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**INVESTOR-STATE DISPUTE SETTLEMENT (ISDS):
CURRENT LANDSCAPE, AND A LOOK INTO THE FUTURE**

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TABLE OF CONTENTS

	Page
Summary/Key Terms	3
Introduction	4
I. ISDS TODAY / CONCEPTUAL FRAMEWORK	6
II. PROBLEMS WITH THE SYSTEM	17
<u>I. Asymmetrical Nature</u>	19
<u>II. Issues with Awards</u>	22
1. The Lack of Publicity of Decisions	22
2. The Inconsistency of Decisions	23
<u>III. Lack of Arbitrator Variety</u>	25
<u>IV. Double Hatting</u>	29
III. PROPOSED CHANGES AND STRUCTURAL REFORM	32
<u>I. Working Group III</u>	33
1. Selection and appointment of ISDS tribunal members	34
2. Appellate mechanism and enforcement issues	37
3. The draft code of conduct	39
<u>II. Most Likely Solutions</u>	44
1. Asymmetrical Nature	44
2. Issues with Awards	45
3. Lack of Arbitrator Variety	46
4. Double Hatting	46
<u>III. Structural Reform Plan</u>	47
Conclusions	49
Bibliography	51
Annex	53

SUMMARY

International Investment Arbitration, Investor-State Dispute Settlement or simply ISDS, is a system that allows international investor-state disputes to be settled outside the traditional court system of a country. ISDS has been around for over a decade but recently, the system has received considerable resistance from a big portion of the international legal landscape. Four main problems were highlighted: the asymmetrical nature of the system, issues with awards, the lack of arbitrator variety, and double hatting. The current proposed solutions are laid out, followed by an assessment of which are the most likely solutions. Finally, the idea of a structural plan reform is introduced.

KEY TERMS

International Arbitration, International Investment Arbitration/Investor-State Dispute Settlement, International Centre for Settlement of Investment Disputes, International Chamber of Commerce, Permanent Court of Arbitration, Investment Treaty, National, Contracting State, Host State, Tribunal, Adjudicator, Arbitrator, Double Hatting.

INTRODUCTION

This paper undertakes the task of (1) analyzing the Investor-State dispute settlement system landscape today, (2) identifying some of the problems within the system, and (3) proposing a structural reform.

International investment is a constant in today's globalized world economy. Multi-national businesses are a reality and a big part of the world economy. When a business decides to expand/invest abroad there is always a risk that a dispute might arise between the investor and the host state where the investment is taking place.

If a dispute does arise, as an investor, one would not want to go to the national courts of the country against whom they have a dispute.¹ Suing a country in that same countries' national courts intrinsically would bring questions of neutrality, independence, and efficiency of the dispute settlement.^{2 3}

The Investor-State arbitrations arose out of this need for a neutral forum to decide on investment dispute cases, not the courts of one country, not the courts of another. This depoliticizes the dispute.

The area of Investor-State law is quite deep and complex. This paper will only attempt to cover the general notions of ISDS and identify only some of the problems within the system.

¹ It is true that investors could invoke diplomatic protection but, the discretion of the exercise of this protection by the home state of the investor, which depends on the home state's interests, creates uncertainty and unpredictability for the investors.

² Schill, S. W. (2015). *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*. (E15Initiative). International Centre for Trade and Sustainable Development/World Economic Forum.

³ States (especially developing countries) have an interest in foreign businesses coming to invest in their Country. It feeds the economy and brings jobs. Legal and political uncertainty scares businesses away, therefore States also have an interest in having a neutral and efficient dispute settlement system. Foreign direct investment (FDI) constitutes 38% of global gross domestic product (GDP).

Even though there are many other institutions⁴ that administer investment disputes, only the ICSID and the Permanent Court of Arbitration⁵ will be addressed as most disputes are administered by these institutions. In the same way, there are already several proposed structural reforms (and probably more coming). However, this paper will mainly address the proposed concepts from the European Union.

The main questions this research will try to answer are: What is ISDS, what are the biggest problems with the system, and how can they be solved? Why is ISDS so criticized? How is an Investor-state dispute carried out? and What are the alternatives to a reform to the system?

This research paper is based on documental, analytical, deductive and descriptive methods.

The paper is structured as follows. Chapter I will lay a conceptual framework that will provide with the general ideas that must be kept in mind to understand the research. This Chapter will briefly touch on concepts of arbitration, what ISDS arbitration is and how it works. The chapter rounds up by presenting a few arguments/backlashes to the system.

Chapter II will focus on some of the structural problems that are perceived in the system. Problems which actually slow down the development of the system. Chapter III will overtake the challenge of proposing a new structure for the system. Propose ideas that would help ISDS become a truly a neutral and efficient system.

⁴ Some other institutions include: LCIA, HKIA, SIAC, ICC.

⁵ Under the UNCITRAL Rules of Arbitration.

CHAPTER I

ISDS TODAY / CONCEPTUAL FRAMEWORK

Before we can dive into ISDS we must first establish the main concepts of arbitration. Arbitration is a private mechanism of law adjudication.⁶ Arbitration can be defined as a creature of consent⁷ which creates a panel of “private judges” to decide over a dispute. Parties agree to resolve their disputes outside the traditional court system.^{8 9}

Arbitrations can be institutionalized or ad hoc,¹⁰ national or international.¹¹ In all circumstances arbitrators are chosen by the parties.¹² Non-governmental decision makers that do not “*belong to any governmental hierarchy*.”¹³

Arbitrations result in final and binding awards. Awards can be enforced due to the New York Convention on the Recognition and Enforcement of Foreign Awards.¹⁴ This gives arbitration awards a very high chance of being enforced internationally in comparison to national court judgments.

⁶ Moses, M.L. (2012) *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press.

⁷ Consent is usually found in arbitration clauses or arbitration agreements.

⁸ Loc. Cit.

⁹ Or any judiciary system for that matter.

¹⁰ Institutional arbitration refers to arbitrations administered by arbitration institutions which provide among other things: administrative functions and procedural rules for the arbitration. In the absence of an arbitration institution the arbitration is considered ad hoc, situation in which parties would have administer the arbitration on their own and would have to agree on all the procedural rules.

¹¹ This paper focuses primarily on international arbitration.

¹² Usually, one by each side and then the two chosen arbitrators elect a third arbitrator who acts as president of the newly formed tribunal.

¹³ Moses, M.L, Ob Cit., p. 25.

¹⁴ 162 countries are parties to the convention, the convention requires countries to enforce awards unless of serious procedural issues. The convention is considered to be “pro enforcement” biased.

The main reasons why parties resort to arbitration are: (I) Because the parties would rather choose the “judge”, rather than leaving the decision up to appointment by judicial authorities.¹⁵ (II) Dissatisfaction with the court systems’ excessive duration and quality of the decisions. (III) In, international disputes, because none of the parties is comfortable with a national court of the other side to decide the dispute.¹⁶

Reason (III) is why arbitration is linked with ISDS. ISDS refers to the system of arbitration that foreign investors and host States use to resolve their investment disputes.¹⁷ It arises from the idea that when there is a foreign investment dispute there should be a neutral arbitral tribunal decide it not the courts of one country nor the courts of the other.¹⁸

This notion started with the friendship commerce and navigation treaties in the 1930s-40s¹⁹. It did not exist in the form of arbitration until 1987. In 1987, an English investor sued Sri Lanka because the company’s shrimp farm was destroyed in the civil war.²⁰ The company based the claim under a bilateral investment treaty that England and Sri Lanka had signed.²¹ The BIT included a ISDS provision.²²

¹⁵ Another motivation is usually the “expertise” that the party selected adjudicator would have over the judicially appointed one.

¹⁶ Rubino-Sammartano, M. (2014) *International Arbitration: Law and Practice*. JurisNet.

¹⁷ Caplan, L. M. (2019). *Isds reform and the proposal for multilateral investment court*. Berkeley Journal of International Law.

¹⁸ This to avoid any political/diplomatic pressures influence the decisions.

¹⁹ Among other notions, in these treaties the United States implemented the idea of parties choosing a member of a deciding panel.

²⁰ Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka. (ICSID Case No. ARB/87/3)

²¹ Sri Lanka - United Kingdom BIT (1980)

²² This ISDS provision was specifically a ICSID provision.

Investor-state dispute settlement provisions started appearing in most Bilateral Investment Treaties and other international investment agreements. These provisions allowed investors to enter arbitration with states over treaty breaches.²³

Provisions on ISDS have been a core component of international investment agreements for decades now. Here is an example of an ISDS provision from the Myanmar-Singapore BIT:²⁴

*“...the disputing investor may submit the dispute to arbitration: (a) under the ICSID Convention and the ICSID Arbitration Rules, provided that both the respondent Party and the Party of the disputing investor are parties to the ICSID Convention; ... (c) under the UNCITRAL Arbitration Rules; or (d) to any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree”.*²⁵

In section (a) of the provision, ICSID arbitration rules are mentioned. ICSID or the International Centre for Settlement of Investment Disputes, is an international arbitration institution. ICSID was established in 1966 by the ICSID convention.²⁶ The ICSID Convention is a multilateral treaty formulated by the board of governors and executive directors of the World Bank.^{27 28}

One of ICSID’s main functions is to provide rules designed specifically for the resolution of international investment disputes between investors and States. ICSID also offer a neutral physical venue for the arbitrations to take place.²⁹ While ICSID provides a wide

²³ An example is Exportation.

