modern investment treaty.[1)] A number of European countries soon followed suit by concluding BITs with a range of developing countries. They were eventually joined by the United States, which up until that point had simply included provisions regarding investment protection in its treaties of Friendship,

1）Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012)

Commerce and Navigation (FCN) as its means to protect its nationals investing abroad.[2] Over time, the BIT has emerged as the main legal instrument for delineating rules governing investment relationships among countries with different levels of economic development. With the increase in the number of international investment agreements (IIAs), such as BITs, free trade agreements (FTAs) and other treaties containing investment provisions, international investment law (IIL) quickly developed into a specific field distinct from international economic law to the extent that it seems to now constitute an independent area of international law.[3]

Basically, IIL covers the set of obligations upon host states regarding how they should treat foreign investors and investment.[4] These obligations conventionally consist of most-favored-nation (MFN) treatment, national treatment, fair and equitable treatment, the obligation not to illegally expropriate, and similar matters. Since being first introduced in the Netherlands-Indonesia treaty of 1968, investor-state dispute settlement (ISDS), has enjoyed popularity as an effective avenue of legal redress for foreign investors.[5] Under an ISDS mechanism, aggrieved investors may initiate arbitration directly against the host country before a neutral third party.[6] They need neither exhaust the local remedies of the host country nor petition their home country for diplomatic protection, which had been the normal course when individuals suffered due to the act of a foreign country.[7] From the host country's point of view, ISDS has been regarded as necessary for attracting foreign capital to support economic development since it is expected to dispel the apprehensions of foreign investors with regard to unexpected expropriation such as nationalization, accordingly minimizing the potential for disputes to devolve into inter-state conflicts. Within the IIL framework, investors enjoy a legal personality through which they can independently defend their interests in the international legal plane. This attribute is one of the most unique features provided by the IIL architecture, since it had not been previously allowed to individuals or corporations under the international law regime. Even in the fields of human rights or international criminal law, the right to file a suit against the state has not been introduced with the exception of individual

2) *Ibid*.
3) *Ibid*.
4) Malcom D. Evans, *International Law (fourth edition)* (Oxford University Press, 2014)
5) Rudolf Dolzer and Christoph Schreuer, (n 1)
6) *Ibid*.
7) Malcom D. Evans, (n 4)

applications under the European Court of Human Rights.[8)]

As above, the IIL regime has developed based on a myriad of bilateral, regional, and sectoral investment treaties, which does not allow for the establishment of a unified institutional structure.[9)] Instead, IIA generally provides investors with the option to resort to ISDS against host states under pre-existing arbitration frameworks such as the World Bank's International Centre for Settlement of Investment Disputes (ICSID). In practice, the ICSID has developed into the primary and most public arena for investment treaty arbitration.[10)] It provides institutional arbitration exclusively established for ISDS processes, and even in the case that neither of the parties is a member to it, ICSID can be accessed under ICSID Additional Facility Rules when a claimant so chooses. There are other available options as well, such as the Stockholm Chamber of Commerce (SCC). Alternatively, the establishment of an ad hoc arbitral tribunal is possible, mainly under the United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules.

As some developing countries also became major investment sources, they also began to conclude IIAs with other emerging nations. Concurrently, IIAs were forged between advanced countries as well, albeit not as frequently, in forms including regional treaties, such as the North American Free Trade Agreement (NAFTA), or sectoral treaties, such as the Energy Charter Treaty (ECT). As it became an accepted practice for countries to conclude IIAs to promote foreign investment imports, the network of IIAs grew exponentially over the 1990's and continued to expand during the 2000's. According to the United Nations Conference on Trade and Development (UNCTAD), the period of 1990-2007 was an era of proliferation in the conclusion of BITs.[11)] At present, the number of BITs in effect has been estimated at over 3,000.[12)]

8）See Article 34 (Individual Applications) of the Convention for the Protection of Human Rights and Fundamental Freedoms

9）Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009); and Geraldo Vidigal, Beatriz Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" *Journal of World Investment & Trade* 19 (2018) 475–512 (2018)

10）Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press, 2013)

11）World Investment Report (UNCTAD, 2015)

12）According to the World Investment Report 2019 (UNCTAD), the number of IIAs at the end of 2018 amounted to 3,317, consisting of 2,932 BITs and 385 TIPs. UNCTAD maintains a database of IIAs and model agreements. (International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA, last visited July 27, 2019); and Tim R Samples, "Winning and Losing in Investor–State Dispute Settlement First," *American Business Law Journal,* Vol. 56, No. 1, 115–175 (2019)

Recourse to ISDS arbitration has been widely used since the mid-1990's.[13)]

As ISDS arbitration emerged as a frequent resort for investors, the regime began to reveal shortcomings and vulnerabilities that had not been anticipated at the time of its formulation, and accordingly concerns have heightened over the IIL regime that features the ISDS mechanism. By exercising the right to invoke ISDS arbitration, investors have been able to challenge measures by a host country that affect their business interests, even when such measures were taken in the pursuit of public purposes. While ISDS arbitration pits the state's sovereign right of regulation against investors' economic rights, in some ISDS cases where the host state's measures became merits purportedly taken in pursuit of a public purpose, such as protecting the environment, claims have frequently been decided in favor of investors.[14)] On some occasions parties choose to settle before a tribunal hears the merits, and it is not difficult to conjecture that the respondent state might have accepted disadvantageous conditions in order to avoid worse consequences, e.g., a ruling on the contested policy in a way favorable to the claimant investor.[15)]

Tribunals interpret relevant laws, including the treaties from which their jurisdiction originates. It was their interpretation of the purpose of an investment treaty, following the rules prescribed in the Vienna Convention on the Law of Treaties (1969), that allegedly gave rise to the result that the rights of foreign investor often supersede the state's right to regulate. Public purposes were not a critical element in the formation of the first generation if IIAs, and accordingly do not enter into tribunals' considerations – such content was clearly enunciated neither in the preamble nor as specific provisions of the classic IIAs.[16)] The purpose of the IIAs was obvious: the protection of the interests of foreign investors. However, inconsistency in the interpretation of the meaning and the scope of standards according to tribunals has resulted in a lack of predictability and transparency. Interpretations and applications of

13) ISDS were virtually nonexistent prior to 1990, yet, as of the beginning of 2018, there have been over nine hundred cases. Annual case volumes have trended upward. The ten-year average of cases per year from 2006 to 2015 was forty-nine. However, more recently volumes have climbed to eighty in 2015, seventy-five in 2016, and sixty-five in 2017. (ISDS Navigator Update: 850+ Known Cases by Year-End, UNCTAD, March 2018)

14) Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB (AF)/97/1(Oct. 31, 2001); and S.D. Myers/Onc. V Government of Canada, UNCITRAL (Jan. 13, 2004)

15) Ethyl Corporation v. The Government of Canada, UNCITRAL Award (Jun. 24, 1998); and Duy Vu, "Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration," *Springer Nature* (2019)

16) Metalclad Corporation v. The United Mexican States, (n 14)

jurisdiction and admissibility, and elements of standards have appeared inconsistent among various cases, even in cases addressing identical situations, to the point of sometimes being contradictory.[17] This divergence has undermined the creditability and legitimacy of the ISDS system as a legal avenue. Furthermore, traits of the arbitral system such as confidentiality, finality, and autonomy in the appointment of arbitrators have become the source of criticism against the existing ISDS regime.

Against this backdrop, early opposition to ISDS tended to be limited to the anti-globalization and environmentalist movements, but has evolved into a widening backlash against ISDS in recent years that has ranged to advanced countries such as Canada, Australia, and some European nations.[18] The changing dynamics of capital flows made traditional capital-exporting countries often subject to ISDS arbitration, and challenges to ISDS have gained momentum among such countries based their experience.[19]

As such, the IIL regime and the ISDS mechanism it has featured over the last half-century have recently faced a strong call for modification or improvement. Many countries have embarked on reforms of the IIAs to which they are parties by revisiting some of their fundamental provisions and providing alternatives to ISDS to improve the mechanisms for international investment governance. Major attempts to improve IILs could be summarized as the following: i) incremental changes to the existing IIL regime maintaining the ISDS system; ii) replacing the six-decade-old ISDS mechanism with a multilateral investment court; or iii) a return to state-to-state arbitration. To name a few examples of these types of attempts, the United States-Mexico-Canada Agreement (USMCA) was concluded by the United States, Mexico and Canada as a replacement for NAFTA, while the European Union put forward a proposal to establish a multilateral investment court in its revision to IIAs with trading partners

17）Zaherah Saghir, "Reforming investor-state arbitration: justification for appellate mechanisms," *International Company and Commercial Law Review* (2018)

18）See, e.g., Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 479 (2001); and Kavaljit Singh & Burghard Ilge, "Opinion, India Overhauls Its Investment Treaty Regime," *Fin. Times: Beyondbricks* (2016)

19）See, e.g., Timothy Meyer and Tae Jung Park, "Renegotiating International Investment Law," *Journal of International Economic Law* Volume 21, Issue 3, 655, 658–59 (2018); Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3 (Oct 31, 2005); Methanex Corporation v. United States of America, UNCITRAL (Aug 3, 2005); Pope & Talbot Inc. v. The Government of Canada, UNCITRAL (Nov. 26, 2002); and Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (Mar. 6, 2019)

such as Canada. Meanwhile, countries like Brazil have begun to conclude IIAs featuring state-to-state arbitration for resolution of investor-state disputes. On top of that, there are countries such as India which have developed Model BITs that oblige investors to exhaust local remedies before bringing a dispute to an arbitral tribunal.

Against this backdrop, this paper examines the problems faced by the existing IIL regime and evaluates current ISDS reform efforts based on the standards of effectiveness, feasibility, and legitimacy. By doing so, it comes to suggest the most effective and feasible ways to improve the existing IIL regime that would be considered legitimate. To begin, Part 2 identifies the problems with IIL that need to be tackled: i) structural issues with balancing the interests of a state and investor; ii) vague and overly broad standards for the protection of foreign investment; ii) the ISDS mechanism that has been a main cause of derogation of the legitimacy of IIL; and iv) systemic problems arising from the fragmented and decentralized nature of international law. Part 3 reviews the reform efforts for IIAs currently taking place in the international community under three categories: i) incremental changes to the existing IIL regime; ii) the proposed establishment of a multilateral investment court (MIC); and iii) the suggestion to return to inter-state arbitration. In this section, multilateral efforts directed at the improvement of the IIL regime and procedural improvement of arbitral institutions will be briefly addressed as well. Part 4 analyzes the respective ideas for IIL remediation in terms of effectiveness, feasibility, and legitimacy. Based upon this analysis, Part 5 suggests means to improve the current IIL regime through the revision of provisions on substantive protection standards and procedures in IIAs, and the establishment of an ombudsman system in order to allow the ISDS provided in IIL to operate in a more effective and efficient manner. This section also includes the evaluation of suggestions to determine whether they could help to resolve the problems in the IIL regime spelled out in Part 2, and finds that they have limits in addressing all the loopholes found in IIL and leave some structural and/or systemic issues behind.

2. Problems in the existing IIL regime

Investment disputes and the use of ISDS have surged since the 1990's based on the expansion of IIAs, which has revealed lacunas within IIL.[20] This section examines the issues

20) Karl P. Sauvant, *The Evolving International Investment Law and Policy Regime: Ways Forward* (ICTSD and World Economic Forum, 2016)

within IIL that have been identified to date from four perspectives: i) the issue of balance between a state and investors, especially between a state's right to take regulatory measures and investors' right to protection; ii) problems regarding substantive protection standards under IIL, particularly stemming from vague or overly broad standards which lead to inconsistencies in the application and interpretation of the law under fragmented ISDS mechanism; iii) procedural problems arising out of the ISDS mechanism that have triggered criticism and demands for reform; and lastly, iv) systemic issues emerging from the fragmented nature of international law.

For the third issue, the ISDS mechanism, the related section partly refers to the efforts of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), which was commissioned to identify concerns over the ISDS mechanism and identify potential reforms. In the thirty-sixth session of the General Assembly of the United Nations, held last year, UNCITRAL reported its progress, including on the following matters: i) concerns pertaining to the consistency, coherence, predictability, and correctness of arbitral decisions made by ISDS tribunals; ii) concerns pertaining to arbitrators and decision-makers; iii) concerns pertaining to the cost and duration of ISDS cases, and other concerns.[21)]

2.1 Fundamental criticism: Balance between the state and investors

One of the fundamental criticisms that the IIL regime has faced is that, under it, sovereign states have abandoned their ultimate authority to take legitimate measures on behalf of the public in favor of the economic rights of foreign investors.[22)] ISDS is a specially-conceived mode that is rarely found in other areas of international law since they were structurally aimed to effectively protect investor's rights. The IIL regime has evolved to impose substantive standards on host states and enforce procedural provisions designed to be initiated by investors and secure the rights to protection of foreign investors. Eventually, the reconciliation of investment protection with the host state's right to regulate has emerged as one of the most critical issues IIL must address. The vast treaty network assented to by states in order to facilitate the fair, prompt, and effective adjudication of business disputes across borders and

21）UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), submitted for the Thirty-sixth session, Vienna, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, October 2018

22）Cheltenham, *Gloucestershire International Investment Law and the Environment* (Edward Elgar Publishing Limited, 2013)

thus accelerate economic development is now found to be at risk of employment to actually challenge states' development efforts.

