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SUBSTANTIVE AND PROCEDURAL CHALLENGES IN INTERNATIONAL INVESTMENT LAW

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Keywords: International investment law, international investment treaties, international investment agreements, unified law, global convention.

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ABSTRACT

Background: *Given the lack of development in the International Investment Law (IIL) and its increase of substantive and procedural challenges, this paper identifies those issues and challenges and provide suggests solutions to these challenges.*

Methods: *The procedures to be followed in obtaining information concerning the adequacy of IIL and its effectiveness. The article will look at the logical method, comparative method, and historical method. After data collection using these methods, the data will be analysed; accordingly, a comparison will be carried out between different international investment legal instruments to establish the gaps and development opportunities. A logical method will be applied to data collection. It is an analysis methodology that combines concepts and ideas. A historical method will be used to collect data and facts from records, to investigate the competence of international investment legal instruments over time. The researcher will explain the history of international investment legal instruments to show the importance of law development.*

Results and Conclusions: *The development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to regulate international investments would, in fact, meet the optimal objectives of the state and investor in the most appropriate manner according to the current legal investment instruments.*

1 INTRODUCTION

For their populations to live to reasonable standards, many countries need large sums of funding. Local savings are essential for providing capital, yet they are insufficient.[1] Consequently, foreign capital is essential for economic growth. A significant portion of foreign capital is derived through public resources (donations, loans, technical assistance), but these are insufficient in quantity, and their use is frequently constrained by political, economic, and administrative factors that lessen their efficacy.[2] Foreign private investment, as a complement to state assistance and an element that injects flexibility, therefore, contributes significantly to development.

In light of the aforementioned, international investment rules were created to encourage investment by safeguarding investors' assets from political risks, which include acts of discrimination, expropriation, nationalisation, violation of agreements, and damages, among other things.[3] Moreover, international investment treaties, customary IIL protecting aliens' rights, local legislation, prior awards and judicial decisions, and other guiding international investment legal instruments are also included in the IIL mentioned above.

The existing 2,850 international investment agreements (IIAs) serve as the primary definition of investor rights.[4] This paper argues for the development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to

1 Martin Feldstein and Charles Horioka, 'Domestic Saving and International Capital Flows' (1980) 90 (358) The Economic Journal 314.

2 SC Vetrivel and S Chandra Kumarmangalam, 'Role of Microfinance Institutions in Rural Development' (2010) 2 (2) International Journal of Information Technology and Knowledge Management 435.

3 Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford International Law Library, 2nd edn, OUP 2015) doi: 10.1093/law/9780198703976.001.0001.

4 'International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 6 December 2022.

regulate international investments to meet the optimal objectives of the state and investor in the most appropriate manner.

This paper aims to explore IIL development and the purposes associated with it, along with the potential substantive and procedural challenges in IIL, and to investigate the development of a unified global international investment convention that could potentially provide a uniform and neutral set of substantive and procedural rules to regulate international investments to meet the optimal objectives of the state and investor in replacement of existing international investment legal instruments. This paper will look at the form of legislation best for international investment and examine each existing international legal instrument. This paper will also be very effective in providing development forums for in IILs, thus reducing the challenges faced by states and investors towards international investments.

2 INTERNATIONAL INVESTMENT LAW DEVELOPMENT

The General Agreement on Tariffs and Trade (GATT) was signed by a number of nations in 1947 to reduce trade barriers and establish treaty safeguards for foreign investment.[5] With regard to 'trade and'-related problems, the GATT experienced crises and conflicts. As a result of globalisation, this significant worldview underwent a change in the 1990s and into the 21st century. Similar legitimacy issues are already plaguing IIA for the same reasons, notably in relation to BIT and investor-state arbitration.

The IIA was derived from the traditional economic rights of aliens connected to property under international law.[6] To elucidate, the host state's activities truly posed a threat to foreign investors' interests, necessitating a petition on the investor's property to support the allegation. In any subsequent trade between the investor's property and the host state, this technique offered little to no mechanism for the investor to act on their own behalf. Hence, the investor would not carry any influence on the political changes of the host country's domestic laws, which would potentially have had an influence on the investment. Modern foreign investment emerged to remedy this mismatch, albeit inadequately.

Bilateral Friendship, Commerce, and Navigation (FCN) Treaties, the forerunners of today's Bilateral Investment Treaties (BITs), were initially developed to regulate and rectify such deficiencies as a legal mechanism.[7] FCN was initially focused on commercial instruments but eventually expanded to include other sectors. Despite its efforts, FCN did not establish a private right of action for the citizens of its signatories.