²⁴ Myanmar - Singapore BIT (2019)

²⁵ Loc. Cit.

²⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States. (1996)

²⁷ The Boards of Governors consist of one Governor appointed by each member country of the World Bank. The office is usually held by the country's minister of finance.

²⁸ ICSID is part of and funded by the World Bank Group

²⁹ ICSID Headquarters are located in Washington D.C.

range of services during the course of a proceeding, it does not itself make procedural rulings or decide the dispute.³⁰

The ISDS landscape has been transformed in recent years by the constantly globalizing market.³¹ “*An arbitration industry has emerged, led by entrepreneurial lawyers advising potential clients about options for resolving investment disputes through international arbitration that would not have been considered only a few years ago.*”³²

ICSID administers the majority of investment disputes. As of the 31st of December 2019, the total number of known ISDS cases pursuant to international investment agreements (IIAs) had reached 1023³³ out of which 637 are under ICSID arbitration rules.³⁴ ICSID also handles arbitration cases under other rules, such as the UNCITRAL arbitration rules and ad hoc investor-State and State-State cases.

ICSID is a self-contained system. It possesses its own simplified award enforcement system and its own post award remedies which include but are not limited to annulment.

For an arbitration to take place, both the home country from an investor and the host country where the investment is taking place, have to be part of the ICSID convention. As of today, there are 154 member states to ICSID.³⁵ Like most arbitration cases,³⁶ in ICSID

³⁰ ICSID archive World Bank. *Process Overview*. <https://icsid-archive.worldbank.org/en/pages/process/overview.aspx>

³¹ Gaukrodger, D. & Gordon, K. (2012) *Investor-state dispute settlement: A scoping paper for the investment policy community*. OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT No. 2012/3.

³² Loc. Cit.

³³ There are 3 bases of Consent to ICSID arbitration: investment treaties, domestic investment laws, investment contracts.

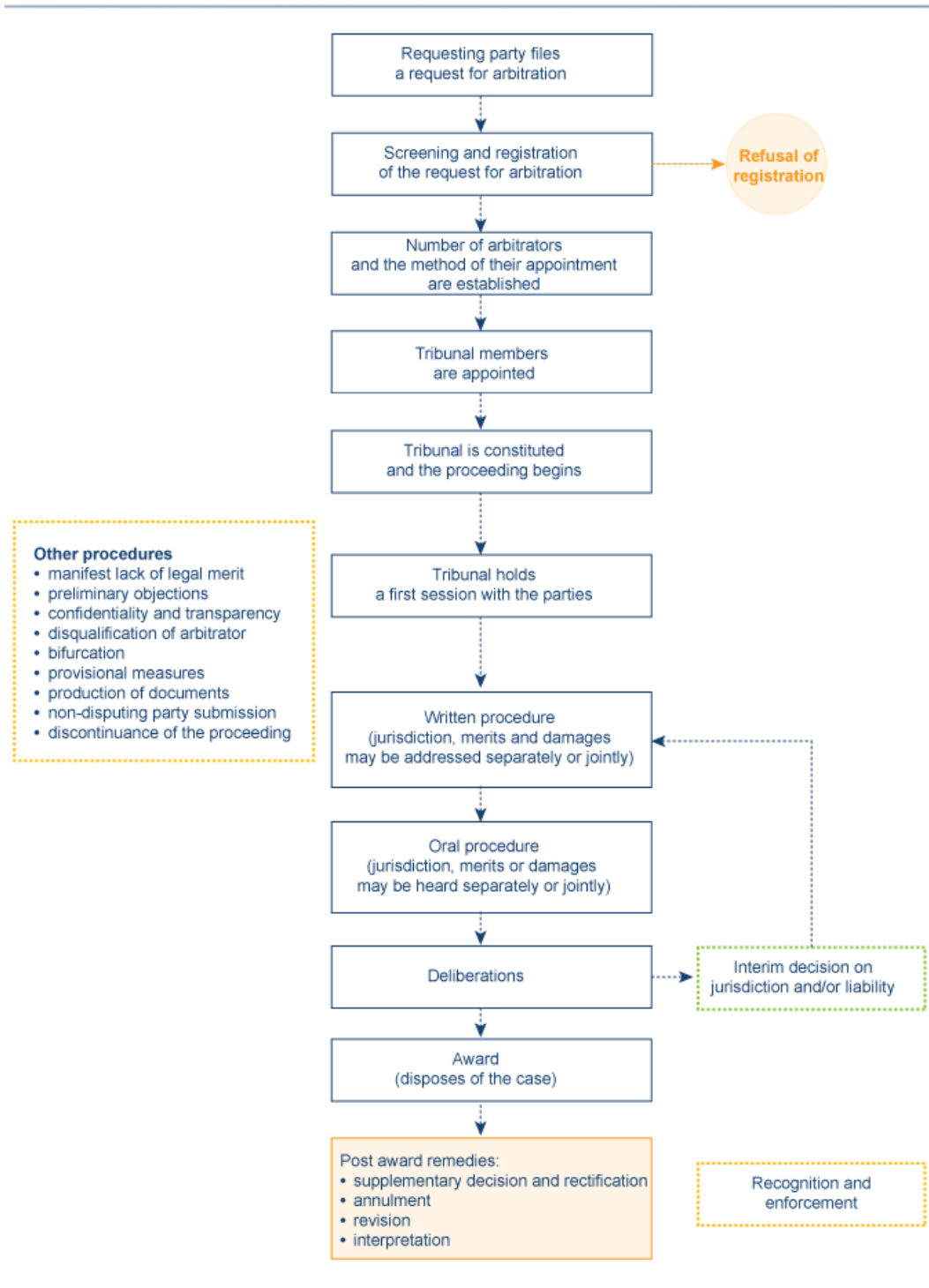
³⁴ Statistics from: investmentpolicy.unctad.org, Investment Dispute Settlement Navigator

³⁵ Mexico is the second newest member.

³⁶ In some cases, when parties cannot come to an agreement ICSID can act as a nominative entity appointing the arbitrator.

cases the tribunal is made up by party elected adjudicators.³⁷ Even though ISDS cases are decided by arbitral tribunals, cases under the ICSID arbitration rules have specific procedural steps. The complete process can be seen in the following flow chart:

³⁷ Article 37(2)(b) of the ICSID convention.



The scope of jurisdiction for ICSID cases can be found in article 25. Article 25 states that jurisdiction extends to:

*“any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national³⁹ of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.*⁴⁰

For an ICSID tribunal to auto determine its own jurisdiction,⁴¹ there must be **(1) an investor with nationality from a contracting state, (2) a host state which is also a contracting state, (3) a dispute arising out of an investment and (4) that the parties consented to ICSID arbitration**^{42 43}

(1) National of another contracting state means any natural or juridical person which had/held the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit the dispute.⁴⁴

³⁸ Chart from: ICSID, World Bank. Available at: <https://icsid.worldbank.org/services/arbitration/convention/process/overview>

⁴⁰ (2003). *ICSID convention*, regulations and rules. Washington, D.C. International Centre for Settlement of Investment Disputes. Article 25.

⁴¹ The principle of *kompetenz-kompetenz* gives the arbitral tribunal the ability to rule on the question of whether it has jurisdiction. Rule on its own jurisdiction.

⁴² A state can consent to ICSID arbitration in BIT's or contract's with an investor for example.

⁴³ These are not listed in any hierarchy order or order of any sorts.

⁴⁴ Gaukrodger, D. & Gordon, K. p. 4.

(2) **For a host states'** subdivision or agency to have the ability to consent into ICSID arbitration it shall require the approval of that state. Unless that State notifies the Centre that no such approval is required.⁴⁵

(3) The term **investment** is not defined under the ICSID rules. Yet, this concept is so fundamental to determine if a tribunal has jurisdiction over a case. "*There is no general definition of the term "investment" under international investment law*"⁴⁶ either. Tribunals refer to the Salini⁴⁷ test to determine if there is an investment. The Salini test, in short, provides that all following have to be present in order for there to be an investment. (I) A contribution or commitment by the investor. (II) Performance of the project for a certain duration. (III) Existence of a risk for the investor. (IV) A significant contribution to the economic development of the host state.⁴⁸

(4) There are three ways which the parties can **consent** to ICSID arbitration. (I) Consent through Direct Agreement between the Parties, (II) Consent through Host State Legislation, and (III) Consent through Bilateral Investment Treaties and Multilateral Treaties.⁴⁹

ICSID, as stated previously, serves as a mechanism for investors to raise claims for alleged treaty protections that were violated. These treaty protections are substantive protections or investor rights that are included in BITs and MITs.