Intrinsically, ISDS has altered the sovereign right of the home state to pursue international indemnity for damages that its nationals suffered in favor of investors' individual right to seek compensation. It has elevated investors' pursuit of indemnification from recourse to diplomatic protection to self-initiated proactive litigation. As it has made it possible for investors to directly raise the issue of a state's measures, concerns have arisen that ISDS could be employed to challenge not only outright expropriation, but also legitimate policies adopted in the pursuit of non-economic objectives.[23] It seems that investors were granted an effective enforcement method for securing their economic benefits by challenging a host state's public policy before a tribunal that is empowered only to apply rules adopted to protect foreign investment without taking into account the preferential consideration of public interest.[24] ISDS can have a significant chilling effect on the public policies of a host state when an award is rendered in favor of investors and compensation, sometimes up to billions of dollars, is ordered. Public investments and governmental programs can be affected more gravely in developing countries, which usually have fewer resources and less leverage along with a stronger demand for the inflow of foreign direct investment (FDI). They may be more willing to renounce a long-term established public policy in favor of the attraction of FDI in the shorter term. Professor Van Harten analyzed a case study from the aftermath of the Argentine debt crisis. Following this economic meltdown and the subsequent expropriations, there has been more than $17 billion at stake in 30 international arbitrations (with damages totaling roughly Argentina's annual GDP). In light of this dramatic increase in the number and scope of ISDS arbitrations, he argued that private arbitrators have been given a newfound power in a wide range of disputes to review and discipline states in a manner that impacts the lives of ordinary people and the way in which they are governed.[25] From the perspective of investors, the public interests that need to be guaranteed are the right to private property and the principles that make it possible, such as due process and rule of law.

This situation has been continuously exacerbated by, as will be addressed in the following

23) Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law*, Vol. 7, No. 2, 229–250 (2018)

24) Hi-Taek Shin and Liz (Kyo-Hwa) Chung, "Korea's Experience with International Investment Agreements and Investor-State Dispute Settlement," *Journal of World Investment and Trade,* Vol. 16, No. 5–6, 952, 968 (2015)

25) Gus Van Harten (n 10)

section, poorly articulated compliance standards imposed on states. Vague and poorly prescribed substantive protection standard provisions have left a great deal of discretion to tribunals which interpret laws, including the treaty itself. MFN clauses are an example of a standard that has exacerbated the serious imbalance between the state and investors in actual ISDS practice. Rather than alleging that they were discriminated against by virtue of a host states' more favorable application of domestic measures to investors from third states, investors have most often invoked the MFN clause to access more "investor-friendly" provisions in IIAs concluded by the host state with third countries, or to avoid dispute resolution requirements imposed by the base treaty. The application of MFN clauses in this manner has resulted in investors "cherry picking" – invoking the most advantageous clause from different treaties concluded by the host state, thereby potentially undercutting individual treaty bargains and sidelining the base treaty.[26] This contributes to worsening the imbalanced relations between the state and investors.

Against this background, concerns have been raised that ISDS might eventually be used to prevent the realization of the global public interest as enshrined in other international conventions.[27] Apparently, those most likely to be at the forefront of pursuing new measures in value-oriented areas are mainly advanced countries addressing areas such as environmental protection and the protection of human and animal health and labor, to name a few. Under the ISDS mechanism, measures that were far from outright expropriation in their substance and adopted in the pursuit of the public policy could be susceptible to ISDS challenges. A telling example would be a suit filed against Australia by the global tobacco company Phillip Morris regarding the country's public health policy of plain packaging for cigarettes.[28] The tobacco-maker initiated ISDS arbitration against the Australian government, alleging that its legislation imposing a ban on cigarette advertisement beyond simple plain packaging breached the foreign investment protections included in the Australia-Hong Kong Investment Promotion and Protection Agreements. Despite a decision rendered in favor of the state in the preliminary stage, the case touched on a crucial issue in ISDS: tensions between the private rights of foreign investors and sovereign regulatory powers in matters of public interest, such as health

26）World Investment Report, (n 11)

27）Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012)

28）Phillip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

and welfare, can surface at any time.[29] Advanced countries with the will and capability to push forward revision and reform of IIL are now among the most effective elements driving the backlash against the frequent use of ISDS, which leads to concerns that this will have a chilling effect on policymaking.[30] This situation could interfere with compliance with other obligations imposed by international law.[31] It eventually discourages efforts by states to comply with international rules in the area of environmental protection and labor and similar norms, especially considering that under the international environmental law, most of the norms are still evolving on a soft law-basis.[32]

In line with the vague and broadly prescribed standards and considerable room for interpretation given to ISDS arbitral tribunals, grave doubts exist regarding such tribunals' democratic accountability and legitimacy. There can be no question that these aspects can upset the balance between the conflicting interests of states and investors. These substantial problems with IIL will be addressed in the following two sections.

2.2 Excessively broad and vague standards for investment protection

In the first half of the 20th century, customary international law (CIL) was the primary source of international rules governing foreign investment, such as international minimum standards or requirements for legitimate taking and similar obligations.[33] However, since the 1960's when FDI began to expand, several controversial cases of expropriation and violation of investors' rights lead many countries to conclude IIAs in order to secure compliance of CIL standards. In the absence of a multilateral treaty which would provide uniform standards for investment protection, countries have relied on BITs that include substantive standards and an ISDS mechanism. Among these, the most frequently invoked treaty standards have been fair and equitable treatment (FET) and indirect, creeping expropriation, among similar obligations.

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29) See Sergio Puig, "Tobacco Litigation in International Courts," *Harvard International Law Journal* 383, 392–93 (2016) (exploring broader issues in international tobacco disputes); and Tim R Samples, (n 12)

30) Gus Van Harten et al., "Investment Provisions in Trade and Investment Treaties: The Need for Reform," *GEGI EXCHANGE* (Boston University, 2015)

31) Cheltenham, (n 22)

32) Vinuales, Jorge, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012)

33) Rules in the customary international law about conditions for the legitimate expropriation are not clear as the development has been stalled because of the disagreement between the advanced countries and developing countries.

However, clauses included in the IIAs have often been unclear and ambiguously elucidated to the extent that broad interpretational authority has been provided to each tribunal. Many IIAs contained divergent language for the content on standards as a result of the fragmentation of IIL which has deferred the drafting of IIAs to their respective member states. This discrepancy has led to arbitrariness and frequent inconsistencies in the interpretation and application of fundamentally identical or at least similar content of provisions in cases which consisted in substance of identical or similar elements. Such problems have been widely observed in the interpretation of preliminary questions, such as the existence of jurisdiction for the interpretation and application of elements of standards and procedural rules across the overall process.

As an example, there has been a great deal of uncertainty concerning the precise meaning of the concept of FET under IIL. This is mainly rooted in the fact that the notions of 'fairness' and 'equity' do not connote a clear set of legal prescriptions and are open to subjective interpretation. FET has generally been enunciated in IIAs as part of the international minimum standard which had been established under the CIL, and it was the job of the tribunal to ascertain the content of customary international law, especially when the IIA text in question did not express a clear link with CIL. As a result, the task of determining the FET standard has been effectively left to arbitral tribunals, and the interpretation has varied according to the tribunal.[34] One particularly challenging issue that has arisen through arbitral practice relates to the invocation of the FET standard to protect investors' 'legitimate expectations.' Some tribunals took a broad approach to including the legitimate expectations of investors, citing that it is an important element of FET, while others have denied this interpretation, pointing out that the element has been and should be considered as an element of indirect expropriation, highlighting that this should not be confused. Given the potential for far-reaching application of the concept of 'legitimate expectations,' there has been a concern that the FET clause could restrict countries' ability to adjust investment-related policies and introduce new policies for the public good that could have a negative impact on individual foreign investors.

The problem of ambiguous codes can also be found in preliminary questions, such as the right to sue. Many first-generation investment treaties contained definitions of investment that were overly broad and open-ended. The interpretation of the treaty definition of investor has also varied according to the tribunals: it has sometimes been viewed as broadly as possible by tribunals proactively considering the objective of the IIAs and the intention of their drafters.

34）World Investment Report (UNCTAD, 2012)

Concerns about arbitrariness and uncertainty have unsurprisingly been raised in this regard. A similar problem was pointed out in the interpretation of the scope of the agreement in regard to arbitration. The so-called 'umbrella clause' has dramatically expanded the range of the standards imposed on host states. Even when an IIA delineated the scope of the merits of the arbitration as the determination of the amount of compensation for expropriation, some tribunals have upheld the position that they were empowered to determine whether an actual expropriation had taken place.[35)]

Based on the inconsistent approach adopted by arbitral tribunals, a variety of theories including police doctrine, margin for appreciation theory, and similar theories have been produced to explain the logic of the applications conducted by arbitral tribunals. Most of the theories have focused on the character of state measures and their expected effect on foreign investment, and the bulk of the literature has analyzed the pattern of the application of theories in order to address ISDS issues. However, these efforts to develop legitimate grounds for investigation and evaluation of ISDS have been developed based on case law considerably lacking in credibility and predictability as a legal system, so they do not provide an appropriate and consistent explanation, especially considering that problems of substantive standards for investment protection remain unaddressed. This point is exacerbated when interacting with the flaws of ISDS tribunals in terms of neutrality and democratic accountability. This has evolved in a negative way under the fragmented ISDS system, undermining the principle of rule of law and accordingly the credibility and legitimacy of the IIL regime.

2.3 Complications within the ISDS mechanism

The ISDS mechanism is a vehicle through which the compliance of host states with standards for the protection of foreign investment can be reviewed and eventually guaranteed in specific cases. It has been evaluated as one of the most prominent features of the IIL regime and has guaranteed the robust and effective protection of foreign investment. At the same time, however, ISDS has become a focal point for the backlash and criticism against the global investment order.[36)] Section 2.1 examined the observed imbalance in IIL, and it would be safe to say that ISDS has played a major role in the emergence of this issue.

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35) Mr. Tza Yap Shum v Republic of Peru. ICSID Case no. ARB/07.6, Decision on Jurisdiction and Competence, 19 June 2009

36) William Mauldin, "Arbitration Provision Emerges as Flashpoint in NAFTA Overhaul," *Wall Street Journal* (July 19, 2017)

Before the advent of ISDS, no non-state actor, whether individual or corporate, was acknowledged as a legal actor in the international legal span, so no standing was endowed in the context of international law. However, a system began to evolve after the Second World War, particularly in the area of human rights law, in a direction allowing an individual to report to a relevant international organization a state's misconduct or failure to comply with human rights treaty law. However, even in such cases, international entities had only limited enforcement power: when actual cases were reported, the bodies issued an advisory report on the referred country's related measures, as it could not issue a binding order. One exception to this practice might be the European Court of Human Rights, which was given the mandate to issue rulings actually binding on the defendant state, at least within the realm of the EU.

However, within the IIL regime, a sub-sector of international economic law, ISDS has been developed within IIAs as an avenue to provide foreign investors with effective protection. Originally, arbitration was a form of alternative dispute resolution (ADR) along with mediation, conciliation, and other avenues. Therefore, there are actually considerable commonalities between ISDS and international commercial arbitration. Under an arbitration agreement, arbitration provides an effective option for dispute resolution between two parties: arbitrators are selected as parties prefer; the tribunal has the competence to hear a dispute within the jurisdiction granted by the agreement; procedures are confidential; and a final and binding award can be issued. There are several advantages to arbitration compared with the formal judicial system: confidentiality; cost and time effectiveness; expert arbitrators appointed by the disputing parties themselves; ease of recognition; enforcement of the award thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and more. (In the case of ICSID awards, the recognition and enforcement of awards is guaranteed by the convention.[37)] These advantages have become part of the reasons that global business actors generally prefer commercial arbitration to litigation as an avenue for dispute settlement. However, these benefits do not seem to operate in the same way between states and investors. Rather, they have triggered major criticism of ISDS in three regards: confidentiality leading to the lack of transparency; the autonomy to appoint arbitrators causing doubt of the impartiality and independence of tribunals as fair umpires; and their finality disallowing the correction of erroneous awards, in turn giving rise to inconsistency and incoherence in ISDS case law. Such concerns, intertwined with worries that there an effective tool to prevent the

37）Article 53, 54 of the ICSID Convention

abuse of ISDS by foreign investors only barely exists, have fed criticism of the current IIL regime, calling into question the legitimacy and credibility of ISDS. This section examines the three points referred to above in detail.