Modern IITs were created when independent governments became keen to impose the authority of their own laws and drive away the influence of their previous colonisers in politics and the economy.[8] This dilemma raised concerns for foreign investors. IITs addressed these issues with its expropriation regulations and measures ensuring fair and equal treatment for foreign investment.

5 General Agreement on Tariffs and Trade (GATT 1947) <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> accessed 26 April 2023.

6 Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in PM Dupuy, EU Petersmann and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, OUP 2009) 45, doi: 10.1093/acprof:oso/9780199578184.003.0002.

7 Frank J Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 (4) Journal of International Economic Law 861, doi: 10.1093/jiel/jgv042.

8 Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) ch 1.

IITs were first concluded in the 1950s to 1970s, but not many IITs entered into force after that. Since then, the number of IITs has dramatically increased as developing nations surmounted initial reluctance and engaged in IIA with other nations,[9] which led to the conclusion of over 265 IITs by the late 20th century. Some constraints were encountered by developing countries, who found IITs as a means of capital resource growth. These pressures, along with the fear of the potential damages to be encountered, mean that developing countries showed more interest in IITs. The fact that more IITs were signed in the last decade is evidence of the growing interest of developing nations in IITs. Today, around 2,850 IITs are in force.

The development of the IIL over the centuries provided several outputs, but notwithstanding the IIT influence on the economic development of in-need countries in promoting stability via the replacement of proper laws and functioning courts and providing minimum protection for foreign investors in those countries, there is no proof to support such conclusion.[10] Investors do not make investment decisions based upon IIA – in fact, most often, investors are not aware of the IITs but invest in developing countries due to different reasons. The lack of proof to support such a conclusion could lead host countries to potentially lose their sovereignty via new, legally binding IITs.

Despite the unawareness of the investors of the IITs, countries face multi-million-dollar arbitral awards for violating IITs. For instance, Argentina encountered approximately fifty arbitrations, including billion-dollar claims, while recovering from an economic crisis. Such arbitral awards for violating IITs undertake sufficient damages that undermine the countries' economic plans and stability.

The Philippine parliament had attempted to calculate the legal costs of meeting such disputes by using the *Fraport v. Philippines* case as an example.[11] The Philippine parliament found that the estimated cost of meeting the arbitration exceeded a total of fifty million dollars, noting that the investor in the dispute had not been able to receive back his USD 400 million investment.

Investment managers still need to invest in global markets, even with the risk of high legal costs of meeting the arbitration of disputes that could result from the IIAs. If investment managers avoid entering those markets, their competitors will assume their place.[12] The home markets will be impacted by the rivals' revenues since they will be utilised for innovation and expansion. This leads us to the reasoning for the economic benefits behind the development of the IITs. Many scholars argue that the economic benefit the IIAs bring is for the arbitrators interpreting those treaties and bringing them before the arbitral tribunal. This system, though it has many challenges and negative consequences, tremendously profits the arbitrators – so much so that vulture funds have emerged to fund arbitrations.

States' economic benefits are not necessarily based upon IITs. This is proven as states with no IITs, such as Brazil, have successfully progressed in their economic position. This is due to the national legal framework, which has attracted foreign investments to implement their investments instead of basing their investment regulatory policies on underdeveloped IITs. Many other states have withheld their treaty programmes and withdrawn from participation

9 Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 American Society of International Law Proceedings 27, doi: 10.1017/S0272503700060699.

10 Stephan W Schill, Christian J Tams and Rainer Hofmann, *International Investment Law, and Development: Bridging the Gap* (Frankfurt Investment and Economic Law series, Edward Elgar Pub 2015) doi: 10.4337/9781784711351.

11 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* (I) (ICSID Case No ARB/03/25) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/125/fraport-v-philippines-i-> accessed 26 April 2023.

12 Schill, Tams and Hofmann (n 11).

in the ICISD system (e.g., South Africa and several Latin American states), as they consider the involvement of arbitration a threat to the public interest.

The case of *Tokios Tokeles v. Ukraine*[13] is a solid case of the law in the hands of arbitrators. It was possible to transfer a secure investment consisting of the host country's original assets to another treaty state. This perspective contradicts the purpose of the IIT, which is to promote economic growth by attracting new capital. Moreover, the so-called 'Dutch Sandwich' – a corporate arrangement that enables subsidiaries of large multinational firms to benefit from enhanced protection provided by an IIT – is an additional instance of the deceptive manipulation of IITs.