⁴⁵ Loc. Cit.

⁴⁶ Burgstaller, M. *Definition of investment in international investment law*. Hogan Lovells.

⁴⁷ Salini test comes from: *Salini Costruttori SpA v Morocco* (ICSID Case No ARB/00/4)

⁴⁸ *Salini Costruttori SpA v Morocco* (ICSID Case No ARB/00/4)

⁴⁹ United Nations Conference of Trade and Development. (2003) *Dispute Settlement: International Centre for Settlement of Investment Disputes*.

BITs and MITs for the most part include the same 6 investor protections⁵⁰. These protections, in general terms, are: protection from expropriation without full compensation, most favored nation provisions, national treatment provisions, fair and equitable treatment, full protection and security, and free transfer of investment and returns.⁵¹

Investor-State dispute settlement provisions have been in over 2000 bilateral agreements.⁵² However, in the last few years ISDS has been the face of controversy and has received serious backlash. Hereafter, some of this backlash and criticism will be discussed.

One of the main criticisms to the system is that it is unfairly advantageous toward big multinational corporations. “*Critics have argued that the ISDS system is overly focused on safeguarding commercial concerns at the expense of the public interests.*”⁵³ The narrative of this criticism is that big companies are using this system to escape the national courts of the host state countries to get multimillion dollar awards over states (most of the time developing countries).⁵⁴

Even though this criticism may have some fair points, it seems to allude that the system is heavily handicapped towards investors. The Counter-narrative to that, is that actually, awards are rendered more often in favor of States, which in fact is true.⁵⁵

⁵⁰ Investment treaty word the protections differently and limit the scope of the protections differently.

⁵¹ See *Biwater Gauff (Tanzania) Ltd -v- United Republic of Tanzania* (ICSID Case No ARB/05/22) and *RSM Production Corporation -v- Grenada* (ICSID Case No ARB/05/14).

⁵² All of the trade agreements United States has been a part of since NAFTA contain a ISDS provision.

⁵³ AS Hurst, *Guide on international investment protection*. (2020)

⁵⁴ The money to pay for this awards comes from tax payer money.

⁵⁵ 37% of ISDS decisions have found in favor of the state, 25% in favor of the investor and 28% have been settled. The remaining cases have been discontinued or led to no damages being awarded (UNCTAD, 2015).

Another part of this narrative is that companies “bypass” the domestic court systems. Using “bypass” in its negative connotation. The counter-narrative to that, is that, companies are not “bypassing” the courts at all. Arbitration allows parties who consent to have their disputes settled by an expert panel of non-Governmental decision makers. This is exactly what is happening in this instance, that does not mean that companies are “bypassing” the laws of a domestic countries. Another counter-argument to this criticism is that many of the countries where the investment are taking place, can not offer a reliable legal for companies.⁵⁶

Countries have different attitudes toward ISDS. The backlash lately has caused the *“retreat of some countries from the existing system, the recalibration of substantive investment disciplines, and debates about ways to reform it at the national, regional, and international levels.”*⁵⁷

Some critics even propose to end the system. They argue that the system is intrinsically corrupt so it should be completely dismantled, they argue that there is no way that the system can be corrected.

The opinion on ISDS is very divided. On one side some agree that foreign investment is vital for the global economy and therefore an efficient and reliable system should be in place to protect the rights of the investors. On the other side, some view ISDS as an unnecessary system that helps multinational companies.

⁵⁶ For example, multinational companies which have long been in Venezuela would get brushed off if they try to sue Venezuela in Venezuelan domestic courts, for exportation.

⁵⁷ Schill, S. W. (2015). Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward. (E15Initiative). International Centre for Trade and Sustainable Development/World

Even though some of the critics want to discard the system, the numbers show that FDI is very impactful in countries, (especially in developing countries) in today's globalized economy.⁵⁸ Business will never invest in countries where they feel the legal and political climate is unpredictable, especially if there is no mechanism to help them protect their rights. Eliminating the ISDS would certainly hurt foreign investment in these countries.

With all that being said, it is clear that the system is not perfect. The main problems that are actually affecting the system and not allowing it to be fully effective will be discussed next.

⁵⁸ Foreign direct investment (FDI) constitutes 38% of global gross domestic product (GDP).

CHAPTER II

PROBLEMS WITH THE SYSTEM

ISDS clauses included in recent international treaties like the United States-Canada Comprehensive Economic and Trade Agreement⁵⁹ for example, have been met with “wide-spread opposition”⁶⁰, as briefly mentioned in the previous Chapter. The current system for ISDS is not perfect by any means. However, it is one that is greatly needed.

There is no doubt that there is a need for a specialized, independent, and neutral system to settle international investor-state disputes. The idea the one side may be favored because of “home-court” advantage just is not compatible with any sense of fairness or due process. A neutral “playing field” is fundamental in order to have a proper deliberation of a legal resolution.

A perfect example of how a neutral avenue helps avoid discrimination can be found in article 19(3) of the German Constitution:

*“It follows that investment protection in Germany does not privilege foreign investors. It merely remedies existing shortcomings in their legal protection and thus is necessary to avoid discrimination.”*⁶¹

There are many polarizing opinions about the short comings of the ISDS system. In this Chapter, the discussion will be focused on the problems which are deemed the most critical and which are eroding the system the most. Four problems have been identified and divided into two groups:

⁵⁹ Comprehensive Economic and Trade Agreement (signed 30 October 2016, parts entered into force provisionally 21 September 2017) [2017] OJ L11/23.

⁶⁰ Alessandra Arcuri, *The Great Asymmetry and The Rule of Law in International Investment Arbitration*, (2018).

⁶¹ Richard Happ, ‘Why Investors in Germany Need Investment Protection’ (EFILA Blog, 29 March 2016) accessed 19 December 2020 (hereafter Happ, ‘Investors in Germany’).

Procedural/Structural Problems	Problems with Adjudicators
I. Asymmetrical Nature	III. Lack of Arbitrator Variety
II. Issues with Awards	IV. Double Hatting

The Procedural/Structural Problems portion of the discussion will focus on the obstacles that make the fairness of proceeding doubtful at time.

(I) The Asymmetrical Nature refers to the fact that investors are granted the rights to bring claims against governments, on the counterpart states do not have the right to directly bring claims against investors, they can only resort to counterclaims.⁶² It is important to note that “*one of the first economic partnership agreements between the Netherlands and Indonesia included a provision that made the right to initiate disputes possible also for host states.*”⁶³ However, in general, host states are not granted with the right to bring claims directly they can only resort to counterclaims, making the nature of the process asymmetrical.

(II) After, questions that arise with awards adjudicated by ISDS tribunals will be discussed. The main issues that will be analyzed are the lack of publicity of the decisions, the fact that there have been different decisions on similar fact patterns, and that there is no established mechanism to reconcile different decisions.

The discussion of the second group of issues will focus directly on those surrounding the adjudicators. These problems are in a different category because meanwhile the first type focus on the obstacles that slowdown an effective procedure, the second type are focused on the troublesome nature of aspects of the investment arbitral tribunals. The two issues which were deemed of most relevance for this research will be discussed.

⁶² This is article 9 from the Greece-Romania Bit (1991): ... the investor concerned may submit the dispute either to the competent courts of the Contracting Party or to International Arbitration... . Most articles are written in the same spirit where only investors can bring claims to start an International Arbitration.

⁶³ Art. 11 of the Netherlands and Indonesia Agreement on Economic Cooperation “(entered into force 17 July 1971 replaced on 01 July 1995 by Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia)”.

(III) First, the issues revolving about the fact that most investor-state tribunals are constituted by the same group of people over and over again, why this happens and how it hurts the system as a whole.

(IV) The last obstacle that this research paper will touch on is a practice labeled as “Double Hatting”. Double Hatting alludes to the fact that lawyers in the landscape of investor-state arbitration change between roles (“hats”), in one case they might be an arbitrator but in a different case they might act as the lawyer for one of the parties. This last portion of the Chapter will analyze why this is problematic and how it affects the system as a whole.

In essence many countries have always hesitated about the fact of conceding economic sovereignty to an international entity. However, the need for ISDS has made many countries which are normally stricter in this sense be more lenient. The problems to be discussed in this Chapter have made some countries⁶⁴ go as far as isolating themselves completely from the ISDS, putting the system in danger of slowly disappearing. This is why talking about the problems and coming to a quick solution is crucial in order to maintain an optimal dispute settlement system for investor-state disputes.