First, arbitral procedures take place behind closed doors. As mentioned, confidentiality has been one of the distinguishing features behind the attractiveness of arbitration as an option. In the case of ISDS arbitration, however, given that many of the subjects of ISDS cases are state measures taken in consideration of public interests, it leads inevitably to a lack of transparency in the procedures through which a tribunal renders an award that can substantially affect lives of the nationals of the host state. Often, the outcome of ISDS arbitration also alters the direction of public policy in the host state. Despite this, the arbitral proceedings in ISDS case have remained effectively secretive, and there have been hurdles for the public or interest groups attempting to access arbitral proceedings and documents. The practice of international courts, including the International Court of Justice (ICJ), of allowing third-party participation such as amicus curiae is an antithetic concept in the world of arbitration.

Second, the lack of neutrality and accountability in the arbitral tribunals has often come under criticism. Under arbitration, disputing parties can appoint their preferred arbitrators as they are entitled to be heard before an even-handed third party designated by themselves. This method of appointment creates an unavoidable link between the party and the arbitrator, which would not be the case under a formal adjudicative system in which judges are pre-appointed and randomly allocated so that their neutrality and impartiality can be guaranteed. Furthermore, arbitrators seem to mostly be selected from a small pool of practitioners in commercial arbitration circles, which can cause an unintended concentration of appointed arbitrators.[38] There are statistics indicating that the majority of practicing arbitrators are older white males from developed states.[39] Exacerbating this is the oft-criticized phenomenon of so-called "double hatting," in which practitioners who serve as counselors in some cases serve as arbitrators in similar cases. This has been pointed out for eroding the neutrality and impartiality of the tribunal.[40] It also impairs the legitimacy and accountability of the concept of ISDS itself, since arbitrators who are required to decide on a state's compliance with relevant standards and evaluate the legitimacy of public policy become suspected of a lack of

38) World Investment Report (UNCTAD, 2018)

39) See Noel Semple, *Male, Pale, and Stale? Diversity in Lawyers' Leadership*, Canadian Journal of Law and Society 405 (2016)

neutrality. It is hard to deny that appointees may highly likely to lean toward the appointer out of a self-interest in being appointed in the future. There is empirical evidence that arbitrators are partial towards claimants over respondent states, and they tend to favor claimants in Western capital-exporting states over ones from other states.[41] Although many arbitral institutions and the ICSID try to adopt and apply relevant rules that would prevent possible conflicts of interest, such as the IBA Guidelines on Conflict of Interest in International Arbitration, the suspicion of potential partiality and unfairness has not been assuaged. In this situation, it is often noted that there is no effective sanction for incompetent arbitrators engaging in impropriety.

The third concern arises from the trait of finality of awards in the absence of a rigorous appeals process– meaning there is no opportunity to fix a fallacious award under the current ISDS system. ICSID allows annulment proceedings with limited corrective functions in the case where procedural missteps occurred over the course of arbitration.[42] In addition, in the case of non-ICSID arbitral awards, the New York Convention provides exhaustive grounds enabling losing parties to challenge the enforcement of an award, only on the grounds of procedural error.[43] It is a major cause for concern that measures adopted according to national law and in pursuit of a public objective could end up being subject to erroneous judgment by an arbitral tribunal that could not then be held accountable for the result (mostly orders for

40）The OECD's findings reveal that this 'double-hatting' practice is more common among arbitrators acting as counsel for claimants. In this regard it was expressed: 'it appears that over 50% of ISDS arbitrators have acted as counsel for investors in other ISDS cases while it has been estimated about 10% of ISDS arbitrators have acted as counsel for States in other cases. It does not appear that government ISDS defense counsel (for example from those countries with sizable inhouse litigation departments that defend ISDS claims) have been selected as arbitrators for cases involving other States. Nor do government investment treaty negotiators appear to figure among arbitrators. The practical exclusion of these government investment law specialists from the arbitral pool may exacerbate the apparent tendency for ISDS arbitrators' work as counsel in other cases to be significantly more frequently for investors than for States. It may also be a factor in the limited degree of public law expertise on ISDS panels' (GAUKRODGER and GORDON, above n. 34, p. 44)

41）Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication," *Osgoode Hall Law Journal 211*, (2012)

42）Article 52(1) of the ICSID Convention is the following: Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

43）Zaherah Saghir, "Reforming investor-state arbitration: justification for appellate mechanisms," *International Company and Commercial Law Review* (2018)

substantial compensation.) To make matters worse, the finality of the awards rendered by *ad hoc* tribunals contribute to the creation of inconsistent case law within IIL. Also, because of the finality involved, parties concentrate their full efforts and resources to garner an award in their favor. The claimants in ISDS arbitration are often mega-corporations with the capacity to mobilize massive resources. If the respondent state is an impoverished developing country, this can be more disturbing since it would lack the resources to pursue the suit. For example, it took more than seven years to release a ruling in a case involving El Salvador, while the country had to spend millions of dollars on its defense that instead could have gone to a development program.[44)]

Under the ISDS mechanism, unlike in ordinary commercial arbitration, a state's measures become the subject of the merits. Theoretically, foreign investors can challenge not only administrative measures and legislation, but also rulings handed down by the highest court of a sovereign state.[45)] This feature inevitably causes tension between ISDS arbitration and constitutional principles involving the rule of law and democracy. Some argue that a tribunal could issue an injunctive order in the form of interim measures for some jurisdictions whose procedural rules allow arbitral tribunals to issue such preliminary injunctions.[46)] Considering the merits of arbitration, which is compliance by a state with international law, some even argue that state responsibility for an internationally wrongful act should include full reparation.[47)] However, if the power to order a state to perform specific conduct, including the continued duty of performance, is interpreted to fall within the arbitral tribunal's competence, this would be a serious distortion going far beyond the purview of an ISDS already criticized for an irrational inclination toward the investor's side.

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44) Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case no.ARB09/12 (2008)

45) Marco Bronckers, "Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements," *Journal of International Economic Law* No. 3 (2015)

46) Lisa Johnson, Lisa Sachs and Jeffrey Sachs, "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law," *CCSI Policy Paper*, Columbia Center on Sustainable Investment (May 2015)

47) Article 29 of the Draft Article on Responsibility of States for Internationally Wrongful Acts (2001), adopted by the UN General Assembly resolution 56/83 (adopted on December 12, 2011) states the continued duty of performance that the legal consequences of an internationally wrongful act do not affect the continued duty of the responsible State to perform the obligation breached.

2.4 Systemic problems stemming from the fragmented international legal system

Even as the idea of universalism progressed, international society has remained decentralized.[48] Therefore, rule-making and the development of subset systems of law sometimes causes unexpected consequences from a systemic point of view. The world lacks a general international legislative body, so law-making treaties tend to develop within a number of separate historical, functional, and regional groups whose mutual relationships are in some respects analogous to those of separate systems of municipal law.[49] Fragmentation is not a technical problem resulting from a lack of coordination, but from the emergence and consolidation of special regimes and technical sub-disciplines such as human rights law, environmental law, trade law, and humanitarian law, projecting their preferences as universal. The result was an increase in normative and jurisdictional conflicts.[50] Furthermore, sub-areas of international law do not develop at the same speed and to the same degree.[51] If international law regarding diplomatic relations began to evolve from a very early stage of the history of international law, the international rules on space debris would be at an incipient level and they would probably take a long time to develop to a similar degree as international law on diplomatic relations, although space law overlaps in some significant parts with other areas of law such as security or environmental law. International investment had been treated as a matter for international rules governing trade, but the special needs for protection of investors became an impetus for the development of IIL. However, identical claims could be brought under the dispute settlement understanding (DSU) mechanism of the WTO system while also proceeding the same cases in ISDS arbitration based upon the relevant IIA.[52] The continuing debate over and issue's relation with respect to environmental, human rights, or labor standards within the WTO system reflects the search for the relative priority of political

48) Martti Koskenniemi, Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (United Nations, 2006)

49) C. Wilfred Jenks, "The Conflict of Law-making Treaties," *British Yearbook of International Law* vol.30 (1953)

50) Anne Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization". *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2016-19. (August 15, 2016)

51) *Ibid*.

52) Martti Koskenniemi, Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (United Nations, 2006)

objectives within WTO institutions since these priorities have not been set at the level of the relevant agreements themselves.

At this point a question could arise as to how the legal and factual issues in IIL being addressed through ISDS arbitration could be harmonized with the values guaranteed in other areas of international law, e.g., environmental law, human rights law, etc. Even though some matters falling under these areas might have emerged chronologically later than the protection of foreign investment, this does not mean that they must be treated as of lesser importance. In particular, in a case where a host state attempts to implement its obligations under multilateral/bilateral treaties adopted pursuant to the protection of the environment, such as the Paris Agreement, created by submitting or conducting its determined national contribution, could it be a violation of its obligation to observe the standards of IIL if this had an adverse effect on foreign investment? Would the state then be liable for damages if a tribunal rendered an award in favor of investors? It is one of the various questions needing to be tackled that could arise under the decentralized, fragmented international legal system. As long as neither the obligation of IIL or of IEL is *jus cogens*, there would in theory be no hierarchy between them. Both consist in principle of treaties and customary international law, meaning that the two sets of laws should be of equal validity.[53)]

The other question deriving from the fragmented international legal system is whether the IIL regime is intended to be self-contained. Some areas of international law are evaluated as having established a so-called self-contained regime, e.g. the WTO regime with its DSU mechanism.[54)] However, a lacuna in the regime can sometimes cause an issue with potential overlap or inapplicability of the law. In the case of NAFTA, the practice of previous decades recognizes the right to bring a suit against a foreign country only for an investor, not for a trader. However, this entrenched dualism among the three member countries would not be found generalized in IIL, and that is why it was said above that there is an open question about whether the concurrent invocation of dispute settlement procedures could be raised. Given the fact that there is a set of special rules, including rights and obligations relating to a special subject matter, some would argue that the IIL has developed into a self-contained regime. However, it is hard to accept such an argument as the international community is now witnessing the evolving practice of states, as reiterated in the next section.[55)]

53) Malcom D. Evans, (n 4)

54) *Ibid*.

3. Changing international investment law (IIL)

In light of the various problems observed above, a widespread consensus has emerged that ISDS is in need of reform. If the first steps were taken by capital-importing states such as Bolivia, Ecuador, Venezuela, and Russia, which chose to scrap IIAs featuring an ISDS mechanism, it was soon followed by economically advanced countries that had pursued the conclusion of IIAs as traditional capital-exporting countries. Countries have attempted to change course regarding ISDS and modernize their IIAs featuring an ISDS mechanism. Some countries such as Australia have declared that they would consider fully reassessing their policies allowing ISDS arbitration. For example, in 2011, Australia announced that it would no longer support ISDS arbitration. In Europe, Italy declared its withdrawal from the Energy Charter Treaty (ETC). In line with this, an increasing number of states have elected to renegotiate IIAs featuring ISDS mechanisms as many new IIAs demonstrate, including the United States-Mexico-Canada Agreement (USMCA), Canada Comprehensive Economic and Trade Agreement (CETA), EU-Singapore FTA, US-Australia FTA, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and similar treaties. Also, IIA reform is well underway across many regions. As of 2017, it was estimated that approximately 50 countries were undergoing revision of their BIT templates and the national investment policies in their investment regime.[56] The number of new international investment agreements (IIAs) concluded in 2017 was the lowest since 1983.[57] Moreover, for the first time, the number of effective treaty terminations outpaced the number of new IIAs. UNCTAD opined that investment treaty-making has reached a turning point.[58] When the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) were undertaken, with the countries involved accounting for the great bulk of gross international product, ISDS was a point of controversy.

Against this background, the attempts to improve the existing IIAs mainly being currently observed can be summarized as two types of approaches: efforts at incremental change to the

55）Martti Koskenniemi, Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (United Nations, 2006)

56）International Investment Agreements Issue Note (UNCTAD, February 2015)

57）UNCTAD, (n 38)

58）*Ibid*.

existing ISDS mechanism and abandonment of the existing ISDS mechanism entirely. The latter are witnessed in two kinds of movements, either as a proposal to establish a multilateral investment court to replace ISDS arbitration or the pursuit of dispute settlement via state-to-state arbitration.

