FROM DIVERGENT PATHS TO THE SAME TRAP: THE LEGITIMACY CRISIS OF THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM

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ABSTRACT

FROM DIVERGENT PATHS TO THE SAME TRAP:
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This thesis critically examines a much-debated issue in international law: the legitimacy of the Investor-State Dispute Settlement system (ISDS). The system was initially conceived to provide an alternate dispute resolution mechanism for the protection and promotion of foreign investment. In time, this objective has incited a discussion on the legitimacy of the system as the developed world has started to experience the role of host states. Since then, they have taken the lead in the reform process to achieve a balance between host state's and foreign investors' rights. To this effect, both the European Union (EU) and the Third Way Approaches to International Law (TWAIL) are for centralization of the system arguing its current problems emanate from its ad hoc and decentralized nature. Although both are aimed at system centralization, the paths they take to achieve it clearly differ. The EU seeks a permanent investment court by which ad hoc arbitration would give way to a more centralized framework. However, TWAIL advocates for a return to the pre-ISDS era,

where national courts resolve investment disputes between foreign investors and states. The effectiveness of these two reform ideas in addressing the purported legitimacy concerns of the ISDS is critically examined in this thesis using Martti Koskenniemi's legal approach. Ultimately, it asserts that neither proposal is adequate to resolve the legitimacy issue of the system, as legitimacy can only be achieved by strengthening the principle of justice, which is feasible alone through a more decentralized structure.

Keywords: International Investment Law, The Investor-State Dispute Settlement System, Critical Legal Approaches, The European Union, Third Way Approaches to International Law

ÖZ

FARKLI YOLLARDAN AYNI TUZAĞA:
YATIRIMCI-DEVLET UYUŞMAZLIKLARI ÇÖZÜM SİSTEMİNİN
MEŞRUİYET KRİZİ

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Bu tez, uluslararası hukukta çok tartışılan bir konuyu eleştirel bir bakış açısıyla incelemektedir: Yatırımcı-Devlet Uyuşmazlıkları Çözüm Sisteminin (ISDS) meşruiyeti. Sistem başlangıçta yabancı yatırımların korunması ve teşvik edilmesi için alternatif bir uyuşmazlık çözüm mekanizması sağlamak üzere tasarlanmıştır. Zamanla bu amaç, gelişmiş dünyanın ev sahibi devletlerin rolünü deneyimlemeye başlamasıyla sistemin meşruiyetine ilişkin bir tartışma başlatmıştır. O zamandan bu yana, bu devletler ev sahibi devletin ve yabancı yatırımcıların hakları arasında bir denge sağlamak için reform sürecinde liderliği üstlenmişlerdir. Bu doğrultuda, hem Avrupa Birliği (AB) hem de Uluslararası Hukukta Üçüncü Dünya Yaklaşımları (TWAIL), sistemin mevcut sorunlarının *ad-hoc* ve âdem-i merkeziyetçi yapısından kaynaklandığını savunarak sistemin merkezileştirilmesinden yanadır. Her ne kadar iki yaklaşım da sistemin mevcut sorunlarına çözüm olarak merkezileştirmeyi önerseler de, bunun nasıl gerçekleştirileceği konusundaki yaklaşımları farklılık göstermektedir.

AB, *ad-hoc* tahkimin yerini daha merkezi bir çerçeveye bırakacağı daimi bir yatırım mahkemesi kurulmasından yanayken; TWAIL, yabancı yatırımcılar ile devletler arasındaki yatırım anlaşmazlıklarının ulusal mahkemeler tarafından çözüldüğü ISDS öncesi döneme geri dönülmesini savunmaktadır. Bu iki reform fikrinin ISDS'nin iddia edilen meşruiyet kaygılarını gidermedeki etkinliği bu tezde Martti Koskenniemi'nin hukuki yaklaşımı kullanılarak eleştirel bir şekilde incelenmektedir. Sonuç olarak, her iki önerinin de sistemin meşruiyet sorununu çözmek için yeterli olmadığı, meşruiyetin ancak adalet ilkesinin güçlendirilmesiyle sağlanabileceği, bunun da ancak daha âdemi merkeziyetçi bir yapı ile mümkün olabileceği ileri sürülmektedir.

Anahtar Kelimeler: Uluslararası Yatırım Hukuku, Yatırımcı-Devlet Uyuşmazlıkları Çözüm Sistemi, Eleştirel Hukuki Yaklaşımlar, Avrupa Birliği, Uluslararası Hukukta Üçüncü Dünya Yaklaşımları

To my lovely daughter Alisa

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marked the discovery of my pregnancy. Since that day, my little daughter has experienced all the difficulties of the academic process, hand in hand with me. This thesis has been completed by the time I created it, having stolen it from her all this time. I owe her the absence of a mother during her infancy. My loving husband Cem has always been my strongest supporter as I tried to be a mother to a tiny baby, adapt to the conditions of the pandemic, prepare for the PhD qualification exam, and complete the PhD thesis. I am deeply grateful for his unwavering support, love, and care in making all of my aspirations come true since the minute he entered my life. I would not be the woman I am now if you had not taken my hand, picked me up whenever I fell, and encouraged me whenever I faltered. For having you two in my life, I am eternally thankful and blessed.

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CETA	The Canada-European Union Comprehensive Economic and Trade Agreement
ECB	The European Central Bank
ECSC	The European Coal and Steel Community
EDC	The European Defence Community
EEC	The European Economic Community
EMS	The European Monetary System
EU	The European Union
FDI	Foreign Direct Investment
FTA	Foreign Trade Agreement
GATT	The General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement Mechanism
IIA	International Investment Agreement
IIC	International Investment Court
IMF	International Monetary Fund
MAI	Multilaretal Agreement on Investment
MFN	Most Favored Nartion
MIC	Multilateral Investment Court
NAFTA	The North American Free Trade Agreement
NPM	The Non-Prevention Measures
NIEO	The New International Economic Order
SEA	The Single European Act
TTIP	The Transatlantic Trade and Investment Partnership
TPP	The Trans-Pacific Partnership

TWAIL	Third World Approaches to International Law
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	The United Nations Conference on Trade and Development
WGIII	Working Group III
WTO	The World Trade Organization

CHAPTER 1

INTRODUCTION

> "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as *Investor-State Dispute Settlement,* or *ISDS*" (The Economist, 2014).

Probably would have laughed if someone had told Aron Broches—the "principal architect" (Schreuer, 2001, p. 2) of the Investor-State Dispute Settlement mechanism (ISDS)—in the 1960s that nearly half a century later, one of the most influential Western media organs, the Economist, would publish such an article criticizing the system he had laboriously established with such harsh arguments. Since its inception, the ISDS has been a fundamental feature of international investment law. It has provided a unique legal mechanism for the settlement of disputes between foreign investors and the host states. Its prevalent existence in the international legal system has gone hand in hand with a continuous controversy for over 20 years that has centered around questions such as the impartiality, consistency, and transparency of the ISDS.

Opponents of the system argue that it creates a worldwide imbalance in favor of foreign investors by weakening national control and regulatory authority. On the other

hand, proponents argue that the ISDS promotes global economic development and foreign investment by providing a reliable and impartial legal framework for dispute settlement. Therefore, the crux of the debate is whether the system should prioritize the rights of the host country or the foreign investor. This ongoing debate has led to strong calls for the ISDS reform. While initially unilateral and bilateral, since 2017 these refom efforts have taken on an institutional and multilateral identity under the United Nations Commission on International Trade Law (UNCITRAL).

1.1. Motivation and Research Inspiration

This study is motivated by the ongoing debates about the legitimacy of the ISDS and the subsequent efforts to reform it. Being a lawyer and former assistant foreign trade specialist, I have a deep and enduring interest in ISDS, as I have represented Türkiye in multiple talks concerning Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). I have been particularly intrigued by the process by which governments have come to acknowledge and embrace such an exception to the principle of state sovereignty. Armed with a critical legal perspective from readings by Martti Koskenniemi, I started my research on the system's reform process and was surprised by the numerous reform options that were proposed and the expected results from these suggestions.

I found it extremely interesting to see how similar the goals of Third Way Approaches to International Law (TWAIL) and the European Union (EU) are when it comes to the ISDS reform. Despite TWAIL's direct opposition to European ideals and values, they both argue that centralizing the system, albeit at different centers, is the only way to resolve the crisis of legitimacy facing the ISDS. This is the exact moment at which I decided to examine the arguments that the ISDS is experiencing a crisis of legitimacy and that, if such a crisis is there, it may be resolved by centralizing the ISDS under the control of either national governments or a permanent international court. The research topic of this thesis is to examine how these proposals aim to improve the system and

assess the probable effectiveness of these recommended methods in addressing the stated legitimacy problem.

1.2. Research Focus

This research aims to look at how the ISDS has developed over time, weigh its pros and cons, and discuss the current reform efforts aimed at addressing its criticisms. By using the core principles of critical international law, the study will thoroughly evaluate the reform proposals from the EU and TWAIL. The primary goal of the research is to determine whether these approaches are effective in resolving the presumed issues in the system. If the research finds that existing reform proposals do not adequately address ISDS's alleged problems, it will propose a new reform proposal based on the basic principles of a critical legal perspective. Thus, the main question this thesis seeks to answer is: "How effectively do the EU and TWAIL reform proposals address the legitimacy crisis of the ISDS when examined through the framework of critical international law?"

1.3. Theoretical Framework

The principles of critical international law, particularly Martti Koskenniemi's deconstruction of international law, have consistently served as my reference point for analyzing what I have read in my preliminary readings on the ISDS and its reform process, as well as for conducting my primary research for this thesis. As a result, I built the theoretical background for the thesis on Koskenniemi's critical perspective. Several important factors have contributed to this choice. First of all, Koskenniemi's work constitutes one of the foundations of critical international law. His approach offers a robust and recognized methodology for critical analysis. Moreover, his central argument that no legal decision is devoid of political elements helps uncover the power dynamics that actually govern the practice of international law. In this way, his work provides a great opportunity to critically examine structural biases in the ISDS and to uncover stakeholders' political agendas in ISDS reform proposals. Using

Koskenniemi's critical international law as a prism, the paper analyzes the current system and two proposed reforms and finds that centralization cannot address the system's problems. The primary contention of this study is that increasing the level of decentralization enhances the efficacy of the concept of justice in the system's operation, thereby bolstering its legitimacy.

1.4. Research Methodology

This thesis adopts a qualitative research approach in which legal texts, case studies, and academic literature will be analyzed in depth. Given the complex legal and technical aspects of international law and the ISDS framework, a qualitative method that is conducive to uncovering the underlying meanings of apparent phenomena is considered more appropriate than a method based solely on quantitative data. Qualitative research methods, which are suitable for comprehensive contextual analysis, will make it possible to capture all the fine details of the concepts and developments discussed. This method is also helpful for analyzing all the legal, political, and social contexts affecting the ISDS and the reform process. Moreover, it enables us to see the motivations and political objectives underlying the EU and TWAIL reform proposals, as it reveals underlying themes, patterns, and meanings.

1.5. Structure of the Thesis

The thesis has seven chapters, which include sections for an introduction and conclusions, besides five main chapters. Chapter 2 details the origins, historical development, and current criticisms of the ISDS. It begins with a concise overview of the key historical developments and demonstrates how international arbitration, initially used solely for state disputes, has progressively expanded to include the resolution of commercial and investment conflicts. Next, the chapter covers the origins and development of the ISDS. The discussion describes how this *sui generis* manifestation of legal decision-making arose and moves on to detail the evolution of

the system over time. The final two sections in the chapter address the functioning of ISDS and its current challenges.

Chapter 3 examines the beginnings of the ISDS reform and the factors that led to its evolution over time. Indeed, the ISDS has allegedly suffered a crisis of legitimacy for over two decades, leading to the development of uncoordinated unilateral, bilateral, and multilateral reform initiatives as an initial response. From an institutional perspective, while the International Centre for Settlement of Investment Disputes (ICSID) and other arbitration centers have revised their formal procedures to tackle this alleged crisis, states have developed very different responses. Some have ranged from denouncing the ICSID Convention and opting to terminate investment treaties to developing new model treaties, replacing arbitration with a court system, and substantially revising existing treaties and agreements. These independent reform efforts have been coordinated since late 2017, when states have tasked UNCITRAL Working Group III (WGIII) with reforming the ISDS. This chapter aims to provide the context for the ISDS reform process and an update on its present status.

The goal of Chapter 4 is to examine the ISDS reform from an EU perspective. It is indeed a dramatic shift that European governments, historically the leading suppliers of foreign investment, are now also the largest recipients of it. Despite being the principal consolidators of the system, their experience as host states has led to criticism that the ISDS does not provide sufficient assurance of impartiality and predictability. Citing the ad hoc nature of the system as the source of the problem, the EU proposes centralizing the ISDS through the establishment of a permanent Multilateral Investment Court (MIC). The chapter illustrates the specifics of the EU reform proposal within the larger framework of the EU politics. The primary objective of the chapter is to demonstrate how the European perspective on the settlement of investor-state disputes is contextually entrenched in the development of the European politics.

Chapter 5 focuses on the TWAIL perspective on the ISDS reform. TWAIL is a critical approach to the imperialism-international law relationship, and questions simplistic

visions of a Third World. Consistent with its criticism that international investment law is a continuation of Western colonialism, TWAIL argues that the ISDS reform proposals are more concerned with sustaining legalized colonialism than addressing the issues with the ISDS that stem from its colonial origins. It thus proposes abandoning the ISDS altogether and constructing a new centralized investor-state dispute settlement mechanism under the control of the nation-states. The chapter describes what TWAIL is and how it reflects on the existing system and on the continuing the ISDS reform efforts, and the type of investor-state dispute resolution mechanism that they seem to suggest.

In the last chapter, a happily ever after ISDS is envisioned and the necessary features are outlined. This chapter aims to tell a different story than the ongoing reform efforts led by the EU and the reform proposals of TWAIL. It examines, using Koskenniemi's critical legal approach, whether centralization can resolve the so-called legitimacy crisis of the ISDS. The first step in so doing is to debunk the notion that international law is objective, seeking to demonstrate that nothing in law is independent of politics. In turn, the chapter argues that the implementation of technical or legal reforms cannot possibly overcome the overall legitimacy crisis in law. The chapter then explores the political context in which the ISDS was established in order to shed light on the critical role that the alignment of sovereignty and possession had in the formation of the ISDS. It concludes by imagining a more decentralized structure for the ISDS embedded in social life, governed by the principle of justice and centered on constant reimagining, deconstruction, and transformation.

1.6. Literature Review

The literature review is the heart of this research, offering an in-depth look at our current understanding of the ISDS. It aims to fully explore the ISDS, from its origins and advantages to the critiques it encounters and the various reform efforts underway. In this regard, many sources have been analyzed to get a comprehensive view of the ISDS. Several books, legal commentaries, journal articles, reports from international

organizations such as United Nation Trade and Development (UNCTAD) and the ICSID, and policy papers have been examined to identify major themes, trends, and gaps in the current literature.

A substantial amount of literature examines the historical evolution of the ISDS, tracing its beginnings to the early BITs and the establishment of pivotal institutions like the ICSID (Tiryakioğlu, 2022). This body of work offers a detailed account of how the ISDS has grown and evolved, highlighting key developments and milestones that have influenced its current structure and function (Muchlinski, Ortino, & Schreuer, 2008) (Newcombe & Paradell, 2009). While Vandevelde (2010) examines this development through the historical process of BITs, Schill (2011) examines how this development process evolved from bilateral initiatives of states to multilateral institutionalization. The core ideas that led to the foundation of international investment law have been analyzed by Dolzer and Schreuer (2012), while Sornarajah (2010) critically tracks the development of a legal structure that he argues will protect foreign investments and investors. Likewise, through a historical analysis of the ICSID, Parra (2012) highlights how the advancements in the institutionalization of investment arbitration contribute to the peaceful settlement of investment disputes.

Proponents of the ISDS argue that it has a big impact on attracting foreign investment and economic development. Research by Büthe and Milner (2008) and another by Neumayer and Spess (2005) found that developing countries often see a substantial increase in Foreign Direct Investment (FDI) when their BITs include the ISDS clauses. In a related manner, UNCTAD (2015) draw attention to how the ISDS contributes to economic growth and sustainable development. According to Salacuse (2010), bilateral investment treaties that include the ISDS clauses create a regulatory environment that enhances investment flows and builds investor trust, which is the primary reason for increased foreign investment and economic growth. Moreover, in their detailed analysis of ISDS, Gaukrodger and Gordon (2012) draw attention to the positive effects it has had on economic growth and stability. Bonnitcha et al. (2017) take a closer look at the political side of investment treaties and find that the ISDS

arbitration helps build trust in the judicial system, which in turn attracts more foreign investment. Similarly, Paulsson (2005) and Yackee (2008) stress how crucial BITs are for bringing in foreign investors, focusing on the importance of rule-of-law and legitimacy.

Especially after the 1990s, there has been a remarkable increase in the number of international investment treaties and foreign investors' resort to arbitration based on the ISDS provisions in these treaties. This has brought the system to the attention of both governments and the public (Yannaca-Small, 2010) (Bishop, Crawford, & Reisman, 2005). This rise has also sparked concerns about whether the system is truly fair and transparent, whether it delivers consistent rulings, and, most importantly, whether it might limit the regulatory powers of states (Franck, 2014) .

Its potential to undermine state sovereignty and negatively impact public policy constitutes some major points of criticism (Çal, 2008). In this manner, by arguing that the ISDS has a considerable detrimental impact on state sovereignty, Van Harten (2007) calls for a more balanced approach to international investment law that will protect the regulatory rights of the host state in addition to the interests of foreign investors. Given that foreign investors can challenge the host state's domestic regulatory decisions before an international legal mechanism, Sornarajah (2010) discusses how the expansive rights granted to foreign investors under the ISDS are detrimental to state sovereignty. Tienhaara (2011) and Johnson and Volkov (2014) develop similar arguments under the concept of regulatory chill. They argue that the threat of lengthy and expensive litigation under ISDS tribunals prevents states from enacting the necessary regulations.

From a different perspective, Eberhardt and Olivet (2012) take a critical perspective on the role of law firms, arbitrators, and financiers that get financial benefits from the ISDS cases in promoting the initiation of cases that undermine state sovereignty. Similarly, Eberhardt (2016) argues that the ISDS favors corporate rights over public interests. Mann (2008) and Cotula (2012) look at how this imbalance can harm public

policy and international agreements that protect human rights. Tienhaara (2006) points out the negative impact of the ISDS on environmental conservation, especially in developing countries. Other studies also highlight these harmful effects on sustainable development (Bernasconi-Osterwalder & Johnson, 2011) (VanDuzer, Simons, & Mayeda, 2012).

Another criticism of the ISDS is its lack of transparency, which UNCTAD's (2012) research points to as the main reason for legitimacy issues and public skepticism (See also (Karacan, 2017)). Van Harten (2008) and Schill (2010) emphasize the close connection between international investment arbitration and public law, arguing that secretive arbitration procedures undermine the system's public accountability. Public Citizen's (2012) case studies further support this assertion. Based on this study, arbitration systems that lack transparency have substantial adverse effects on policies that serve the public interest. Tienhaara (2009) arrived at a comparable finding through an analysis of the nationalization of environmental governance. Critics point to the exorbitant expenses and inefficiencies associated with the ISDS, in addition to its lack of transparency (Puig, 2014). Gaukrodger and Gordon's (2012) study and UNCTAD's (2014) report both address the issue, emphasizing the need for ISDS reform to address cost and efficiency issues.

Some other criticisms directed at the ISDS are its alleged bias in favor of foreign investors, and inconsistent arbitral awards. Brower and Schill (2009) raise concerns about bias, examining whether ISDS arbitration enhances or diminishes the validity of international investment law. Van Harten (2005), echoing his criticisms in other domains, contends that the system's bias stems primarily from the exclusive right provided to foreign investors to initiate arbitration proceedings and the parties appointing arbitrators, who have the authority to make decisions that directly impact state sovereignty. From another perspective, Franck (2005) argues that the underlying reason for the ISDS's legitimacy crisis is inconsistent arbitral awards due to their detrimental impact on the rule of law. Taşdelen (2016) also asserts that the inconsistency of the rulings of the arbitration tribunals not only erodes the notion of

legal certainty but also frequently results in infringements of the right to a fair trial. Schneiderman (2008) highlights the negative impact of the alleged bias of the system on democratic governance, and Langford (2011) underlines the negative impact of inconsistent arbitral awards on human rights.

Research has been ongoing to determine how to best shield international investors from unjust government policies while yet empowering host nations to enact regulations to safeguard vital public health, environmental, and security concerns (Pohl, Mashigo, & Nohen, 2012) (Choy, 2018). The discussion around the ISDS reform has explored various solutions, ranging from minor changes to the current system to major proposals like setting up a permanent MIC (Baltag & Dautaj, 2020). Researchers have looked into adding obligations for investors, giving host states more opportunities to counterclaim, and making the arbitration process more transparent and consistent (Muchlinski, 2008) (Pohl, Mashigo, & Nohen, 2012).

Various reform proposals have evolved over the years in response to increasing concerns about ISDS. Several avenues for reform, from small adjustments to the system to more extensive overhauls and even alternatives like state-to-state conflict settlement systems, were proposed in some of the early reports of UNCTAD (2014). Since the Transatlantic Trade and Investment Partnership (TTIP) was the primary subject of discussions on the ISDS reform throughout the initial stages of reform endeavors, multiple studies in the existing body of literature examine the reform of the ISDS through the lens of the TTIP. In its 2015 proposal, the European Commission put forward a substantial change: replacing the ISDS with a MIC for the TTIP (European Commission, 2015). This court would consist of permanent judges and include an appeals process. Simultaneously, Poulsen et al. (2015) assessed the potential impact of the TTIP on the ISDS reform, highlighting the need for greater transparency and public involvement.