That being said, and in reference to the above-mentioned development of IIL, the following chapters will discuss the objective and purpose of IIL, along with its development, explore the substantive and procedural challenges of IIL, and propose recommendations to address such challenges.

3 CRITICAL ISSUES AFFECTING THE INTERNATIONAL INVESTMENT REGIME

As acknowledged in Strengthening the IIL and Policy Regime, there are a number of crucial concerns influencing the international investment regime, as identified by Karl Sauvant and Federico Ortino. The critical issues related to matters on the purpose of the regime *(3.1)*, the scope of IIAs *(3.2)*, the substantive content of investment disciplines *(3.3)*, investment arbitration *(3.4)*, managing multiple legal sources *(3.5)*, and the institutional structure of the regime (*3.6).* This section will elaborate on the above-mentioned issues in further detail.

3.1 The purpose of the international investment regime

Due to the variety of international investment legal instruments and sources, the purpose of the IIL is not clear. This includes the purpose of the 2,850 investment treaties that are in force today. There is a distinct disagreement regarding the intent of these agreements.[14] The identification of the treaty objective constitutes a vital factor in giving meaning to those criteria, given the broadness and vagueness of the substantive requirements provided in IITs. Tribunals frequently use what they define as a treaty's objective or purposes to interpret its provisions.

Alternatively, other than the actual interpretation of the IIAs, the purpose of the IIL plays a crucial element in future lawmaking. If the purpose of the IIL is clearly identified, then the interpretation of the IIAs will also be clear.[15] Furthermore, by explicitly defining the objective of future IIAs, the contracting parties will be able to construct the substantive elements of an agreement in a way that will ensure that those aims are genuinely and successfully realised.

13 *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/78/tokios-tokel-s-v-ukraine> accessed 26 April 2023.

14 Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24 (3) The International Lawyer 655.

15 Andres Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (Hersch Lauterpacht Memorial Lectures, CUP 2012) 7-8, doi: 10.1017/CBO9781139136792.

3.2 The scope of the international investment agreements

Generally, IIAs provide protection for 'investors' who have made 'investments'.[16] Despite this, the meaning of 'investors' and 'investments' remains ambiguous.

3.2.1 The meaning of foreign 'investment'

It is believed that the broad interpretation of 'investment' has a very high attraction power in terms of drawing investment flows; it protects all kinds of assets.[17] This broad interpretation is a predictable method for determining the subject-matter application scope of IIAs since it is also clear. In contrast, newly developed IIAs have enacted tougher meanings of the term 'investment' that exclude speculative and short-term investments. The conventional components include the commitment of funds, the duration of the contract, the acceptance of risk, and the hope of profit, among other factors. Although there are no disagreements over which factors are to be taken into consideration or whether these factors are found to be 'tough' criteria or merely identifying characteristics, this method is a mere stipulation on what investments are to be protected within the newly developed IIAs based on a number of economic characteristics.

3.2.2 The circumstances in which an investor is a 'foreign'

Given that the standard approach in IIAs is to consider the location of parties as the optimal criterion for defining legal persons, the controversy surrounding the applicability of IIAs has circulated around the perception of the 'foreignness' of investors. This method encourages 'nationality planning' and 'forum shopping', but it also provides clarity and expectedness. As a result, the following two basic scenarios are plausible: First, by incorporating on the soil of one of the contracting parties, an investor from a third country can benefit from the protections provided by an IIA. A person of one contracting party may benefit from the protection provided within the IIA in regard to the other contracting party by incorporating within the territory of the other contracting party.

3.2.3 Coverage of state-controlled entities (SCE)

SCEs are becoming more prevalent as foreign investors, which draws attention to the changing global FDI landscape.[18] To elucidate, countries that have historically been host states are now actively participating through these SCEs in industries with economic, political, and strategic significance, despite the fact that SCEs with headquarters in countries that are well-developed carry significant roles in their nations' outward FDI. Presently, the majority of IIAs provide both state-owned and privately managed enterprises operating

16 Lukas Vanhonnaeker, 'International Investment Agreements' in JA VanDuzer and P Leblond (eds), *Promoting and Managing International Investment: Towards an Integrated Policy Approach* (Routledge Research in International Economic Law, Routledge 2020) 200.

17 Mavluda Sattorova, 'Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' (2012) 2 (2) Asian Journal of International Law 267, doi: 10.1017/S2044251312000112.