3.1 Incremental changes to the existing IIL regime

As an increasing number of countries are taking a more critical stance towards the current ISDS mechanism, IIA reform has been well underway across all regions of the globe. Rather than just setting aside the existing ISDS mechanism, most countries are putting a great deal of effort into reforming the regime by revising the substantive protection standards and procedural aspects of IIL that have been subject to criticism. Such efforts to create incremental change in the ISDS system include the following: i) clarifying provisions of IIAs and circumscribing their scope;[59] ii) providing greater authority to the parties, for example by establishing a treaty organ such as a commission empowered to issue binding decisions; iii) attaching requirements for invoking ISDS; and iv) reducing arbitral discretion. As such, the reform efforts directed at IIAs are wide-ranging, as reports from international organizations and institutions have shown in their analysis of related data.[60] This section examines such modifications to IIAs by reviewing the examples of the USMCA and the BITs recently concluded by India.

USMCA, which was negotiated as a replacement for NAFTA (the regional free trade agreement among the US, Canada and Mexico), includes a far-reaching overhaul of its precedent, Chapter 11 of NAFTA. USMCA was improved in terms of clarity since the elements and the scope of commitments were more lucidly stipulated compared to its precedent. It described the content of obligations such as non-discrimination and international minimum standards in a more detailed manner and delineated the content of standards such as fair and equitable treatment in order to prevent the arbitrary interpretation by succeeding tribunals. USMCA also dramatically narrowed the scope of what it subjects to ISDS arbitration. Compared to the NAFTA provision that allowed invocation of any clause of obligation, USMCA limits the subject to alleged violations of national treatment, most-favored treatment, and expropriation with compensation. Furthermore, USMCA places greater

59) Zaherah Saghir, (n 17)

60) World Investment Report (UNCTAD, 2015)

significance on the interpretations of the commission. The interpretation of provisions or annexes of the USMCA is binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.[61] Such commission authority has been gradually incorporated in other IIAs as well, and provides binding interpretations to tribunals.[62] Further, the coverage of ISDS arbitration was significantly trimmed to only include certain areas enumerated in the appendix, such as oil and gas, power generation services, telecommunication services, transportation services, etc.[63]

Upon examining the changes in USMCA, it would be worthwhile to observe the US model BIT 2012 alongside it. The first version drafted in 1984 went through two series of revisions, respectively in 2004 and 2012. Considering the experience of NAFTA arbitration, substantive protection standards were greatly clarified and the scope was narrowed to a degree while the scope of utilization of ISDS was limited.[64] The model BIT 2004 contains far more changes compared to the 2012 version, and has been criticized by ISDS proponents.[65] The model BIT contained various "safeguard clauses" under which countries' sovereign right to take regulatory measures might be inconsistent with the treaty standards. Accordingly, Annex B, which laid out a list under the title of 'Expropriation' provides examples of state actions that would not constitute an expropriation and is applied as an integral part of the treaty.[66] Furthermore, Article 14 allows state parties to list in one or another of Annexes I, II, and III any existing measure that does not conform to the BIT's standards, such as MFN treatment and national treatment, so these measures could be exempted from application in the USMCA.[67] Article 31, with the title of 'Interpretation of Annexes,' provides that a tribunal shall on the request of the respondent request the interpretation of the parties binding on the issue

61）Article 14.D.9, 10, 30.2 of the USMCA

62）International Institute for Sustainable Development, Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions. Given that most classic BITs did not have institutional structures or follow-up mechanisms, strengthening of the authority of the commission established under the IIAs could be interpreted as an attempt to make structural changes in the IIAs as well.

63）Annex 14-E, Article 6 (b) of the USMCA

64）Charles N. Brower et al., 'We Have Met the Enemy And He Is US!' Is the industrialized North 'Going South' on investor–State arbitration?" *Oxford University Arbitration International* (2015)

65）*Ibid*.

66）Article 35 of the Model BIT 2004 (Annexes and footnotes)

67）Judge Charles N. Brower and Jawad Ahmad, "Why the "Demolition Derby" That Seeks to Destroy Investor-State Arbitration?" *Southern California Law Review* Volume 91, Number 6 (September 2018)

whenever a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II or III.[68)]

Despite much progressive revision of the ISDS mechanism and the enhanced clarity of the substantive protection standards in USMCA, Canada, which was the most frequent respondent among advanced countries according to the UNCTAD World Investment Report 2018, chose to opt out of the ISDS chapter as a whole.[69)] Canada also carved out the CPTPP chapter regarding investment. All the cases against Canada were invoked based on NAFTA, and were accordingly brought by US or Mexican investors. These repeated suits against the government of Canada allegedly gave rise to the recalibration of its policy regarding IIAs in an attempt to address concerns regarding imbalances and defects in current IIL.

Among states that grant investors the right to access ISDS arbitration, some, like India, have significantly changed the terms of their engagement with the regime. India made local remedy and consultation a prerequisite to the commencement of ISDS arbitration, in particular by setting various limitations such as a temporal requirement. An investor must first submit a claim before the relevant domestic courts or administrative bodies for the purpose of pursuing domestic remedies.[70)] In the event that an investment dispute cannot be settled amicably, an investor may submit a claim to arbitration, but only if no more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment had incurred loss or damage as a result.[71)] India made this structural revision while also placing greater restrictions on substantive protection standards. This proposal for reintroducing the exhaustion of local remedies is a reflection of host states' attempts to allow greater discretion for local adjudicative authorities regarding disputes.[72)]

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68) Greg Anderson, "How did investor-state dispute settlement get a bad rap? Blame it on NAFTA, of course," *The World Economy* 40: 2937-2965 DOI: 10.1111/twec.12515 (2017); Judge Charles N. Brower and Jawad Ahmad, (n 65); and International Institute for Sustainable Development, Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions

69) By being sued 27 times, Canada ranked fifth at the end of 2017 after Argentina, Venezuela, the Czech Republic, and Egypt (UNCTAD, n38)

70) Article 15 of the Indian Model BIT

71) In its new model BIT (2015), India adopted the principle of exhaustion of local remedies as a prerequisite for an investor to refer a dispute to arbitration. India also made the invocation of ISDS arbitration more difficult by attaching various conditions, such as setting a restricted period during which the investor can raise the issue. The India-Belarus BIT (2018) provides an informative example.

In conclusion, the reform efforts that have been most frequently observed contain substantive standards and procedural improvements to standards as well as to the ISDS mechanism. As a great number of IIAs exist, the dimensions of reform efforts also vary due to each state's unique experiences with ISDS and the diverse significances of their improvement strategies. Mostly, improvements have seemingly focused on aspects that have been found problematic in actual cases to date, such as the interpretation of standards or application of rules. However, they share the fact that such improvement efforts have been conducted under a fundamental acceptance of the existing IIL structure.

3.2 Proposal of a new mechanism: The establishment of a multilateral investment court (MIC)

The preceding section referred to overall reform efforts based on bilateral treaty relationships, but there is also a movement to reform the regime multilaterally. The EU suggested to the US during negotiations in September 2015 that a standing multilateral investment court (MIC) be introduced to the TTIP. According to a news release by the Directorate-General for Trade of the EU, this proposed court system would include the following major refinements: composition of a first-instance tribunal and an appeal tribunal; judgments made by publicly appointed judges with greater qualifications than those required for members of permanent international courts such as the International Court of Justice and the WTO Appellate Body; a new appeal tribunal operating on similar principles as the WTO Appellate Body; and precisely defined and limited cases that investors would be able to take before the tribunal.[73] The EU highlighted the fact that the proposal is designed to ensure the transparency of proceedings. Under it, hearings would be open, comments would be available to read online, and a right to intervene would be provided to parties with an interest in the

72）For example, MFN treatment was excluded from the purview of the BIT. The definition clause for investment adopted a hybrid enterprise and asset-based definition of investment (Article 1.4), as opposed to the broader asset-based definition typically contained in India's investment treaties, without the inclusion of a most-favored nation (MFN) clause, and without the inclusion of pre-establishment protections. It also does not include the standard fair and equitable treatment (FET) provision; instead, the model provides for protection against denial of justice, certain violations of due process, targeted discrimination, and manifestly abusive treatment. (Article 3.1); and Infinito Gold Ltd. v. Republic of Costa Rica ICSID Case No. ARB/14/5

73）News Archive of the European Commission Directorate-General for Trade, "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations" (16 September 2015); and The EC presented the draft investment chapter of the TTIP in November 2016 <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, last visited on Jul. 5, 2019>

dispute. It also attempted to make forum-shopping impossible by allowing the tribunals to dismiss frivolous claims, and to maintain a clear distinction between international law and domestic law while prohibiting parallel proceedings.[74)]

While the negotiations with the US over TTIP have stalled, the EC concluded treaties that include a similar establishment of a court with Canada,[75)] Singapore (the Investment Protection Agreement is currently in the ratification process among the EU member states), and Vietnam.[76) 77)] The EC has made it clear that in the case that an individual member country concludes an individual BIT, it should include the provision of the establishment of such an investment court.[78)] According to the EC, the proposed investment court system is intended to effectively address loopholes in the current system. It insists that the system will be based on principles of fairness and impartiality and guarantee the right of governments to regulate on behalf of the public interest. It expects the appeal tribunal to ensure the consistency and credibility of the ISDS mechanism. Recently, it presented a further-developed proposal to the Working Group of UNCITRAL in January 2019 for further discussion.

At first glance, the EC would seem to have made a drastic switch from being a devotee of the IIL regime featuring ISDS to entering the opposition. France and Germany appear to be taking the lead. This may come as a surprise, given that Germany contributed significantly to the development of current IIL by initiating the first BIT. Over the last decade, Germany has been hauled before a tribunal twice by the Swedish energy company Vattenfall, which has sued Berlin under the investment terms of the European Energy Charter Treaty (ETC) over a German local government's delay of permits and authorizations for a coal-fired power plant,

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74) John Lee, "Resolving Concerns of Treaty Shopping in International Investment Arbitration," *Journal of International Dispute Settlement* Volume 6, Issue 2, 2015, 355-379

75) Government of Canada, Joint Statement by European Commissioner for Trade and Canada's Minister of International Trade on Canada-EU Trade Agreement, Global Affairs Canada (Feb. 29, 2016)

76) European Commission, The EU and Vietnam Finalize Landmark Trade Deal, European Commission News Archive (December 2015) Newly concluded EU-Vietnam FTA will replace the bilateral investment agreements that 21 EU Members States currently have in place with Vietnam.

77) The EU-Japan Economic Partnership Agreement did not include the protection of investment and left room for further negotiation. The EU suggested the adoption of the investment court system. European Commission, A new EU trade agreement with Japan (July 2018) http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf (last visited on July 5, 2019)

78) European Commission, Proposal for a Council Decision Authorizing the Commission to Negotiate a Convention to Establish a Multilateral Court on Investment on Behalf of the EU in Line with Article 218 of the Treaty Together With Negotiating Directives (presented on August 1, 2016)

and the German federal parliament's decisions to accelerate the closure of nuclear facilities in 2009 and in 2012. (Previously, it had only once been subject to an ISDS arbitration initiated by an Indian investor, which was eventually settled outside arbitration.)

In fact, the idea of the establishment of a multilateral framework is not new. An attempt to conclude a global treaty that includes a permanent arbitral tribunal charged with its application was first observed in 1957 and crystalized in a recommendation by the Organization for Economic Co-operation and Development (OECD) – a forum of capital-exporting countries. This resulted in a difference of opinion between state groups of capital-exporting and capital-importing countries. Against this backdrop, the World Bank developed procedures for dispute settlement – the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) establishing the International Centre for Settlement of Investment Disputes (ICSID) in 1965. The ICSID Convention is a multilateral treaty that provides a procedural framework for dispute settlement between host states and foreign investors through conciliation or arbitration. It had emerged as the main forum for the settlement of investment disputes by the 1990's. Among Arab countries, the Unified Agreement for the Investment of Arab Capital was adopted and a standing tribunal was established in 1980. However, even after the embodiment of the tribunal, Arab nationals and governments continued to prefer ISDS arbitration, such as through ICSID procedures, leaving the tribunal nearly unused.

In the mid-1990s, the OECD decided to put forward the Multilateral Agreement on Investment (MAI). The attempt was subject to much attention in the international community, but the discussion was soon halted. The majority of the criticism was that the OECD primarily represents capital-exporting countries and could not provide a proper forum for negotiating a treaty that would serve as a global instrument and require consent from both groups. Meanwhile, the World Trade Organization (WTO) also placed the issue on the negotiating table through its Agreement on Trade-Related Investment Measures (TRIMs), which regulates foreign investment with a negative impact on liberalized trade regimes, but its efforts to include the investment issue into the organization's mandate failed. This has led to today's international investment regime characterized by a lack of a universal treaty and the dominance of bilateral treaties, which have woven a net of multilayered IIL. More recently, Professor Gus Van Harten suggested in his article pointing out the limitations of the ISDS system that in order to strike a balance between the interests of investors and the governments' right to regulate, the international community should agree to establish an international investment

court with a set term of office for the judges.[79] In 2004, the ICSID proposed the creation of an international facility to hear appeals from investment tribunals, but there was insufficient support for the idea at the time. UNCTAD, in its World Investment Report 2015, referred to the introduction of a new mechanism such as an international investment court as one of the options for improving the existing ISDS system. The 2008 German Model BIT also included a proposal for the establishment of an investment court.