Since 2019, scholarly studies have increasingly advocated for the implementation of systemic reforms rather than merely focusing on modest improvements to the system.

UNCTAD's (2019) report takes a deeper dive into these reform efforts, highlighting the critical need for more transparency, accountability, and fairness in the ISDS proceedings. The UNCITRAL Rules on Transparency (2014), along with the endeavors of the UNCITRAL WGIII (2020), signify a consistent drive to enhance the legitimacy and credibility of the ISDS. By 2019, the European Commission had begun to actively promote the idea of a MIC to overcome the persistent problems of impartiality and consistency in dispute settlement that it had raised in 2015 (European Commission, 2019). Similarly, the ICSID (2021) report proposed a number of changes to its rules aimed at making the process more efficient, reducing costs, and increasing transparency.

The latest report from UNCITRAL WGIII, following their April 2024 meeting, indicates that discussions about the EU's proposal for a permanent MIC are still ongoing. The meeting also highlighted several contentious issues, such as the establishment of an Advisory Center, the creation of a Code of Conduct, and the implementation of dispute prevention mechanisms. Moreover, there's a noticeable lack of concrete proposals that address the primary criticisms of the ISDS, such as issues of transparency, the balance of rights, and the establishment of clear rules (UNCITRAL, 2024). This highlights an urgent need for scholars and policymakers to develop fresh and innovative reform ideas. Only by doing so, they can make the ISDS more responsive, inclusive, and fair.

A review of the literature reviewed above reveals that the existing research on the ISDS reform process has been conducted mainly from a mainstream legal perspective and that there is a significant lack of critical legal assessments of the issue. To gain a deeper understanding of the ideological biases, power dynamics, and socio-political factors that affect both the existing system and proposed reforms, it is crucial to integrate these critical perspectives into the debate. Without these insights, academic discussions may not fully address the complexities involved, potentially limiting the effectiveness and relevance of the proposed solutions. As a result, there is an urgent need in the literature for research that analyzes the ISDS and the reform process from

a broader and more critical legal perspective. Incorporating these different perspectives into the current debate may help to shape more just and inclusive reform solutions. This thesis aims to fulfill this need by providing a new and critical perspective on how to improve the investor-state dispute settlement mechanism.

In more precise terms, applying Koskenniemi's critical legal perspective to the ISDS reform process can significantly advance existing literature in various ways. Koskenniemi's critique of legal formalism, power dynamics, and ideological bias provides a unique framework for examining the ISDS reform proposals. His perspective holds the potential to enhance our understanding of the effectiveness of these reforms by uncovering the fundamental drivers behind them and fostering critical inquiry. Specifically, this critical approach can help determine whether the current reform proposals are truly based on principles of justice or if they are shaped by neoliberal ideologies that favor investor rights or by existing state-centered power dynamics. It also prompts us to consider how changes to the ISDS might impact broader issues like national sovereignty, economic development, and social equity, as well as their overall effect on society.

CHAPTER 2

THE TORTUOUS PATH OF THE ISDS

The global investor-state arbitration regime aims to promote and protect foreign investment in individual states via the ISDS. The arrangement is a unique framework of presently over three thousand International Investment Agreements (IIAs). Decentralization is one of the defining features of the regime. Despite significant variations in the texts of IIAs, the decentralized nature of the endeavor, along with other significant features, ensures its flexibility for application across a wide network. Foreign investors are enabled to seek compensation against possible wrongful actions of the host state before a tribunal set up for the purpose. Although the whole process is international, foreign investors do not need either the diplomatic cloak of their respective states of nationality or the exhaustion of domestic remedies in any form before national authorities. The enforcement of the ISDS clauses of IIAs is direct, without being vetted by external devices and motions. As a result, the regime provides a robust rights enforcement procedure for foreign investors.

As such, the ISDS forms an exception to the settled notion of state sovereignty. While sovereignty, as a principle, refers to international independence and uncontested authority of the state to act within its territories, the rights granted to foreign investors under the ISDS constitute a formidable compromise. Conventionally, diplomatic protection of nationals and overall state responsibility have been the basis of dispute settlement between the host state and the injured foreign investors (Yen, 2014, p. 156). Possible disputes fall into the realm of domestic law, and the only place to settle disputes is the domestic courts of the host state (Yen, 2014, p. 168). If foreign investors exhaust local remedies and still feel wronged, their state of nationality may develop

and extend a diplomatic gesture of protection under international law (Yen, 2014, p. 168).

In their detailed analysis of the historical origins of international investment law, Newcombe and Paradel indicate that the state of nationality of the investor is the only authority to decide whether or not to act diplomatically, offering protection. In so doing, the state of nationality naturally takes into account a myriad of interests. More, for international adjudication via the diplomatic intervention of the state of nationality, the consent of the host state is required. Such settlements are possible often via reciprocity among the state parties. The upshot of all of this is that conventionally investors are no genuine actors in the event of a dispute with the host state. The capacity to act is reserved for the states involved (Newcombe & Paradell, 2009, pp. 3-7).

The investor-state arbitral tribunals, which look into governmental practices with extensive powers of interpretation, appear to revolutionize the system. Under the ISDS, foreign investors are empowered to claim compensation for a wrongful act of the host state directly before an international arbitration tribunal. Based on the state's general consent extended in IIAs, foreign investors can raise their claims directly before an arbitral tribunal. Van Harten uses the metaphor of "a blank cheque" to define this power in the hands of foreign investors that "may be cashed for an unknown amount at a future, and as yet unknown, date" (2007, p. 100).

This chapter opens with a brief outline of international arbitration's historical development. It illustrates how international arbitration, which was originally reserved for states, has gradually evolved to cover the settlement of commercial and then investment conflicts. The chapter next covers the origins and development of the ISDS. First, it describes how this "uniquely international and privately modelled system of public law adjudication" (Van Harten, 2007, p. 6) arose. It then details the evolution of the system over time. The final two sections discuss the operation of the ISDS and its current challenges.

2.1. Historical Development of International Arbitration

As St. John argues, at the heart of the colonial era was the use of force as the principal means of resolving interstate problems and the extraterritorial application of colonial law. As an alternative to the domination of these methods, states also developed international arbitration system to settle their conflicts without the use of force. It was The system was exclusive to states because it was founded on an agreement between states to resolve interstate conflicts. Individuals who lacked external autonomy were not entitled to file claims in the arbitration system (St John, 2018, pp. 55-57). This exclusivity of states, however, would not last forever.

The twentieth century brought with it significant developments in international arbitration system. It was no longer exclusively reserved for resolving interstate disputes. In conjunction with the rise of liberal policies and international trade worldwide, the scope of international arbitration has broadened to encompass the resolution of international commercial disputes. Through this expansion of coverage, individuals acquired the authority to act in the international arbitration system (Van Harten, 2007, p. 9). Persons, both natural and legal, can now seek international arbitration in commercial disputes.

Providing individuals with acting capacity was a watershed moment in the history of international arbitration. Since then, it has developed into a formidable alternative to domestic courts in the resolution of commercial disputes (Kaufmann-Kohler & Potestà, 2020, p. 32). The rulings of arbitration tribunals have increasingly viewed as comparable to those of domestic courts. Adopted in 1958, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) was the most significant step taken to make international arbitration awards as enforceable as domestic court judgements (Born, 2018, p. 115). The primary objective of the New York Convention was to broaden the scope of the enforcement of commercial arbitration judgements, so changing them into judgments enforceable by national courts. Additionally, it eliminated the requirement that a

commercial arbitration award conform to the laws of the state where enforcement is sought. All of these developments in international arbitration mark the beginning of a transformation in international law in which states have surrendered major judicial control over international arbitration tribunal decisions.

The establishment of the ICSID in 1965 was a further milestone in this transformation. This establishment might be viewed as the final step in the transition initiated by the New York Convention (Kaufmann-Kohler & Potestà, 2020, p. 12). It is essential to remember that the New York Convention designated international arbitration as an alternative to domestic courts exclusively in disputes between private parties. Domestic courts continued to have exclusive authority over public law disputes involving a state as a party. The use of public authority by a state over private parties was formerly off-limits to arbitration tribunals under the pretext of state sovereignty, but the establishment of the ICSID changed all that.

Since then, international arbitration has extended to encompass "regulatory" disputes between a state and a private party, in addition to "public" disputes between legal equals (Van Harten, 2007, p. 48). Under the legal framework of the 1965 Convention on the Settlement of Investment Disputes (The ICSID Convention), investors were granted access to international arbitration for the resolution of investment disputes with states. Therefore, in 1965, the private arbitration model established by the New York Convention was extended to the regulatory domain, with the participation of states in the arbitration processes.

The evolution of international arbitration throughout the years demonstrates how the ISDS draws substantially from the commercial dispute settlement model. It is predominantly a public appropriation of arbitral norms that were hitherto restricted to private arbitration. Thus, international arbitrators have significant latitude in regulatory conflicts, as they do in commercial disputes. Moreover, investment arbitration parties have the same legal standing as commercial arbitration parties.

Arbitrators do not grant states exclusivity against foreign investors on the basis of public interest or any other sensitive feature of public law.

In fact, this radical application of the private arbitration model to the public domain is the underlying source of the most pressing issues of the ISDS today. Since then, "the cyclical nature of the controversy's ebb and flow" has persisted (Sornarajah. , 2021, p. 74). Before examining the current problems of the system, it is essential to understand why states initially consented to it. States must have compelling grounds to allow an international arbitrator to rule on the legality of their sovereign acts. In the origins and historical development of the ISDS, a number of essential elements may be identified.

2.2. The Origins of the ISDS

Western colonial states dominated international politics throughout the late 19th and early 20th centuries. As a result of their colonial policies, they accumulated tremendous sums of power and wealth. With these vast resources at their disposal, they became the world's leading investors. Van Harten explains in detail how this necessitated colonial powers to safeguard their foreign investments and investors. In their colonies, the resolution of investor-state disputes was governed by imperial law. Due to the extraterritorial applicability of imperial law, international investors had the same level of legal protection in these regions as they would in their home country. On the other hand, foreign investors in non-colonial regions needed diplomatic protection from their home countries and, if necessary, the use of force to settle disputes with the host states. For instance, European powers put pressure on the Ottoman Empire to sign capitulation treaties and threatened to use force against Japan to protect the interests of their foreign investors (Van Harten, 2007, pp. 13-17).

With the end of colonialism and the collapse of empires, the twentieth century was destined to witness a profound transformation in the global order. As the previous investor-state dispute settlement system was based on a colonial framework, this development also led to the construction of a new system. The emergence of

international law and the related legislative limitations on the use of force significantly influenced the foundational structure of this new system. Given these circumstances, international arbitration has become the principal instrument for protecting and promoting foreign investment.

However, as Sornarajah indicates there were significant divergences among states on establishment of an international investment arbitration system. While capital-exporting states supported the formation of an international system for investment arbitration, many newly independent states were hostile towards it. These states argued that the proposed international investment arbitration system is merely a relic of the defunct colonial order. The interests of foreign investors were regarded as the fundamental motivation for the system, to the detriment of those of host nations. This divergence persisted, including the institutional characteristics of the international arbitration system. The international arbitration system for capital-exporting countries must be based on external criteria. This argument posits that national legal standards in newly independent states were inadequate in protecting international investors and luring foreign investment. External criteria equivalent to Western standards were required for this purpose. This is also why international arbitral awards must take precedence over decisions rendered by domestic courts (Sornarajah, 2021, pp. 12-18).

This Western perspective on investor-state dispute settlement was formalized with the formation of the ICSID in 1965. The ICSID is the first international body whose rules are dedicated to investor-state dispute settlement. In accordance with the ICSID Convention, governments have consented to obligatory international investment arbitration, and the ICSID tribunals have jurisdiction over any dispute that arises directly from an investment. Clearly, this is an exceptional circumstance that undermines the concept of state sovereignty. States have for the first time ever permitted an international tribunal to investigate the legitimacy of their regulatory actions.

For capital-importing states, however, the establishment of the ICSID symbolizes a continuation of Western colonial power in a different form (Van Harten, 2020, p. 21). The fact that it is built on external criteria and has precedence over domestic court rulings makes it a clear violation of the post-colonial states' hard-won sovereignty (Van Harten, 2020, pp. 21-23). It also defies the principle of equality before the laws. This principle necessitates that similar cases be treated similarly; nonetheless, national investors were denied the same ICSID-guaranteed access to international tribunals that was extended to foreign investors (Van Harten, 2020, pp. 21-23). For some commentators, providing such special treatment to foreign investors is discriminatory (St John, 2018, pp. 253-254). Consequently, the founding of the ICSID ignited a campaign among newly independent states, led by Latin American states. Their primary objective was complete economic and political independence, as well as absolute national sovereignty over foreign investment.

1974 saw the formalization of these concerns through a proposal for a New International Economic Order (NIEO). The core idea underlying the proposal was the sovereign control of states over their national reserves, which dates back to the nineteenth-century Calvo and Drago doctrines (Sornarajah, 2021, p.203). This idea was also recognized as a fundamental principle of the international economic order in the Declaration on the Establishment of an NIEO. The ultimate objective of establishing an NIEO was to restructure the monetary, financial, and trade systems in order to reduce existing imbalances and obstacles for developing countries (GA Res 3201, 1974).

In this context, the United Nations (UN) approved a Charter of Economic Rights and Duties of States in the same year. This resolution places special emphasis on the reform of foreign investment structures in light of the NIEO's core principles. It emphasizes the right of each state to regulate according to its own national objectives and interests. In prohibiting preferential treatment for foreign investors, the Charter also acknowledged the absolute legal sovereignty of each state on its territory (GA Res 3281, 1974). Although the UN General Assembly adopted the Charter with the support

of 120 developing countries, it is essential to note that six developed nations voted against it and ten abstained. The accentuated divergence between developed and developing states would have a dramatic impact on the future of the ISDS.

2.3. Historical Development of the ISDS

2.3.1. The Changing Context in the late 1970s and early 1980s

As was said above, the debate during the early stages of decolonization centered on whether international law or domestic law should be utilized to settle conflicts between investors and states. In the second part of the 1970s, when stagflation and slow economic growth were the norm, the debate shifted substantially. Due to its huge current account deficit, the developing world was struck the hardest by the global economic crisis. The situation for emerging economies deteriorated as demand stalled and commodities prices declined. Foreign investment was the only way for them to escape their dire situation.

Therefore, they intended to establish a national investment structure that would be appealing to international investors. Altering national law to grant preferential treatment to foreign investors was the most crucial step in achieving this objective. On the other hand, developing states continued to advocate for the creation of NIEO on a global scale. They have expressed their adherence to the concept of permanent sovereignty over natural resources in every possible international forum. It was, in a word, hypocritical. Assuming Sornarajah's claim that their hypocrisy was an act of rationalization (2021, p. 120) is valid, this would also explain why developing states were so keen to join BITs. Indeed, the signing of several BITs in the 1980s marked the beginning of preferential investment ties between capital-exporting states and developing countries.

This rapid increase in the number of BITs can also be attributed to the pressure imposed on developing countries by international financial institutions. Loans from

the International Monetary Fund (IMF) and World Bank were contingent on the recipient developing countries enacting market-oriented economic reforms (Newcombe & Paradell, 2009, p. 46). As part of these reforms, developing countries were required to implement structural improvements that would strengthen the protection and promotion of foreign investment (Newcombe & Paradell, 2009, p. 47).

The development of preferential investment ties through BITs was a pillar of these structural reforms. The other pillars included reforms to national legal systems and the launch of privatization programs. The primary goal of legal reforms was to shield the interests of foreign investors, and in privatization programs, those foreigners were the primary buyers of formerly state-owned enterprises (Parra, 2012, p. 121). Since then, it has been widely acknowledged that the presence of international institutions is crucial for promoting and preserving investments, particularly in the developing world.

2.3.2. A Time of Heightened Investor-State Disputes

Similarly, despite a "slow start" in the initial stages of decolonization, the ICSID as an international organization enjoyed a "steady but intermittent" rise in importance (Dolzer & Schreuer, 2008, p. 224). Given the increase in the number of BITs and the frequency of conflicts between international investors and host governments in the 1980s, it is not surprising that the ICSID became the preeminent institution. There are two primary perspectives that can be used to explain this rise.

First, there is the anticipated benefit for both the home and host countries of delegating conflict settlement jurisdiction to an international tribunal. The most obvious advantage of delegation is preventing direct confrontation between governments that would have evolved into a military conflict. From this perspective, the ICSID is a depoliticization strategy (see (Schneiderman, 2011) (Kriebaum, 2018)). From the perspective of historical institutionalism, the ICSID's rise is largely attributable to its tight institutional relationship with the World Bank. So close was this relationship that

Aron Broches, the first Secretary-General of ICSID, simultaneously served as General Counsel of the World Bank. Using the World Bank's institutional strength, the ICSID officials, particularly Aron Broches, exerted considerable influence over a state's choice to relinquish jurisdiction to the ICSID. St. John claims that Broches, in his capacity as General Counsel of the World Bank, was substantially responsible for convincing several European states to recognize the ICSID as an authority in investor-state dispute settlement. By 1981, the ISDS provisions in European BITs had effectively transferred jurisdiction to the ICSID. Eventually, this pattern extended to the rest of the world (St John, 2018, pp. 183-211).

2.3.3. The pinnacle of the ISDS in the 1990s

Conditions were favorable in the 1990s for the ICSID to grow to prominence and become the leading ISDS forum. As a result of the fall of communism, former communist states joined the ICSID during those years, and many emerging economies adopted the ICSID Convention to follow the global trend. In fact, the ICSID's increasing significance reflected the fact that the ISDS had developed into a system in the 1990s. The standardization of the ISDS sections in over 2,000 BITs and a number of regional agreements led to the system's development (Van Harten, 2007, p. 26).

To assess the evolution of the ISDS into a system, it is crucial to comprehend the global economic context of the 1990s. The end of the Cold War and the fall of communism, an ideology antagonistic to international investment and private property, promoted the neoliberal perspective and the global expansion of investment-friendly policies. Under the influence of neoliberal policies, the developing world began to compete for limited international investment sources. Numerous developing countries followed the prosperous economic model of Asia, which was made possible by international investment (Newcombe & Paradell, 2009, p. 48). To reassure foreign investors of the safety of their investments, developing states have delegated jurisdiction over investor-state disputes to an international tribunal. In addition to the voluntary participation of states, the increased institutional influence of the World Bank and IMF in the neo-

liberal world also contributed to the establishment of an international investment arbitration system. These institutions were especially instrumental in promoting the liberalization of national investment structures, which was a prerequisite for international credit.

Since the mid-1990s, international investment law has been characterized by the delegation of investment disputes to "hybrid bodies: international private tribunals with a public function" (Herranz-Surrallés, 2020, p. 339). The expanding importance of international tribunals in the resolution of investor-state disputes is reflected in the rising number of the ICSID cases over time. The ICSID has reported a 6500% increase in the number of instances from 1972 (when there was 1) to 2021 (when there were 66). There were 19 new cases reported during the first half of 2022 (ICSID, 2022).

In contrast to the significant growth in the use of international tribunals to adjudicate investor-state disputes, discontent with the current system has developed since the late 1990s and the early 2000s. The international campaign against the Multilateral Agreement on Investment (MAI) from 1997 to 1998 was one of the earliest notable expressions of this discontent. The objective of the MAI was explained as to create a robust and comprehensive framework for setting high standards for international investment by expanding the scope of existing liberalization and ensuring legal protection for foreign investors (Witherell, 1995, p. 1). In contrast, the MAI's drafters disregarded the fact that it would compromise the rights of both the host state and its citizens in social and political matters, all while protecting the interests of investors. When the 29 members of the OECD began negotiations on the MAI in 1995, they had no idea how big of an issue this disdain would become for them. Their early optimism that non-OECD countries would also join the agreement through negotiations (Witherell, 1995, p. 1) suggests that they were underestimating the level of popular opposition they would encounter.

Despite the negotiations beginning in secrecy, the public leaked an early draft of the treaty, leading to strong backlash against the proposed MAI for "boldly stepping on so

many toes" (Johnston & Laxer, 2003, p. 50). Condemning the MAI as a serious and imminent threat to citizens' social and political rights, a strange coalition of hitherto unrelated non-governmental organizations emerged, including the Public Citizen, the Australian Conservation Foundation, Amnesty International, and the World Development Movement (Kobrin, 1998, p. 98). They asserted that the MAI would confer a form of sovereignty upon corporations, transform elected governments into their puppets, and obstruct justice within the state and society (Kobrin, 1998, p. 98). The stepping back of the OECD members and the eventual demise of the MAI is accepted as the first significant setback for globalism in the West (Johnston & Laxer, 2003, p. 49).

2.3.4. Argentina's Case: The Beginning of Discontent

The case of Argentina is instructive for grasping the source of the discontent. In 2001, Argentina was hit by a financial crisis that had a severe impact on the country's economy. The crisis caused the Argentine peso to fall by around 70% against the US dollar in a few months (Dupont & Schultz, 2013, p. 567). It also had political repercussions, as seven administrations resigned and a state of emergency was established as a result of substantial public unrest and disorder (Sornarajah, 2021, p. 1374).

The Argentine government responded to the crisis by declaring an economic emergency, freezing all utility rates, and prohibiting the renegotiation of contracts for public utilities. The Argentine response generated a wave of investor-state disputes, especially before the ICSID. Several foreign investors, most notably Aguas Argentinas, brought investment arbitration claims against the Argentinian government. In these cases, tribunals were criticized for favoring investors and failing to find a balance between the state's regulatory authority and the protection of foreign investment. With so many the ICSID cases involving Argentina, these claims have called into doubt the legitimacy of the entire ISDS (Waibel, Kaushal, Chung, & Balchin, 2010, p. xlviii).