I. Asymmetrical Nature

There could be several areas of the ISDS procedure or systemic structure that could be labeled as “asymmetrical”. Herein, the scope of the analysis will focus on the asymmetrical rights when it comes to who can bring claims to start an ISDS arbitration. Asymmetrical in the sense that the rights granted to the investors are not the same as the ones granted to states.

⁶⁴ Indonesia terminated multiple BIT's as of 2014. India terminated a total of 58 BIT's in 2017.

Investment Treaty Arbitration dispute resolutions systems allow investors to bring claims based on the breach of specific protections, against states. However, states do not possess the reciprocal right to bring claims against investors. Only under rare circumstances, states have the right to counterclaim,⁶⁵ but not to bring claims directly. In other words, states are usually always the respondent in the case. Only in rare occasions states have acted as claimants.

Another layer of this asymmetrical nature is how communities are affected by the awards, yet they do not have a direct right of employing defenses against investors. “*If something goes wrong in the way the investment activities are conducted, local communities are likely to suffer harm and have no voice before an arbitration tribunal.*”⁶⁶ There is no mechanism established in any of the ISDS legal frameworks that allow directly affected third parties to make petitions or claims in order to start an arbitration.

Even when the system does not allow for states to directly bring claims against an investor, like previously mentioned, only in some cases can counterclaims prosper.⁶⁷ The rights granted to states in regard to counterclaims, vary depending on the institutional framework followed for each arbitration. For example, Article 46 of the ICSID convention allows for counterclaims “*arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*”.⁶⁸

⁶⁵ In the words of Tietje and Crow, “*ICSID decisions over the past years have all but eliminated the use of counterclaims in international investment arbitration, that is, unless an investor consents to a counterclaim, the state has exhausted domestic remedies, and the counterclaim is sufficiently linked to the claim.*” In rare occasions, counterclaims have been admitted; e.g. *Saluka Investments BV v The Czech Republic*, Decision on Jurisdiction over the Czech Republic’s Counterclaim, Ad hoc-UNCITRAL Arbitration Rules, 7 May 2004.

⁶⁶ Alessandra Arcuri, Ob. Cit. p. 2.

⁶⁷ *Burlington Resources v Republic of Ecuador* is an example of case where the counterclaim was successfully found in the scope of jurisdiction and wasn’t even challenged much.

⁶⁸ ICSID Convention, Article 46.

Another big problem with the asymmetry of the system is that investors have found ways to evade the few obstacles set in place against investor claims. One of the few and fundamental requirements for an investor's claims to be under international investment jurisdiction is that the investor is not a national from the state whom the claim is meant to be raised.⁶⁹ However, "vertical claims" have been used to avoid this obstacle and create and even greater unbalance and asymmetry in the system.⁷⁰

Asymmetry causes a great issue when it comes to a balanced forum. The fact that only side Investor can bring claims, but side State is the one that surrenders its sovereignty which allows the forum to exist, only spells trouble. If the state is only defending itself but never able to hold investors liable,⁷¹ eventually states will start to pull out from ISDS provisions like we have seen in recent years.

The asymmetrical nature might emanate from the fact that international investment agreements usually do not emphasize on investor obligations and state protections against the breach of this obligations the same way that they emphasize on states obligations.⁷²

The figure of counterclaims can help bring a bit of balance to the asymmetrical nature of the bringing of claims. However, as discussed, there are many different pieces that have to perfectly match up in order for the counterclaim to fall under the jurisdiction of an ISDS tribunal, obstacles that investors do not have to face.

⁶⁹ In that case the only applicable forum should be the national courts, as being a national the threat for discriminatory actions based on nationality virtually disappear.

⁷⁰ Vertical claims alude to the practice where multiple companies are entitled to bring claims against a country since they are linked by the same corporate structure, for example a mother company. Sometimes this entities are from the same country which the claims are brought against, but the claims are raised by one of the entities in a different country allowing it to satisfy the non national requirement.

⁷¹ Liable in the sense that they can be brought against an arbitration tribunal for breaching a protection.

⁷² The Morocco-Nigeria BIT, The India-Belarus BIT, and the Pan-African Investment Code are examples in which investor only obligations are specified.

In 2017, the United Nations Commission on International Trade Law (UNCITRAL) established Working Group III “*with a broad mandate concerning ISDS reform*”, among the various issues⁷³ to be address by this working group, whose work is ongoing, is the issue of asymmetry of claims. Not much has been discussed directly yet as of the asymmetry of bringing claims by the groups, however the proposed solutions and viewpoints on the topic will be discussed in the next Chapter.

The asymmetry is apparent, there is no question that the obstacle the system is unbalanced in that sense. The ISDS system should strive to strike a balance between the rights and obligations of all relevant stakeholders, protecting investors and their investments while also protecting the nationals and the rights of the states.

II. Issues with Awards

The two main issues in regard to awards that will be discussed in this research paper are (1) The lack of publicity of the decisions and (2) The inconsistency of decisions.

1. The Lack of Publicity of Decisions

The first issue with the awards in international investment arbitration is that many are not even fully available. The publicity of ISDS awards is in most of the cases not a requirement and is only made publicly available if both parties consent to it. Rule 48(4) of the ICSID convention states that in cases where parties do not consent the center must publish an excerpt and some of the basic information.⁷⁴

Besides the fact that publicity brings transparency to the system, publicity of the awards is crucial for the development of investor-state arbitration for a simple reason, the

⁷³ Working Group III elaborates its own agenda but all tasks must be in the landscape of international investment arbitration.

⁷⁴ Rule 48 (4) ICISD convention: The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications’ excerpts of the legal reasoning of the Tribunal.

precedent awards rendered create a body of law. Even if precedent awards do not have a binding nature, a body of law helps the legal field transcend and ultimately enhances the effectiveness and consistency of the decisions.

Transparency like briefly mentioned, is also enhanced by the publicity of the decisions. Awards being non-public in issues that ultimately involve a public repercussion is a bit worry-some. This aspect of “non-publicness” can be interpreted to many a secrecy.

The reason as to why award publication must be consented by parties is not quite known. However, one of the main reasons as given is that these awards contain controversial topics and having them made public might generate great tension in the state immersed in the dispute. For example, the state agreeing to settlement of a case with a foreign multinational business might not bode well for the average national of that state and might cause tension for the state officials, therefore they would rather not make the award public and not have to carry the public blame.

2. The Inconsistency of Decisions

As briefly addressed, the publicity of decisions is needed in order to have a reliable system because it ultimately makes decisions consistent. Decisions have not really been consistent, however.

“Awards issued by investment tribunals are sometimes inconsistent or even contradictory, and there is no appropriate mechanism in place to remedy or limit such inconsistencies. Inconsistent awards could negatively affect the reliability, effectiveness and predictability of the investment arbitration regime and, in the long run, its credibility.”⁷⁵

⁷⁵ Submission by Indonesia commenting on proposed agenda by UNCITRAL Working Group III.

Another alarming structural issue are the complete discrepancies/inconsistencies of awards in cases with similar facts. Added to that, the fact that there is no mechanism to remedy the discrepancies calls the question the effectiveness of the system as a whole.

The apparent reason of why these discrepancies exist, is because investment tribunals are in essence made of ad-hoc panels, which are established under various arbitration institutions and rules. However, there are deeper rooted reasons that cause these issues with the awards rendered.

Although there is no binding nature for precedents argued in arbitration, consistency in decisions is the mark of a balanced and effective system. “*A disperse system composed of some 3,000+ different Bilateral Investment Treaties has generated beliefs that some degree of inconsistency will be inevitable.*”⁷⁶

It is hard to expect unanimous decisions when different BIT’s are negotiated differently between states and even contain differently worded provision. Naturally the tribunals make their decisions on the respective treaty in a case-by-case basis⁷⁷ and if treaties are different the decisions normally will be different as well.⁷⁸ However, if the inconsistencies are inevitable there should be a reliable sorting mechanism to help navigate between these inconsistencies and create a more predictable and consistent system.

The main reasons found as to why an appellate body or second instance body is not advantageous are because: I) it eliminates the “finality of decision” aspect the tribunal⁷⁹

⁷⁶ D. Gaukrodger et al., ‘*Investor-state dispute settlement: A scoping paper for the investment policy community*’ (OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012) p. 61.

⁷⁷ Article 31 of the Vienna convention of the law of treaties “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁷⁸ A decision along these lines can be found in *Methanex Corporation v United States of America*, UNICTRAL, 3 August 2005. The tribunal stated: “*As to the ... principle, the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose.*”

⁷⁹ One of the main advantages of arbitration is said to be that tribunals have the finality on their decisions, making them quicker and more reliable.

bodies possess; II) it may increase the cost and delay the procedure.⁸⁰ However these reasons are fairly superficial when juxtaposed with the possible problems that might be solved by implementing a reliable appellate body.