Going back to the EU proposal, the change in the position of the EU seems to be more complicated than it may have seemed and to include repercussions on international investment governance. It is considered that the EC has been granted the exclusive competence for foreign direct investment from each member country under the 2009 Treaty of Lisbon. Meanwhile, in recent judgments by the Court of Justice of the European Union (CJEU) in the *Achmea v The Slovak Republic case*, the CJEU issued a ground-breaking preliminary ruling that the ISDS provisions included in the FTAs between EU member countries were incompatible with EU law, in particular that they were inconsistent with the autonomy of the EU legal system.[80] In its Communication addressed to the European Parliament and the Council issued on July 19, 2018, the EC made it clear that CJEU holds the exclusive purview for reviewing the validity of EU acts. Since they qualify as a "court or tribunal of a Member State" under Article 267 of the Treaty on the Functioning of the European Union, domestic courts of the member states are able to bring the matter before the CJEU. However, arbitral tribunals designated in intra-EU BITs do not meet these criteria and therefore cannot be considered to be "courts or tribunals," and therefore, intra-EU BITs incorporating ISDS provisions are contrary to EU law in that they "take away from the national judiciary litigation concerning national measures and involving EU law." The Communication states that they entrust such litigation to "private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice."[81] Interestingly, subsequent to this Communication a number of arbitral tribunals have held that the Achmea case does not apply to ECT arbitrations since the EU itself

79) Gus Van Harten, (n 10)

80) Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13. It was originally an ISDS arbitration case appealed to the German Supreme Court regarding the claim of the Slovakia seeking to annulment of an award given in favor of the investor Achmea under the ISDS provisions in the Netherlands-Slovakia BIT. The CJEU was asked by the German Supreme Court to issue a preliminary ruling in the case.

81) Communication From the Commission to the European Parliament and the Council on Protection of intra-EU investment (issued by European Commission on July 19 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8 (last visited on Aug. 8, 2019)

is a signatory to the ECT and there is no carve-out for intra-EU disputes. Similarly, they have also held that Achmea did not apply to ICSID arbitrations, given the fact that Articles 53 and 54 of the ICSID Convention, which pre-dates the EU constitutional treaties, provides that an ICSID award is binding on a signatory state and must be recognized and enforced as if it were a final judgment by the signatory state's national court.[82] The legal obligation of EU members to the ECT and ICSID Convention requires further study.

In May 2017, upon a request for clarification of whether the EC had the exclusive competence to oversee the talks to conclude IIAs, CJEU responded that the former did not have such exclusive power to negotiate on investment dispute settlement with third countries on behalf of member countries, but held a shared authority with them. That is, the EU had to secure approval from national parliaments in order to finalize a free trade deal with Singapore, so, after the CJEU opinion was issued, the EC separated the treaty into EU-Singapore FTA and the EU-Singapore IPA and presented them separately before the European Council in April 2018 with an aim to have the EPA ratified by each EU member's parliament.

Since roughly half of all BITs worldwide have at least one EU member state as a party, the EU policy on IIAs and the ISDS mechanism has global repercussions. The EC announced a directive that all the EU countries must terminate existing IIAs that include an ISDS mechanism. It claimed that extra-EU BITs (BITs between EU members and non-EU members) would not be affected, but many commentators suspect this.[83] In an opinion delivered on April 30, 2019, the CJEU (full court sitting) concluded that the new investment tribunal system included in the Canada–EU CETA is compatible with EU law, but the realization of a MIC seems to require further global discussion.

3.3 Return to inter-state arbitration[84]

Among the major state actors in IIL, some have attempted to eliminate the current ISDS arbitration mechanism, suggesting a preference for a return to inter-state arbitration. Brazil has never ratified IIAs allowing an ISDS mechanism and has no experience of ISDS arbitration.

82）Richard Power, "The (final?) death of intra-EU investor-state arbitration," Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration.com/2019/01/28/the-final-death-of-intra-eu-investor-state-arbitration/ (posted on Jan. 28, 2019, last visited on July 5, 2019)

83）Following up on the legal consequences of the Achmea ruling, EU member states issued declarations in January 2019 that set a timeline for the termination of intra-EU BITs by December 6, 2019.

84）Geraldo Vidigal and Beatriz Stevens, (n 9)

Nevertheless, it consistently ranks among the top-ten recipients of foreign direct investment (FDI) worldwide.[85] However, upon calls for the conclusion of investment treaties as it became a source of FDI, in 2015 it began to conclude Cooperation and Facilitation Investment Agreements (CFIA) with African and Latin American countries that included a state-to-state dispute resolution.[86] What differentiates Brazil's case from other countries which similarly chose not to participate in ISDS is that it focuses upon a number of institutions and procedures aimed at preventing differences from escalating into litigious disputes.

Brazil's case has shown that countries can embark on the production of an alternative model to ISDS in an attempt to rebalance the set of rights and obligations between states and investors. Notably, one of the novelties of the Brazilian model is the establishment of substantive obligations for investors, a focus on dispute prevention rather than adjudication, and the requirement that dispute settlement be initiated by the home state of the investor. In fact, inter-state arbitration is more similar to traditional diplomatic protection by the home country. In that sense, the Brazilian system seems more or less like a pre-adjudication stage before bringing a suit before an international court to which both parties agree to be subject. The Brazilian model focusing on the prevention of the dispute occurrence reportedly benchmarked the South Korean system that was established to facilitate FDI. Under this method a focal point or ombudsman is in charge of addressing the grievances of foreign investors before they develop into serious disputes which must go before a tribunal.

Another peculiarity of CFIA is that it shares with WTO adjudication the purpose of re-establishing compliance following a finding of inconsistency as declared in Article 3.7 of the

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85) According to the World Investment Report (UNCTAD, 2017), even during its crisis years of 2014 and 2015, Brazil ranked fourth worldwide among FDI recipients.

86) South Korea's Office of the Foreign Investment Ombudsman (OFIO) was commissioned by the President on the recommendation of the Minister of Trade, Industry and Energy following deliberation by the Foreign Investment Committee. It provides post-investment services for foreign investors and on-site consultations regarding issues of finance, taxation, accounting, intellectual property rights, construction issues and labor issues. OFIO hears grievances brought to it by foreign investors, and is empowered to contact ministers and high-level governmental authorities directly in order to solve grievances, not only dealing with specific issues but also proposing systemic improvements and legal changes. OFIO has received on average 400 cases a year since its creation in 1999. The resolution rate, initially at 25%, now consistently reaches over 90% (2007–2011 data). It has been widely recognized as an effective entity to prevent the grievance from leading to the ISDS arbitration. (Françoise Nicolas, Stephen Thomsen and Mi-Hyun Bang, 'Lessons from Investment Policy Reform in Korea' OECD Working Papers on International Investment 2013/02 (OECD 2013); and webpage of the OFIO http://ombudsman.kotra.or.kr/)

DSU. The goal of arbitration is to determine compliance with CIFA rules.[87] This is another salient aspect that distinguishes Brazil's model from ISDS arbitration aimed at monetary compensation awards for indemnification of investors, opening the possibility of agreement between parties on the tribunal's jurisdiction over monetary compensation.

A similar approach is observed in the Protocol for the Cooperation and the Facilitation of Investment of MERCOSUR. Member states agreed to disallow investor-state arbitration and to have aggrieved investors resort to domestic litigation in host states while providing the use of MERCOSUR's ADR mechanisms, including state-to-state arbitration under the Protocol.[88]

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3.4 Multilateral efforts at improvement of the IIL regime

Multilateral developments in investment policymaking continued to gain prominence in 2018, with several discourses taking place, for example within UNCITRAL and ICSID. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration was adopted by the United Nations General Assembly in 2013 with the intention to apply them to ISDS arbitration initiated under the UNCITRAL Arbitration Rules out of consideration for the public interest in transparency in treaty-based ISDS arbitration. These rules allow submission by a third party, publication of arbitral proceedings and documents, and public access to hearings, albeit subject to certain safeguards and temporal exceptions. Going further, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) was adopted in 2014. The main achievement of this convention was its extension of the scope of application of the Transparency Rules, eliminating the *ratione temporis* restriction as of April 1, 2014. The Transparency Rules could be applied to all existing bilateral, regional, and multilateral

87）Annex I, Article 3 of the Brazil-Chile CIFA

88）Article 19 of the Brazil-Mexico CIFA

89）See in this regard Charlotin, D. and Peterson, L. E., "In new Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina radically pare back protections, and exclude investor-state arbitration," *Investment Arbitration Reporter*, [S.l.], May 4, (2017). The new MERCOSUR Protocol also contemplates the implementation of an ombudsman or focal point in charge of questions concerning investment development, promotion, and cooperation in each member state.

IIAs and in all available arbitral fora upon the ratification of the Convention by both the respondent state and an investor's home state or, alternatively, if the investor accepts the unilateral offer of the respondent State which is contracting party to the Convention.[90) 91)]

Recently, ICSID reportedly embarked on a review to improve its rules overall – mostly to modernize the rules and streamline the process in order to save time and costs and respond to questions that have been raised. Considering that ICSID has played a central role in the development of the ISDS mechanism over the last three decades in the absence of a multilateral agreement on standards of IIL, it is meaningful that the institution is working to improve its rules in line with reform efforts regarding the existing IIL regime. Provided the difficulty of amendment of the Convention, the discussions have been focused on the revision of ICSID rules and regulations.[92)]

The facilitation of discussion via various multilateral platforms is important, especially in an area where rule-making is underway. By doing so, opinion exchanges regarding the problems with the existing regime along with current proposals and best practices could be shared among interested parties. In that sense, UNCTAD has been serving actively as a forum where changes in practices among countries can be shared and viable options for the development of IIL are proposed. Even though the IIL regime does not seem to face the immediate advent of a multilateral treaty which governs international investment as the WTO regime governs inter-state trade, discussion via this forum could play a significant role in the development of IIL.

3.5 Reform efforts for the rules of arbitral institutions

Recently, one of the greatest concerns in international arbitral circles has been how to overcome the stigma of arbitration growing increasingly expensive and time-consuming. Arbitration was once favored for its time- and cost-effectiveness compared to the formal adjudicative mode of the court, but has allegedly lost competitiveness. One of the most frequently mentioned sources for these developments is "due process paranoia."[93)] In major

90) Articles 2 and 3 of the Mauritius Convention

91) Gabrielle Kaufmann-Kohler and Michele Potesta, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap* (Geneva Center for International Dispute Settlement, June 2016)

92) Article 66(1) of the ICSID Convention prescribes that a two-thirds majority of its members could propose an amendment to the Convention, but the amendment would enter into force only upon its ratification, acceptance, or approval by all contracting states.

arbitral institutions such as the Arbitration Institution of the Stockholm Chamber of Commerce (SCC) and Singapore International Arbitration Centre (SIAC), efforts to tackle "due process paranoia" are being pursued, e.g., by streamlining arbitral procedures to improve effectiveness and efficiency.[94] In addition, many efforts have been focused on expanding the participation of the third party in the process as well as promoting transparency in arbitral procedures. In that context, many institutions have embarked on improving the procedural rules applied in ISDS arbitration. As an example, the Japan Commercial Arbitration Association (JCAA) recently introduced its "Interactive Arbitration Rules" with the aim of providing more efficient and affordable arbitration procedures. To increase efficiency while reducing costs, the new rules suggest an inquisitorial approach from the tribunal and fixed remuneration for arbitrators based on the value of the claim.[95]

4. Evaluation of current reform efforts for the IIL regime

The preceding section reviewed three categories of major efforts to remedy the IIL regime: (a) incremental changes to the existing regime, (b) a return to state-to-state settlement and (c) the establishment of a multilateral investment court (MIC). This section evaluates each of these reform efforts based on the standards of i) effectiveness, ii) feasibility and iii) legitimacy. Effectiveness relates to whether the idea could effectively solve investment disputes between a state and investor while successfully addressing the manifest problems in IIL as intended. Feasibility examines whether an idea is practical and realizable to the degree that it could be accepted within the international legal system without excessive resistance.