18 Nilgün Gökgür, 'Are Resurging State-Owned Enterprises Impeding Competition Overseas?' in KP Sauvant and J Reimer (eds), FDI Perspectives: Issues in International Investment (2nd edn, Vale Columbia Center 2012) 26.

within the same jurisdiction the same degree of protection. A few treaties specifically grant this protection to government-owned or -controlled businesses. Yet, there is a discrepancy in the rules for investment protection for state-owned and privately held firms because of certain domestic authorities' responses to the rise of FDI by state-controlled entities that may pursue political goals.[19] On the other hand, whether state-controlled enterprises have the authority to seek dispute settlement under the ICSID Framework remains disputable, and arbitral rulings have not yet offered a well-defined direction. As was already indicated, the exclusion of state-controlled organizations from the ICSID framework would lead to these entities looking for other dispute resolution venues, which would eventually reduce the importance of ICSID.

3.2.4 Temporal scope of treaties

In light of growing unsatisfaction with the results of existing IIAs, several countries' decisions to 'opt out of ICSID dispute settlement in their legal international investment instruments, whether partially or wholly, have raised doubtfulness on the effectiveness of this matter in regards to when and how such 'opt outs' should be applied.[20] The impact of 'survival clauses' and the capacity of state parties to agree to override a treaty's 'survival clause' are important considerations. If governments decide to leave the ICSID Convention, it is conceivable that an IIA's agreement to ICSID arbitration would become void.

3.2.5 Express exclusions from the scope of IIAs

State parties are presently seeking exclusions from the scope of IIAs for certain sectors.[21] Furthermore, renegotiations, limitations, or expropriations of investments in extractive industries are common in the most contentious state actions of recent years. The scope of IIAs may exclude policies such as taxation, public procurement, and subsidies. IIAs may also exclude actions taken by the host country in regard to their scope of application due to the potential effects they may have on state decision-making.

In addition, there have been some concerns regarding whether the state's commitments specified in an IIA should include the protection of foreign investors from actions taken by municipal or provincial authorities.[22] While local governments are allowed to take non-conforming measures without adhering to national treatment or national standards, host states are obligated to extend to any entity exercising delegated regulatory or governmental authority.[23] If an IIA does not declare differently, it complies with customary law on state accountability and is applicable to all state actions. Express exclusions can be used to solve temporary or unique issues, but enacting exclusions that are too broad could defeat the goal of IIAs.

19 Salacuse (n 15).

20 Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 (1-4) Indian Journal of International Law 173, doi: 10.1007/s40901-020-00111-2.

21 Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 (3) The International Lawyer 1033.

22 Anne Debevoise Ostby, 'Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?' (2003) 21 (1) Wisconsin International Law Journal 242.

23 Karl P Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland 2013).

As a result, there are a number of significant issues within the IIL, notably the application scope of IIAs. States have access to a variety of intricate and connected alternatives to make sure that IIAs are successful in attaining those objectives, even if deciding the proper scope will primarily rely on the ultimate objective(s) of a treaty signed by the contracting parties.

3.3 The substantive content of investment disciplines

There are four main substantive investment norms are; the controversial meaning of investment-protection standards *(3.3.1),* the appropriate balance between investment protection and states' right to regulate in the public interest *(3.3.2)*, the controversial of substantive matters and the extent of investment liberalization in IIAs *(3.3.3)*, and dispute on IIAs disciplinary rights directed at home countries and foreign investors in order to strengthen the promotion of foreign investment and compliance with international norms *(3.3.4)*.

3.3.1 The controversial meaning of investment-protection standards

The IIA's principles and rules were developed over time as 'standards' that, in contrast, fostered less political and administrative costs of development and, on the other hand, allowed implementation flexibility to take into account a range of circumstances.[24] The democratic legitimacy of these standards is thus poor since a less representative group determines their interpretation and execution, but these norms have little predictability and strong enforcement. For instance, distinguishing the distinction between a compensable indirect taking and a regulatory action pursuing a legitimate public aim that negatively impacts foreign investors' properties have been the focus of expropriation-related disputes.[25]

The so-called origin-neutral policies, which do not expressly differentiate between foreign and local investors, are likewise subject to the national treatment clause.[26] If a national treatment provision is violated by an origin-neutral measure, it will be determined by identifying the domestic investor treatment in comparison with the treatment given to an investor, identifying the differences between those treatments, and determining if such differences are justifiable for a public policy reason.

Some courts have either taken a much tighter interpretation or a wider meaning (for example, comparing a local flower exporter to an international oil exporter), and many tribunals have thought about whether the measure under review is the least restrictive option that may be used to accomplish the public policy goal; yet, many tribunals have just asked that there be a non-discriminatory rationale for the unequal treatment.