An appellate body in the landscape of international investment arbitration has been discussed for some years. In 2015, the law firm White & Case along with the Queen Mary University of London conducted a survey which was “answered negatively by 61% of respondents among the arbitration community.”⁸¹

“It ultimately lies with the users of the system, and especially States, to decide what suits them more: a final decision, less expensive and faster, or a decision of potentially higher quality, but even more costly and lengthy.”⁸²

However, the idea has always been centered in the pure idea of being able to appeal, being able to convince a second tribunal of the rightness of its position. The idea of a body that solely helps in settling inconsistencies has not been widely discussed yet but might be just what investment arbitration needs.

III. Lack of Arbitrator Variety

“Social science literature shows that diverse decision makers are more likely to avoid cognitive biases and group-think in decision making.”⁸³ Diversity is always some-thing balanced system should strive for. Diversity is a great thing. A decision is always more integral if all perspectives are considered. Diversity can be understood under two lev-

⁸⁰ K. Sauvart, ‘The Evolving International Investment Law and Policy Regime: Ways Forward’ (Policy Options Paper, E15Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016).

⁸¹ Queen Mary University of London and White & Case LLP, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ (2015).

⁸² Kaufmann-Kohler et al., p. 18; G. Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitra-tions: Are there differences?’ in Emmanuel Gaillard and Yas Banifatemi (eds), Annulment of ICSID Awards (IAI Series n° 1, JurisNet 2004).

⁸³ The Culture of International Arbitration Won L. Kidane (24 March 2017).

els: a strict level and a general level. In regard to ISDS, diversity in its strict level refers to the same people being appointed over and over again. On the other hand, diversity in a general level refers to a group of people for example women being underrepresented.

Both levels of diversity are in conflict in ISDS. The issue in international investment arbitration is not just that one group of people are not being represented as arbitrators, but the problem is also that the same people are getting appointed on panels over and over again.

Since the creation of investor-state arbitration, neither of the senses of diversity have been very much present. A recent study by PluriCourts researchers⁸⁴ covering arbitrators in ICSID as well as non-ICSID cases “*found that 11% of arbitrators were female. Yet two women – Kaufmann-Kohler and Stern – account for 57% of all appointments given to female arbitrators.*”

Up to 2018, “only 35% of 695 individual arbitrators who have sat in at least one investment case were from non-Western states.”⁸⁵ That means that out of 695, 452 are nationals of either western Europe or North America.

Perhaps the biggest problem in regard to diversity comes in the general level.⁸⁶ There is not much rotation in arbitrators appointed, there is not many new appointments. The same arbitrators are always in the panels. In 2019, only 15% of appointments overall were first time appointees.⁸⁷

⁸⁴ Empirical perspectives on investment arbitration: What do we know? Does it matter? Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay (15 March 2019).

⁸⁵ Western is defined by the United Nations as the regions of western Europe and North America.

⁸⁶ By general level it refers to different people being appointed, the general level of diversity does not focus on what minority groups are being represented rather just that different people are appointed.

⁸⁷ Information available at: <https://icsid.worldbank.org/>

The international investment arbitration landscape has been described as one of a closed circle. Meaning new faces are really welcomed. The reason as to why investors and states rarely appoint first time arbitrators is quite logical. ISDS cases have very high stakes, neither investors nor states want to “risk” a bad choice by picking an arbitrator with no experience, creating a cycle where new entrants rarely get a chance.

“It is quite natural that a party and its counsel will wish to appoint the ‘best’ arbitrator available for a given case and that prior experiences with that potential arbitrator are of course adequate to give that assurance.”⁸⁸

The main problems that arise out of a lack of diversity in the arbitrators appointed are a lack of different perspectives in the decision makers, and the inherent conflicts of interest and biases that being named to a tribunal brings.

The lack of different perspectives affects the legal landscape of international investment arbitration because it makes counsels attempt to start tailoring their arguments and ideas to fit what the tribunal usually looks for, this discourages creative solutions and arguments. The lack of movement in arbitral tribunal bodies causes for a stale system in which things are settled like they have been settled in the past being anti-innovative.

The other side of the lack of diversity problem, like briefly mentioned, are the inherent conflicts of interest and biases that being named to a tribunal brings.

“The determination of an arbitrator’s impartiality and independence is a very subjective. There are many variables that must be taken into consideration... the idea of being repeatedly appointed seems attractive to an arbitrator⁸⁹”

Even when arbitrators are professionals and have high moral standards. There is a danger that arbitrators might tend to bias their decisions in favor of their appointing party in

⁸⁸ Caratube Int’l Oil Co. v. Kazakhstan ICSID Case No. ARB/13/13 (Mar. 20, 2014).

⁸⁹ The ‘Repeat Arbitrators’ Issue: A Subjective Concept. Natalia Giraldo-Carrillo. (2011)

hopes of being elected in future cases. It may be a risk “when the same individual has been appointed repeatedly by the same party.”

*“The repeated nomination of arbitrators is a controversial phenomenon to the extent that it falls directly within the scope of two of the most important duties of an arbitrator, namely his independence and impartiality.”*⁹⁰

As of today, one must turn to The *IBA Guidelines* to determine what may interfere with an arbitrator’s independence and impartiality. *“The IBA Guidelines were created with the purpose of providing a list of specific situations that could call into question an arbitrator’s independence or impartiality, and therefore require disclosure”*⁹¹ of any possible conflicts.

Working group III has discussed this issue and proposed different solutions. A code for adjudicator transparency and conduct has been proposed. The code and other possible solutions to this problem will be addressed in the next Chapter.

⁹⁰ Loc. Cit.

⁹¹ International Bar Association, IBA, IBA Guidelines on Conflicts of Interest in International Arbitration as approved on 22 May 2004 by the Council of the International Bar Association, section (3) Disclosure by the Arbitrator. Available at: http://www.zivilprozessordnung.ch/uploads/IBA_Guidelines_Conflicts_of_Interest_in_International_Arbitration.pdf.

IV. Double Hatting

Double hatting happens when an individual plays both the role of an arbitrator and counsel “*simultaneously in different cases.*”⁹² The term “double hatting” refers to an individual who “switches between hats”, in one case the individual “wears the arbitrator hat” and in the next case he “wears the legal counsel hat.”

*“A further issue when it comes to the question of independence and impartiality of arbitrators is the switching of roles between arbitrators, counsels and experts in different cases. They sometimes also shift back and forth from their private arbitration practices into public service (double or triple hatting); several arbitrators reportedly have played official or unofficial governmental roles in the negotiation of the very types of IIAs that they adjudicate or litigate in the private sector, resulting in bias perception and lack of independence.”*⁹³

*“The very definition of double-hatting conflicts with the idea of impartiality while deciding on a legal issue.”*⁹⁴ Even if arbitrators do not want to be biased, it is very hard not to be biased when double hatting. There can even be circumstances where opposing counsel can bring up arguments made in previous cases by the counterpart when acting as arbitrator. This can also lead to for example, “*arbitrators appearing as counsel before tribunals composed of arbitrators with whom they had previously sat.*”⁹⁵ Many in the ISDS landscape have questioned if an individual with overlapping roles can ever be 100% biased free.

Double hatting is also potentially impactful in a procedural aspect. Awards may be annulled if proven that undisclosed double hatting might have altered the impartiality of an

⁹² Double Hatting: Challenging the International Investment Dispute Resolution Mechanism, Divij Jain (2020) found at: <https://rmlnluseal.home.blog/2020/08/04/double-hatting-challenging-the-international-investment-dispute-resolution-mechanism/#:~:text=Double%2Dhatting%20occurs%20when%20an,deciding%20on%20a%20legal%20issue.>

⁹³ A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia, 29 Oct. 2018, ¶ 14, cited in Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, p. 2 & n. 2. Indonesia’s submission also included the suggestion that there be a code of conduct for arbitrators in *appraising valuation of claims*. A/CN.9/WG.III/WP.156, ¶ 9.

⁹⁴ Double Hatting: Challenging the International Investment Dispute Resolution Mechanism, Divij Jain (2020)

⁹⁵ International Arbitration Alert, Louise Bond, (2020).

arbitrator. An example of this happened recently when “the annulment of a €128 million arbitral award against Spain was imposed due to an arbitrator’s undisclosed instruction of the claimant’s expert in other cases in which the arbitrator acted as counsel.”⁹⁶

It may appear as if double hatting is intrinsic to an arbitration lead procedure. However, there have been examples that show that there can be an integral arbitration system without the need of double hatting. In 2009 for example, the Court for Arbitration of Sports, “*amended its regulations to prohibit⁹⁷ double hatting.*”⁹⁸

As briefly discussed, UNCITRAL work group III proposed a draft Code of Conduct for Adjudicators. Among the many proposed reforms, the code proposes different options on how to deal with double hatting. The practice of switching hats, defined as the practice by which one individual acts as an international arbitrator in certain ISDS proceedings and as a counsel in other ISDS proceedings, is dealt with in draft Article 6 of the proposed Code of Conduct, a short but notable provision. It is drafted with brackets to indicate options of parameters.⁹⁹

“Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].”