During the arbitral procedures, the Argentine government provided two arguments in favor of its regulatory activities. The first line of defense asserts that, under customary international law, Argentina is permitted to take emergency measures if necessary. For instance, the Argentine government argued in *CMS v. Argentina* that it should not be held to its BIT obligations due to the country's life-threatening economic, political, and social challenges. The administration's misdeeds, if any, must be weighed against the pressing necessity to restore order to the country's chaotic circumstances and prevent Argentina's complete collapse. Decisions made under these circumstances should avoid "the wrongfulness of an act not in conformity with an international obligation," as stated by the International Court of Justice in its *Gabckovo-Nagymaros* judgement (CMS v. Argentina, 2005).

Argentina's second argument was that the Non-Prevention Measures (NPM) clauses in some bilateral investment agreements must be implemented owing to the country's economic collapse during the crisis. With these NPM clauses in place, the host state might restrict investor protections under certain conditions. For instance, the US and Argentina BIT's Article XI provides that either party may waive the Treaty's application if doing so is necessary for "the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests" (U.S. Department of State, 1991, p. 13). Argentina claimed that its crisis-era regulatory actions were permissible under the NPM, and as such, the country was under no obligation to compensate foreign investors.

Argentina consistently relied on these two grounds before the each ICSID tribunal, yet the rulings rendered by these tribunals were inconsistent. The legitimacy of the ICSID was questioned in part because of this inconsistency. As an illustration, the arbitrator in *CMS v. Argentina* argued that the requirement for a host state to make the claim of necessity is the absence of other measures to defend its interests. If there are alternative measures that may be undertaken, the host state cannot claim necessity. Argentina was determined to not meet this condition. Consequently, the *CMS v. Argentina* tribunal

decided that Argentina could not rely on a claim of necessity because it had other policy options available to protect its interests. (CMS v. Argentina, 2005) In *Enron* and *Sempra* instances, the ICSID tribunals reached the same conclusion: Argentina's actions could not be justified by necessity (Sornarajah, 2021, pp. 1371-1376).

In contrast, the tribunal in *LG&E* determined that the crisis situation in Argentina posed an urgent threat to the country's very existence. Argentina's misconduct was justified by the necessity to maintain domestic stability and economic prosperity. It, thus, concluded that Argentina was not required to pay compensation (LG&E. v. Argentina, 2007). Similar to the *LG&E* ruling, the *El Paso* tribunal upheld Argentina's necessity argument. After evaluating Argentina's claim of need, it was determined that Argentina should be excluded from its BIT obligations (Sornarajah, 2021, pp. 1371-1376).

Limited interpretations of the state of necessity by tribunals also provoked debate, as did the inconsistencies in the ICSID decisions. The ICSID has been accused of generating a "regulatory chill" for investors by severely limiting the state's margin of appreciation, even during severe crises (Rane, 2021, p. 2839); see also (Neumayer, 2001). The more the tribunals sided against the state's argument of necessity to justify regulatory measures, the more pro-investor it was thought the tribunals were. It was also alleged that arbitrators rendered expansive pro-investor decisions by relying on the ambiguity of treaty language and concept definitions. (Juillard, 2008) These concerns have even spawned the notion that international tribunals tend to favor investor-friendly measures at the expense of state sovereignty (Bungenberg & Reinisch, 2020, p. 118). Some went so far as to claim that the current system of international investment agreements is characterized by a tendency to impose tariffs on host states (Muchlinski, 2011, p. 35).

2.3.5. The 2000s: The Quest for Regulatory Authority

All of these criticisms about the existing system were but a little indication of the anti-liberal tendencies of the 2000s. Throughout the 2000s, a growing number of nations were victims of economic disparity. Despite lofty hopes that economic liberalism would lead to greater prosperity, a number of developing states faced catastrophic economic crises. They were unable to effectively respond to these crises since so much regulatory authority had been delegated to multinational corporations and international organizations. They began to experience the agony of moving regulatory authority from the state to any other entity. The quest of regulatory authority thus began.

In light of this, developing states began to voice concerns regarding the potential drawbacks of granting arbitrators the authority to decide regulatory conflicts between investors and the state (Boon, 2023, p. 2). Concerns about the legitimacy of the system have been exacerbated by the arbitrators' wide discretion in determining on such a crucial aspect of public law. When rendering decisions, arbitration tribunals have been accused of disregarding the state's major restraints resulting from its public responsibilities (Gathii, 2021, p. 2). Thus, the ISDS has been criticized for its perceived inability to guarantee national sovereignty while protecting foreign investment.

This has strengthened the argument that the current system is merely another form of colonial rule over the developing countries. As Van Harten argues the desire of ex-colonial states to retain the benefits of obsolete colonial and semi-colonial legislation has been identified as the incentive for the creation of the system. Claims that the ISDS was created to insulate international investors from domestic oversight and to undermine key principles of international law, such as sovereign equality and independence, have therefore risen to prominence. Motivated by these ideas, developing states aspired to regain their regulatory authority (Van Harten, 2007, p. 18).

Developing states were not the only ones to request the return of their regulatory authority. Like many authors, Gilson argues that since the early 2000s, developed countries have shared the developing world's concerns about the existing system. The fact that several of these countries that were once among the top exporters of capital are now also among the top importers of capital brought the two group of states together. As a result of their experiences as host states, which differed from their past experiences as the home state of foreign investors, developed countries have begun to openly criticize the current ISDS structure. Their primary critique has been the system's imbalance against the host states (Gilson, 2023). This did not come as a surprise to the developing world, since they had been stating the same thing for years.

The current attitude of developed countries toward the ISDS is reflected in the EU Trade Commissioner's designation of the ISDS as "the most toxic acronym in Europe" (Cecilia Malmström, as cited in (Herranz-Surrallés, 2020, p. 336). Similarly, in the United States, the constraints on state sovereignty and promotion of foreign investment imposed by NAFTA have sparked considerable resentment. The New York Times publicly criticized Chapter 11 of NAFTA, which governs the ISDS, on the grounds that tribunal proceedings are confidential, arbitrators are anonymous, and rulings are not transparent. It was stated that the decision-making authority granted to a restricted number of international tribunals in investor-state disputes would lead to the repeal of national laws, the questioning of legal systems, and the contesting of environmental rules (DePalma, 2001).

Consequently, after being exposed to the experiences of developing countries, developed countries' perspectives on the ISDS have shifted dramatically. They have become ardent proponents of state regulatory authority. Since then, developed countries have been vociferous in their support for reforming the current system to achieve a balance between investor protection and state regulatory authority. This has led to an increased priority on efforts to reform the current system over the past five years. The reform process will be analyzed in depth in the following chapter. However,

before getting into the specifics of this reform, it is essential to provide an overview of the functioning of the ISDS and the problems that plague it.

2.4. The Functioning of the ISDS: The Example of the ICSID

Since the ICSID established the foundation of the ISDS, its operation will serve as an illustration of how the system functions. An ICSID process begins with a foreign investor's request for arbitration. A copy of this request is sent to the host country by the Secretary-General. It is essential that the request include the nature of the dispute, the identities of the parties, and their consent to arbitration. The case is registered if the Secretary-General determines after reviewing this information that the ICSID has jurisdiction. When a request is accepted or denied, the Secretary-General notifies the relevant parties. Upon approval of the request, the number and selection process of arbitrators will be determined.

Reviewing the parties' prior agreement on the number of arbitrators and/or the method of their appointment is the first step in the appointment process. In the absence of a prior agreement, the ICSID urges the parties to reach a consensus on the number and selection procedure of arbitrators. In this case, the parties either exchange a list of candidates, with one party informing the other of the candidate(s) it accepts or rejects, or they request a list of candidates from the ICSID. Each party may reject a fixed number of candidates and rank the candidates that remain. The candidate with the highest ranking is appointed, or the ICSID chooses one of two or more candidates with identical rankings. Article 37 (2) (b) of the ICSID Convention is triggered if they are unable to reach an agreement. In this instance, the Tribunal will consist of three arbitrators. Each party will choose one arbitrator, and the third arbitrator, who will serve as president of the Tribunal, will be mutually agreed upon (ICSID, 1966) (See also.

Additionally, the ICSID Convention establishes two essential criteria for the nomination of arbitrators. One of them is nationality. According to Article 39 of the Convention the majority of arbitrators must be nationals of countries other than the host state and the foreign investor. The exception to this general norm is also addressed in the same Article. According to this exception, if the parties agree on the appointment of a tribunal member or members, the nationality requirement does not apply. The second criterion relates to the qualifications arbitrators must possess. Article 14 (1) of the Convention stipulates that all the ICSID arbitrators must possess a high moral character, acknowledged competence in the disciplines of law, trade, industry, or finance, and the ability to make independent judgements (ICSID, 1966).

The Tribunal is established and the arbitration begins when the Secretary-General notifies the parties that all arbitrators have accepted their assignments. Unless the parties agree otherwise, the Tribunal must hold its first session within sixty days after its creation. The Secretary of the Tribunal, who is also a member of the ICSID Secretariat, will contact the parties to determine their availability for the session. During the first session, the Tribunal addresses procedural matters, the most significant of which is defining the arbitration's seat of jurisdiction, which establishes the applicable domestic law. Other procedural issues, such as document disclosure, the degree of openness of the proceedings, and any objections to an arbitrator's impartiality, are also discussed throughout this session.

After the first session, during which procedural issues are resolved, the arbitration process begins its written procedure. The tribunal initially considers the respondent state's arguments to the tribunal's jurisdiction or admissibility. If the tribunal concludes that it has jurisdiction over the dispute, the arbitration will proceed to the case's merits. The oral procedure, which involves of hearings and procedural sessions, is also a part of the case's merits assessment. After all of the material has been presented and arguments have been made, the Tribunal will decide whether the respondent state has violated its responsibility under the treaty to protect foreign investment.

Investors may be entitled to compensation from the host country if a tribunal rules that their losses were caused by the host country's infringement. In the absence of such evidence, the court may dismiss the claim. This judgment is recognized and enforceable in the all ICSID member states. It is final and binding on all parties. The Convention's Section 5 stipulates limited post-award remedies, including interpretation, revision, and annulment. Other than these alternatives, the parties may not contest the award in any other court.

2.5. The Problems of the ISDS

The case of the ICSID highlights how the current system develops comprehensive mechanisms for the adjudication of investor-state investment disputes and the enforcement of decisions. Despite the comprehensive nature of its design, the ISDS has been experiencing a legitimacy crisis for a variety of reasons. Its main drawbacks can be listed as lack of transparency, inconsistency in awards, the impartiality and independence of arbitrators, the difficulty of resolving legal errors, exorbitant expenses, and the duration of arbitral procedures.

2.5.1. Lack of Transparency

The ISDS is unique in that its procedures are conducted in absolute confidentiality. Only the foreign investor, as the complaining party, and the host state, as the responding party, have access to the case's procedural details. Other parties with an interest are permitted restricted access to the case. Their access is limited to the registration of the dispute and the final award. Alternatively, under Rule 32 of the ICSID Convention, the parties may consent to the attendance of interested third parties at all or a portion of the hearings. In addition, they may opt to publicize the final award under Convention Rule 48 (ICSID, 1966). However, in most instances, the parties concerned desire to keep the case confidential (UNCTAD, 2022, p. 4) (See also (Şit Köşgeroğlu, 2023)).

The confidentiality underlying the system has been criticized for generating a “legal grey area” that should be “shed some light on” (The Economist, 2009). It has been suggested that arbitration tribunals must find a balance between maintaining the confidentiality and serving the public interest. As a requirement in a democratic society, they have been asked to inform civil society without weakening one of the system's defining characteristics. This has led to calls for a more transparent system.

The good news is that calls for greater transparency have not gone unheeded. Several arbitral tribunals incorporated them into their decision-making processes. In *Philip Morris v. Australia* (2012), for instance, when the Tribunal was asked to determine on the case's confidentially, it weighed both the parties' arguments and the requirements of the public interest. Similarly, in *Biwater Gauff v. Tanzania* (2007), the ICSID Tribunal permitted five non-disputing parties who possessed crucial information that could influence the resolution of the dispute to submit written arguments. The Tribunal's goal was to improve transparency and serve the public's best interests. To accomplish this, it relied on Rule 37(2) of the ICSID Convention, which was modified in 2006 to increase transparency.

The Tribunal considered Rule 37(2) as a crucial first step in protecting the expectations of all parties involved, as well as the Parties' procedural rights and privileges. In interpreting the Rule, the Tribunal cited the 2001 *Methanex* judgement, which said that "the... arbitral process could benefit from being perceived as more open or transparent; or, conversely, it could be harmed if perceived as unduly secretive" (Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, 2007). The tribunal also cited the 2005 *Aguas Argentinas v. Argentina* ruling. This precedent was used to argue that the current case is more than corporate liability resulting from private law because it concerns matters of public importance (Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, 2007).

The efforts of individual tribunals have been strengthened by a variety of institutional improvements that increase system-wide transparency. In December 2013, the General

Assembly approved the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. It establishes a set of procedural standards for investor-state arbitration based on international treaties that enhances public access and transparency. Similarly, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly referred to as the Mauritius Convention) was adopted in 2014. The primary objective of the Convention is to increase the parties' transparency requirements in their existing investment agreements. The Convention's principles are applicable to all arbitral tribunals.

2.5.2. Lack of Consistency and Coherence

Due to the decentralized nature of the ISDS, arbitrators have broad discretion in assessing the relevant facts and legislation. In making decisions, they are not constrained by precedent. Thus, critics assert that divergences and a lack of consistency in decision-making undermine the system's predictability and accountability. In this regard, Fuller argues that ad hoc decision making is the first and most evident way to produce a disaster when building and sustaining a system of legal standards. According to him, the adoption of inconsistent norms is also one of the eight additional causes of disaster. Further, he suggests that a legal system with ad hoc or inconsistent rulings is not just a lousy legal system; it is something that cannot even be termed a legal system (Fuller, 1969, pp. 38-39). Similarly, Kramer argues that a significant number of disputed appellate cases that characterize a legal system, as opposed to being exceptional, leads to "lawlessness" in the lack of the necessary regularity for the creation of the rule of law (1999, s. 142).

On this basis, critics suggest that the jurisprudence should be harmonized in order to eliminate divergences resulting from inconsistent judgements (Kaufmann-Kohler, 2004, p. 220) (See also (Legum, 2003, pp. 146-147), (Arato, Brown, & Ortino, 2020, p. 2)). To strengthen their argument, they frequently cite the fact that the different ICSID tribunals have reached widely different conclusions regarding Argentina's state-of-necessity argument (Arato, Brown, & Ortino, 2020, p. 11) (Van Harten, 2007, p.

165). They find it incongruous that different tribunals may get such disparate conclusions from the same facts. You may recall that the Tribunals dismissed Argentina's state-of-necessity claims in *CMS v. Argentina* (2005), *Enron v. Argentina* (2007) and *Sempra v. Argentina* (2007), but accepted the same argument in *LG&E v. Argentina* (2007). The main reason the first three courts dismissed Argentina's claim was the allegation that Argentina contributed to the onset of the economic crisis. In addition, these three tribunals argued that the availability of alternative measures to address Argentina's financial difficulties precludes the use of the condition of necessity. The *LG&E v. Argentina* (2007) Tribunal, on the other hand, determined that Argentina was in a state of exigency and hence should not be required to pay damages.

The fact that various Tribunals interpreted Article VII.2 of the Turkey-Turkmenistan BIT differently is another instance of the ISDS inconsistency. According to this Article, if the investor-state dispute cannot be resolved through consultation and discussion, the investor may bring it either to the ICSID, the UNCITRAL ad hoc tribunal, or the International Chamber of Commerce (UNCTAD, Turkey - Turkmenistan BIT, 1992). In *Kılıç v. Turkmenistan* (2013), the Tribunal determined that this Article required recourse to domestic courts. However, in *Muhammet Çap v. Türkmenistan* (2015), the Tribunal held that the Article does not necessitate the exhaustion of domestic remedies before resorting to the international arbitration tribunal. Article VII.2 was said to give foreign investors a choice. Foreign investors may choose between international arbitration and domestic courts, in conformity with the Treaty's scope and purpose.

As Kaufmann-Kohler and Potestà show, critics have utilized all of these inconsistencies in the relevant case law to argue that an appeal court must be included in the system. This appeal court must be empowered to review all tribunal awards in order to set a precedent in the system. Thus, it is hoped that a uniform standard of interpretation for arbitrators will be established, preventing different tribunals from giving divergent interpretations of fundamental ideas and concepts. In addition, as a higher authority, the appeal court is expected to rectify the tribunals' legal errors.

Consequently, the appeal court is regarded as essential for guaranteeing uniformity and predictability in the system's application of the law. (Kaufmann-Kohler & Potestà, 2016, pp. 20-22)

2.5.3. Independence and Neutrality of Arbitrators

It has been argued that ad hoc appointment of arbitrators by the parties compromises their ability to remain objective and unbiased (Branson, 2010), (Van Harten, 2007, p. 167). This allegation originates from the system's restriction on who may make claims. Because, under the current system, only foreign investors can submit claims and only states can be compelled to pay compensation, it is alleged that arbitrators interpret investment treaties and render decisions in favor of foreign investors. It is supposedly motivated by the belief that foreign investors will be more likely to appoint the same arbitrators in future cases if they are assured of compensation in the ruling (Van Harten, 2007, p. 172). Paulson believes the arbitrators' partiality stems from their financial and political dependence on one side of the dispute. In the same way that we wouldn't trust Ali Baba and the 40 Thieves to write a penal code, we shouldn't trust arbitrators to interpret investment treaties, he argues (Paulsson, 2010, p. 355).

In addition, it has been questioned if the arbitrators' impartiality is influenced by their previous experience or publications. Regarding experience, the impartiality of arbitrators is called into doubt if they have previously served as arbitrators in analogous tribunals or as representatives of one of the parties in arbitration proceedings. Prof. Gaillard's appointment as arbitrator in the *Telekom Malaysia Berhard v. Republic of Ghana* (2004) case was met with great opposition from the host nation. The Republic of Ghana questioned Prof. Gaillard's objectivity due to his dual role as an attorney in the annulment proceedings of the *RFCC v. Morocco* (2006) case. Prof. Gaillard was compelled to withdraw from his role as counsel in the *RFCC v. Morocco* (2006) in order to meet the Republic of Ghana's concerns about impartiality and to bolster the tribunal's authority and efficiency.

It is debatable whether arbitrators who have published papers expressing their opinions on the issue of the dispute can maintain their objectivity during the proceedings. Bangladesh, the host state in *Saipem SPA v. The Peoples' Republic of Bangladesh* (2009), objected to the investor's nominated arbitrator. It was asserted that the arbitrator had a predetermined stance on a number of crucial matters, as evidenced by his previous publications. This argument was rejected by the court. It was maintained that abstract doctrinal principles have no bearing on the impartiality and independence of an arbitrator in the absence of evidence of misbehavior.

Giorgetti, et al. are among the critics, who suggest replacing the party appointment of arbitrators with an institutional appointment mechanism to ensure the arbitrators' independence and neutrality. They advocate a standardized system in which arbitrators are selected or approved uniformly by the governments. In addition, it is proposed that arbitrators be chosen for a defined period and receive a set stipend regardless of their performance in particular cases. Therefore, critics assert that arbitrators should be more like judges with public service experience. They seek to move the appointment of arbitrators and their fiscal and social rights from the private to the public domain (Giorgetti, et al., 2020, pp. 469-471).

2.5.4. Lack of Appropriate Control Mechanisms

The system's legitimacy is also questioned due to the absence of appropriate control mechanisms (Kaufmann-Kohler & Potestà, 2016, p. 43). The decisions of the arbitral tribunals are conclusive, precluding any possibility of appeal and rendering annulment the only viable remedy. Even in these situations, the arbitral ruling can only be annulled if there are particular, narrow grounds for doing so (Tiryakioglu & Canyaş, 2016, pp. 183-185). It has been contended that misinterpretation of investment treaties could lead to grave legal errors (Alvarez, 2021, p. 258). Since arbitrators determine the legality of actions committed or laws enacted by democratically elected governments, the most important consideration is their potential impact on the host state (Sornarajah, 2008, p. 57). Any errors made by the arbitrators in these judgments

will not only damage the government but the entire nation. Consequently, the lack of judicial review over arbitrators' judgments casts doubt on the accountability of the ISDS framework (Johnson & Guven, 2017).

In light of the far-reaching effects of tribunal judgments on host states, critics are emphasizing the urgent necessity to build judicial review mechanisms (Gantz, 2006). As Sornarajah discussed, the top recommendation of critics of the system is establishment of a permanent appellate body. By establishing this body, they intent to alter the prevalent practice of giving greater weight to the finality of awards than to their correctness (Sornarajah, 2015, pp. 384-385). In contrast to the annulment process prescribed in Article 52 of the ICSID Convention, in which the initial decision is overturned, a successful appeal would result in the correction of the arbitral award. According to Dyson, the more the opportunity for contesting decisions through appeal or review, the greater the likelihood of error elimination (Dyson, 2000, p. 288).