The fair and equitable treatment (FET) provision typically mandates governments to treat investments fairly and equally, which is the IIT norm that has generally served as a standard. There is minimal controversy on the two fundamental aspects of this criterion, even though there have been several formulations of it and numerous interpretations of the universal responsibility of 'equal and fair treatment'. First, the FET standard is considered broad and

24 Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 (3) Duke Law Journal 557.

25 Andrew Paul Newcombe, 'Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?' (Master of Laws thesis, University of Toronto 1999).

26 Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 377.

ambiguous.[27] Second, it is 'very fact and context sensitive' to determine if a FET standard breach has occurred remains unclear. So, as with any other standard, it takes a lot of work to determine whether this standard applies to a given instance; this work is essentially the task of the dispute-settlement tribunal.

Despite the aforementioned, recent IIAs do not seem to have greatly increased clarity and predictability; therefore the majority of conventional investment protection criteria are still under discussion.[28]

3.3.2 The interlink between investment protection and the right to regulate

Giving foreign investors the most protection possible and defending the right of host states to regulate the public good are two fundamental ideals that are at the centre of the argument over the present investment system.[29] Governments must ensure that all investors and investments made in their territory are treated fairly and protected to the fullest extent possible from discrimination, arbitrary decision-making, and other forms of unfair or detrimental treatment. While being prominent across the whole investment regime, the issue over the authority to regulate is most relevant to the actual content of investment rules (i.e., obligations of states to exercise their regulatory functions).

3.3.3 Investment liberalisation commitments

In the signed IIAs, only a small number of nations have outlawed (obligations placed on investors by host nations to run their company in a certain way).[30] While some believe that performance standards are in opposition to the concept of open markets, others find that they play a component part in the domestic development strategy. Theoretically, states are permitted to establish requirements pertaining to things like employment, local ownership, technology transfer, and research and development. Nevertheless, a special WTO agreement prohibits the implementation of some trade-related investment policies. Even so, many industrialised nations have implemented trade policy measures with comparable goals, including voluntary export restrictions, rules of origin, screwdriver controls, and anti-dumping laws. Yet, performance standards have typically been phased out in wealthy nations.

3.3.4 Disciplines on host state and foreign investors

Another concern is whether these agreements may be used as vehicles to encourage investment and/or sustainable development since their original emphasis was on addressing the imbalance in the substantive substance of existing IIAs (which historically placed

27 Federico Ortino, 'Refining the Content and Role of Investment "Rules" and "Standards": A New Approach to International Treaty-Making' (2013) 28 (1) ICSID Review 152, doi: 10.1093/icsidreview/sit002.

28 Art. 92 (and Annex 10) of the 2011 Japan-India Economic Partnership Agreement (EPA); art. 9.12 (and Annex 9B) of the 2011 Korea-Peru Free Trade Agreement; and art. 6 (and Annex B) of the 2012 United States Model BIT.

29 Howard Mann, International *Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Development (IISD) 2008).

30 Dani Rodrik, 'The Economics of Export-Performance Requirements' (1987) 102 (3) Quarterly Journal of Economics 633, doi: 10.2307/1884221.

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responsibilities solely on host countries).[31] Therefore, there is a case for imposing a set of restrictions on both the host state and foreign investors.[32]

IIAs could contain clauses mandating, for instance, that the host state provide investors with financial and/or insurance systems. Although many nations provide such 'host state measures' unilaterally, they are seldom bound by IIA commitments. For this reason, the 'neutrality of competition' among investors has lately come under increased scrutiny due to these host state restrictions. IIAs disciplines may be used to prevent host state laws from interfering with the fair playing field between investors of various nationalities.

The inclusion of foreign investor sanctions in IIAs is a much more sensitive topic, mainly because doing so would go beyond the agreements' initial goals but also because doing so is technically more challenging.[33] The jurisdiction and breadth of dispute resolution between host states and investors may expand along with the complexity of governing law concerns if the categories of duties included in treaties are expanded. One of the most controversial issues in the debate over the future of the investment regime is the necessity to incorporate investors' obligations (in addition to investors' rights) and the business community's scepticism of the use of IIAs as a regulatory tool.

Several options have been suggested, from best-effort clauses to legally obligatory requirements to adhere to accepted international norms or standards.[34] A shareholder's compliance with (predetermined) corporate standards may be a requirement for certain protections or advantages. For instance, only investors who abide by such corporate standards would be eligible for the investment-protection assurances granted by the applicable IIA. Similar to this, under IIAs, host states may be obligated to link investor incentives and processes to adherence to best practices, human rights standards, or obligations connected to impact assessments.[35] IIAs might also include provisions requiring host states to provide foreign investors who meet the aforementioned standards, requirements, and commitments priority entry treatment. This includes identification of the particular business standards and envisioning the implementation of enforcement and/or monitoring measures present challenges. These methods could call for more complex treaties or the creation of an institutional structure that can implement these numerous clauses.