Double hatting will be one of the areas that will certainly be modified in the upcoming years. The questions will be: What is the best way to modify double hatting? Should it be banned completely? Should it just be regulated to avoid conflict of interest? The best

⁹⁶ Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36

⁹⁷ CAS justified its prohibition on the basis that it is reasonable to believe that arbitrators might favor lawyers they were likely to appear before in other cases.

⁹⁸ Double Hatting: Challenging the International Investment Dispute Resolution Mechanism, Divij Jain (2020)

⁹⁹ Loc. Cit.

possible outcome for this problem and the other three discussed earlier will be outlined in the following Chapter.

CHAPTER III

PROPOSED CHANGES AND STRUCTURAL REFORM

ISDS is coming to an important crossroads, the next coming days and months will determine if international investment arbitration can be a sustainable system for the years to come. There is the option of fully reforming the system in place, or the option of trying to reform some aspects of the system in order to “patch it up.” Both options have pros and cons, those points will be talked about hereinafter.

In this final Chapter, the discussion will be centered in all the changes that have already been proposed for the problems previously presented. After discussing the already proposed solutions, the best and most likely solution for each problem will be analyzed. To finalize this research paper, a proposal for a structural reform will be set forth. The structural reform will be based on current proposals together with other supporting ideas.

The first section of the Chapter will focus on UNCITRAL’s Working group III; why was it formed, how it is composed, what is there assignment and what proposed changes the group has set forth or is looking to set forth. After explaining the commission of Working group III, the group’s ideas will be analyzed and discussed.

The second section for this Chapter will be centered which solutions are most likely to be effective for each of the problems discussed in the previous Chapter. Solutions from UNCITRAL’s Working group III will be the main source of reference, however other author’s ideas and original ideas will be used as supporting ideas.

Finally, this Chapter and research paper as a whole will conclude by presenting a structural reform plan. The structural reform plan’s main goal is to create a balanced and self-sustaining system that can deliver awards of the highest quality, consistently. The struc-

tural reform will aim to integrate the ideas mentioned throughout Chapter III to therefore solve all the problems discussed in Chapter II.

I. Working Group III

Throughout this research paper, the vast criticism of ISDS as a whole has been presented. There is no denying that there is a tension between many sides of international law practitioners. Some do not agree with the nature of the system and some others believe it just needs a few modifications to work, but the common thread is clear: ISDS must be reformed.

Working group III is a specialized UNCITRAL work group that is dedicated solely to Investor-State dispute settlement. In 2017, the United Nations Commission on International Trade Law entrusted Working Group III with a “*broad mandate to work on the possible reform of Investor-State dispute settlement.*”¹⁰⁰ This working group was entrusted the keys of change in the ISDS landscape. Since 2017, the group has been working by proposing possible reforms and adjusting these reforms to the feedback given by countries.

Working group III is “*government-led with high-level input from all governments.*”¹⁰¹ It is also established that stakeholders can contribute to the deliberations of the working group, but the group nonetheless is “government-led.”

Working group III’s commission is exactly the following:

“First, identify and consider concerns regarding ISDS; second, consider whether reform is desirable in light of any identified concerns; and third, if the

¹⁰⁰ Working group III, Annotated provisional Agenda, (Nov. 9, 2020) Can be found online at: <http://undocs.org/en/A/CN.9/WG.III/WP.200>)

¹⁰¹ Loc. cit

Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.”¹⁰²

Working Group III had a very important meeting in the coming month.¹⁰³ The 40th session of Working Group III took place in Vienna on the 8th of February, 2021. Here, Working Group III is expected to continue its consideration of the following reform options: (1) Selection and appointment of ISDS tribunal members¹⁰⁴; (2) Appellate mechanism and enforcement issues¹⁰⁵; and (3) The draft code of conduct.¹⁰⁶ All points that directly tackle the problems presented in Chapter II.

1. Selection and appointment of ISDS tribunal members.

This section of the reforms that are being proposed by Working group III helps solve problem III Lack of Arbitrator Variety and also helps solve problem IV Double hatting. During this subsection only the methods and mechanisms of selection and appointment will be discussed.

In their 36th meeting, the Working Group concluded that “the development of reforms was desirable to address concerns related to the lack or apparent lack of independence, impartiality... and the lack of appropriate diversity among decision makers in ISDS.”¹⁰⁷ The working Group aims to address this concerns in its 40th meeting.

In the ISDS system in place, the disputes are resolved by a tribunal constituted *ad hoc* for that particular dispute. As we have discussed previously this allows, among other

¹⁰² (A/CN.9/WG.III/WP.198), Paragraphs to 6-10.

¹⁰³ At the moment of drafting this research paper it was: January 27th, 2021.

¹⁰⁴ (A/CN.9/WG.III/WP.203)

¹⁰⁵ (A/CN.9/WG.III/WP.202)

¹⁰⁶ (A/CN.9/WG.III/WP.201)

¹⁰⁷ (A/CN.9/964)

things, for the parties to have their dispute be settled by a panel of “experts” in the specific area of law. One of the options for Working group III is to further regulate such selection and appointment method in the context of *ad hoc* mechanism.

The proposed options to further regulate the ad hoc selection and appointment of ISDS tribunal members, among others, include:

*“(i) a selection and appointment method whereby tribunal members would be selected by a third party acting as an appointing authority, without any input or with limited input from the disputing parties; and (ii) the use of a pre-established list or roster of arbitrators”*¹⁰⁸

Another possible idea is to modify the nature of the current ad hoc method of selecting and appointing tribunals. In this scenario, one of the proposed ideas is to have a “*roster of qualified candidates and the setting up of a standing mechanism or “permanent body” composed of full-time adjudicators.*”¹⁰⁹

*“Various possibilities for composing a roster were mentioned in the Working Group and the Submissions. A suggestion was that a roster would not need to be extensive but should list names of established arbitrators specialized in ISDS while also including new candidates. Regarding this matter, a study notes that, based on current rosters established by arbitral institutions handling ISDS cases¹¹⁰, a single roster based on the retention of a party-appointment system for the selection of arbitrators would likely need between 150 and 200 individuals.”*¹¹¹

The other option given is to set up a permanent body.

¹⁰⁸ Other proposals to regulate the selection process contained in submissions from governments include: A/CN.9/WG.II-WP.162, Submission from the Government of Thailand; A/CN.9/WG.III-WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III-WP.164 and A/CN.9/WG.III-WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III-WP.174, Submission from the Government of Turkey

¹⁰⁹ (A/CN.9/1004)

¹¹⁰ Currently, these lists are indicative, and there is no obligation to select ISDS tribunal members from the list (with the exception of ICSID which is bound by its list for the appointment of chairpersons if there is no agreement of the parties.)

¹¹¹ (A/CN.9/WG.III-WP.203)

“A first question to consider in the design of the composition of a standing dispute settlement mechanism is the number of adjudicators and, in this respect, whether States would wish to establish “full representation” or “selective representation” bodies. In full representation bodies, each State has an adjudicator on a permanent basis, usually a national of that State; in selective representation courts, there are fewer seats than the number of States parties to the court’s statute.”¹¹²

The other alternative, in the scenario where the system modifies the nature of the ad hoc method of appointing tribunals, is to have a body of appointing authorities. The options for appointing authorities are that they can either partially appoint the tribunal or they can directly and fully appoint the tribunal. As to how the appointing authorities would possibly act, Working Group III explained:

“There are a variety of ways in which an appointing authority could select arbitrators. One possibility is to have a hybrid selection process whereby the parties to an ISDS dispute each select and appoint an arbitrator of their choosing (either from a roster or not) and then the relevant appointing authority selects and appoints the chairperson (either from a roster or not). Another possibility is to have all appointments (the two co-arbitrators and the chairperson) made by an appointing authority.”¹¹³

“Further options include selection and appointment of ISDS tribunal members by the appointing authority, possibly in consultation with the disputing parties¹¹⁴, it being understood that the ultimate decision would fall on the appointing authority.”¹¹⁵

The Appointing authority has been proposed in two different modalities by an individual, the secretary general for example, or by a special committee tasked with making

¹¹² Loc. Cit

¹¹³ Loc. Cit

¹¹⁴ For example, the appointing authority could circulate a list of potential co-arbitrators to each of the disputing parties and the parties could then rank their preferences off of the list.

¹¹⁵ (A/CN.9/WG.III/WP.203)

such selection and appointment.¹¹⁶ Several options for the establishment of an appellate mechanism are conceivable, as follows.

Further considerations include: *"(i) whether the appointing authority would be compelled to select from the roster or whether it would use it as guidance only; and (ii) whether different rules¹¹⁷ would be needed for the selection of the co-arbitrators and for the chairperson."*¹¹⁸

2. Appellate mechanism and enforcement issues

Several options for the establishment of an appellate mechanism have been proposed by Working Group III.