2.5.5. Excessive Costs and Long Duration of Arbitral Procedures

Lastly, there is growing concern that the exorbitant cost of international arbitration hearings discourages parties from pursuing such resolutions (Schill, 2015, p. 2). In addition to the total cost of arbitration processes, the amount of money awarded against the host country is also regarded to be excessively high (Garcia, 2004, p. 355). Both of these factors are seen as disincentives for host states, and especially developing countries, to participate in international arbitration (Rosert, 2014, p. 1). Consequently, Johnson et al. assert that states comply with the requests of foreign investors to avoid costly defenses and potential excessive compensation before the arbitral tribunal. This defect has been contended to have resulted in a regulatory chill for foreign investors (Johnson, Sachs, Guven, & Coleman, 2018, p. 14).

Likewise, Skovgaard Poulsen claimes that foreign investors utilize the ISDS as a tool to exert pressure on host states to refrain from imposing regulatory measures. Foreign investors are believed to gain the informal capacity to serve their interests and the

ability to enhance their regulatory chill in the host governments, in addition to the legal rights afforded to them by the ISDS (Skovgaard Poulsen, 2014). In a similar manner, Peterson contends that arbitral tribunals provide a "potential legal stick" for foreign investors to restrict the sovereign activities of states (Peterson, 2004, p. 139). For instance, since the Emergency Law was passed in 2001 in reaction to the financial crisis, Argentina has been involved in dozens of arbitration cases, as stated above. The government came perilously close to insolvency after arbitration tribunals awarded hundreds of millions of dollars in compensation to investors. This was an issue that the Czech Republic, another developing country, also confronted.

In *CME Czech Republic B. V. v. Czech Republic*, (2001), the tribunal decided that the host state violated its BIT with the Netherlands. The regulating measures of the Media Council of the Czech Republic were deemed to violate treaty obligations. In specifics, CME was a Dutch company that founded the Czech subsidiary CNTS in order to enter the Czech media market. CME attributed the bankruptcy of CNTS, its Czech affiliate, to the regulatory activities of the Czech Republic Media Council. Alleging that the Czech Republic's Media Council had repeatedly violated the BIT, it sought compensation from the country in excess of $500 million. In its decision, the tribunal ordered the Czech Republic to pay 270 million dollars in addition to 10 percent interest from the start of the arbitration proceedings. Ian Brownlie, one of the arbitrators in the case, provided a separate conclusion regarding the legitimacy of the decision. Given that the Czech Republic's gross national revenue is only $53.9 billion USD, he questioned the appropriateness of requesting such a high amount of compensation (Separate Opinion of Ian Brownlie), 2003).

Not only are arbitration proceedings and awards frequently criticized for being too expensive, but so is the length of arbitration proceedings. The ISDS has historically been praised for its capacity to help parties avoid an endless cycle of appeals and legal challenges to the tribunal's decisions (Ameli, et al., 2016, p. 23). This was the quickest accessible option for resolving investor-state disputes. On the other hand, the

arbitrators' workload has risen to the point where the system has been criticized for being overly slow. What gave it a clear advantage in the past is now being lost.

Additionally, while the introduction of an appeals body is anticipated to improve the system's consistency, impartiality, and efficiency, it is also likely to exacerbate existing cost and time problems (Lee, 2015, p. 483). This new system has the potential to make arbitral proceedings even more time-consuming and costly. If an appeals body is established, awards will no longer be final, and the system will meet obstacles comparable to those of national legal systems. Unnecessary litigation, exorbitant costs, prolonged procedural delays, and increased public exposure are a few of the potential obstacles.

2.6. Chapter Summary

The ISDS is a unique aspect of international law in which sovereign nations delegate jurisdiction to private arbitrators to assess the legitimacy of their government activities. The legal right afforded to foreign investors to sue states in international tribunals without first exhausted domestic procedures is one of its distinguishing characteristics. This treaty-based system is also distinguished by its high degree of decentralization and arbitrators' wide judicial discretion. Therefore, it is fascinating to study the factors that led to the existence of this unique system. The initial part of this investigation is to analyze the origins and historical development of the system.

The system has its roots in the postcolonial period. Imperial law and the use of force to resolve investor-state issues had to be replaced at the time. As a result of the end of colonialism, capital-exporting colonial powers could no longer rely on the extraterritorial application of imperial law and armed force. They were required to develop new strategies for securing and promoting their overseas investments. The founding of the ICSID in 1966 represented the first international initiative dedicated only to the resolution of investor-state disputes.

Initially, the newly independent states were antagonistic toward the ICSID and the ISDS in general. They called for complete control of national resources by the government. The late 1970s and early 1980s, however, prompted a reevaluation of their earlier appraisal of the new order. To escape the stagflationary cycle of those years, newly independent governments required either immediate foreign investment or international financing. Capital-exporting states required structural changes to be undertaken to ensure the protection of foreign investors before investing in these countries. Similarly, the World Bank and IMF applied intense pressure on them to liberalize the framework for foreign investment in order to grant credit. Under these circumstances, they were compelled to sign the ICSID Convention and reform their existing investment strategies. In the 1990s, delegation of authority to the ICSID for the resolution of investor-state disputes became a key component of the international investment environment.

Nonetheless, since the early 2000s, the legitimacy of the ISDS has been questioned on numerous grounds. Principal grounds for criticism include lack of transparency, inconsistency in awards, lack of impartiality and independence of arbitrators, difficulty in rectifying legal errors, and excessive costs and lengthy duration of arbitral proceedings.

In fact, there has been a tremendous improvement in the ISDS's level of transparency during the past decade. Concerns regarding the confidentiality of arbitral tribunals have been substantially alleviated by individual tribunal initiatives and institutional reform efforts. In spite of this, criticism has increased on other grounds. To address these concerns, the existing ISDS is intended to be more centralized. Attempts at centralization include, but are not limited to, proposals to create a permanent dispute settlement body and/or an appeal mechanism. It is believed that the centralized ISDS would be more effective in resolving the system's problems with transparency, accountability, consistency, and impartiality.

CHAPTER 3

ISDS REFORM IN PROGRESS

The turn of the millennium heralded the beginning of a new period that was ripe with potential transformations in many areas. By Friedman's definition, the year 2000 marks the transition from “Globalization 2.0” to “Globalization 3.0” (Friedman, 2007, pp. 9-11). In his work, he delineates the period between 1800 and 2000 as Globalization 2.0, asserting that corporate globalization's emergence and rapid expansion marked it. In contrast, he contends that the epoch of Globalization 3.0 began in 2000 and was characterized by a surge in international collaboration and rivalry among individuals. Friedman's categorization is particularly pertinent to the current research due to his assertion that Globalization 3.0 has been spearheaded by a far more heterogeneous array of individuals and organizations compared to Globalization 2.0 or 1.0. Unlike Globalization 2.0 and 1.0, where European and American individuals and enterprises played a key role, non-Western groups of people have primarily driven Globalization 3.0 (Friedman, 2007, pp. 9-11). These evolving features of the transition from Globalization 2.0 to Globalization 3.0 clarify the rationale behind the urge for ISDS reform.

The dissatisfaction with the system actually began in the early 2000s, due to economic crises in non-Western countries, particularly Argentina. The Western powers, who are the founders of the ISDS, also became disillusioned with the system as a result of the repeated impact of these crises on the West and the occurrence of various other economic crises in the Western world. These economic developments coincided with changes in the social context. With the advent of digital tools in the 2000s, people have had more opportunities to express themselves globally and grow online communities.

This has increased the influence of general public opinion on political decisions. The influence of the new social climate can be observed in the way that widespread negative public sentiment against the ISDS compelled governments to reevaluate their policies toward the international investment system.

Since then, the discontent with the system has prompted several unilateral efforts to modify the existing IIAs, which form the basis of the ISDS. Nevertheless, the pivotal moment in the reform of ISDS was in late 2017, when thE UNCITRAL WGIII was assigned the responsibility of tackling ISDS reform. It is called "a constitutional moment in international economic governance" (Schill, 2018, p. 1) because of the expectation that it initiates an inclusive and multilateral reform process leading to broadly acceptable solutions by all stakeholders in the system.

The chapter begins with an explanation of the economic and social background of the ISDS reform. These facts are used in the following section to show why the current system needs to be reformed. The chapter goes on to detail the ISDS legitimacy problem and the early attempts to reform the ISDS in light of these concerns. The process of institutionalizing reform initiatives is then presented. The chapter concludes by illustrating the different proposals for reforming the ISDS and how they can be implemented.

3.1. The Economic Context of the ISDS Reform

Many different forces worked together to bring about the latest phase, the broadening of global political and economic participation in the 2000s. The most notable has been *the tech bubble* burst, which has paved the way for an internet-based economic model. The advent of this new economic model has offered developing nations a chance to raise their global competitiveness. By 2011, it was clear that India, China, and Brazil had the fastest-growing technical ecosystems and internet-related growth (Manyika & Roxburgh, 2011, p. 3), despite predictions from 2001 that developing countries would not be able to close their wealth gap with the industrialized world by taking advantage

of this new paradigm (Litan, 2001, p. 17). The collapse of *the dot-com bubble* in the year 2000 also played a role in the ascent of the developing world. As Clarke indicated, an indicator of the magnitude of this bubble, which relates to the meteoric rise of U.S. technology stocks between 1995 and 2000, was the 290% increase in the NASDAQ Composite stock market index between 1997 and 2000. When looking at the same index that dropped by 76.81% from 2000 to 2002, it is evident how destructive the bubble burst was (Clarke, 2015).

A terrorist attack in 2001 gave the U.S. economy another shock, which had global repercussions. The collapse of the New York Stock Exchange was a tremendous shock to a global economy and business community that had become interdependent and interconnected as a result of value chains and increasing specialization in production. While this attack weakened economies around the world, it was felt most acutely in Western economies. According to the World Economic Outlook of the year, the incidents of corporate fraud at Enron, one of the largest companies in the United States, also contributed to the loss of investor confidence. This loss precipitated the 2002 stock market decline, which was felt most strongly in the United States, Japan, and Europe (International Monetary Fund, 2002, p. 1).

The UN research states that in 2000 and 2001, developed countries experienced output and trade growth rates of 3.4% and 1.0%, respectively. In contrast, developing economies saw higher growth rates of 9.3% and 5.7% over the same period. The report emphasized that China and India, the two most populous countries in the world, saw significant economic growth throughout the recovery period, surpassing the global average by more than double. Thus, the analysis implies that the swift advancement of these two economies will have significant ramifications for international trade, production, and finance (United Nations, 2004, pp. 4-5). Indeed, time itself will prove that this prediction is correct; by 2005, China and India, which were once developing countries, had emerged as significant economic powers.

Knowing these indicators from emerging economies could change the world's economic balance, the US Federal Reserve attempted to stimulate the economy in 2003 by providing cash to businesses and consumers at low interest rates and lowering the federal funds rate to 1% (Baily, Litan, & Johnson, 2008, pp. 7-8). In fact, this action contributed to the emergence of a later financial crisis. The literature explains this phenomenon as follows: because of the urgency of potential buyers to benefit from historically low mortgage rates, a significant surge in house prices became inevitable. Numerous people who typically would not have met the eligibility criteria received credit during this period of high demand. Once banks began selling these loans to Wall Street corporations, a significant secondary market for them rapidly emerged. Eventually, the economy reached a saturation point where it could not accommodate more homebuyers, leading to an increase in interest rates. Conversely, the drop in home prices commenced in early 2006. The subprime loan industry suffered a significant impact. At the onset of 2007, American businesses initiated bankruptcy proceedings sequentially (Baily, Litan, & Johnson, 2008, pp. 7-8).

Nonetheless, the 2008 collapse of the legendary Wall Street bank Lehman Brothers became a symbol of the American economy's devastation, which quickly spread to the rest of the world's financial markets. The IMF reported that the world economy as a whole has been severely impacted, but the advanced economies have been hammered particularly hard, plummeting 7.5% in the fourth quarter of 2008. This was particularly relevant for the United States, Western Europe, and Japan. On the other hand, slowdowns in China and India were more bearable since exports played a lower role in their economies overall, and domestic demand was more resilient (International Monetary Fund, 2009, p. 25).

A further sign of the shift in global economic balance after 2008 is the noticeable shift in the relative contributions of countries to Gross Domestic Product (GDP). The IMF demonstrates that the contribution of advanced economies to global GDP was significantly higher than that of emerging markets and developing economies until 2008. This trend was halted by the global financial crisis. Since 1980, 2008 was the

only year in which developing countries' GDP share exceeded that of developed countries. 2015 also marked a turning point for this trend. The United States' reign as the world's top economic power ended in 2014. As of the beginning of 2015, China's economy had surpassed that of the U.S. as the world's largest (International Monetary Fund, 2023).

Another significant event of the twenty-first century was the outbreak of coronavirus pandemic and accompanying economic crisis in the beginning of 2020. The unprecedented emergency measures taken by governments to prevent the spread of the pandemic, like travel bans and mandatory shelter-in-place orders, caused the biggest economic crisis in more than a century. The proportion of countries with negative production growth due to the epidemic was said in a World Bank assessment to have exceeded that of both world wars and the Great Depression. It was also stated that in 2020, the global economy contracted by almost 3%, with 90% of countries experiencing a decline in economic production (World Bank, 2022, p. 26).

The Russian invasion of Ukraine in 2022 further exacerbated the already volatile global economy. Russia's protracted war in Ukraine has added to global risk and supply chain restrictions. In turn, these factors led to a slowdown in global economy and an increase in inflation. Despite these changes, the IMF demonstrates that China remains the world's biggest economic power, accounting for around 20% of the global GDP. The United States ranks second at 15%, followed by India with 7.5%. Similarly, developing countries account for a bigger share of global GDP (58.83%) than developed economies (International Monetary Fund, 2023).

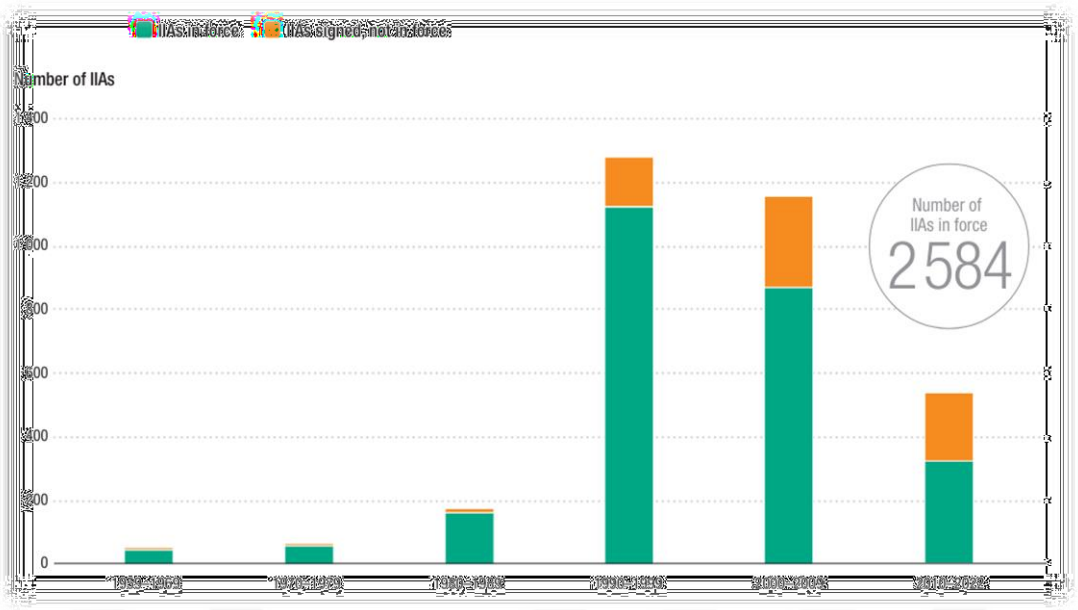

Figure 1. Number of International Investment Agreements per Year

Source: (UNCTAD, World Investment Report 2023. Investing in Sustainable Energy for All, 2023, p. 71)

This more than 20-year evolution of the global economy has had an impact on the international investment regime. According to UNCTAD research, the number of IIAs increased unprecedentedly between 1990 and 1999 but then showed a downward trend from 2000 to 2009. From 2010 to 2022, the downward trend in IIAs was very steep. In tandem with the significant decrease in IIAs signed during these years, there was a rise in the number of IIAs dissolved. Notably, in 2022, the number of terminations exceeded the number of newly concluded IIAs (UNCTAD, 2023, pp. 71-73). Those trying to understand why this shift in foreign investment is occurring should take into account the previously described shift in global economic power.

Since the early 2000s, the developing world's need for IIAs has decreased due to a shift in the global economic power dynamics in favor of them and an improvement in the debt crises in those regions. The old distinction between developed countries as capital exporters and developing countries as capital importers was blurred in the 2000s. The global trend of FDI flows over the past 30 years, as presented in the table below,

demonstrates that the gap between developed and developing countries has narrowed significantly. Since late 2019, developing countries have accounted for a larger share of FDI inflows than developed countries.

As the table below indicates, the trend of global FDI flows over the last 30 years shows that the great gap between developed countries and developing countries has closed and since late 2019 developing countries' share in the inflow of FDI has outweighed the share of the developed countries. An analysis of the data in this table suggests that the developing world is no longer required to unquestioningly follow the investment system's Western-oriented regulations in order to attract Western investors. It is because they not only receive investments from developed countries, but they also make investments in both developed countries and among themselves. This implies that the existing international investment system needs to be reformed to allow developing countries to take on a more proactive role rather than just following the established rules. China and India are only two of the examples of developing countries that have had substantial economic success and are emerging as major capital exporters (UNCTAD, 2023).

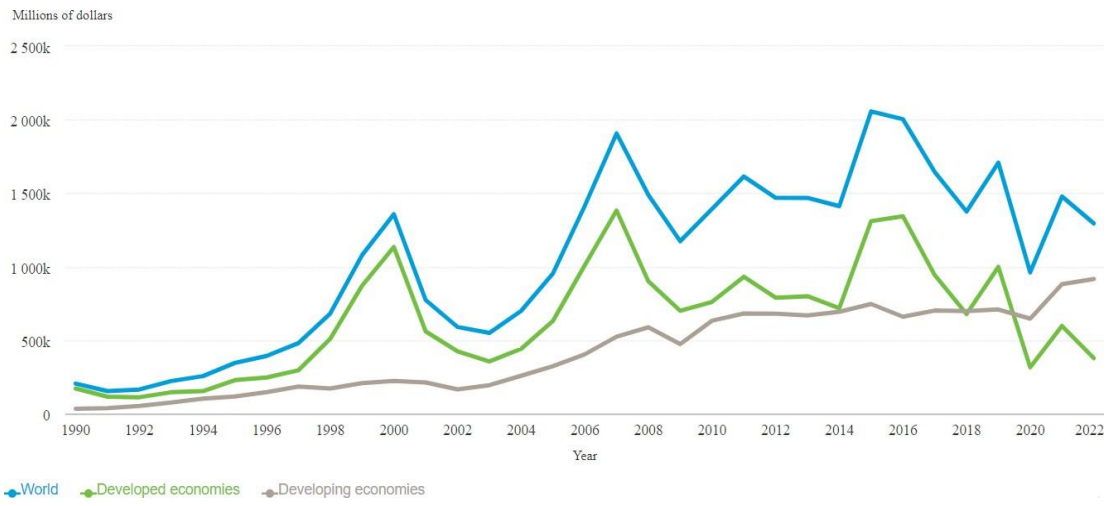

Figure 2. Foreign Direct Investment Flows per Year

Source: (UNCTAD, 2023)

The World Bank reports that China's role as a bilateral creditor is expanding quickly. In 2019, it represented 4.8% of the overall debt of low- and middle-income countries, up from 0.4% in 2000 (World Bank, 2022, p. 211). According to another report of the World Bank, India has also become a net international creditor as of 2021. Its rise in real GDP that year was greater than China's; thus, it is expected to play an even larger role as a creditor in the coming years. China is also a prominent player in foreign direct investment, ranking fifth globally. As with the previous indication, India's recent performance puts it in the running for a spot in the top 10 investor countries worldwide. Throughout the time that these two countries have been climbing the ladder as providers of foreign direct investment, the United States has been the largest destination of foreign direct investment (World Bank, 2021).

Therefore, since the early 2000s, the Western countries that designed and established the ISDS rules have experienced how much of "a dynamic laboratory" (Sharpe, 2018, p. 263) it is. As long as Western countries acted as the home state for investors, they supported keeping the system as it is. Once they assumed the position of the host state, they promptly encountered the system's drawbacks and took the lead in both individual endeavors to modify the IIAs and collective initiatives to reform the ISDS.

3.2. The Social Context of the ISDS Reform

While the economic context of the ISDS reform process has been outlined thus far, it is equally crucial to analyze the global social context. Changes in the social milieu since the turn of the millennium parallel those in the economic context. The 2000s have been dubbed the "Age of Protest" (Clark & Themudo, 2003, p. 109), and to understand why, it is useful to recall Friedman's description of Globalization 3.0 as the globalization of individuals (Friedman, 2007, pp. 57). The proliferation of digital tools and the expansion of online communities in the 2000s empowered individuals to express themselves creatively, reach a wider audience through hitherto impossible international networks and coalitions, and shape the very fabric of society.

These more empowered and globalized individuals have raised a number of new concerns for policymakers. Just before the turn of the millennium, thousands of people in Seattle protested globalization and global inequality at World Trade Organization (WTO) ministerial negotiations. In part due to the protests, the WTO ministerial meeting was canceled, which drew considerable media attention to the struggle against global capitalism. The day marked the triumph of a social movement over the established system of global governance.

Shiva argues that the refusal of developing counties to participate in a consensus was another, possibly more significant, reason that doomed the Seattle negotiations. Because of a lack of transparency and participation, they alleged, the negotiations were biased against the developing countries. Consequently, they declared that developing countries would no longer participate in the WTO decisions made without their input. They also contended that the WTO oppresses developing nations in order to protect the interests of the Western corporations. Some have even argued that having the meeting in Seattle, which is home to big Western companies like Boeing and Microsoft, shows whose interests the WTO rules are meant to protect and promote (Shiva, 1999).