93）According to a survey conducted by Queen Mary University of London in 2015, due process paranoia is defined as reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. Anselmo Reyes, *The Practice of International Commercial Arbitration A handbook for Hong Kong Arbitrators* (Informa Law from Routledge, 2018); and Lucy Reed, *Ab(use) of due process: sward and shield* (Oxford, 2017)

94）The Japan Commercial Arbitration Association, Interactive Arbitration Rules (as effective on January 1, 2019) http://www.jcaa.or.jp/e/information/docs/20181116_INTERECTIVE%20ARBITRATION%20RULES.pdf (Last visited on Oct. 25, 2019); Investment Treaty News (posted on Mar. 13, 2017) https://www.iisd.org/itn/2017/03/13/siac-investment-arbitration-rules-come-into-effect-new-scc-rules-include-appendix-on-investment-treaty-disputes/ (Last visited on Aug. 7, 2019)

95）Kluwer Arbitration Blog post, New 2019 JCAA Rules: Is Three a Crowd? (Posted on Feb. 8, 2019) http://arbitrationblog.kluwerarbitration.com/2019/02/08/new-2019-jcaa-rules-is-three-a-crowd/ (last visited on Aug. 7, 2019)

The standard of legitimacy reflects if it could serve to uphold the rule of law and legal stability, not only under a domestic jurisdiction, but also under the international legal order. By testing proposals according to these standards, the following section examines which ideas could serve best as means to reform the existing IIL regime featuring ISDS. This section begins with the EU's proposal for the creation of an MIC, which has recently been a center of attention for the international investment community. Based on the analysis results, this paper proposes methods to improve the current IIL regime in Part 5.

4.1 The EU proposal to establish an MIC

As reiterated in the preceding section, the EC proposal to establish a multilateral investment court (MIC) features fundamental structural changes to the existing ISDS mechanism. The proposal is aimed at establishing an appellate body which would review the decisions made by a first-instance tribunal. It also suggests that the court be composed of judges with qualifications comparable to those of other international courts, such as the ICJ and similar tribunals. By doing so, the MIC court could allegedly mitigate the issues that have arisen regarding ISDS arbitration. This section examines whether it could operate effectively and feasibly while being considered legitimate under the international legal order.

4.1.1 Effectiveness

It has been pointed out that the consequences stemming from an MIC might not differ considerably from those of the heavily criticized ISDS mechanism. A publication entitled 'Investment Court System put to the test' argues that some controversial ISDS cases would, contrary to expectations, result in similar outcomes under an MIC since disputes analogous to those brought under ISDS could be launched under an MIC regime and give rise to similar results.[96] This may be a product of the poorly defined standards presented by the EU since its proposal focuses much more on structural and procedural reforms than on substantive standards, even though it contains some of the refinements manifested in recent bilateral IIAs. However, so long as substantive protection standards and procedural issues are not properly resolved, the introduction of a new mode to settle disputes would not operate effectively. Even

96) Natacha Cingotti et al., Investment Court System put to the test, Canadian Centre for Policy Alternatives (Corporate Europe Observatory, Friends of the Earth Europe, Forum Umwelt und Entwicklung and the Transnational Institute, 2016)

though the EU has emphasized that the MIC system would assure states' right to regulate, the host country would still need to prove that the measures being challenged were necessary, non-discriminatory, and legitimate, just as they must under the ISDS mechanism. This proposal does not include a substantial difference in the standards that it would apply.

More serious concerns are expressed from a practical perspective regarding the weakening of the grounds to enforce awards. There are some critical differences between arbitral and judicial systems, such as the laws governing procedures, seat of arbitration, recognition and enforcement, etc.[97] ICSID awards are enforced based on the related provisions of the ICSID Convention, while recognition and enforcement of non-ICSID awards are addressed by the New York Convention, as touched upon previously. Facilitation of the enforcement of awards was one of the major incentives offered by arbitration compared to court rulings, considering that there is currently no multilateral treaty that ensures the enforcement of decisions or rulings rendered by foreign courts. By its nature, an MIC appears aimed at establishing a hybrid mechanism that would stand somewhere between arbitration and adjudication, with traits of an international court, such as the composition of tribunals, existence and administration of a secretariat, and other features.[98] The EC idea of composing tribunals through prior appointment by each member state, including a neutral third country, is far from the existing mechanism under which each party to a dispute (including the investor) would appoint a preferred arbitrator.[99] In addition, the proposal suggests restricting the competence of the tribunal by prescribing that the court dismiss a case if an identical case is pending in another international or national court. Such points imply that the idea of an MIC pursues the creation of a mode with features distinct from arbitration, which is why the enforcement of awards became a major concern. Meanwhile, the EC had included provisions in IIAs concluded with partners such as Canada and Vietnam that would ensure the

97）Anselmo Reyes, *The Practice of International Commercial Arbitration A handbook for Hong Kong Arbitrators* (Informa Law from Routledge, 2018)

98）Article 37(2)(b) of the ICSID Convention: The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree; Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a standing mechanism for the settlement of international investment disputes (Jan. 18, 2019)

99）There could be some objection to the idea that pre-appointment of judges would eliminate the true novelty and the unique nature of arbitration. It is one of the controversial questions that demands deeper discussion.; and Jose Luis Gomara, *Towards a Permanent Investment Tribunal? From Regionalism to Multilateralism* (Intersentia, 2019)

enforcement of awards within their territories, which hints that the nature of the investment court could be more that of a court and less of an arbitral tribunal which could only issue an award.[100] The American Bar Association (ABA) also highlighted that the hybrid nature of the EC proposal could trigger additional uncertainty, presenting a hypothetical scenario of a successful claimant being faced with the suggestion that the MIC is not an arbitral body and its awards are therefore unenforceable under the New York Convention.[101]

In that context, it would also be worth noting the remarks of Greenpeace, which has joined the criticism of the EU proposal, stating that that plan was, in fact, aimed at establishing a global system that locks in special rights for investors.[102] It contends that the proposal substantially failed to address and mitigate concerns over the detrimental impact of ISDS mechanisms on the protection of the public interest. Investors and businesses would also be affected by the multiplicity of investment agreements giving rise to different procedures for investment dispute settlement, which implies perils that decrease the effectiveness of problem-solving via the ISDS mechanism.[103]

At the same time, it is highly likely that the authority of the decisions of first-instance tribunals would be undermined given the presumption that the losing party would invariably attempt to bring the decision to the appellate body.[104] This would heighten the function's ineffectiveness and lead only to more expensive and lengthier procedures.

4.1.2 Feasibility

The EC recently concluded respective IIAs with Vietnam, Canada, and Singapore that promote the idea of an MIC. If the notion of investment courts as contained in these IIAs can been realized, there would be at least three investment courts in operation, respectively

100) Article 8.41 of Charter 8 of the CETA

101) The EU's proposed reform of ISDS, available at https://www.nortonrosefulbright.com/en/knowledge/publications/e17ef991/the-eus-proposed-reform-of-isds (posted on June 2017 and last visited on July 5, 2019)

102) Press release, *Open and honest look at the EU's trade practices needed* (Greenpeace, 2017), available at https://www.greenpeace.org/eu-unit/issues/democracy-europe/1038/open-and-honest-look-at-the-eus-trade-practices-needed/ (last visited on Aug. 8 2019)

103) European Commission, Inception Impact Assessment of the Establishment of a Multilateral Investment Court for investment dispute resolution (3rd Quarter, 2017), available at https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf (last visited on Aug. 7, 2019)

104) Jose Luis Gomara, *Towards a Permanent Investment Tribunal? From Regionalism to Multilateralism* (Intersentia, 2019)

consisting of a chamber of judges appointed by the EC and Vietnam, EC and Canada, and EC and Singapore. Although the treaties set the goal of the member states working to realize the eventual establishment of an MIC, the coexistence of several investment courts based on the respective schemes seems to be inevitable for quite some time since the establishment an ultimate multilateral regime would require a consensus among the international community to replace the more than 3,000 existing IIAs.[105] This does not seem feasible in the near future. Furthermore, the EU's proposal lacks a specific plan to deal with technical issues, including how to establish and administer a secretariat, how to allocate the costs of maintaining a standing court, the criteria for selecting judges, etc. For example, the committee being established under the CETA must select 15 judges, but no specific criteria are provided. Regarding cost-sharing for the administration of the court, suggestions have been put forward including a hybrid funding system, which is the method adopted by some tribunals such as ICSID. However, it is unclear whether the EC supports this proposal. Moreover, such a decision would require the consent of the member states in the relevant IIAs basically through a case-by-case approach.

This is why many observers have cast doubts on the feasibility of the realization of an MIC. The idea could likely be realized within the EU given that the international community has already witnessed extraordinary accomplishment such as the European Court of Human Rights (ECHR). However, this would end in forming a totally different design from the one originally mapped out by the EC.

4.1.3 Legitimacy

The CJEU has confirmed that the establishment of an investment court is compatible with EU law and seemingly would not raise problems of inconsistency within it. Upon a request for its opinion on the EC proposal of an MIC in CETA in April 2019, the court made this point clear stating that the principle of autonomy in EU law would only be breached if the CETA tribunal could i) interpret and apply EU rules other than the provisions of the CETA, or ii) issue awards having the effect of preventing the EU institutions from operating in accordance

105）Article 8.29 of the CETA, *titled* Establishment of a multilateral investment tribunal and appellate mechanism. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

with the EU constitutional framework. This means that CETA's conception of an investment court would not jeopardize the principle of autonomy of EU law and the CJEU's exclusive jurisdiction over its definitive interpretation. However, it does not appear that the CJEU addressed all the risks that the new investment court could pose under the existing legal regime.

Some scholars argue that foreign investors could still challenge EU acts and decisions before multilateral investment tribunals, and these tribunals would be faced with questions of EU law.[106] Since this system of dispute resolution operates entirely outside the EU judicial framework and in fact rivals it, the authority of the courts of the member states and that of the CJEU may be adversely affected.[107] This in turn could impact the uniform interpretation and effectiveness of EU law and the autonomy of the EU legal order.[108] The court could actually accelerate the fragmentation of IIL, failing to meet the original goal of tackling the problem of inconsistency within the regime.

It is unclear whether the investment tribunal would be allowed the authority to request a preliminary ruling from the CJEU. If not, this could lead to a potential violation of EU rules under which the CJEU holds the sole jurisdiction for interpreting EU law.[109] Furthermore, at the international level, there is a possibility of conflicts in the interpretation of international law with international courts such as the International Court of Justice (ICJ). Unless there are provisions allocating the purviews and competences of international courts, under the current fragmented international legal system lacking a hierarchy, the divergent interpretations of international law offered by various courts would be another flashpoint for dispute. Moreover, some countries would be more frequently exposed to such risks. For example, Canada, by joining several IIAs with different methods of dispute settlement provided by the CETA, is already envisaging increasingly facing awards or rulings based on diverse interpretations of standards from different modes of dispute settlement ranging from ad hoc tribunals to

106) Love Rönnelid, *An Evaluation of the Proposed Multilateral Investment Court System* (European United Left/Nordic Green Left (GUE/NGL)in the European Parliament, 2018); and Laurens Ankersmit, "The Compatibility of Investment Arbitration in eu Trade Agreements with the eu Judicial System," *Journal for European Environmental & Planning Law* Volume 13, Issue 1 (April 18, 2016)

107) *Ibid*.

108) Dr. Laurens Ankersmit, "The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System," *Journal for European Environmental & Planning Law* (2016)

109) Christa Tobler-Jacques Beglinger, *Essential EU Law in Text(fourth edition)* (HVG-ORAC, Budapest, 2018)

investment courts, given that the hierarchy among them is unclear.

The issue of coherence among cases is clearly expected to be resolved in theory by the introduction of the standing multilateral court. However, the point is that at least during the period in which the international community is negotiating an agreement to establish a single court governing all international investment disputes, multiple international investment courts set up according to each IIA would inevitably co-exist. Simply put, as many investment courts will be established as there are IIAs featuring an MIC. Under this system, the problems of incoherent application and interpretation of law and inconsistent awards delivered by various tribunals are very highly likely to remain. Against this backdrop, it would be unreasonable to expect that in the foreseeable future the IIL regime would serve a role similar to the WTO Appellate Tribunal in the international investment area as initially conceived. In the sense that an MIC could exacerbate the problems of legitimacy and consistency faced by international law, this proposal could not be evaluated as a legitimate solution.

4.2 Return to inter-state settlement

The idea of returning to the traditional method of dispute settlement between states seems troublesome from the perspectives of both effectiveness and feasibility. Even though there have been various problems with its mechanism, it can hardly be denied that ISDS has been serving as an effective mode of dispute settlement between states and investors. It is based upon sovereign states' consent to allow an individual to initiate arbitration directly against a host state so that its legal grounds can be regarded as firmly rooted. However, the idea of returning to state-to-state arbitration is tantamount to reversing the achievements of ISDS to date. In that sense, it would be unable to achieve its original intended purpose. Also, such a proposal would likely meet with fierce opposition from business circles and related stakeholders who would stand against any return to the traditional, regressive method of settlement of investor-state disputes. Therefore, it seems unfeasible since most states are highly likely to be faced with domestic antagonism over the course of negotiations.