*"In a Submission, reference is made to treaty-specific appellate mechanism. The proposal for an appellate mechanism in ISDS found its way in investment treaties as programmatic language, with some investment treaties providing for the possibility of establishing an appellate mechanism in the future, either on a multilateral or bilateral. Recent treaties have included bilateral appeal mechanisms for decisions made by tribunals as part of a standing mechanism."*¹¹⁹

Another option given is the appellate mechanism to be developed on a purely ad hoc basis, with the appellate panels being constituted by the parties on a case-by-case basis. *"Following the same pattern as the constitution of first instance arbitral tribunals in the current ISDS framework based on international arbitration."*¹²⁰

¹¹⁶ Loc. Cit

¹¹⁷ For instance, there could be a rule that for the selection of the co-arbitrators, use of the roster by the appointing authority would be voluntary; but for the selection of the chairperson, use of the roster would be mandatory.

¹¹⁸ (A/CN.9/WG.III/WP.203)

¹¹⁹ (A/CN.9/WG.III/WP.185)

¹²⁰ Loc. Cit

The third option given by Working group III in regard to an appellate mechanism is an institutional appellate mechanism. A body that specializes on appeals of ISDS cases. A previous example of this proposal can be found in the 2004 ICSID Appeals Facility proposal.

*“The proposal suggested that a single appellate mechanism under the ICSID framework would be preferable over multiple mechanisms under different treaties. The new facility was suggested to be designed so as to be compatible with any type of investment arbitration.”*¹²¹

Another possible alternative offered by Working group III is the creation of a permanent multilateral appellate body *“which could either complement the existing arbitration regime, or constitute the second tier in a multilateral investment court.”*¹²² *“Most of the Submissions that suggest the establishment of an appellate mechanism refer to a permanent multilateral body.”*¹²³

The nature of the judicial body itself can be differentiated in to two different approaches, Working Group III explained. One option is for the judicial body to be a stand-alone appellate body, complementing the current arbitration regime.¹²⁴ This body could help sort between conflicting awards with similar fact patterns in order to create a more organized and effective jurisprudence.

The other alternative is for the judicial body to serve as a *“second tier in a multilateral investment court.”* For the body to be a second instance to argue the interpretation of treaties for example. *“A multilateral appellate body could also be established as a second*

¹²¹ (A/CN.9/WG.III/WP.185)

¹²² Loc. Cit.

¹²³ Loc. Cit.

¹²⁴ Loc. Cit.

*tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.”*¹²⁵

A further consideration is

*“whether it would be conceivable that a multilateral appellate body could be tasked to review first instance decisions made by arbitral tribunals, first instance decisions in a multilateral investment court, as well as decisions by regional investment courts, international commercial courts and domestic courts in case of denial of justice.”*¹²⁶

3. The draft code of conduct¹²⁷

ICSID has considered the question of a code of conduct for adjudicators in its recent proposals for reform. The development of a code of conduct was left for further discussion in the context of the joint efforts of UNCITRAL and ICSID in this area.

On May 1, 2020, the ICSID and UNCITRAL Secretariats released a draft Code of Conduct for Adjudicators.¹²⁸ The draft code is accompanied by annotations explaining the thinking behind the code’s articles.¹²⁹

The draft provides provisions on independence and impartiality, and the duty to conduct proceedings with integrity, fairness, and efficiency. The code’s Introduction cites to Indonesia’s proposals for ISDS Reforms, as well as submissions of other states. Indonesia’s submission included the suggestion that there be a code of “*conduct for arbitrators in ap-*

¹²⁵ Loc. Cit.

¹²⁶ Loc. Cit.

¹²⁷ The full draft for the Code of Conduct is located in the attachment section.

¹²⁸ *ICSID and UNCITRAL Release Draft Code of Conduct for Adjudicators*, ICSID News Release, 1 May 2020, with links to draft Code, <https://icsid.worldbank.org/en/Pages/News.aspx?CID=365>.

¹²⁹ Draft Annotated Code, https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

praising valuation of claims”, as well as Indonesia’s concerns over the independence and impartiality of arbitrators;

*“A further issue when it comes to the question of independence and impartiality of arbitrators is the switching of roles between arbitrators, counsels and experts in different cases. They sometimes also shift back and forth from their private arbitration practices into public service (double or triple hatting); several arbitrators reportedly have played official or unofficial governmental roles in the negotiation of the very types of IIAs that they adjudicate or litigate in the private sector, resulting in bias perception and lack of independence.”*¹³⁰

The draft was jointly developed by the ICSID and UNCITRAL Secretariats in the context of the work of UNCITRAL Working Group III (ISDS reform) and the ongoing process to amend ICSID’s rules. It is touched upon in the ICSID Working paper #4.¹³¹

For the time being, it is envisioned that the primary method of enforcing the code is through voluntary compliance.¹³² In ICSID Working paper #4, it is explained that once consensus on a Code of Conduct is reached, an arbitrator can incorporate the Code by reference in the arbitrator’s declaration. The ICSID Secretariat will also invite States to consider whether the Code should be formally included in the standard arbitrator declaration for all arbitrators.¹³³

The draft code contains 12 articles, each is relatively short and concise.¹³⁴

¹³⁰ A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia, ¶¶ 9, 14, *cited in* Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, p. 2 & n. 2.

¹³¹ https://icsid.worldbank.org/sites/default/files/documents/WP_4_Vol_1_En.pdf

¹³² Draft Annotated Code, Art. 12, Comment 89.

¹³³ ICSID Working Paper# 4, Comments 46-48 to AR 13, p. 294, https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf, explaining that Arbitration Rules 19(3), on acceptance of appointments, allows for incorporation by reference of a Code of Conduct in the Arbitrator Declaration. Arbitration Rules 19(3)(b) provides that “within 20 days after receipt of the request for acceptance of an appointment, an the arbitrator shall: . . . provide a signed declaration in the form published by ICSID, addressing matters including the arbitrator’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceeding.”

¹³⁴ The drafters explain that the Code is based on a comparative review of codes of conduct in investment treaties, arbitration rules on ISDS, and international courts.

The articles can be grouped in 5 main issues. Articles 1 & 2 focus on definition of terms and the application of the code. Articles 3, 4, 7, 8, & 9, focus primarily on the duties and responsibilities of the adjudicators. Article 5 addresses the obligation to disclose any conflict of interest. Article 6 discusses regulation for double/multiple hatting. Finally, Articles 10 & 11 focus on Pre appointment interview, fees and expenses and article 12 focuses on the enforcement of the code.

Articles 1¹³⁵ & 2¹³⁶ mention that: All adjudicators would have to comply with this code, adjudicators are defined as: “*arbitrators, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes.*” It’s also important to note that adjudicators have to make sure that their assistants are aware and comply to the code, assistants are defined as: “persons working under the direction and control of the adjudicators who assist them with case-specific tasks...”¹³⁷

Articles 3,¹³⁸ 4,¹³⁹ 7,¹⁴⁰ 8,¹⁴¹ & 9¹⁴² focus on the previously mentioned fact that the code recollects ideas and standards from different codes of conduct in investment treaties, arbitration rules on ISDS, and international courts. The standards of conduct that adjudicator must follow are no different, these include: integrity and fairness, confidentiality, competence, availability, diligence, civility, efficiency, independence, and impartiality.

¹³⁵ Draft Annotated Code, Art. 1

¹³⁶ Draft Annotated Code, Art. 2

¹³⁷ Draft Annotated Code, Art. 1, Comment 14.

¹³⁸ Draft Annotated Code, Art. 3

¹³⁹ Draft Annotated Code, Art. 4

¹⁴⁰ Draft Annotated Code, Art. 7

¹⁴¹ Draft Annotated Code, Art. 8

¹⁴² Draft Annotated Code, Art. 9

Article 5¹⁴³ shifts the burden of disclosing any possible conflict of interest to the adjudicators. There is an extensive requirement, the adjudicator shall make all reasonable efforts to become aware of any interests, relationships and matters that might cause possible conflict of interest and disclose all of them to the parties (favoring disclosure when in doubt). The idea is that parties would have the most amount of information possible on the adjudicators. Any of the parties could challenge an arbitrator if they consider that a conflict does exist.

This article is drafted in a flexible way, which invites discussion from policy makers on how extensive the disclosure should be. The extent of the disclosure can be capped by time, subject matter of previous events, or type of relationships. The debatable issue in the current draft is presented below, the [] mark the debatable points and what the current draft provides:

- On the time period which the disclosure should cover: *“any professional, business and other significant relationships, within the past [five] years...”*
- On the type of relationship: The adjudicators must disclose relationship with *“The parties [and any subsidiaries, parent-companies or agencies related to the parties]; [Any third party with a direct or indirect financial interest in the outcome of the proceeding]”*;
- On the subject matter of previous roles: Adjudicators must disclose *“All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator];*
- Also, adjudicators must produce *“a list of all publications by the adjudicator or candidate [and their relevant public speeches]”*.