In Seattle, the assumption that globalization means 'the end of history' was disputed. It was shown that globalization is in fact a political construction that may be contested politically. It is thought that globalization can be redesigned so that it serves as a resource for everyone instead of serving as a tool of Western supremacy over developing countries. Öniş and Şenses describe this movement as an anti- or alternative globalization movement. They assert that it encompasses various interests, such as labor and environmentalist groups in the United States who are generally opposed to free trade, as well as movements from developing countries that advocate for greater access to developed country markets and technology (Öniş & Şenses, 2005, p. 272). This prepared the stage for protests at meetings like the The Group of Seven (G7) summit in Genoa in 2001 and the WTO ministerial in Doha the same year, as well as many others in the years to come.

Many individuals from developed countries have also joined anti-globalization movements in the 2000s. For this group, the hidden face of globalization was revealed by the rise of the developing world and the recurrent economic crises in the West. These people, in contrast to the advantages of free trade, to which they had become accustomed, were beginning to experience the drawbacks of globalization. Consequently, a significant political backlash against globalization has evolved throughout the industrialized world. It was the global financial crisis of 2008, with its accompanying spikes in prices, volatility, and income inequality, that mostly fueled this backlash. Since then, various groups and individuals in the developed world have urged for a shift away from neoliberal policies. The rise of right-wing populist candidates and parties in the West is a clear indication of this demand.

The COVID-19 pandemic outbreak has exacerbated these de-globalization tendencies. While the health of millions of people was the top priority throughout the pandemic, the near-simultaneous lockdown of the world's population was an unprecedented social phenomenon. The pandemic and the measures taken in response to it have had, and will continue to have, profound repercussions on the worldwide social fabric. The most obvious worldwide effect of COVID-19 has been a rise in nationalism, leading some to declare, "We are all nationalists now" (Farage, 2020). Loss of life, economic collapse, and the closing of borders in response to the pandemic have all contributed to a climate of global uncertainty and fear. The instability has heightened people's reliance on the state and contributed to a rise in authoritarianism. Therefore, in the post-pandemic world, the state's power and relevance have grown, and nationalist sentiments have been bolstered.

One significant outcome of these developments, in the eyes of the public, has been the belief in the necessity for governments to possess all essential tools to mitigate the adverse socio-economic effects of severe crises. On the other hand, the measures taken by governments in response to COVID-19 and the subsequent economic downturn, such as travel restrictions, business operation limitations, and tax incentives, are raising concerns about potential compensation claims from foreign investors under the

ISDS (Corporate Europe Observatory, 2020). That is to say, while the governments legitimately justify these actions as necessary steps for the public good, they could potentially harm foreign investors by lowering profitability, slowing down businesses, or excluding them from government benefits (Corporate Europe Observatory, 2020). Thus, UNCTAD reminds the states that while state actions to lessen the pandemic's negative economic effects are in the public interest, some of them may expose governments to arbitration proceedings under IIAs brought by foreign investors (UNCTAD, 2020, p. 11).

Therefore, it seems that the main focus of the international investment policymaking agenda after the pandemic will be on changing the ISDS. Several factors, including the historical evidence that an increase in the ISDS disputes follows economic, financial, or other crises, and the concerns that these potential arbitration cases against the host states and the monetary compensation that foreign investors may seek will further strain many states' already enormous budgets, can be expected to fuel the reform initiatives. All things considered, the overarching goal of the present reform efforts is to protect the state's regulatory authority in the public interest while also considering robust levels of investor protection (UNCTAD, 2020, p. 12).

3.3. The ISDS in Transition

All of the aforementioned economic and social contexts speak to the reality that the world has evolved since the 2000s, as it has always done. Friedman characterizes the transformation as the world moving “from round to flat" (Friedman, 2007, pp. 48). An important part of this transition is the deconstruction of traditional hierarchies in favor of a new multilateralism that is based on a more horizontal and collaborative framework. The ISDS reform is, in this sense, a grain of sand in the ocean of global change. The ongoing efforts to reform the ISDS under the auspices of UNCITRAL WGIII are thus indicative of the fact that international lawmaking is continuous, albeit with shifting focus and actors.

The ISDS, as a post-World War II institution, is an exceptional neoliberal mechanism that offers broad rights to private parties investing abroad. In the 1990s, when neoliberal policies were prevalent, there was minimal interest in investment treaty arbitration. The first case to receive an arbitration award was *Asian Agricultural Products v. Sri Lanka* (1990). In terms of the number of cases brought to arbitration, the 1990s were a relatively tranquil period for investment arbitration. It wasn't until the early 2000s that notable cases started to emerge. The importance of these cases in the 2000s lay in the fact that developed countries acted as defendants, thereby taking the place of developing countries. The North American Free Trade Agreement (NAFTA) of 2001 marked a turning point in this regard. Since then, developed nations have voiced concern that the ISDS could undermine national legal systems by invalidating domestic laws and regulations. In fact, these are the fundamental objectives of the ISDS, which has been praised by the same states for decades as a politically neutral alternative to domestic courts.

One of the most prominent NAFTA-related cases in the early 2000s was *Loewen v. United States* (2003). The Loewen Group, a Canadian investor, operated funeral homes in Mississippi. The Loewen Group's owner had a legal dispute with its American competitor and the owner of a funeral facility in Mississippi, resulting in a trial before a Mississippi jury. Raymon Loewen, the owner of the Group, sought compensation from the state of Mississippi under several provisions of NAFTA, arguing that the Mississippi trial court's judgment was unfair to the foreign investor and based on discriminatory treatment due to nationality. It firstly asserted that NAFTA Article 1102's national treatment and anti-discrimination principles had been violated due to the trial's evident anti-Canadian and pro-American prejudice. The claimant further argued that the trial's pro-American bias was a violation of the minimum standard of treatment guaranteed by NAFTA Article 1105. In addition, Loewen contended that Article 1110's restriction on uncompensated expropriation was breached. Due to the host state's alleged violation of these three NAFTA articles, Loewen demanded more than $725 million in damages. The ICSID Tribunal dismissed

all claims against the United States at the merits stage (The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, 2003).

Despite being dismissed on jurisdictional grounds, this case prompted widespread opposition to ISDS. In a New York Times article that is widely cited, Depalma provides an excellent summary of the controversy surrounding NAFTA's ISDS provisions (Depalma, 2001). According to this discussion, one group of people suggest that NAFTA's hidden power is its use of secretive arbitration tribunals to settle disputes. These people criticize the transfer of conflict resolution authority to international tribunals. They base their criticism on the confidentiality of meetings, the anonymity of members, and the non-transparency of international tribunals' decisions. Another point of criticism is that international tribunals, despite their secrecy, can overturn national laws, challenge national rules, and question the legitimacy of the national justice system. However, it is essential to get to the essence of the subject, the argument that lies beneath this procedural argument.

To get a sense of this, it may help to look at the passages in the article of Depalma again with references to Barry Appleton, a Canadian trade lawyer who has represented clients in many NAFTA tribunal proceedings (Depalma, 2001). He contends that ISDS critics are just engaging in scaremongering, and he highlights the fact that the United States and Canada supported the ISDS provisions in Article 11 of NAFTA when they were negotiated in the early 1990s. Investment arbitration tribunals would be a politically neutral alternative to the court system, as these two countries suggested. Appleton continues by stating that the Canadian and American governments supported Article 11 on the assumption that it would not affect them, but are now dismayed that it does (Depalma, 2001).

Although the NAFTA drafters anticipated that American and Canadian investors would use investor protection measures to safeguard their investments in Mexico, this case has demonstrated that NAFTA also imposes obligations on either country, which may become the defendant in arbitration tribunals. As public and official concerns

about this issue have grown, the benefits and drawbacks of the investment arbitration system have come into question. This spark of questioning was about to turn into a legitimacy crisis together with the power shift in both economic and social terms in the coming periods.

3.4. Legitimacy Crisis of the ISDS

An institutional structure is likely to experience a legitimacy crisis if it cannot carry out its duties effectively and fails to fulfill its commitments. The institution proves its legitimacy by effectively fulfilling its main purpose within a set framework. In this aspect, legitimacy requires a legal system to be built on the idea that "law should be good for, and justly serve, the people who live within it" (Hurst, 1971, p. 224). However, the ISDS legitimacy crisis is a unique case in this regard. Contrary to common understanding, the criticism of the system's legitimacy stems from the system's effective control over developed and developing countries alike after the change in power in the global economic and social structure. As long as it served as a means of promoting the interests of investors from developed countries, its legitimacy was unquestionable. Upon issuing judgments that adversely affected the interests of these countries, the ISDS started to be accused of lacking legitimacy (Şit Köşgeroğlu, 2013, p. 144).

The discussion in the previous chapter should serve as a reminder that the critics of the ISDS have pointed to the system's lack of transparency, inconsistency in awards, the impartiality and independence of arbitrators, the difficulty of addressing legal errors, prohibitive costs, and lengthy arbitral procedures as reasons for its legitimacy crisis. However, these factors are all inherent to the ISDS and not merely external additions that have been made over time. All of these issues with the ISDS are preexisting concerns that existed before the 2000s. What has changed in the system since then is that developed and developing countries have begun to share concerns about how the ISDS is being implemented. By assuming the role of the defendant, developed states

have been able to gain some understanding of the challenges faced by developing states since the inception of the ISDS.

This understanding portends a new era in which investors' rights are curtailed and the states' regulatory authority is expanded. The tendency of reasserting sovereign prerogatives can also be observed in a variety of other instances since the early 2000s. Two countries have publicly denounced the ICSID Convention: Bolivia in May 2007 and Ecuador in 2009 (UNCTAD, 2010, p. 86). And both Ecuador and Bolivia have terminated many of their BITs. Venezuela, for its part, has implemented substantial modifications to national laws to strengthen its regulatory control over foreign investment. In January 2012, Venezuela followed its Andean neighbors in denouncing the ICSID Convention. The Russian Federation also decided not to join the Energy Charter, and a number of European countries have abrogated intra-EU Bilateral Investment Treaties (UNCTAD, 2010, p. 86).

The rise of this backlash against the ISDS has been fueled, in part, by a number of high-profile instances of international arbitration. Two well-known cases in this area concern tobacco regulation: *Philip Morris v. Australia* (2015) and *Philip Morris v. Uruguay* (2016). These cases are significant because the arbitration tribunal ruled in favor of the states in both instances and determined that the allegations made by the US firm were unfounded. The surprise denial of an investor's compensation claims in a developing country, which aligns with the interests of developing states as host countries, has been a surprising occurrence. These cases have contributed to the calls for the ISDS reform coming from developed countries.

According to the specifics of the case, when Uruguay and Australia mandated warning labels on cigarette packages, tobacco giant Philip Morris filed for investment arbitration. The company claimed that it lost significant market share because huge mandatory warning labels on cigarette packets prevented it from prominently featuring its trademarks. Philip Morris's claim against Australia was dismissed by the tribunal in 2015 due to a lack of jurisdiction (Philip Morris Asia v. Australia-Final Award

Regarding Costs, 2015). The tribunal found that Philip Morris was not a Hong Kong company, notwithstanding the company's attempt to rely on the Hong Kong-Australia BIT for arbitration. Philip Morris attempted to take advantage of the ISDS provision by relocating ownership of its Australian operations to Hong Kong, as discovered by the tribunal. Australia's challenge to the tribunal's authority was unanimously upheld. Philip Morris not only lost the case against Australia on a technicality, but it also lost the case against Uruguay on the merits (Philip Morris Asia v. Australia-Final Award Regarding Costs, 2015).

The Philip Morris v. Uruguay award is also noteworthy because it addresses the need for a balance between investor rights and the responsibility of states in regulations for public health. The tribunal ruled that states have broad discretion to set their own standards for public health and that they have the right to do so (Philip Morris Brands Sàrl, Philip Morriss Products S.A. and Abal Hermanos S.A. v. Uruguay – Award, 2016). It also established that a state is not required to provide proof of a causal relationship between the measure and any measurable improvements in public health. The fact that measures are being taken in good faith to address a public health risk is sufficient. Therefore, the tribunal agreed that Uruguay's tobacco control measures were necessary to preserve public health, and thus it rejected Philip Morris's claims. All arbitral fees and a sum of $7 million in reimbursement for Uruguay's legal fees were ordered to be paid by Philip Morris (Philip Morris Brands Sàrl, Philip Morriss Products S.A. and Abal Hermanos S.A. v. Uruguay – Award, 2016).

Vattenfall v. Germany (2011) is another symbolic arbitration case that contributed to concerns about the legitimacy of the ISDS in developed countries. Romano thinks that this case represents an anomaly in the ISDS because it is the first arbitration case against Germany, a country that usually tries hard to project itself as investor-friendly. It is also an exception because, in the vast majority of cases, the respondent in investment arbitration is the government of a developing country. This is the first case against a developed country alleging violations of the Energy Charter Treaty. Up until this point, international investors had invoked the Energy Charter Treaty's provisions

to bring 20 investment arbitration cases against the host states. Remarkably, all of these cases targeted the governments of developing countries, such as Turkey, the former Soviet Union, and Eastern Europe. Romano claims that while this was an anomaly at the time, it could be a portent of an emerging trend for the investor-state arbitration system as a whole (Romano, 2009).

The issue that causes to *Vattenfall v. Germany* case dates back to 2009, when the Swedish energy firm Vattenfall filed a claim against Germany. Specifically, it is based on the company's demand for compensation due to the implementation of German environmental rules limiting the use and discharge of cooling water for the company's coal-fired power plant in Hamburg. Despite the negative environmental repercussions of the power plant, Germany reached an agreement with the company to loosen environmental regulations (Eberhardt & Olivet, 2012, p. 13).

Undoubtedly, this setback prompted Vattenfall to pursue a second arbitration action against Germany in May 2012 (Vattenfall AB and Others v. Federal Republic of Germany, 2012). In the wake of the Fukushima disaster, Germany passed a new nuclear energy law in 2011 with the intention of hastening the country's transition to renewable sources of power. Due to the new regulations, the companies were required to cease operation of their nuclear power plants. Vattenfall demanded arbitration, claiming that the shutdown of the nuclear power plant violated the company's property rights and that it was therefore entitled to compensation (Vattenfall AB and Others v. Federal Republic of Germany, 2012). Almost ten years after the notice of arbitration was issued, on November 1, 2021, the claimant formally requested that the procedure be discontinued, and the respondent stated that it consented to the cessation. To that end, the Tribunal noted the termination of the proceedings in accordance with Rule 44 of the ICSID Arbitration Rules (Vattenfall AB and others v. Federal Republic of Germany, 2021, p. 62).

3.5. The Beginning of the ISDS Reform Initiatives

What all of the above instances have in common is that they have contributed to already existing widespread public concern that the ISDS could obstruct domestic policy objectives. The dramatic rise in concerns since the turn of the millennium has naturally led to calls for the ISDS reform. Indeed, the framework for the multilateral efforts to reform the ISDS was laid in part by unilateral actions to amend the IIAs in the years preceding 2017. As a leading norm-setter in the regime, the United States undertook a notable unilateral initiative in 2004 by updating the U.S. Model BIT of 1984. In 1984, a preliminary attempt was made to protect investments using the Model BIT. The same Model, in its 2004 version, is among the early attempts of the opposite ilk. Due to its strong pro-state connotations, it established an exception in the current ISDS norms.

The first change in there was increased protections for the general public. Particular elements included to address government regulation for the purposes of health, safety, the environment, and internationally accepted labor standards. Broad exemptions for issues like taxes, essential security, and the safeguarding of humans, animals, and plants were also incorporated. And although the old model's concept of investment was quite broad, covering practically any asset conceivable, the new model narrowed this definition considerably. Certain debts, licenses, orders, and judgements were excluded from the definition of investment depicted in Article 1 through footnotes.

A further example of pro-state characteristics in the 2004 Model is formed by the limitations placed on national and Most-Favored-Nation (MFN) treatment. These modifications simplified the process by which governments can exempt certain industries from national treatment and MFN treatment obligations. Without a doubt, the MFN clause does not provide the same level of protection for investors in BITs signed after 2004. In a similar vein, the 2004 Model significantly narrowed the scope of fair and equal treatment as well as comprehensive safety and security guarantees extended to investors. The prior provision protecting investors' rights to pursue

disputes in national courts was also removed, as was the additional protection against arbitrary or discriminatory acts and the umbrella clause.

Building on these and other earlier unilateral initiatives, notable progress toward multilateral and all-encompassing the ISDS reform was made in July of 2017. In fact, the basis of this comprehensive reform has also been laid since 2015. In 2015, the UNCITRAL Secretariat asked the Geneva Centre for International Dispute Settlement (CIDS) to conduct a research towards determining whether the Mauritius Convention on Transparency can serve as a model for the future ISDS reforms. To improve the ISDS, CIDS has studied two potential solutions in depth: a permanent dispute settlement body and an appeal mechanism. Establishing these permanent bodies was suggested as a remedy to the challenges caused by the ISDS's ad hoc framework (Kaufmann-Kohler & Potestà, 2016).

Many different aspects of these bodies were examined, such as their legal nature and composition, the law guiding their processes, their relationship with the annulment of decisions, and enforcing awards (Kaufmann-Kohler & Potestà, 2016, pp. 33-68). It was also considered how a multilateral instrument, called the Opt-in Convention, could be established to add these additional dispute settlement options to the existing IIAs (Kaufmann-Kohler & Potestà, 2016, pp. 75-93). Thus, the study paid more attention to the procedures of the ISDS than to the substantive protections it offers. This means that the primary focus of the research was to find ways to alter the ISDS provisions in the treaties so as to address the criticisms leveled against the ISDS, such as its perceived lack of consistency and the difficulty in appealing or annulling awards. The report concludes that the Mauritius Convention could serve as a valuable model for a desired multilateral ISDS reform, despite the fact that the issues involved in this reform are much more complex than the establishment of a transparency standard in investment treaties (Kaufmann-Kohler & Potestà, 2016, pp. 93-99).

Following the presentation of this report at the UNCITRAL Commission's 49th session in 2016, the UNCITRAL Secretariat commissioned additional research from the CIDS in 2017. This additional research was carried out to analyze how the proposed multilateral investment court and appeal mechanism might be structured (Kaufmann-Kohler & Potestà, 2017). To that end, it compared the composition of several international judicial and arbitral bodies. It revealed that the procedures for appointing arbitrators would undergo the most radical transformation if such adjudicatory bodies were to be established (Kaufmann-Kohler & Potestà, 2017, pp. 10-17).

The arbitrators in this system would be appointed by the states, much like judges, rather than the parties, as is the case with the current ISDS (Kaufmann-Kohler & Potestà, 2017, pp. 17-21). It was noted that arbitrators needed to meet certain criteria in order to be chosen, including having the knowledge and experience to carry out their duties, meeting certain racial and gender diversity quotas, and having certain institutional and personal independence guarantees in place (Kaufmann-Kohler & Potestà, 2017, pp. 21-60).

The study emphasized the necessity for states to guarantee that the selection of the adjudicators is carried out through a method that is multi-layered, transparent, and open to stakeholders in order to ensure the independence and credibility of these bodies (Kaufmann-Kohler & Potestà, 2017, pp. 60-90). Other elements considered as contributing to the independence and integrity of the process are long, nonrenewable terms of office, financial stability, incompatibilities, and immunities (Kaufmann-Kohler & Potestà, 2017, pp. 90-93).

According to the study's conclusion, the new investor-state dispute settlement system's success and legitimacy hinge on the composition of these permanent bodies (Kaufmann-Kohler & Potestà, 2017, p. 108). The primary focus here is on the role of these permanent bodies in reducing the influence of political factors in the selection of arbitrators and the decisions made by these arbitrators. Meritocratic arbitrator selection is proposed as a solution to the ISDS's legitimacy crisis, based on the understanding

that political factors in arbitrators' appointments and rulings are the primary cause of the crisis (Kaufmann-Kohler & Potestà, 2017, p. 109). It is argued that justice is regarded to be attainable if states, investors, and other stakeholders have faith in the composition of these bodies to carry out their duties fairly, impartially, and in accordance with the mandate placed upon them (Kaufmann-Kohler & Potestà, 2017, p. 110).

3.6. Institutionalization of the ISDS Reform Initiatives

Evaluating the findings of these two studies, the UNCITRAL Commission gave WGIII a broad mandate to investigate potential changes to investor-state dispute settlement in July 2017 (UNCITRAL, 2017, p. 46). This is, in fact, consistent with UNCITRAL's standard operating procedures, whereby the Commission assigns tasks to Working Groups, which are technical organizations focused on particular legal frameworks regulating global trade, to further specific objectives. The membership of WGIII includes UNCITRAL member states and observers such as non-member states, international organizations, and non-governmental organizations. WGIII schedules regular sessions and intersessional meetings, where many stakeholders participate in in-depth deliberations on different reform alternatives. Between sessions, each member state may also provide written submissions.

Confidence in the ISDS as a whole was said to be the primary goal of the reform process (UNCITRAL, 2017, p. 43). To that purpose, the process was characterized as government-led, consensus-based, fully transparent, and open to all input (UNCITRAL, 2017, p. 46). For the Working Group's part in the reform, three key steps were outlined. First, the Working Group would identify and examine issues with investor-state dispute settlement; second, it would determine if reform is desirable in light of any discovered concerns; and third, it would design any appropriate remedies to present to the Commission (UNCITRAL, 2017, p. 46). It is important to stress, however, that the mandate does not extend to the substantive standards that underlie investment treaties but rather to merely procedural ones.