However, this approach does not appear to pose any issues in terms of legitimacy. State-to-state arbitration is time-honored international method of dispute settlement within international law. In that sense, it would not erode legitimacy as a legal avenue under IIL.

In conclusion, the idea of the adoption of inter-state arbitration replacing the current ISDS mechanism would be evaluated as relatively unsatisfactory in light of its poor effectiveness and feasibility.

4.3 Incremental changes to the existing IIL regime

As referred to above, this approach is the most frequently adopted reform pattern. Not only in the USMCA, but most revisions to older-generation IIAs have taken a similar approach to the problems that have been identified with the application and interpretation of IIAs by ISDS arbitral tribunals. Parties to IIAs have negotiated texts to replace former versions so as to adopt more clearly stipulated commitments provisions with their scope circumscribed. Some countries have chosen to strengthen the authority of the commission being established under the IIA in order to limit the discretion of arbitral tribunals that had been broadened where standards were not clearly determined in the text. In terms of procedures, many IIAs have been updated to contain clearer provisions regarding procedures for ISDS arbitration. In order to avoid inappropriately broad interpretations by tribunals, some countries have imposed additional requirements to make the invocation of ISDS more difficult, while others grant domestic courts a prior opportunity to review a case. Furthermore, attempts have been pursued to ensure a more transparent process in ISDS, as well as to set guidance and standards for the appointment of more competent arbitrators.

First, from the perspective of effectiveness, an approach pursuing gradual improvement within the current regime would simply be as effective as was the existing regime. Such an approach could not be sufficient to resolve the substantive and procedural problems which the IIL regime has been facing as it could not bring about the fundamental institutional improvements which the current regime requires. However, by responding to the specific issues of the regime in a gradual manner, the method would be able to effectively tackle problems without damaging the stability required of a legal regime. Further, as a continuance of the existing system, the idea would be feasible in terms of its real-world applications. In practice, such efforts have been witnessed at various levels – from bilateral treaties such as the Korea-US FTA to multilateral examples such as USMCA. From the perspective of legitimacy, it is based on the ISDS arbitration mechanism which has been developed and actively utilized over the last half-century, so it is expected not to spark any serious legitimacy issues beyond those that already exist. In particular, ISDS arbitration derives from a commercial arbitral mechanism which has taken deep root in the legal system that has developed outside the court. Loopholes could exist, mainly because of the fragmented international legal system, and partly from the application of the arbitral system to a dispute between an individual and a state. However, incremental changes seem at least not to exacerbate the existing problems.

4.4 Summary

Based upon the review above, it could be concluded that compared to the idea of the establishment of an MIC or a returning to the traditional method of arbitration between the host state and the home country, incremental changes to the existing IIL regime would be the best solution for improving the existing IIL regime since no critical weaknesses have been identified through the application of the three standards of effectiveness, feasibility, and legitimacy.

5. Suggestions for improving the IIL regime

A standing multilateral investment court that is truly supranational would be the ideal ultimate option if a pertinent agreement could actually be reached. It would minimize inconsistency and thus secure coherent application of the law. It would also be able to address the problems of a potential lack of independence and impartiality on the part of arbitral tribunals if an effective means to sever the link between disputes parties and arbitrators could be puzzled out and applied. It might also reduce the chance that a state's regulatory measures would not be considered legitimate, as is sometimes the case under the current fragmented arbitration system. Ultimately, it would contribute to accomplishing a more unified and normalized international legal order.

In reality, however, it does not seem that the international legal system has ripened sufficiently to realize such an idea. It remains difficult to imagine that most states would agree to create a unified arbitral court system and transfer to it the authority to hear all disputes. The lived experience is rather the opposite, as witnessed in the global economic order since the Second World War.[110] Important multilateral frameworks have been collapsing or are under pressure: the European Union after Brexit is just one example.[111] While drawing conclusions about the new shape of the international landscape is a difficult task, there have been growing trends casting doubt on the trajectory and future of the modern global order.[112] In the meantime, major state players have figured out their own solutions to the ISDS mechanism and are attempting to encapsulate them in the process of the revision of their own IIAs.

110）See The Rules-Based System Is in Grave Danger, ECONOMIST (Mar. 8, 2018)

111）*Ibid.*

112）See, e.g., Harlan G. Cohen, "Multilateralism's Life Cycle," *American Journal of International Law* 47, (2018)

Against this backdrop, the best solution available at this moment seems to be the idea of revision of IIAs for improvement within the existing ISDS mechanism, which was identified as the most effective, feasible, and legitimate option in Section 4. The most important point to remember regarding this option is that the improvement of substantive elements of standards is closely co-related to the improvement of procedural aspects of ISDS, as indicated in Section 2, considering the fact that most of the problems borne by IIL are the result of the interaction of both sides in the exacerbation of the crisis in IIL.

Therefore, the following sections provide a solution to improve the IIL regime featuring the ISDS mechanism: the improvement of the substantive and procedural aspects of the current IIL rules and the adoption of a dispute-prevention mechanism. After that, the final section examines whether such a solution would effectively tackle the problems noted in Section 2.

5.1 Improvement of the substantive protection standards in IIL

As reviewed in Sections 3.2 and 4.1, incremental changes have been made mostly through the revision of IIAs. This includes improvements such as the clarification of the language in treaties in order to more precisely deliver the intent of the drafters of the treaty and thus lower the likelihood that arbitrary interpretations will afterwards be rendered by tribunals. Such efforts also include calibrating the scope of the application of the treaty, allocating greater authority to the parties via a commission established under the IIAs, and imposing additional requirements on investors that must be satisfied before they initiate ISDS. Such efforts to improve the substantive protection aspects of IIL would be effective for reducing the risks of abuse of ISDS and guarantee a more consistent and coherent application and interpretation of the law. Further, it would help secure a state's right to take regulatory measures.

Among these recent developments in IIAs, the efforts to take a sustainable development-oriented approach are worth particular attention. According to a UNCTAD study, many countries have begun to enunciate the objectives of sustainable development in the preambles of their IIAs and include conditions in the treaty coverage on investors' contribution to sustainable development.[113] Some IIAs also attempt to oblige foreign investors to foster responsible investment, a novel phenomenon observed in second-generation IIAs. In the same

113) Issue Note: Reforming Investment Dispute Settlement: A Stocktaking (UNCTAD, 2019) Since 2012, over 150 countries have taken steps to formulate a new generation of sustainable development-oriented IIAs. (UNCTAD, n 38)

vein, some BIT even stipulate that counterclaims can be brought by the respondent country against an investor. This could be interpreted as part of endeavors to strike a balance between the two parties to ISDS arbitration. This effort has been coupled with attempts to preserve the state's regulatory space, which has become a main motivation for reforms to the ISDS mechanism, or even its elimination. From this perspective, it would be a first step toward placing foreign-invested corporations under the obligation to respect and observe the laws and policies of the host country. Also, IIAs can also contain obligations on investors, such as the performance of corporate social responsibility (CSR). Considering that there have been many soft legal approaches to CSR, treaties would be able to quote such international resolutions or include "best efforts" obligation provisions and require entities to contribute to the extent possible to the sustainable development of the host country.[114] It would also be possible to consider the inclusion of a provision not only imposing obligations on foreign investors, but also on their home countries.[115] This would make it clear that the objective of IIL is to ensure that the conduct, management, and operations of investors and their investments are consistent with the laws of the host state and to enhance the contribution of investments to the inclusive growth and sustainable development of the host state. This would be effective for rebalancing IIL, which has been criticized for disproportionately leaning toward the protection of investors.

5.2 Improvement of the procedural aspects of ISDS

In order to ensure a stable legal system, there should be a reliable, credible mode of dispute resolution. Over several decades, the ISDS mechanism has evolved into a unique and effective avenue for dispute resolution without recourse to litigation. This is why the utilization of the existing network of roughly three thousand IIAs is evaluated as more feasible and effective compared to options such as the creation of a new mode (e.g., the MIC) replacing the existing regime. In this context, countries have been undertaking reform efforts to improve the ISDS mechanism.

First, to address the question of the potential lack of neutrality and independence of arbitral tribunals, there have largely been three proposals for constituting fair and impartial tribunals: i) constitute a court that consists of a one-instance tribunal and an appellate tribunal;

114）Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) concluded with its partner countries in Africa and Latin America are good example.

115）Indian Model BIT

ii) assign the authority to appoint arbitrators to a committee established under the treaty, that is, transfer authority to signatory states to the treaty; and iii) defer to arbitrators' self-determination considering their motivation to avoid a negative impression. The first proposal was found to have considerable side effects, as described in the previous sections in which this paper reviewed the proposal offered by the EU. In actuality, the creation of a court which includes an appellate body is highly likely to trigger new problems, such as lengthening the procedures and incurring greater costs while weakening the authority of the first-instance tribunal as indicated in Section 4.3.Without setting up a credible system, simply deferring to self-censorship by arbitrators would also not appropriately address the criticism of the legitimacy of the mechanism. On the other hand, stripping investors of the right to appoint an arbitrator and granting it to the state member would be most effective among the three options for tackling the problems raised, although a backlash would certainly be expected from the business community. In that sense, it would be valuable for major state members to discuss ways to refine the authority to appoint arbitrators among parties. For example, it could be possible to allow international organizations to participate in the appointment process to provide a more balanced approach to the composition of tribunals. In short, each party could first appoint a preferred arbitrator, while an international party, e.g., the UN Secretary General, could designate the third from a roster provided by UN organs such as UNCITRAL. Arbitrators could be selected considering the nature of the merits of the dispute, context, and pertinent laws, etc. For example, in a case where a state's measures which form the main part of the merit are found relevant to environmental issues, experts in environmental law and policy could be put forward as candidates for the third arbitrator. Specific details of standards and procedures of appointment should be studied in greater depth in a relevant forum such UNCITRAL. On top of that, it would be important to have in place a detailed prescription of criteria for appointment of arbitrators, a code of conduct and ethics to be applied to arbitrators, specific standards for conflict of interests and procedures for challenges, and similar standards.

Another significant component of reform efforts is the promotion of transparency in the ISDS process. As touched upon in Section 3.4, the Mauritius Convention was adopted in 2014. This convention has yet to be universally accepted by the international community, and member countries, including the EU, are now introducing provisions recognizing the Convention in their revised IIAs in an effort to make the ISDS process more transparent and open.[116] Third-party interventions such as *amicus curie*, which have been admitted by tribunals in some cases (e.g., *Methanex v. US*), also began to be prescribed in IIAs.[117] This

attempt to enhance the procedure of ISDS in combination with the efforts to improve their substance would not only address challenges to the ISDS system itself, but also provide a response to the criticism against the IIL regime as a whole.

Regarding attempts to manage the problem of the lack of substantial control over awards, the idea of the establishment of an appeals body has been reviewed in the preceding section. It was found that creating an appellate body holding the authority to modify or reverse an award based on errors in the application or interpretation of applicable law would make ISDS less competitive in terms of cost- and time-effectiveness while undermining confidence in the first-instance tribunal. This could be partially mitigated by strengthening the review function under the purview of ICSID. Currently, ICSID provides only a very limited review mechanism for cases with evidence of procedural errors. ICSID has been driving the evolution of the ISDS system, for example through transparency initiatives, and would be able to play a role in the amendment process considering the fact that it is the only body established through a multilateral investment treaty on which most of the world's states have agreed, although its function is limited to the procedural aspect of ICSID arbitration. Beyond the existing limited function, it should be discussed how to expand and utilize the competence and function of ICSID over control of cases in order to overcome the lack of a proper control mechanism within the ISDS mechanism. Currently, ICSID provides this function only for ICSID cases, but in the future it could also be possible to expand its coverage over non-ICSID cases as IIL evolved to include greater multilateralism.

5.3 Dispute prevention through ADR methods

It is true that cross-border investors are often faced with different cultures and customs that pose rigorous challenges over the course of doing business abroad. This is why host countries strive to improve the investment environment and promote business among foreign-invested companies by providing special assistance with the difficulties they might face. Such efforts by a host country can lessen the incidence of ISDS arbitration from the beginning.

South Korea has been applied as an example of a country successfully institutionalizing

116）This convention entered into force on October 18, 2017, and as of April 2018 it has been ratified by Canada, Mauritius, and Switzerland. In total, the convention has been signed by Australia, Belgium, Benin, Canada, Cameroon, Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, the Netherlands, Sweden, Switzerland, Syria, the United Kingdom, and the United States. (Article 9(1)).