Article 6¹⁴⁴ tries to address concerns that an adjudicator who switches roles in different proceedings might lack impartiality and independence. In the same fashion as article

¹⁴³ Draft Annotated Code, Art. 5

¹⁴⁴ Draft Annotated Code, Art. 6

5, this article invites for discussion and provides different options on how to limit multiple roles. The options provided in the article are the following:

- Outright ban, double hatting is not allowed under any circumstance.
- Time period between each case, adjudicators shall refrain from acting within X years of each case.
- Subject matter cap, adjudicators shall refrain from acting on “*matters that involve the same parties, [the same facts] [and/ or] [the same treaty]*”.
- Disclosure, disclose any situation that falls within the scope of the options above and let parties decide.

Article 10¹⁴⁵ & 11¹⁴⁶ limit the scope of the pre appointment interview to discussions concerning availability of the adjudicator, fees, expenses, and absence of conflict and not any substantial, jurisdictional, or procedural issues. The discussions shall conclude “upon constitution of the adjudicatory body,” the contents of the appointment shall be disclosed.

Article 12¹⁴⁷ provides that the enforcement of the code as of now like previously mentioned, has a voluntary compliance obligation. However, the discussion is open on how this code might be implemented moving forward, these options depend on how the ISDS landscape shapes in the immediate future. Possible options, for example, are the following:

- Incorporate the code into investment treaties and other instruments of consent
- Have disputing parties agree to its application at the inception of each case
- Append it to the disclosure declaration that adjudicators must file upon acceptance of nomination
- Be made part of a multilateral instrument on ISDS reform

¹⁴⁵ Draft Annotated Code, Art. 10

¹⁴⁶ Draft Annotated Code, Art. 11

¹⁴⁷ Draft Annotated Code, Art. 12

II. Most Likely Solutions

All of Working Group III's proposed solutions have been laid out in the previous portion of this Chapter. This section will aim to sort between all the proposed solutions and give an opinion on which are the most likely to happen and the most likely to succeed. The most effective way to carry out this is to answer each of the four problems discussed in Chapter II with the best proposed solution.

The solutions to answer each of the questions will mostly be based on the proposed solutions of Working Group III. However, some other ideas will also be used to support the ideas. The ideas will aim to work harmonically between them. All the following solutions will be tied together in the last portion of the Chapter.

1. Asymmetrical Nature

As this issue has not been fully addressed by Working group III, and only opinions would be laid out, this issue will not be fully explored in this subsection. However, a possible opinion will be offered as a matter to tie up all the sections.

The issue with the asymmetrical nature of the system is still one with discussion to be had. Working Group III, for now, has not fully addressed the issues of the asymmetrical nature as they have deemed other aspects of the process to have a higher need of being addressed.

The reason why this issue has been "kicked around" has to do more with the possible structural reform in the system. As exemplified by the code of conduct¹⁴⁸, there cannot be a precise answer or solution until the question of whether the ISDS system will be fully restructured or just modified is answered.

¹⁴⁸ The code of conduct exemplifies this by offering different alternatives depending on what happens structurally.

The best and most likely solution is to renegotiate as many investment treaties as possible, clarifying by the addition of an article. Added to this, all new investment treaties should logically also be negotiated with this same notion. Proposed Sample Article:

ARTICLE

Symmetrical Sense

The overriding interpreting factor for this treaty shall be to provide all the benefits of a balanced, and symmetrical procedure. In this sense, this treaty must be interpreted in a way that provides a balanced procedure.

This will help solve the problem because the provisions granting the right to investors for bringing claims will now also be interpreted to grant the same rights to the host states. This will also help balance out the issues laid out in Chapter II; all of the tribunals would now have a direct instruction to interpret the treaties in a way that is balanced for both sides.

2. Issues with Awards

The main issues with the awards that were discussed were the lack of publicity of decisions and the inconsistency of decisions. The lack of publicity has not been discussed much by Working Group III. However, the inconsistency of the awards has been partly addressed in detail.

The solution for this issue would come in the form of an appellate body. In the previous portion appellate bodies were discussed. The best solution for this problem now would be to create a multilateral appellate body that would help sort out between conflicting awards with similar or same fact patterns.

The best way to implement this is to have the institutions reform their law frame and add a provision that grants interested sides¹⁴⁹ the right to bring requests for deciding between awards to the appellate body.

This body, however, would only determine which reasoning should prevail and this should be instituted as jurisprudence suggesting tribunals to interpret treaties under this reasoning.

3. Lack of Arbitrator Variety

Multiple solutions that directly help address this problem were proposed by Working Group III. The solutions come from creating a roster, to an appointing authority and all the way to create a standing body.

The best solution for now would be to have appoint authorities with a non-binding aspect. This means that the appointing authorities will not impose the appointing directly however the most effective solution would be for the appointing authorities to give a possible list of arbitrators with 5 to 10 options on which the parties would have to select.

The appointing authorities would be composed of a special body or working group inside of UNCITRAL committed with constantly creating the most balanced and most diverse lists for each of the cases.

4. Double Hatting

Similar to the previous issue, Working Group III has also offered a solution for this problem. Double hatting was directly addressed by the draft code of conduct. Several options were presented depending on the structural future of the system.

¹⁴⁹ This may include practitioners and even scholars.

The best option for now would be to implement the following proposed article in the code of conduct:

Adjudicators shall refrain from acting on *matters that involve the same parties, and the same treaty*".

This would be the best option because it would restrict double hatting in the cases that would tend to be the most dangerous, yet it would not be over restrictive to a point where it would not allow a fluent system to exist.

III. Structural Reform Plan

The future landscape of international investment arbitration is in question now more than ever. As presented throughout this research paper, there are issues that are alarming, but there are also answers for those problems. The question now would be how to best address these changes going forward.

In the coming months ISDS will no doubt change in a big way. The solutions to be undertaken are yet to be known. However, the best possible solution that is proposed by this research paper is to: Completely reform the international investment settlement system and create a standing, permanent International Investment Tribunal.

The first step would be to have as many states as possible sign a multilateral convention that gives birth to the International Investment Tribunal. By signing this convention, states would give jurisdiction to the tribunal for it to judge on cases that fall within the scope of investment. The scope of international investment would be defined in the convention with the multiple aspects that arbitral institutions use today to determine what is and what is not an international investment.¹⁵⁰

¹⁵⁰ This for example can be the requirement for the investor to be a national of another country rather than the host state.

The tribunal will be composed of many different individuals tasked to judge and oversee international investment specifically. The notion of arbitration would disappear in a way as the judges will not be private parties they will work solely for the tribunal. The host states would nominate and select individuals like they do for any other international tribunal.

For each case a tribunal of 5 judges would be assigned and with a new investment law body work, they would settle the cases. Enforcement would be possible because of the convention, the convention creates the tribunal and gives it the power to enforce the decisions they render.

In general, the tribunal would act like any other international systemized tribunal, tasked with settling new cases and revising and enforcing old awards rendered by the past system.

This way all the issues expressed in Chapter II would be solved. The solutions in the previous portion of the Chapter can perfectly fall into place with the new system. This would finally allow to bring balance in a system that has lacked it for some time.

CONCLUSIONS

Throughout this research paper, International Investment-State dispute settlement as a whole was analyzed. In order to meet the objectives, we set out we first addressed the outstanding problems that arise out of the system. Followed by the solutions that have been thrown around for said problems. As stated in the last Chapter of this research, a structural reform might be the best option to solve these alarming problems.

Systems are set in place to preserve an order. Systems are necessary in order to have “all players on the same table”. However, when systems have unsolved problems, they turn out to be incredibly dangerous against justice. ISDS as talked all through this paper, has apparent problems, fortunately as also discussed, these problems have very tangible and feasible solutions.

The idea of a structural reform plan is encouraged as result of this research paper, this might serve solve as a “solve all” solution. In other words, re-structuring the entirety of the system presents a rare opportunity to “start from scratch” and in turn the ability to get every aspect of the system right.

The solutions in a structural reform plan can be contributed-to by all the members bound by it, therefore all the concerns that the members might have can be addressed in the genesis of a new system. The problems discussed throughout the paper would certainly be addressed by the creation of a new investor-state dispute settlement system.

This paper outlines possible fragments of the new system in the form of the solutions discussed through Chapter III. The solutions that are being offered would most likely be the foundational pieces which the re-structure would build from.

In a more positive light, most of the problems, as briefly mentioned, are scheduled to be debated by Working Group III in the upcoming months. New propositions and even

agreements can be expected to address the issues conveyed in this research paper. It will most definitely be interesting how things the system will shape out in the upcoming years.

As the world evolves so should the legal landscape. The world we live in is highly dynamic and investment as we know it changes by the day. Therefore, an update on the system, is needed. A rare opportunity lies ahead, an opportunity to start over and get things right. An opportunity that cannot be passed up.

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