In accordance with its mandate, WGIII met in November 2017 and April 2018. Many issues related to the democratic accountability and legitimacy of the ISDS regime were discussed during these meetings. At the third meeting, held in November 2018, the issues were broken down into the following categories: "Concerns pertaining to consistency, coherence, predictability, and correctness of arbitral decisions by the ISDS tribunals; concerns pertaining to arbitrators and decision makers; and concerns pertaining to the cost and duration of the ISDS cases" (UNCITRAL, 2018, p. 3). WGIII also developed possible reform options to address these concerns during the same meeting (UNCITRAL, 2018, pp. 7-21).

Accordingly, reform options to address the first group of concerns include giving states a larger role in interpreting their investment treaties and increasing the involvement of state authorities in the preliminary settlement of disputes (UNCITRAL, 2018, p. 7). The introduction of a mechanism for preliminary scrutiny of awards, binding precedent, and preliminary judgments, as well as the creation of an appeals body and an international court system, are also on the list of proposed reforms (UNCITRAL, 2018, pp. 8-10). Reform strategies to address concerns relating to arbitrators and decision makers include developing a code of conduct and other ethical requirements for arbitrators and adjudicators and adjusting the appointment procedure of arbitrators by the parties (UNCITRAL, 2018, pp. 11-12). The construction of a conflict prevention system and advising centers, the promotion of alternative dispute resolution mechanisms to arbitration, and the substitution of ad hoc arbitrators with full-time judges are all advocated to reduce the time and money spent on the ISDS proceedings (UNCITRAL, 2018, p. 13). All of these suggestions have formed the backbone of future talks on reforming the ISDS.

At the April 2019 WGIII meeting in New York, more issues, such as third-party funding, were added to the list of concerns, and the Group ultimately reached consensus on the need for reform. As a result, it moved into the third stage of the reform process, which involves determining how to assess alternative reform

proposals. At that point, states engaged in "battles over naming and framing" (Roberts & John, 2019). A good example of this would be the heated debate at the meeting about whether or not the terms *incremental* and *systemic* should be used to categorize the reform proposals on the table (Roberts & John, 2019).

Following debate, the Working Group agreed that there should be no differentiation between incremental and systemic reform (UNCITRAL, 2019). However, it was stressed that the reform proposals were not identical. There were proposals that were more structural in nature, proposals that involved improvements within the existing system, and those that fell somewhere in between. Creating new international institutions, like a multilateral court and appellate body, is an example of structural reform, whereas making minor adjustments to the current system, like amending the text, is an example of non-structural reform.

Indeed, this categorization is similar to the one made by Anthea Roberts, who finds three major reform perspectives among the members. According to *incrementalists*, the current system is the best possible option for dispute settlement. Thus, the expressed concerns can be remedied with the modest revisions. While *systemic reformers* believe in the significance of keeping the investors' right of directly appealing to international tribunals, they argue for more radical systemic reforms than incrementalists. Establishing a multilateral investment court and an appellate body can be some examples of their proposed changes. Lastly, *paradigm shifters* argue for a total dismissal of the existing system. They suggest some alternatives to strengthen the state sovereignty, such as restoring the authority to the domestic courts or developing state-to-state arbitration instead of investor-state international arbitration. *Paradigm shifters*' involvement in reform initiatives may be particularly interesting to observe, but since the UNCITRAL reform process is the most inclusive reform initiative to date, their desire to influence the current process and set the standard for the new framework for international investment dispute settlement may account for their involvement in the reform process (Roberts, 2018, p. 410).

In another major study, researchers identified four distinct types of reform ideas (Langford, Potestà, Kaufmann-Kohler, & Behn, 2020, p. 176). The first type seeks to improve the present systMIRem by, for example, changing the appointment and conduct rules for arbitrators. The second type of reform proposes adding an appeal mechanism to the present system as a second level of review. The third reform category envisions the establishment of a multilateral investment court as a new international body of the ISDS. In the fourth category, the ISDS is completely eliminated, with two sub-scenarios proposed: recourse to domestic courts or State-to-State arbitration (with or without prior required recourse to domestic courts).

3.7. Proposed Options to Reform the ISDS

In order to facilitate discussion, WGIII decided to classify the specific reform proposals indicated in the submissions from various nations. The reform options were classified into seven categories (UNCITRAL, 2019). In the first category, reform options for tribunals, ad hoc, and permanent multilateral mechanisms are provided. In this context, the EU and its member states, Morocco, Thailand, Costa Rica, Turkey, and the Republic of Korea have all proposed the establishment of advising center(s) with a seat in one location or on a regional basis. The proposal's principal impact is the creation of best practices and the dissemination of necessary institutional information for the purpose of preventing disputes, with due regard for maintaining confidentiality and avoiding conflicts of interest. Concerns about access to justice, the correctness and consistency of awards, and the cost and duration of the ISDS processes are aimed to be addressed.

Under the same category, the EU and its member states propose establishing a stand-alone review mechanism to evaluate the ISDS tribunal decisions before they are issued. The EU and its members support the creation of a pre-award review mechanism and a streamlined process for post-award actions including interpretation, revision, and annulment in their submission to the WGIII (UNCITRAL, 2019, p. 2). They contend that this kind of reform is the only one that can adequately address every issue the

Working Group identified (Submission from the European Union and its Member States, 2019, p. 2).

Similarly, proposals from Morocco, Chile, Israel, Japan, Ecuador, and China call for the establishment of an appellate system that might be responsible for reviewing the judgments and awards handed down by arbitral tribunals, international investment courts, etc. (UNCITRAL, 2019, p. 3). Both stand-alone review and appellate mechanism sought to address inconsistent and incorrect decision-making. The first category concludes with the suggestion of establishing a multilateral investment court with permanent judges and a permanent court of first instance and an appeals court. The EU and its member states, South Africa, the Republic of Korea and Bahrain made this suggestion in response to concerns about the reliability and accuracy of judgments, the time and money required for the ISDS processes, and the impartiality of arbitrators (UNCITRAL, 2019, p. 3).

The second category is about changing the appointment methods for arbitrators and developing a code of conduct for them (UNCITRAL, 2019, p. 4). Appointing members of the ISDS tribunal through strengthened regulations was proposed by the EU and its member states, Thailand, Chile, Israel, Japan, Costa Rica, Turkey, Ecuador, China, and Bahrain. They also advocated the establishment of appointing authorities, the use of a roster to choose arbitrators, or the adoption of methods already in place at other international courts and organizations (UNCITRAL, 2019, p. 4). Morocco and South Africa joined these countries to their proposal for the development of a code of conduct for arbitrators (UNCITRAL, 2019, p. 5). The goal of this code of ethics was to create a uniform legal benchmark for arbitrators. It was believed that these two reforms would help to overcome most of the issues with the ISDS (UNCITRAL, 2019, pp. 4-6).

Reforming treaty parties' involvement and control procedures on treaty interpretation constitute the third category (UNCITRAL, 2019, p. 6). The EU and its member states, Morocco, Thailand, Chile, Israel, Japan, Costa Rica, and South Africa, all proposed increasing the authority of treaty parties over their instruments as an initial step in this

direction. To promote a more systematic use of unilateral interpretations and ensure abidance by arbitrators, these countries suggested establishing a mechanism for treaty interpretation and associated concerns (UNCITRAL, 2019, p. 6).

Moreover, in their submissions, the EU and its member states, Costa Rica, Brazil, South Africa, and Bahrain, advocated for a greater role for state authorities in the ISDS proceedings (UNCITRAL, 2019, p. 7). In it, they proposed a structure for the preliminary assessment of issues among states, including technical discussions, decisions by the respective State authorities, and the establishment of a joint review committee by the treaty parties. They also proposed creating a review/appeal mechanism or State-State body that claimants could apply to if the dispute could not be resolved at the technical level within a specified time frame. Hence, they intended to address unjustifiably conflicting interpretations of investment treaty provisions, inconsistency and inaccuracy of judgments, and excessive expense and duration of the ISDS processes (UNCITRAL, 2019, p. 7).

The fourth category focuses on the development of methods for conflict prevention and resolution (UNCITRAL, 2019, p. 7). The majority of states favor a reform that would improve alternative dispute resolution processes like ombudsman and mediation instead of arbitration (UNCITRAL, 2019, pp. 7-8). This idea was included in nearly every state's submittal. Mediation and ombudsman are believed to facilitate early dispute resolution and preserve long-term relationships, hence reducing the cost and time of the ISDS proceedings. Moreover, Indonesia, Morocco, and South Africa proposed the creation of model laws on the exhaustion of domestic remedies (UNCITRAL, 2019, p. 8). Under the fourth category, there is also the suggestion to create procedures or mechanisms to dismiss frivolous claims at an early stage, such as dismissal before a hearing (UNCITRAL, 2019, p. 9). The submissions from Indonesia, Morocco, Chile, Israel, Japan, Costa Rica, Turkey, and South Africa all expressed support for this proposal (UNCITRAL, 2019, p. 9).

The final reform proposal in the fourth category concerns multiple proceedings, reflecting loss, and respondent States' counterclaims (UNCITRAL, 2019, pp. 9-10). Some countries have requested that arbitral tribunals be given direction on how to handle cases involving multiple procedures, wherein various entities within the same corporate structure have a right of action against a State respecting the same investment. Active use of consolidation, the ability to share information between tribunals, and stays of processes are all within the scope of this proposal. The countries that supported this idea include the EU and its member states, Chile, Israel, Japan, Costa Rica, Turkey, and South Africa. In addition, Morocco and South Africa established certain recommendations for a concurrent procedure in which a State's action affects multiple unrelated investors. Here, they called for establishing a systemic response to recurring issues through the establishment of claims commissions and a system of preliminary judgments by designated authorities. Specifically, the goal is to have the ISDS tribunals make more uniform conclusions and to create new legal norms that can deal with issues of process abuse, judicial economy, and the high expenses and lengthy nature of dispute resolution (UNCITRAL, 2019, pp. 9-10).

Within the fifth category, Thailand, Chile, Israel, Japan, Costa Rica, and Turkey proposed streamlined approaches to cost control (UNCITRAL, 2019, p. 10). The proposed reform involves the application of separate procedures for smaller claims and less complex cases, as well as the development of guidelines to streamline and expedite some phases of the system (UNCITRAL, 2019, p. 10). The submissions of Morocco, Thailand, Chile, Israel, Japan, Costa Rica, Turkey, and South Africa also called for the establishment of a cost-sharing mechanism between the disputing parties, with the loser-pays rule included, and for regulations on security for cost to be put in place to guarantee its availability and use by tribunals (UNCITRAL, 2019, pp. 10-11). The final reform proposal in this category focused on various streamlined procedures and cost-management solutions (UNCITRAL, 2019, p. 11). Morocco, Thailand, Chile, Israel, Japan, Costa Rica, and South Africa all advocated for the implementation of stricter timeframes and means of compliance. In addition, they desired improved case management from the ISDS tribunals, such as the provision of more precise, real-time

information on the status of a case and its accompanying costs to the parties (UNCITRAL, 2019, p. 11).

The sixth category covers the definition, prohibition, and regulation of third-party funding in relation to admissibility limitations, disclosure requirements, cost-related considerations, legal aid mechanisms, and codes of conduct (UNCITRAL, 2019, pp. 11-12). The countries that included these concerns in their proposal are Morocco, Thailand, Chile, Israel, Japan, Costa Rica, Turkey, South Africa, China, and the Republic of Korea (UNCITRAL, 2019, pp. 11-12). A distinct seventh category was also formed to outline the additional reform possibilities that the Working Group would determine (UNCITRAL, 2019, p. 12).

3.8. How Can the Reform Options Be Implemented?

From another perspective, the application of these reforms to existing investment agreements is as crucial as the reforms themselves. With this in mind, the EU and its member states, Colombia, and Ecuador recommended adopting the 'Opt-in Convention' format utilized by the Mauritius Convention (UNCITRAL, 2019). Indeed, the Opt-in Convention is the tool through which investment treaty Parties declare their willingness to subject existing treaty disputes to the new ISDS rules and processes. Since it is simpler to incorporate the revised ISDS processes into future treaties, the Opt-in Convention would largely target existing treaties and agreements.

This strategy would allow states to exclude particular sections from application or to select between predetermined possibilities by making reservations or opt-in/opt-out declarations. It is expected that providing states with such options will increase the likelihood of the reforms' implementation (Kaufmann-Kohler & Potestà, 2016, p. 77).

The Working Group, during its session in January 2020, requested that the Secretariat begin preliminary work on the methods to implement the reform options and, in that context, develop a paper on a multilateral instrument on the ISDS reform, called as the

MIIR (UNCITRAL, 2020). As a result, the Working Group received a document summarizing the primary issues regarding the development of the MIIR in April 2020 (UNCITRAL, 2020). It was emphasized in that document that the MIIR should offer a consistent and adaptable framework for the various reform elements, allowing States Parties to decide for themselves whether and to what extent they would accept the various reforms (UNCITRAL, 2020, p. 3).

It also included a summary of the MIIR's essential features. Accordingly, the MIIR was characterized as being designed to address identified issues of the ISDS, such as a lack of consistency and coherence, and to enhance legal certainty in the ISDS (UNCITRAL, 2020, p. 3). It was also described as a flexible institution, in which States could select the reform elements, and continuous involvement by States Parties was permitted (UNCITRAL, 2020, p. 4). Other crucial characteristics of the MIIR include allowing for the greatest possible engagement of states and giving a holistic approach to the ISDS reform (UNCITRAL, 2020, p. 5).

In 2022, after two unofficial meetings of WGIII in June and December 2021, the Secretariat drafted a note for the Working Group to consider regarding the establishment of the MIIR (UNCITRAL, 2022). The note begins with a discussion of the possible framework for a multilateral instrument. In this context, the Secretariat developed two recommendations aimed at balancing the coherence of the ISDS reform with the flexibility to be offered to MIIR States Parties (UNCITRAL, 2022, pp. 2-4). A framework convention supplemented by one or more protocols could be one conceivable structure for the MIIR. While a framework convention can create the institutional or governance structure of the MIIR, as well as broader obligations for its State Parties, protocols can address more specific issues of the MIIR. The MIIR could also be structured as a single convention with one or more annexes. Annexes, which are similar to protocols, can expand on the convention by discussing issues like substantive obligations and the convention's institutional framework. When the state becomes a party to the Convention, it may choose whether or not to be bound by the protocols and annexes. These approaches may provide flexibility, but they may worsen

inconsistency in the ISDS by encouraging further fragmentation (UNCITRAL, 2022, pp. 2-4).

Hence, the note also stresses the importance of maintaining coherence as a guiding principle for the development of the MIIR alongside flexibility (UNCITRAL, 2022, pp. 4-6). It contends that making a set of fundamental principles obligatory on all States Parties would ensure consistency in the implementation of the ISDS reforms. Such fundamental principles may include the MIIR's overarching goal and guiding principles, as well as the State Parties' pledge to reform the ISDS in existing and future investment agreements. In this manner, it is intended that the Working Group consider how the MIIR would operate and which essential aspects should be included in the fundamental provisions (UNCITRAL, 2022, pp. 4-6).

The Working Group should also concentrate on making the MIIR as user-friendly as possible (UNCITRAL, 2022, pp. 6-7). Owing to the anticipated complexity of applying the aforementioned options to give coherence and flexibility, it is essential to provide the instrument with clarity and user-friendliness. In order for the MIIR to function well, it is essential that all parties involved in the system, including disputing parties and adjudicators, have a clear understanding of their rights and obligations and the process for resolving disputes. Consequently, in addition to coherence and flexibility, it is critical to construct the MIIR in a way that provides clarity and legal certainty (UNCITRAL, 2022, pp. 6-7).

In the note, the Secretariat also addressed the scope of applicability and the link between the MIIR and existing treaties (UNCITRAL, 2022, pp. 7-9). The Secretariat has indicated a preference for applying the ISDS system to both existing and future investment agreements in an effort to create some uniformity within the ISDS framework. It made reference to the Mauritius Convention on Transparency with regard to how the MIIR could be applied to existing investment treaties. The Mauritius Convention establishes an effective procedure for states to apply the Transparency Rules to pre-existing investment treaties. A common practice for investment

agreements drafted and signed following the Convention's issuance is to contain a reference to the Transparency Rules. To execute the measures to address particular provisions, such as domestic tax base erosion and profit shifting, the Mauritius Convention applies in addition to and alters the application of existing tax treaties (UNCITRAL, 2022, pp. 7-9).

3.9. Chapter Summary

Any assessment of the developments around the ISDS must take into account the broader economic and social context. Neoliberal ideas and institutions have been losing ground since the turn of the millennium against broadly nationalist ideologies and "the return of the state" (Alvarez, The Return of the State, 2011). International investment protection is no longer the primary objective of the international investment regime. Institutionally and individually, states seek to strike a balance between promoting foreign investment and protecting the rights of states to regulate. The current effort to reform the ISDS, therefore, represents a shift away from prioritizing private sector interests and toward reevaluating the value of public good. Even more importantly, the current reform initiative reflects a shift in the global political power structure. As the developed world has been shrinking, the developing world has been expanding economically and politically. The growing prominence of China and India in trade and investment flows clearly indicates this.

In contrast, the United States and the European Union have been experiencing a decline in their influence. This change has reversed the traditional role of developed countries as net capital exporters, making it necessary for them to become net capital importers. Hence, a new facet of the ISDS has been apparent to them. As a defendant in arbitration tribunals, they have begun to face the detrimental impacts of the ISDS on host states. Although they were the primary architects of the current ISDS, they now urge for its re-balancing it by expanding state rights.

Once the developed world finally shared the developing world's long-standing need for the ISDS reform, the reform process gained momentum and became institutionalized. Nevertheless, their preferences for reforming the ISDS differ. Many developed countries have been part of the systemic reformers camp, which advocates for radical systemic changes to the ISDS, such as creating an appellate body and a multilateral investment court. They attempt to strike a balance between the interests of states and investors by proposing that member states designate judges for these bodies. On the other hand, many developing countries fall into the paradigm shifter camp, which advocates for eliminating the current system and offering alternative arrangements to retain state sovereignty.

Briefly, at its 50th session in 2017, the Commission entrusted WGIII with a broad mandate to examine the potential reform of the ISDS. From December 2017 to October 2019, WGIII identified and reviewed concerns regarding the ISDS and determined that reform was desirable in light of the stated concerns. The Group then worked on developing and classifying concrete reform items between October 2019 and September 2022. The September 2022 meeting was also the forum where potential approaches for implementing reforms were addressed. Submissions from member states and feedback on those submissions, together with in-depth talks about potential the ISDS reform during regular sessions and intersessional meetings have persisted since then.

Concluding this chapter, it is essential to emphasize that the various state proposals on reform options represent their respectively unique contextual conditions. Each is drafted in accordance with the requirements of specific contextual factors, such as a state's history, philosophy, level of development, market structure, etc. The EU, for instance, has proposed setting up a multilateral investment court system with features similar to its existing system formed through bilateral investment agreements. Brazil and South Africa, on the other hand, have proposed alternative conflict resolution mechanisms to arbitration, possibly backed by state-to-state adjudication. With this "lens of pluralism" (Roberts, 2018, p. 23) in mind, the ongoing ISDS reform process

has been able to identify a wide range of reform options and implementation alternatives. The next two chapters will focus on the specifics of two opposing ends of the reform spectrum, the EU and TWAIL perspectives.

CHAPTER 4

LOOKING AT THE REFORM OF ISDS VIA THE EU-COLORED LENS

Looking at international investment law through an EU-colored lens is a relatively new phenomenon. Indeed, no EU law or policy governing foreign investments existed until the Lisbon Treaty. With the Lisbon Treaty, foreign direct investment became part of the EU's Common Commercial Policy. This made it possible for the EU to pursue an international investment policy. A key component of this policy has been the ISDS. Due to the frequent use of the ISDS by European investors and member states, reforming the current system to better safeguard European interests has been a priority for the EU.

Although the existing system was primarily shaped by European states with the objective of protecting the interests of European investors, the context has significantly changed since then. As was stated in the preceding chapter, European participation in the system has primarily taken the form of host states rather than investors. As such, safeguarding member states' rights to regulate via bilateral and multilateral means has been the primary objective of the EU's international investment policy. The EU has been able to get its agenda for reforming the ISDS incorporated into its bilateral agreements. The best illustration of this is The Comprehensive Economic and Trade Agreement (CETA).

The EU also aims to utilize multilateral forums to ensure the sustainability of this success. To this purpose, it has been working to establish itself as a leader in the UNCITRAL negotiations on the ISDS reform and to make the other parties prioritize the EU reform agenda over the other options. Its reform agenda, focused on

centralizing the ISDS through a permanent investment court, is a powerful instrument for reinvigorating support for the ‘united Europe’ dream. Indeed, the real motivation behind doing so is to address pervasive Euroscepticism and restore coherence and confidence in the face of persistent crises.

To view the ISDS reform process through an EU-colored lens, one must first understand how the recurring crises of European integration have impacted the EU policies. With that in mind, the chapter starts by establishing the context with respect to the crises of European integration. The chapter then illustrates how the EU used its newly acquired authority in international investment to mitigate the effects of these crises. The following sections evaluate the EU attempts made at the bilateral and multilateral levels to reform the ISDS. There, the EU's proposed reforms are illustrated using examples from the CETA for the bilateral level and the UNCITRAL negotiations for the multilateral level. The chapter concludes by assessing the viability of the EU's perspective on the ISDS reform.