3.4 International investment arbitration

The dispute resolution process is one of the few topics that international investment negotiations pay greater attention to (if any).[36] Investment arbitration is viewed as the most significant investment protection guarantee by its ardent supporters, whereas investment arbitration is seen to fall short of the essential requirements of accountability, openness, and independence.

31 Zeng Huaqun, 'Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice' (2014) 17 (2) Journal of International Economic Law 299, doi: 10.1093/jiel/jgu019.

32 Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

33 Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 (2) Lewis & Clark Law Review 461.

34 Michael Blowfield and Jedrzej George Frynas, 'Editorial Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81 (3) International Affairs 504-6, doi: 10.1111/j.1468-2346.2005.00465.x.

35 Thomas Walde and Abba Kolo, 'Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty' (2007) 35 (8-9) Intertax 424, doi: 10.54648/taxi2007049.

36 'Statistical Reports' (*International Chamber of Commerce* (ICC), 2022) <https://jusmundi.com/en/icc-dispute-resolution-library> accessed 6 December 2022.

3.4.1 The 'process' and 'outcome' of investment arbitration.

Participation, openness, and due process in investment arbitration processes, along with the choice, impartiality, and independence of the arbitrators, are among the first category of process-related issues.[37] The capacity of third parties to be informed of the proceedings and take part in those proceedings is the specific focus of these concerns. These worries also revolve around (the impression of) arbitrator conflicts of interest and the creation of a group of people who act as counsel arbitrators and investment arbitration specialists, commonly being appointed again. Also, there is a dearth of variety among investment tribunal arbitrators in terms of gender, country, and area of specialisation.

There are also continuing arguments over the acceptable scope and standards for rescinding ICSID awards, which likewise pertain to the calibre of the legal reasoning. Process- and outcome-oriented issues are closely related to one another. A decision may be more (or less) fair and accurate as a consequence of a more (or less) open and inclusive adjudicative procedure.

3.4.2 The principal users of investment arbitration and any other stakeholders.

One may distinguish between internal and external issues about legitimacy by concentrating on the parties who voice doubts about investment arbitration. Internal concerns about legitimacy are canted on the viewpoints and objectives of investors and governments, who are the main recipients of investment arbitration. Investors and governments alike have expressed concerns about the efficacy and predictability of investment arbitration in this setting.[38] Governments, especially those of developing and least developed nations, and investors, including small businesses, must all have equal access to and involvement in the dispute settlement system.

Several nations have renounced their duties due to worries about the system's overall equality.[39] For instance, nations must defend themselves against investor claims because of the structure of dispute settlement on investment matters. A decision in the state party's favour is nearly a 'success', despite the fact that it may subject the state to a large fine if the investor wins. In most cases, the state party is responsible for paying at least some of the expenses associated with a dispute.

The management of mass claims, in which several investors are similarly impacted by a host state's activities, such as via substantial regulatory change or financial crises, is a related topic. After an ICSID panel decision during quarter three of 2011 that it has the power to consider significant litigation about Argentina's defaulted debt, with an estimated 60,000 plaintiffs, this topic has gained attention.[40] The question of whether to classify claims as

37 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 152.

38 Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2013) 52 Columbia Journal of Transnational Law 689.

39 Thakur (n 21).

40 *Abaclat and Others v Argentine Republic* (ICSID Case No ARB/07/5) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/284/abaclat-and-others-v-argentina> accessed 26 April 2023. See Decision on Jurisdiction and Admissibility, 4 August 2011 – a dissenting opinion, written by Professor Georges Abi-Saab, was issued on 28 October 2011.
Hans van Houtte and Bridie McAsey, 'Abaclat and Others v Argentine Republic: ICSID, the BIT and Mass Claims' (2012) 27 (2) ICSID Review 231, doi: 10.1093/icsidreview/sis020; Karen Halverson Cross, 'Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina' (2011) 15 (30) ASIL Insights <https://www.asil.org/insights/volume/15/issue/30/investment-arbitration-panel-upholds-jurisdiction-hear-mass-bondholder> accessed 26 April 2023.

large-scale litigation, how to evaluate consent, and how to handle such mass claims legally and technically are among the issues at hand.

The second main issue in this context is the worry that the verdicts of investment tribunals would make it more difficult for governments to successfully carry out their duties.[41] For instance, investment arbitration has come under fire for emphasizing damages awards almost exclusively as the best form of relief.