117）Methanex Corporation v. United States of America, UNCITRAL (August 2005)

such efforts. The Office of the Foreign Investment Ombudsman (OFIO) was created as a grievance settlement body within the Korea Trade-Investment Promotion Agency (KOTRA) under the Ministry of Industry, Commerce, and Resources in 1999. As of 2015, OFIO had resolved 4,976 grievance cases, averaging 311 cases annually. OFIO provides tailored support for each foreign-invested business to ensure that investment in South Korea can be as rewarding as possible. OFIO operates a "Home Doctor" system under which specialists from various fields, including labor, taxation, finance, and law, provide one-on-one service to foreign-invested companies by investigating and resolving a wide range of grievances. Notably, OFIO has established an exclusive online page for foreign investors who wish to raise claims or offer suggestions on the law-making process so that the views of foreign investors can be reflected in the course of gathering opinions.[118] OFIO has also worked to improve the investment climate by providing foreign-invested firms with up-to-date information on regulatory legislation and reforms.[119] By adopting this ombudsman system, the country was successful at avoiding ISDS arbitral tribunals until it faced an ISDS suit pressed by Lone Star Funds in 2013. A number of other countries have come to embrace this preventive approach in their IIAs. The Brazilian Model BIT is a good example that includes provisions regarding the set-up and operation of an ombudsman modeled after South Korea's OFIO experience.

The institutionalization of such a pre-dispute system that could effectively tackle grievances *ab initio* might be the most effective troubleshooting method in international dispute resolution. By doing this, the host state is not only able to avoid ISDS arbitration, but can also continue to enjoy benefits such as the employment and tax revenue generated from the continuous operation of foreign investment, favorable evaluation of the investment climate, and attraction of additional investment. This approach also helps the host state in addressing ISDS cases in a more effective manner since the bulk of cases can be settled amicably in the pre-dispute stage. Subsequently, only a limited number of cases would be put forward through the ISDS process. Further, both sides, the state and investor, would already have discussed core issues during the preliminary process, elevating the possibility that they can focus on unsettled issues in the course of the ISDS process and overcome the minor issues that can become the main driver of extended procedures under the current ISDS mechanism.

118) http://ombudsman.kotra.or.kr (last visited on Aug. 8, 2019)

119) http://english.kotra.or.kr/foreign/biz/KHENKO140M.html?TOP_MENU_CD=INVEST (last visited on Jul. 5, 2019)

The ombudsman system is regarded as an alternative dispute resolution alongside conciliation and negotiation.[120] As its name indicates, ADR were developed outside the formal adjudicative system as means to settle civil disputes.[121] However, in international law on relations between states, such ADR have been proactively utilized quite often. Article 2.3 of the Charter of the United Nations lists ADR as a peaceful means for the resolution of international disputes.[122] Considering the fragmentation of international law and difficulties of enforcement against states, judgments rendered through formal adjudicative procedures have not always been preferred, and this is why arbitration entered the international legal plane in the first place. In that sense, the active utilization of ADR in IIL could be desirable in that it could play a positive role in easing tensions and keeping disputes from becoming officialized. ADR seems attractive to the many countries that are seeking means to reform IIAs featuring the ISDS mechanism. At the regional level, the European Commission has proposed mediation to resolve intra-EU investment disputes without prejudicing the availability of the recourse to domestic litigation. In 2017, it released its 'Inception Impact Assessment' as a first step in developing a system of prevention and amicable resolution of investment disputes within the EU.[123]

Some critics, however, have argued that more effective investor protection can be provided by a binding mechanism with enforceable decisions as a last resort in the event that state and investor are unable to reach a settlement. In that sense, it would be desirable to apply ADR to supplement the current ISDS mechanism rather than replacing ISDS arbitration as the primary method for adjudicating foreign investment disputes.

120）Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution (Fourth edition)* (Oxford University Press, 2016)

121）*Ibid.*

122）Article 33.1 of Charter of the United Nations states that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

123）The Inception Impact Assessment on prevention and amicable resolution of investment disputes within the single market of the EU Commission is available at https://ec.europa.eu/info/law/better-regulation/initiative/1438/publication/40060/attachment/090166e5b3fb3f49_en (accessed on Jul. 20, 2019); and D. Charlotin, '*European Commission unveils plans for new intra-EU mediation system to supplant network of intra-EU BITs*' (Investment Arbitration Reporter, September 2017)

5.4 Evaluation of the suggestions and residual issues

Part 2 discussed the problems in the existing IIL regime under four categories: i) structural problems of balance between states and investors; ii) overly broad and vague standards for investment protection in IIAs; iii) procedural problems in the ISDS mechanism; and iv) systemic problems originating from the fragmented nature of international law. Before concluding, it would be meaningful in this section to examine whether the suggestions proposed in this paper would resolve the problems discussed above. This could be important for clarifying the residual issues that must be faced by the international legal community.

First, the problems pointed out in Sections 2.2 and 2.3 can be effectively addressed by reform efforts directed at existing IIAs featuring ISDS that focus on resolving them directly. It has been suggested to mitigate the existing problems of poorly prescribed standards for the protection of foreign investment and to fix the procedural flaws that ISDS has contained as a legal avenue. This approach would directly take up the enumerated challenges and could be expected to address the concerns posed in that regard.

However, the issues described in Sections 2.1 and 2.4 would be addressed only partially. As long as the arbitration system is sustained, it may not be possible to resolve all the related problems. Yet, as mentioned above, by tackling the issues of substantive protection and procedural flaws, the adverse effects arising from the traits of arbitration which appear in ISDS could be alleviated to some extent. For example, by circumscribing the substantive protection standards for foreign investment protection in clearer language, the state's right to take regulatory measures would be more fully guaranteed. This aspect relates how efforts to make IIL more conducive to sustainable development and imposing legitimate obligations on investors would be significant for ensuring that the values and interests of states and investors are in balance. Also, by pursuing the establishment of fairer and more independent tribunals, and by expanding the legitimate participation of third parties in the arbitral process, the imbalance between states and investors could be assuaged to a considerable degree, as these two elements of substantive protection standards and procedural aspects of IIL have been interacting to undermine the legitimacy and credibility of IIL.

The systemic issue of the fragmented and decentralized nature of international law is harder to resolve compared with the above issues. There are inevitable problems originating from the international order itself. No specific area of international law could develop a perfect self-contained regime which would operate exclusively and independently without loopholes. In practice, the sub-areas of international law are closely interrelated. The DSU mechanism

established under the WTO regime also remains open to concurrence with other legal modes and, in extreme cases, vulnerable to forum shopping. The dispute resolution under the United Nations Convention on the Law of the Sea (UNCLOS) allows member countries to choose preferred modes other than the International Tribunal for the Law of the Sea (ITLOS) established under the UNCLOS.

In conclusion, it would be difficult to simultaneously resolve all of the problems of the existing IIL regime with the proposed method suggested in this paper, i.e., the pursuit of incremental changes within the existing framework. Although this was found to be the best option among the various suggestions put forward so far, the idea shows limits in resolving the issues reiterated in the preceding section, and some would remain as tasks for future law-makers and negotiators.

6. Conclusion

ISDS was once praised as an epoch-making brainchild of the IIL regime when IIAs were broadly adopted in the wake of the NIEO in the 1960's and 1970's.[124] However, the ISDS mechanism soon became a focal point for the backlash resulting from the multiplication of ISDS claims since the early 1990's, revealing a variety of weaknesses as a legal avenue. In particular, views have been sharply divided throughout a recent series of negotiations over the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Transatlantic Trade and Investment Partnership (TTIP), which had been expected to dramatically extend the reach of ISDS.[125]

Against this backdrop, various efforts to refine the existing IIL regime have been rendered, including the application of incremental changes to the existing IIL regime, a proposal to reintroduce inter-state arbitration, and the establishment of a multilateral investment court (MIC), and similar reforms. As reviewed above, the method of applying incremental changes to the existing ISDS regime seems to prove the most effective while still

124）Texaco Overseas Petroleum Company and California Asiatic Petroleum Company v Libya, 53 ILR 389, 484–95 (1979) The United Nations General Assembly resolutions declaring the NIEO, including No. 3281, entitled 'Charter of Economic Rights and Duties of States', were opposed or abstained upon by capital-exporting countries, and were soon declared and not constituting international law and accordingly not being applicable as international law.

125）Tim R. Samples, (n 12)

remaining both feasible and legitimate. The EU's proposal to introduce a multilateral system to replace the current ISDS arbitration mechanism was evaluated as neither effective, feasible, nor legitimate as an avenue for legal redress of foreign investors under the current international law. The idea of returning to inter-state arbitration was also assessed as negative according to standards such as effectiveness and feasibility.

This result indicates that rather than introducing drastic structural change, gradual amendment and adjustment of the existing rules would provide a better response to the need for transformation into a more effective and efficient system. International investment law, which once consisted of a mass of vague and equivocal standards and the relatively robust avenue of ISDS, has been under modification in the direction of strengthening the sovereign right to regulate in the public interest over that of investment protection. This direction was part of efforts to strike a balance between states and investors, who under IIL have enjoyed disproportionate protection of foreign investment over the state's right to take regulatory measures. Standards for protection of foreign investment, which were once excessively broad and ambiguously prescribed, have fallen under scrutiny and their adjustment has been deliberated. Through such amendment, it is expected that IIAs can provide more clear-cut standards compared to before, and arbitral tribunals can more accurately to interpret and apply them to cases. This would lead to reduced arbitrariness on the part of the tribunals and would contribute to the development of consistent case law, accordingly leading to more predictable application of law and the reinforcement of the credibility of the ISDS system. Revisions of IIAs to improve the procedural aspects of the ISDS mechanism have also been made, such as by introducing provisions to promote transparency in the arbitral process and establish fairer and more impartial tribunals. Furthermore, inclusion of ADR methods such as an ombudsman system could be considered helpful for resolving disputes at the initial stage while allowing ISDS to operate more smoothly and effectively.

However, as reviewed in Part 5, the method of gradual revision of substantive protection standards and procedural provisions of IIAs would not fully cope with all the problems and difficulties originating in the structural and/or systemic aspects of ISDS arbitration and in international law. ISDS is twofold in its nature, consisting of a private feature as a mode which exists outside the official adjudicative system on the one hand, and a public nature with a state called as a party to a case on the other. Also, even though efforts to improve IIL have been undertaken, IIL is governed by international law that is fragmented and decentralized. This would necessarily leave some problems unresolved. Such residual issues, which are mostly

structural and systemic, would have to be addressed as international law evolves.

Benedict Kingsbury and Stephan Schill contended that ISDS is 'developing into a form of global governance.'[126] However, over the course of revision, the international community might experience increasing fragmentation of IIL for some time. While the EU has promoted its proposal for the creation of an MIC, Brazil has chosen state-to-state arbitration in lieu of accepting the prevalent ISDS mechanism. Meanwhile, India has introduced the requirement of exhaustion of local remedies as a prerequisite for the use of ISDS in its new IIAs. According to a recent report published by UNCTAD, at least 71 new treaty-based ISDS cases were initiated in 2018 alone, bringing the total number of known cases to 942. Most of these were based upon older-generation IIAs signed before 2012.[127] This means that the international legal community will probably witness a mixture of modes ranging from ad hoc or arbitration to lawsuits brought before an MIC established by the EU and its treaty partners, with some inter-state arbitration included as well. This more diffuse system for investment dispute resolution will only trigger uncertainty and unpredictability, further hindering the development of case law, which has already been fragile compared to other sub-areas of international law. Therefore, in a forum such as UNCITRAL or through similar platforms, states should to work to reach an agreement on a mode for settling investment disputes by advancing incremental improvements to the existing system.

Meanwhile, in the pursuit of IIL remediation, states should keep in mind that meeting the need for appropriate protection of foreign investment remains one of the significant purposes of IIL. FDI is essential for allowing underfunded countries to pursue the sustainable development they seek, and for this reason IIL must sustain a basic safety net for foreign investors. This is why it is important to set the ISDS mechanism on a more stable footing in the medium-to-long term as well. At this point, it can be concluded that one of the most important considerations in the reform of IIAs is striking the appropriate delicate balance between attracting foreign investment and securing the legitimacy of the IIL regime, between investors' property rights and a state's sovereign right to take regulatory measures, and between the legitimacy of the rule of law and democracy. Furthermore, considering that there

126）Benedict Kingsbury et al., "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *NYU School of Law, Public Law Research Paper* No. 09–4. (2009)

127）World Investment Report (UNCTAD, 2019)

has been increasingly less distinction found between FDI importing and exporting countries, IIAs that tilt unduly in either direction could eventually lead to undercutting the protection of the legal interests of either side. In sum, a counterbalancing achieved in a level-headed and equitable manner will not be an easy task while appropriate reform measures to improve IIAs are being determined, but it is an unavoidable target in order to fulfill the ultimate goal of IIL of securing the legitimate legal values and interests of stakeholders to the fullest extent possible given the imperfect fragmented international legal regime.