4.1. The EU: Borne of Crises

What began in 1951 as a modest attempt at economic unification among six European countries has far exceeded all expectations. Since then, the European project expanded into a union of 27 states covering most of the European continent. With a common currency, closely coordinated policies, and extensive political, economic, and social institutions, the EU has become something very similar to a sovereign state. It is now the largest trading bloc in the world and has the highest levels of both incoming and outgoing foreign investment (European Commission, 2023). Notwithstanding its impressive achievements, the history of European integration is also marked by recurrent crises. The EU is indeed the product of an endless cycle of ups and downs.

4.1.1. Early Crises of European Integration

The beginning of this cycle can be traced back to the 1950s. The establishment of the European Coal and Steel Community (ECSC) in 1951 was a huge triumph for integration. Yet, only three years after this foundation, the first significant crisis on the way to European integration occurred: France's rejection of the European Defense Community (EDC). Three more years passed following the first ‘down’ phase of integration before the ‘up’ phase began. The 1957 formation of the European Economic Community (EEC) was one further stepping stone on the road to the EU. With the establishment of the EEC, European integration was widened, deepened, and institutionalized. Yet, another crisis would soon be knocking on the door.

The Empty Chair Crisis, which involved issues of sovereignty, erupted not long after the EEC's common market came into effect. This political crisis was a result of a collision between two competing political ideologies: federalism, championed by Commission President Walter Hallstein, and nationalism, advocated by French President Charles de Gaulle. In 1965, the French President made clear that France would not join the Council of Ministers until its concerns about national sovereignty were addressed.

This was neither the first nor the only crisis that De Gaulle created. Further manifestations of his aversion to federalism were his vetoes of Britain's applications to join the European Community in 1963 and 1967. Thus, the crises of European integration in the 1960s had a political origin and were influenced by friction between federalism and nationalism. It was believed that the end of the De Gaulle era in 1969 would signal an ‘up’ period for integration owing to the cessation of political crises.

The 1970s, however, brought Europe a number of economic crises. Owing to a succession of global recessions, the continent experienced widespread stagflation. This directly contributed to the rise of economic nationalism and the halting of European integration. Hence, the expectation that the 1970s would result in a more unified

Europe was ultimately unfounded. Even in the populations of the founding states, “a Eurosceptic wind was blowing” (Bussière, et al., 2014, p. 15). In spite of this, Euroscepticism did not prevail in the end. The test of the member states' commitment to an integrated Europe was passed with flying colors. To address economic stagnation, they ultimately turned to supranational solutions rather than national policies. Another crisis was over by the time the 1970s rolled around, and a new, promising phase of European integration had begun.

In 1979, the European Monetary System (EMS) was established to prevent national currencies within Europe from fluctuating in value relative to one another. In addition to stabilizing national currencies and bolstering the EEC’s economic performance, the EMS represented a significant step toward greater fiscal unification. That made the euro possible. The Single European Act (SEA) of 1986 represented a further development toward closer union. It laid the groundwork for achieving full economic and political integration among European states. Using the SEA as a guiding light, the Treaty of Maastricht in 1992 established the EU that exists today. Yet, the additional issues that have come forth by the global and regional transformation of the 1990s would quickly dim the stars in the eyes.

At the outset of the 1990s, it became abundantly evident that the hope for even greater integration that had pervaded the 1980s was nothing more than a fond memory. Europe's preceding geopolitical order was fundamentally transformed with the fall of communism and the Soviet Union in 1991. The fall of the Iron Curtain and the reunification of Germany necessitated a reevaluation of the original rationale for European integration. The redrawing of Europe's borders ushered in a new set of concerns.

One pressing issue was figuring out how to include the Central and Eastern European countries into the established European economic and political order. Accession negotiations with these newly independent states began in the mid-1990s. While the 1995 accession of Austria, Finland, and Sweden to the EU was significant, the year

2004 marked the turning point of the EU enlargement. The Union welcomed ten new members from Eastern Europe.

On top of the already challenging task of widening, the newly constituted EU had to contend with the even more daunting task of deepening. Under the Maastricht Treaty, which unified the ECSC, the European Community, and the European Union Atomic Energy Community, the EU was formed as a political and legal body. This body was constructed on three pillars that represent a balance between supranationalism and intergovernmentalism. In contrast to the supranationalist foundations underlying the European Communities pillar (which includes the single market, the EMU, etc.), the Common Foreign and Security Policy pillar, and the Justice and Home Affairs pillar are both governed by the intergovernmental cooperation method. The goal in this differentiated structure was to leave open the question of 'the finalité politique', which had been a source of internal conflict since the beginning of the integration (Elvert, 2009, p. 52).

Although the Maastricht Treaty's institutional deepening was designed to mitigate the unintended consequences of the widening process, deepening itself ended up being the principal cause of another crisis. In 1992, when Danes voted against ratifying the Maastricht Treaty, a ratification crisis in European history began. The outcome of the referendum was indicative of the Danish people's willingness to maintain their sovereignty against the newly designed EU's intervention in key state competences, such as currency and defense. This rejection was regarded as a significant impediment to the integration process, thus the Community moved swiftly to find solutions.

The ultimate solution was to provide special treatment to Denmark. At the Edinburgh Summit of 1992, Denmark was granted legal exemptions from joining key areas of integration that could threaten its sovereign rights, such as the defense community, the single currency, and European citizenship. While it may have temporarily resolved the issue at hand, the solution itself has become the source of the EU's subsequent ratification crises. Another link in the chain was Ireland's refusal to ratify the Nice

Treaty of 2001 out of concern regarding Eastern enlargement. Similar to the situation in Denmark, Ireland was given the opportunity to opt out. Its exclusion from the Schengen Area, along with that of the United Kingdom, has helped to perpetuate the policy of differentiation between the EU members.

There was concern that the growing trend of differentiation would cause friction within the integration process among the member states. It was stated that the Union's "we-feeling" would be damaged if it adopted a "Europe á la carte," in which members could "pick and choose" from various aspects of the Union (Sion, 2004, p. 3). The results of the referendums in France and the Netherlands on the Constitutional Treaty provided clear evidence of the legitimacy of these concerns. As the President of the European Council, Jean-Claude Juncker, put it, "Europe is not in a state of crisis, it's in a state of profound crisis" (CNN International, 2005) after the rejection of ratification of the European Constitution.

As stated in the 2001 Laeken Declaration, the idea of developing a European Constitution arose from the necessity to deal with a rapidly changing, globalized world. With this goal in mind, the EU was expected to improve how it divides and defines responsibilities, streamline its institutions, and strengthen democracy, transparency, and efficiency. This paved the ground for the development of a European Constitution for European citizens (European Union, 2001). Almost immediately following the Declaration, the European Council called for the creation of a European Convention, which, over the course of 16 months, developed a constitution for the EU. Protracted negotiations eventually resulted in the October 2004 signing of the Treaty establishing a Constitution for Europe. Nevertheless, the refusal of ratification by the Dutch and the French precluded its implementation.

Indeed, careful observers of the surrounding social, political, and economic milieu were not surprised by this rejection. The Treaty's ideal of Europe was at odds with the prevailing conditions on the ground. There was no way for the EU to function as a federal state in the face of growing fragmentation, a lack of a shared identity, and

concerns about enlargement. Having learned this lesson from the hard way, skepticism toward greater integration has intensified. Still, was the failure of the European Constitution the end of European integration? This wasn't the case at all.

The Lisbon Treaty of 2007 represented the compromise. The vision of the Union functioning as a state, complete with an anthem, a flag, people, laws, a President, a Minister of Foreign Affairs, etc., was abandoned there. On the other hand, most of the goals of the Constitutional Treaty for the 'United States of Europe' were maintained in the Lisbon Treaty. Removing the pillar system, granting the EU full legal personality, and transferring new powers from member states to the EU were all achieved. Changes made to the Constitutional Treaty by the Lisbon Treaty were largely cosmetic and consisted solely of the removal of state-like symbols. It merely wrapped up the concerns of the member states in a slick bow and did little to address their underlying causes. Hence, the hope it inspired that this would be the beginning of a more rapid process of Europeanization quickly faded.

4.1.2. Recent Crises of European Integration

Then, the global financial crisis of 2008 came knocking on the EU's door. This crisis ultimately served as the spark for the financial collapse of the Eurozone. It was the first EU crisis to be precipitated by an exogenous shock, as opposed to its predecessors, which were all driven by disagreements over the underlying institutional architecture. It all started with Greece, the first Eurozone member to default on its debt payments. The European financial system's interconnected nature allowed the sovereign debt crisis to quickly spread to other countries. The crisis was exacerbated by individual states' inability to devalue their currencies under the conditions of the Economic and Monetary Union (EMU), as well as an inherent flaw in the EMU structure.

The combination of these two factors rendered the EU unprepared for an existential threat and hindered effective action. In the beginning, national governments handled the crisis independently. Despite this, it soon became evident that Greece was on the

verge of bankruptcy, which may have severe ramifications for the Eurozone. Huge imbalances in the Eurozone posed a threat to the entire Euro Area in the form of recessions, a restraint on government spending, and lasting consequences on the labor and employment markets.

In light of this information, the European Central Bank (ECB) was expected to take decisive action; but, it was unable to do so due to design flaws in the EMU. The failure to achieve convergence between monetary and fiscal policies became the root cause of the problem. While the member states granted authority to the ECB over monetary policy, they kept the control over fiscal resources and fiscal policy at their hand. Because the monetary union was not completed with a financial and banking union, the EU lacked significant crisis-response capabilities. Yet, the Eurozone Crisis would serve as a catalyst for the direction of increased fiscal unification.

From a neo-functionalist standpoint, the crisis originated as an unexpected spillover and resulted in an increase in supranationalism (Hooghe & Marks, 2018, p. 7). Due to a greater understanding of their interdependence, member states increased their fiscal policy coordination. It became apparent that a more integrated fiscal union is necessary for the successful and efficient operation of the Eurozone. Member states approved a series of amendments that saw the transfer of previously opposed sovereign competencies to the EU institutions. As a result, despite the terrible economic impact on the EU, the Euro Crisis resulted in a significant deepening of integration and became the long-awaited hope for a more united Europe. Yet, an additional external shock to the EU caused by the humanitarian crisis in the Middle East would destroy this tide of optimism.

Since the end of the twentieth century, Europe has been the primary destination for immigrants (Hooghe & Marks, 2018, p. 9). Despite this, Europe was unprepared for the huge number of refugees it would encounter as a consequence of the 2011 Syrian Civil War. The EU was stunned by the extent of this immigration wave, which involved the displacement of 13,6 million people and was the largest since World War

II (UN World Food Program, 2022). Due to the EU's lack of a unified policy and institutional structure to absorb huge numbers of immigrants, the situation has evolved into a crisis.

Since immigration policy has been a matter left under the national jurisdiction of member states, the Dublin System that regulates a shared system for asylum seekers in the Schengen area does not have the competence to develop a unified European immigration policy. Thus, unilateral actions of member states in response to mass migration triggered a domino effect in the Schengen area, resulting in a multidimensional crisis. In 2015, despite their obligations under the Dublin System, frontline governments such as Italy and Greece began allowing migrants to travel to the North without verification. In addition, Germany suspended the Dublin regulation. It allowed refugees unilaterally for a short time before reinstating border controls with Austria.

All of these provoked uncoordinated action among Schengen member states. Some of them shut down their borders, some sent asylum-seekers back, and yet others refused to enact a resettlement plan. The "disjoint, schizophrenic and, at times, hypocritical" (Greenhill, 2016, p. 317) responses of the member states characterized the crisis.

Unlike the Euro Crisis, the Refugee Crisis did not stimulate deeper European integration. In contrast, it posed a threat to the existing level of cohesion in European social and identity politics. The crisis had such a profound effect that in early 2016 Donald Tusk, president of the European Council, warned that the EU could disintegrate as a political project if nothing was done to resolve it (Greenhill, 2016, p. 318). What exacerbated the impact of the Refugee Crisis was a series of terrorist attacks on member state capitals. After terrorist incidents in Paris in 2015 and later in Brussels, Nice, Normandy, and Berlin in 2016, Euroscepticism rose across the member states.

So, what started as a humanitarian crisis quickly turned into a political crisis, then a security problem, and finally a crisis of solidarity. Rising Euroscepticism has also been accompanied by rising xenophobia, Islamophobia, nationalism, and support for far-right parties. Thus, another layer of the crisis was added: identity. As if dealing with the multidimensional Refugee Crisis wasn't difficult enough, another crisis entered the picture in 2016. In a historic vote, Britons opted out of the EU membership.

It has been argued that Britain's decision to leave was the single greatest threat to the success of the EU and the beginning of its demise (Cohen & Dootalieva, 2022, p. 8). Taking into account the context preceding the referendum, the outcome was hardly unexpected. Far-right parties' rhetoric, such as "Behind mass immigration, there is terrorism" (Chumley, 2017), added to the already present economic, security, and immigration concerns that together paved the way for Brexit. The far-right UK Independence Party (UKIP) claimed that transferring authority to the EU was the root cause of the country's economic, political, migration, and security problems. Consequently, it motivated the "leave camp" by resolving all existing concerns by "taking back control from Brussels" (Kahraman & Özoflu, 2019, p. 63).

Britain's decision to leave spurred disintegration arguments in the EU, despite the country's long history of skepticism toward and many opt-outs from the EU's policies (Rosamond, 2016). Differentiated integration's short-term benefits came at a high cost to the EU in the long run. As an organization with a goal of enlargement, losing one of its most influential members was a major setback. It was called the EU's greatest crisis and a game-changer for Brussels (BBC News, 2016). Despite Donald Tusk, president of the European Council, saying that the remaining 27 nations are all determined to maintain their unity, the decision was largely seen as a disruption of the political order in Europe. It was expected to have far-reaching consequences for the EU and its remaining member states (BBC News, 2016). And so it has.

The success of a right-wing populist party in influencing such a monumental choice as leaving the EU after more than four decades of membership has inspired its equivalents in other European countries. That the EU and its core values are not the only truth for European countries was another lesson learned from Britain's choice to leave. Under the influence of these two lessons, "the illiberal challenge" (Hooghe & Marks, 2018, p. 14) to the independence of the judiciary, the separation of powers, and the protection of individual liberties began in the EU, most notably in Poland and Hungary. This has been accepted as a threat to the liberal constitutionalism of these countries as well as the legal and political order in Europe (Bertoncini & Reynié, 2022, p. 823).

Since coming to office in 2015, Poland's right-wing populist Law and Justice Party has staunchly opposed to the EU membership and the liberal values it promotes. It has openly and repeatedly attacked the EU and its institutions, as well as European values at large. Colyer argues that recent reforms in Poland have been criticized as an illiberal threat to the EU due to their effects on judicial independence, media freedom, and the protection of vulnerable groups, including religious and sexual minorities. He further claims that these threats to the EU and its liberal ideology should be understood to be part of the Party's strategy to gain support by promoting its own brand of conservatism and nationalism (Colyer, 2021, pp. 1-3). In addition, the Law and Justice Party has not been alone in its opposition to a multicultural, liberal, and unified Europe. The Fidesz Party of Hungary has been one of its most reliable allies along this path.

Viktor Orbán, Hungary's Prime Minister since 2010, is said to have gone further than his Polish counterparts in his efforts to weaken liberal democratic features (Hooghe & Marks, 2018, p. 16). Instances of rising illiberalism in the country are cited to include constitutional amendments, party consolidation of power, and electoral rule changes. As one might expect, anti-EU rhetoric has also increased in Hungarian politics, accompanying the growth of nationalism and conservatism.

In 2018, Orbán claimed the EU's Western political ‘elite’ had failed in its duty to defend Europe from Muslim immigration and must now be removed from office. (Reuters, 2018) He added that it is time to bid farewell to both liberal democracy and the elite of 1968, and to embrace Christian democracy. For the sake of Europe's future, he believes it is time to reject liberalism, multiculturalism, and immigration in favor of Christian principles and conservatism. As a result of these developments, the European Parliament declared that Hungary poses "a clear risk of a serious breach" (Simon, 2022) of the EU democratic norms.

Accordingly, the decade that followed the Eurozone Crisis and the subsequent Refugee Crisis sowed the seeds for the rise of populist radical right parties across Europe, as well as a rise in nationalist and conservative sentiments. This has been a severe test for the EU's ability to function effectively on a supranational level.

The emergence of the COVID-19 pandemic in 2020 has exacerbated the severity of this test for the EU. Throughout the pandemic, the Hungarian and Polish governments made significant use of emergency decrees to further muzzle parliament and the opposition (Schneiderman, 2022, pp. 474-476). This has made the threat that illiberalism poses to the EU cohesion and the primacy of the EU principles even more severe.

Some, on the other hand, believe that the pandemic will be a much-needed catalyst for the revival of European integration (The Robert Schuman Foundation, 2021). It is argued that the collective experience of all Europeans with the severity of the pandemic and its repercussions has been a unique opportunity to advance European integration. In addition, the EU vaccine policy administered by the Internal Market Commissioner is cited as a sign of the deepening of European integration. The pooled purchase of vaccines under this policy is argued to enable Europeans to obtain an adequate dose of vaccine while also assisting in the mobilization of sufficient production capacities on a European scale. Consequently, it is stated that the EU has been successful in addressing the effects of the pandemic by acting in solidarity at the

European level and by mobilizing supranational institutions or procedures (The Robert Schuman Foundation, 2021).

Similarly, Quaglia and Vergun claim that the EU has proven itself to be a competent crisis manager in the face of the COVID-19 pandemic (Quaglia & Verdun, 2023). They also claim that the pandemic crisis has contributed to a pattern that emerged in the wake of earlier crises. Faced with crises, the member states have chosen to transfer new competencies to the EU level, or at the very least, to engage in collaborative decision-making at the EU level (Quaglia & Verdun, 2023). Thus, the European integration continues to move "forward through crisis" (Kahraman & Özoflu, 2019, p. 54). Without the functional demands of crises, the member states would never have given as much authority to the supranational EU institutions as they have.

It also appears that the EU has learned from its previous "polycrisis" (Zeitlina, Nicoliaand, & Laffan, 2019, p. 963) how to manage crises. This knowledge of crisis management has influenced the EU's decision to switch from "coercive Europeanization" to "coordinated Europeanization" (Ladi & Wolff, 2021, p. 32). That is to say, rather than relying on conditionality and monitoring, the EU has opted to increase the member states' active involvement in the policy-making process as a mechanism to assure the implementation of EU policies. Therefore, Europeanization after COVID-19 can be described as a bottom-up rather than a top-down process (Ladi & Wolff, 2021, p. 32). Since then, the EU has exhibited a heightened sensitivity to demands from member states.

4.2. Exit Ramp from the Zone of ‘Danger’

All of these ups and downs support what Robert Schuman, one of the architects of the European integration project, argued: “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity” (Schuman, 1950). Recurrent crises have characterized the dynamic nature of European project and will continue to do so. While some, such as

the Eurozone Crisis, have been catalysts for greater integration, others, such as the Refugee Crisis, have significantly undermined European solidarity across economic, social, and political domains. In terms of the two Chinese connotations of the word "crisis," which are "danger" and "opportunity" (Bussière, et al., 2014, p. 29), the crises that the EU has recently faced have coincided more with the former than the latter for the European integration process. Thus, the EU is in extreme need of finding new means to maintain confidence in supranational institutions and solidarity among member states.

The EU sought to accomplish this by utilizing its newly acquired powers under the Treaty of Lisbon. With the expansion of the Common Commercial Policy to include foreign direct investment, the Commission was given the authority to negotiate and sign international investment treaties on behalf of the member states. In light of this authority, the EU has begun to sign bilateral investment treaties and has expanded the scope of its free trade agreements by incorporating investment sections in the negotiations. CETA with Canada is the first EU agreement to include an investment chapter. Given the context described above, it is not difficult to suppose that the new chapter would spark criticisms throughout Europe.

4.3. CETA: The Symbol of European Opposition to the ISDS

Indeed, the overall structure and content of CETA investment chapter provoked substantial concerns in the European Parliament and in civil society, with the ISDS clauses being the most worrisome (Bernasconi-Osterwalder, 2013, p. 1). The ISDS provisions of CETA called for a dispute settlement system based on the creation of an ad hoc investment tribunal and the subsequent implementation of the relevant procedures. This traditional the ISDS framework was criticized for allowing investors to circumvent the highly developed court systems in Europe and Canada in favor of privatized and mostly unaccountable tribunals (Bernasconi-Osterwalder, 2013, p. 1).

In this regard, the European Parliament issued a resolution regarding the future of European international investment policy (European Parliament, 2011). The principal concern expressed in this resolution was the extensive latitude provided to international arbitrators in interpreting investor protection clauses (European Parliament, 2011, p. 2). It was argued that arbitrators use their power of discretion as a means of prioritizing private interests above the rights of public authorities to regulate. Consequently, the Parliament called on the Commission to protect the regulatory rights of member states in any future investment agreements (European Parliament, 2011, p. 5).

It also demanded that changes be made to the existing dispute settlement regime included in the EU agreements. Some of the proposed changes are: more transparency; the ability to appeal decisions; the requirement to exhaust local judicial remedies; the option to use amicus curiae briefs; and the requirement to choose a single location for arbitration (European Parliament, 2011, p. 6). For its part, the Parliament urged the Commission and member states to "take up their responsibility as major international players" by including the changes it had suggested not only in bilateral agreements but also in reforming the ICSID and the UNCITRAL rules (European Parliament, 2011, p. 6).

The Commission addressed these concerns by explaining that the ISDS provisions in CETA provide new and precise investment protection rules that will guarantee the states' right to regulate (European Commission, 2014). It also maintained that CETA represents a turning point as the most progressive the ISDS implemented to date. This significance was primarily attributed to the application of clearer and more explicit norms for investment protection by arbitral tribunals as well as the introduction of new, more precise regulations for the conduct of procedures before arbitral tribunals. The introduction of this clear and definite standard of treatment for investment and investors was argued to prevent undesirable discretion for arbitrators and to protect legitimate public policy objectives of states. The Commission further ensured that the

Union and Canada have the right to adopt binding interpretations and make submissions even when they are not defendants (European Commission, 2014).