A more complicated concern is the relationship between internal and external legitimacy issues.[42] While the interests of the major parties involved in investment arbitration may sometimes overlap, these interests typically disagree significantly. The selection of arbitrators is a clear reason for this tension: Several interested parties think that arbitrators chosen by an institution or pursuant to a specified roster will produce more coherence and impartiality than arbitrators chosen by a state (or investors).

Several different approaches are taken to deal with matters of legitimacy in investment arbitration.[43] For instance, the UNCITRAL arbitration rules have recently been changed to incorporate elements unique to investor-state arbitrations on openness, despite the seeming lack of excitement shown by a number of state representatives. However, states like the US and Canada have decided to incorporate public disclosure obligations in each of their IIAs signed, and the NAFTA parties have utilized the FTC's mechanism to issue a note of interpretation on the subject of openness in Chapter 11 proceedings. It is crucial to preserve a distinct separation between efforts to improve public (and third-party) engagement and measures to increase openness of investment-treaty arbitration, even though both might support the external legitimacy of the international investment system. The latter might have a more significant structural influence on how investor-state (and perhaps also state-state) issues are now resolved.

3.5 Managing multiple legal sources

Two concurrent situations highlight the present issue, which is related to the general coherence of the IIL regime. First off, the present structure, which comprises more than 2,800 IIAs, has as its primary objective the protection of foreign investment. As a result, there are many troublesome problems brought on by the proliferation of IIAs. It is challenging to construct a well-defined international investment legal and policy framework, for example, due to the many unique instruments with sometimes strong similarities but also frequently large variances (even if only in significant nuances). As a result, it is problematic for governments to evaluate the full breadth of their obligations, how they relate to or conflict with one another, and any possible liabilities.[44] It might be challenging to provide both predictability and transparency for overseas investors to make long-term investment choices.

41 Carole Malinvaud, 'Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration' in AJ van den Berg (ed), 50 years of the New York Convention (Wolters Kluwer 2009) 209; Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 (4) Arbitration International 325, doi: 10.1093/arbitration/20.4.325; Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 721, doi: 10.1093/acprof:oso/9780199589104.003.0023.

42 Federico Ortino, 'External Transparency of Investment Awards' (Society of International Economic Law (SIEL) Inaugural Conference, Geneva, 14 July 2008) doi: 10.2139/ssrn.1159899.

43 Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 139.

44 Ibid.

The status of IIAs and present foreign investment are also out of sync. Although bilateral connections make up the bulk of IIAs, international investment often includes firms that have control over economic assets across many countries and are subject to centralised regulation.[45] Due to the fact that the regulatory reach of the majority of IIAs is less than the operational extent of many multinational investors, there may be jurisdictional 'underlaps'. The existing method has led to 'nationality planning' and 'forum shopping', as was previously illustrated.

Second, in a wider context that goes beyond the scope of conventional IIAs, the problem of the general coherence of the IIL regime is equally relevant.[46] Governments are, nevertheless, prepared to address certain difficulties relating to some unfavourable externalities of global investment in voluntary instruments. As previously stated, governments typically do not go beyond the protection of investors in IIAs. The same goes for international organisations, which have produced documents that may act as recommendations. There are published standards for corporate behaviour abroad.[47] The efforts of non-governmental groups to advance and rebalance investment legislation are also noteworthy. As a result, the problem of the investment regime's coherence may be assessed in a wider framework, calling for coordination across numerous legal organisations and tools that have a significant influence on global investment.

Encouragement of harmonisation, whether via a multilateral investment agreement or a model international investment treaty, is one way to deal with the issues brought on by the proliferation of IIAs.[48] It could be necessary to include 'human rights' or 'sustainable impact evaluations' in IIAs to achieve a better degree of global cooperation.[49] States may need to take into consideration their obligations under international agreements or domestic constitutional limits when investments may negatively affect the local population's access to needs like water. The European Commission has included 'sustainability impact evaluations in a number of trade programs and agreements. Such *ex ante* evaluations offer a policy tool for quantifying the social, economic, and environmental effects of treaty obligations (particularly when combined with widespread public engagement). By the implementation of IIAs' sustainability impact evaluations, states may include sustainability issues at an earlier stage in developing their foreign investment policies.

3.6 The institutional structure of the international investment regime

As was previously mentioned, the traditional IIA did not consider a permanent institutional structure, including (regular) meetings of the contracting parties, a permanent secretariat with specific duties, or the creation of a permanent dispute-settlement body.[50] Due to the institutional vacuum, dispute resolution is essentially responsible for all treaty interpretation and implementation. Yet, a growing number of IIAs have started to contain clauses for long-

45 Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 (4) Journal of International Economic Law 1037, doi: 10.1093/jiel/jgq048.

46 Juri Suehrer, 'The Future of FDI: Achieving the Sustainable Development Goals 2030 through Impact Investment' (2019) 10 (3) Global Policy 413, doi: 10.1111/1758-5899.12714.

47 Ibid.

48 Sebastian Perry, 'Arbitrators and Human Rights' (*Global Arbitration Review*, 13 June 2011) <https://globalarbitrationreview.com/article/arbitrators-and-human-rights> accessed 26 April 2023.

49 Pierre Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in PM Dupuy, EU Petersmann and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (International Economic Law Series, OUP 2009) 487, doi: 10.1093/acprof:oso/9780199578184.003.0020.

50 Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 (5) German Law Journal 1083, doi: 10.1017/S2071832200017235.

term institutional arrangements that fulfil a number of different roles. For instance, accepted interpretation may help to maximise the effectiveness of IIAs and ensure uniformity in arbitral rulings. Deliberations may also help decision-makers make well-informed choices on IIA extensions, modifications, and further investment liberalisation. Strengthening the institutional framework entails expenses, particularly in light of the fact that the bulk of IIAs are signed on a bilateral basis.

Due to its scant and disjointed institutional structure, the IIL regime is insufficiently effective. To improve the regime's capacity to carry out its core objectives, full consideration should be given to improving its institutional architecture (whatever the stakeholders determine they should be).

4 RECOMMENDATIONS TO RESOLVE CURRENT ISSUES IN THE INTERNATIONAL INVESTMENT REGIME

According to Tai-Heng Cheng,[51] decision-makers may help international investment legislation overcome its flaws. Analysing the complex power and authority dynamics of international investment law reveals both its advantages and disadvantages. Four structural changes will be made moving forward to improve international investment law: (1) more careful analysis of which investment protections are necessary to attract capital and which are not; (2) careful calculation of immediate and hidden costs of investment agreements before entering into an investment project; (3) increased power and authority of international investment law, and authority should be exerted over both powerful and weak decision-makers; and (4) increased enforcement of international investment law. These four recommendations ought to direct the development of international investment law.

In order to maintain legal clarity, predictability, and the promotion of the flow of foreign investment sustainably and responsibly, it is recommended that the World Investment Organisation (WIO) be formed with permanent procedures for resolving investment disputes. The World Trade Organization was used as an example because it is frequently referred to as a 'rich man's club', as it places the interests of developed nations above those of less-developed ones. Additionally, N. Butler and S. Subedi argued that none of the existing institutions is focused on handling investment-related issues.[52] Its decision-making process is impeding its capacity to reach swift, strong judgments. Considering this, the WIO will tackle these challenges on its own.

Unfortunately, the legislative and regulatory framework of international investment laws was not addressed in the WIO's suggestion.[53] Its emphasis was transferred from the interpretation and wording of the Law itself to decision-making and conflict settlement. Even if the benefits of reform appear to outweigh the costs of implementing it, reform may be thwarted due to information issues, public choice, or network-related costs.

51 Tai-Heng Cheng, 'Power, Authority and International Investment Law' (2005) 20 (3) American University International Law Review 465.

52 Nicolette Butler and Surya Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) 64 Netherlands International Law Review 43, doi: 10.1007/s40802-017-0082-5.

53 ibid.

5 CONCLUSIONS AND RECOMMENDATIONS

The purpose of the international investment regime is vague and ambiguous, which leads to uncertainty in its interpretation. The scope of IIAs is also unclear. This paper explored the main substantive and procedural challenges faced in IIL, which were illustrated above. These challenges relate to the vagueness and ambiguity of investment disciplines' substantive content, the crucial issues in the interpretation of IIAs, and other issues. This paper explored various recommendations proposed by different scholars and recommends that we resolve all the challenges set out in this paper and reflect Tai-Heng Cheng's way of overcoming IIL shortcomings via decision-makers. Henceforward, international investment law will improve through five structural adjustments – it is not enough to develop WIO as suggested by N. Butler and S. Subedi as they do not address the policy and regulatory framework of international investment laws. However, this paper proposes the development of a unified global convention that is formatted to provide a uniform and neutral set of substantive and procedural rules to regulate international investments, and that would, in fact, meet the optimal objectives of the state and investor in the most appropriate manner according to the current legal investment instruments.

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