By creating a new framework for addressing the traditionally sensitive areas, the Commission believed that CETA's the ISDS provisions would no longer be subject to criticism. Nonetheless, even after the conclusion of the agreement, the ISDS clauses remained a source of continuous concern. A major contributor to this ongoing concern was uneasiness in civil society. The inclusion of the ISDS provisions to the TTIP negotiations, similar to those in CETA, increased public concern.

Likewise, European Consumer Organization Director General Monique Goyens claims that the conclusion of CETA shed light on it's the ISDS clauses, the presence of which in TTIP, CETA's "American-European cousin," was also widely criticized (The European Consumer Organization, 2014). The fact that TTIP is the largest FTA in the world, she argues, has heightened public interest in the ISDS and the potential difficulties it may cause. According to Goyens, the burden of preventing the EU from crossing that "red line" now rests in the hands of national governments and MPs (The European Consumer Organization, 2014). That is basically what transpired.

German Minister of Economy Sigmar Gabriel made it clear in September 2014 that Germany would not sign CETA unless the ISDS clauses were removed (Brown, 2014). Notwithstanding European Trade Commissioner Karel de Gucht's position that CETA should not be renegotiated, Gabriel argued that Germany would attempt to modify the ISDS provisions of CETA: "I am certain that the debate is not over by a long shot" (Brown, 2014). This strong attitude on the part of one of the EU's locomotive states, together with many concerns expressed by civil society, prompted the EU to initiate a process to reform the arbitration provisions (Puccio & Harte, 2017, p. 1). Between March 27 and July 13, 2014, the Commission held a public consultation using the draft ISDS provisions of CETA as a reference text.

4.4. The Path Towards the Investment Court System

The Commission received over 150,000 responses from individuals and groups representing various sectors of EU civil society in the context of this consultation (European Commission, 2015, p. 3). The submissions revealed widespread opposition to the ISDS and a view that the ISDS poses a threat to democracy, public financing and policies (European Commission, 2015, p. 14). In particular, civil society organizations have voiced their concern over governments being sued by investors for large sums of money, which they believe has a ‘chilling effect’ on the right to regulate. Furthermore, certain trade unions have expressed skepticism regarding the independence and impartiality of the arbitrators, as well as the possibility that the ISDS may permit investors to circumvent domestic courts, laws, and regulations.

Several respondents believed that the amendments the EU made to the ISDS provisions of CETA respecting traditional arbitral processes were insufficient to address their overall issues with the ISDS (European Commission, 2015, p. 16). Therefore, four areas were determined in the report in which further improvements should be explored: "the protection of the right to regulate", "the establishment and functioning of arbitral tribunals", "the relationship between domestic judicial systems and ISDS" and "the review of ISDS decisions through an appellate mechanism" (European Commission, 2015, p. 28).

These four areas are indeed consistent with what the European Parliament recommended to the Commission in July 2015 (European Parliament, 2015, pp. 15-16). As per the Parliament's recommendation, TTIP's investment arbitration provisions should guarantee fair treatment of foreign investors without giving them preferential treatment. The Parliament recommended a new system to replace the ISDS in this regard, one that is transparent, open to democratic values, and subject to scrutiny. This new system calls for government appointments of impartial, professionally trained judges to hear cases in open court. In terms of institutional structure, the European Parliament suggested creating an appeals process to make sure that decisions are

consistent. All of these characteristics of the proposed system were intended to ensure that private interests do not take precedence over public policy objectives and that EU and Member State courts' jurisdiction is respected.

Both the results of the public consultation and the requests of the European Parliament were embodied in the Commission's proposal for the founding of the Investment Court System (ICS) (European Commission, 2015). The Commission expressed in September 2015 that the ICS would replace the existing ISDS mechanism in all ongoing and future EU investment negotiations, including the TTIP. By incorporating the same important characteristics as conventional courts, the ICS aims to ensure that each party have complete faith in the system.

4.5. Specifics of the Investment Court System

As opposed to the ad hoc tribunals established in the existing ISDS, the ICS envisions a permanent two-tiered system consisting of a first instance tribunal and an appeal tribunal. Also, governments now designate permanent judges to arbitrate, rather than the parties themselves choosing arbitrators on an ad hoc basis. Another notable change brought about by the ICS is the limitation on the ability of investors to bring a case before the Tribunal. Investment disputes brought before the tribunal are limited to those involving discrimination on the basis of gender, ethnicity, religion, nationality, expropriation without compensation, or a denial of justice. The right of the state to regulate, along with transparency and accountability, are essential components of the proposed ICS (European Commission, 2015).

Investor arbitration clauses in CETA, TTIP, and the EU-Vietnam FTA were all built on this proposal. Since TTIP and Vietnam FTA negotiations were ongoing, this was to be anticipated. Nonetheless, the ICS's incorporation into CETA was intriguing. Although the negotiations with Canada were officially concluded in 2014, the EU suggested amending the CETA to include provisions creating the ICS. Canada, surprisingly, agreed to this.

By late February 2016, the final CETA agreement had been issued, and with it came new provisions of ISDS that replaced the "old, traditional form of dispute resolution" with the "new, modernized system" (European Commission, 2015) of the ICS. In a press statement dated February 29, 2016, First Vice President Frans Timmermans highlighted that the updated CETA text on the ISDS reflects the EU's willingness to defend governments' authority to regulate and to ensure that investment disputes will be adjudicated in full line with the rule of law (European Commission, 2016). At the same press conference, EU Trade Commissioner Cecilia Malmström stated that the revised ISDS provisions in CETA will restore public faith in the tribunal's ability to render impartial decisions. She added that the Commission satisfied the expectations of both the European Parliament and the member states.

Even so, some people think that the new system is mostly based on the traditional ISDS, but with many improvements (Lévesque, 2016, p. 1). Concerns have also been raised concerning whether or not the ICS's new features are compatible with the established ISDS institutions and norms on which it still depends. The fact that the ICS still performs adjudicative responsibilities despite its revised organizational structure contributes to the belief that it is a "simply *sui generis*" (Lévesque, 2016, p. 3). For instance, appointed ‘judges’ serve renewable six-year terms in the new system, but these ‘judges’ issue ‘awards’ that are only enforceable if they comply with the ICSID Convention or the New York Convention (Reinisch, 2016, p. 25). He, therefore, describes the ICS as a hybrid institution with features of both courts and arbitral tribunals. A similar description of the ICS as a "semi-permanent quasi-judicial" (Ameli, et al., 2016, p. 11) body can be found in a report by the European Federation for Investment Law and Arbitration (EFILA).

Thereafter, it is crucial to define the innovations that set the proposed ICS apart from the traditional ISDS. What Reinisch sees as most innovative about the European Commission's proposal is the idea to establish both a Tribunal of First Instance and an Appeal Tribunal (Reinisch, 2016, p. 25). Article 8.27 of CETA, for instance,

establishes a First Instance Tribunal with fifteen members appointed by the CETA Joint Committee. This Joint Committee, comprised of representatives from the EU and Canada, appoints five of the Tribunal's members from among the nationals of the EU member states, five from among Canadian nationals, and five from among third-country nationals. The Committee is also authorized to increase or decrease the number of members of the Tribunal by multiples of three.

Appointed for a term of five years with the option of reappointment, the Members of the Tribunal are required to be knowledgeable legal experts. They shall receive a monthly retainer fee to assure their availability. The most eye-catching element of Article is the provision stating that the CETA Joint Committee shall refer the matter to the Secretary General of the ICSID for appointment if it has not done so within 90 days from the date on which a claim is submitted for dispute settlement. This is a distinct indication of the hybrid character of the ICS.

The next article (Article 8.28) is on the Appellate Tribunal. Accordingly, it has the power to uphold, change, or overturn the Tribunal's award. Appeals can be filed in cases where there was a mistake in the law being applied or interpreted or in the evaluation of the facts, including the evaluation of applicable domestic legislation. Cases where annulment is called for in Article 52(1) of the ICSID Convention may also be heard by the Appellate Tribunal. The cases will be heard by a group of three members of the Appellate Tribunal who will be chosen at random by the CETA Joint Committee.

Thus, a decision made by the First Instance court will not be regarded final anymore. In the line with Article 8.28, no action for enforcement of an award may be brought until either 90 days have passed since the issuance of the award by the Tribunal and no appeal has been initiated, or 90 days have passed since an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal for further consideration.

The other significant change that the ICS introduced was the end of the practice of party-appointed tribunal members. While party autonomy is the norm in the traditional ISDS, expanded state autonomy at the expense of investors is a major characteristic of the ICS in the appointment of adjudicators. Taking what was aforementioned as an example, CETA stipulates that the CETA Joint Committee, comprised of representatives from each government, shall appoint the members of both the first-instance and appeals tribunals.

The EU claims that this "randomized system" is essential to protecting the impartiality of arbitrators by shielding "the judges" from any possibility of bias on the side of the contending parties (European Commission, 2015). Unfortunately, it does not address the more significant issues it will raise. Expanding on this, Brower and Rosenberg contend that the legitimacy of international arbitration is inextricably linked to the parties' appointment of arbitrators (Brower & Rosenberg, 2013, p. 19). They believe it is the only way to build the parties' trust in the overall process. Here, the end of the party-appointment will spell the end of the system's legitimacy.

Moreover, the new system has other characteristics that could cause investors to question its legitimacy. Using CETA as an example again, Article 8.9 of the Agreement places greater emphasis on the right to regulate than on protecting foreign investment. By using clear language, in Article 8.9 (1), it states that "the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives" (CETA, 2017, p. 57). This first paragraph was expanded with three more paragraphs to make the host state's right to regulate and the limitation on investment protection rules more clear.

Article 8.9 (2) states that it does not constitute a breach of obligation if a regulation of the host state or a revision of its law has an adverse effect on investment or interferes with an investor's expectations, including expectations of profits. In addition, it is clarified in the following paragraph that a Party's refusal to issue, renew, or maintain a subsidy should not be construed as a breach of the Agreement. Article 8.9 (4) also made it clear that it is not a violation of the Agreement for either party to decide to

stop providing subsidies or to seek reimbursement for already provided subsidies. Compliance with national or international obligations is the only exception to the rules in paragraphs 3 and 4.

The new system clearly aimed to assure that the rights of the host state should not be unreasonably constrained, but at the same time put significant limitations on investment protection rules. Several other illustrations supporting this claim can be found in the CETA text, and Reinisch provides an in-depth analysis of each one (Reinisch, 2016, pp. 14-19). Some of them can be cited as the narrowing of the scope of fair and equitable treatment requirements and Most Favored-Nation treatment, the restriction of full protection and security to physical security, and the stringent definition of expropriation and its relation to the right to regulate.

Also, CETA provides the Parties with the discretion to make treaty amendments through a joint committee rather than engaging in a full-scale renegotiation. The broad discretion granted to the Parties in developing interpretations is another indication that the new system offers only a minimal amount of investment protection and a considerable deal of freedom for host governments to regulate. The Parties to CETA may "correct 'unexpected' or otherwise 'unwelcome'" interpretations of tribunals through a Trade Committee or a Committee on Services and Investment (Reinisch, 2016, p. 19).

More precise obligations on ethics, a predetermined period of time for the resolution of investment disputes, and a tight code of conduct are some of the other key distinctions between the current ISDS system and the ICS. Members of the Tribunal and the Appeal Tribunal, for instance, are barred from serving as attorneys or experts in any other investment dispute under Article 8.30 of CETA, titled "Ethics" (CETA, 2017, p. 69). Furthermore, CETA Article 8.39 (7) specifies that the first instance tribunal must issue its final award within 24 months of the claim being filed. A code of conduct for members of the tribunal and appellate tribunal is not included in the

final text of CETA; nonetheless, Article 8.44(2) requires the Committee on Services and Investment to adopt such a code upon entry into force of the agreement.

In this regard, Nappert argues that the EU abandoned the international arbitration model with the creation of the ICS, which is made up of "pre-ordained, semi-permanent judges randomly assigned to cases" (Nappert, 2015, p. 3). The inability of investors in the new system to appoint arbitrators and their lack of autonomy throughout the process can be cited as reasons why the ICS cannot be classified as an arbitration system. Whereas in the traditional international arbitration system, states are treated like private parties, on par with investors, the new system's rules provide the framework that states are to be treated as sovereign authorities, rather than private parties. All of them might be seen as conscious efforts of the EU to move investment arbitration from the realm of private international law into that of public international law.

4.6. The Path to the Establishment of a Permanent Investment Court

Another facet of this effort is the establishment of a permanent multilateral investment tribunal and an appellate mechanism. Article 8.29 of CETA requires the Parties to work toward creating a multilateral investment tribunal and appellate system for the settlement of investment disputes with other trade partners. Eventually, this multilateral mechanism is planned to take the place of the bilateral one set up under CETA. In their joint statement, Canada and the EU expressed their determination to pursue this objective (European Commission, 2016).

As it turns out, this statement is not all that different from what the European Commission announced in the context of TTIP (European Commission, 2015). In September of 2015, it was announced that the Commission would begin working with other countries to establish a permanent International Investment Court (IIC). The purpose of the IIC is to serve as a replacement for all current forms of investment dispute settlement. It applies to EU agreements, EU Member States' agreements with

third parties, and trade and investment treaties established between non-EU states. According to the EU Commission, the IIC is an attempt to improve upon the current ISDS system's inefficiency, incoherence, and lack of legitimacy.

On the other hand, some have interpreted the EU's intention of establishing the IIC as an indication of its leadership competition with the US in international investment policy (Schill, 2016). In accordance with the rules outlined in the 2012 US Model BIT and as outlined in “Section B: Investor-State Dispute Settlement” of the Trans-Pacific Partnership (TPP) (2016), the US supports maintaining the existing ISDS, albeit in a modified form. The ISDS in its modified form calls for norms that ensure the host state's regulatory space, boost transparency, and subject it to greater state scrutiny. Nonetheless, the US is in support of maintaining the main institutional structure of the ISDS, including ad hoc arbitration tribunals and party-appointed arbitrators. Thus, it is important to look at the EU proposal for the IIC in light of what Trade Commissioner Cecilia Malmstrom said: “Europe must take the responsibility to reform and modernize it (the existing system). We must take the global lead on the path to reform” (European Commission, 2015).

More importantly, when it is placed in the larger context outlined at the beginning of the chapter, it becomes evident that a permanent IIC is more "a medicine for introverted European sensitivities" than "an independent global public good" (Schill, 2016). Taking the reins of the international effort to reform the ISDS has been seen as a way for the EU to regain public confidence in supranational institutions and strengthen solidarity among member states in the wake of a series of crises. The reform initiative that the EU favors is centered around the centralization of the ISDS as a replacement for the existing ad hoc system. It aims to contribute to the consolidation of the institutional and constitutional balance and order of the EU, which has been upset by the cumulative impact of recent crises (Kahraman & Özoflu, 2019, p. 53).

As Love Rönnelid (2018, p. 6) argues, the continuance of the ISDS in its current form is detrimental to EU interests. He contends that the already existing strong backlash against European integration and international economic governance would be exacerbated by the ISDS's alleged transfer of economic authority from elected state representatives to foreign investors. As such, the IIC, with its permanent bench of adjudicators nominated in advance, an appeals procedure, and methods to increase the transparency of the system, is a cornerstone of the EU's pledge to European citizens to deliver the substantial change sought (2018, p. 7).

4.7. The EU Reform Agenda for the ISDS

Nevertheless, in light of the EU's current precarious situation, it is not sufficient to simply recommend the creation of an international court of investment. The EU must take concrete international steps to satisfy European demands for reinstating state control in international investment dispute settlement. And it has taken the necessary steps to get there.

In this context, the first step was taken in March 2018 when the Council gave the Commission the authority to initiate negotiations for a convention creating a multilateral court for the settlement of investment disputes (Council of the EU, 2018). In January 2019, the Commission used this authority in submitting a proposal to the UNCITRAL WGIII, in which it suggested that establishing a MIC is the most feasible way to reform the ISDS. In this submission, which was made on behalf of the EU and its member states, the Commission stated that the ISDS-related concerns are "intertwined and systemic" and require systemic responses (UNCITRAL, 2019, p. 4). To elaborate on these concerns and highlight the importance of establishing the MIC as a solution to them, the EU's submission to the WGIII in 2017 on the identification and consideration of concerns about the ISDS was cited.

In its 2017 submission, the EU identified six specific concerns with the ISDS and presented a detailed analysis of each (UNCITRAL, 2017, pp. 7-11). Accordingly, lack

of consistency and predictability; concerns of perception; limited checks on correctness and consistency; nature of appointment of adjudicators; substantial costs; and a lack of transparency are issues that need to be addressed. The most important takeaway from this submission is to recognize that the EU has referred to the ad hoc nature of the ISDS as the only source of all these concerns since the outset of UNCITRAL negotiations. In its argument that "addressing one specific concern would leave other concerns unaddressed" (UNCITRAL, 2019, p. 4) until the ad hoc nature of the system changes, the EU aims to justify its proposal for the centralization of the current system through the establishment of the MIC.

Examining the details of the MIC, as presented in the 2019 proposal (UNCITRAL, 2019), can help to understand the nature of the ISDS toward which the EU is aiming. Accordingly, the MIC is intended to be a permanent body with two levels of adjudication. Disputes will initially be heard by a first-instance tribunal. It will proceed in much the same way as an arbitration tribunal, determining the facts and then applying the law to those findings. Different from the existing arbitration tribunals, it will also hear cases that were remanded to it by the appellate tribunal. There will be a separate set of regulations to follow. Those who are dissatisfied with the decision of the first-instance tribunal can take their case to an appellate tribunal. Errors of law (including major procedural inadequacies) or obvious mistakes in assessing the facts are the grounds for an appeal. The appellate tribunal will not conduct a new investigation into the facts of the case (UNCITRAL, 2019, p. 4).

The proposal also provides a comprehensive outline of the rules governing adjudicators (UNCITRAL, 2019, pp. 5-6). They will have committed to working full-time with no extracurricular or political involvement. This is part of the high and strict ethical standards that adjudicators will be subject to. Candidates for adjudicator might be suggested by the contractual parties or apply directly for appointment. A long-term, non-renewable term of office (nine-year periods, for example) combined with a robust and transparent appointment process is suggested to ensure their independence from governments. Also, standards for potential judges are proposed that are similar to those used by other international courts. Some examples of such criteria are demonstrated

knowledge in a particular area of law or eligibility for appointment to the highest judicial posts. Compensation will be paid to adjudicators that is on par with that of judges at other international tribunals. The number of adjudicators will be set when the permanent body's workload has been assessed.

Moreover, two recommendations for how awards should be effectively enforced under the new framework are elaborated in the proposal (UNCITRAL, 2019, p. 7). The first one suggests that an enforcement regime should be built into the instrument that establishes the MIC. An annulment procedure or domestic review of awards will not be necessary given the presence of an appeals mechanism. A second possibility is that awards under the MIC can be recognized and enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indeed, Article 1(2) of the Convention clearly states that the enforcement mechanism envisioned therein applies to awards made by both ad hoc and permanent arbitral bodies (UNCITRAL, 1958, p. 8).

It is additionally outlined in the proposal that the contractual parties will make financial contributions to the MIC (UNCITRAL, 2019, p. 8). Contributions will be weighted according to each country's degree of development, ensuring that less developed or developing countries bear less financial burden than their wealthier counterparts. Moreover, it is proposed that an assistance mechanism be established as part of the procedure for establishing the MIC. The main function of this mechanism will be to aid the least-developed and developing states in international investment litigation and maybe in other areas of the application of international investment law. Overall, the EU contends that the new system has an open architecture. So that it offers flexibility for those countries that wish, for instance, to use it for state-to-state dispute resolution or utilize only the appeal process of it (UNCITRAL, 2019, p. 9).

4.8. To What Extent Is the Proposed EU Reform Viable?

Consequently, the introduction of a "permanent standing two-tier mechanism with full-time adjudicators" (UNCITRAL, 2019, p. 12) is argued to be the only viable reform alternative capable of addressing all of the identified concerns with the current system (UNCITRAL, 2019, p. 12). The Commission, thus, suggests prioritizing it among the reform proposals submitted to the WGIII. On the other hand, there is a significant issue that the EU appears to be ignoring: the applicability of the MIC in the context of international investment law. Given the extremely fragmented nature of international investment law, which consists of a complicated network of bilateral investment treaties, preferential trade agreements, and regional agreements that incorporate investment chapters, it would be highly challenging to implement what the EU proposes.

The realities of the broader political climate also contribute to the belief that the EU's capacity to establish a MIC that reflects its principles and serves its interests is limited (Szilágyi, 2018, p. 179). In Szilágyi's opinion, the main limitation of the EU is the Trump Administration's anti-liberal trade policy, which is evident in the US's withdrawal from the TPP and the suspension of TTIP negotiations. He further argues that the growing influence of India and China in international policy shaping is another constraint on the EU. As a part of their ambition to "become a rule-maker and not a rule-taker", they envision an "Asian-style" ISDS (Szilágyi, 2018, p. 179). Thus, the EU does not have a monopoly on WGIII decision-making. The other rule-makers in the group do not appear to readily embrace the establishment of the MIC as a priority over the alternative reform options.

And indeed, a large number of countries have spoken out against the establishment of the MIC, preferring instead to modernize the current system without making any major structural changes. Chile, Israel, Japan, Mexico, and Peru, for example, stated in a joint submission that the "suite" approach to reform should give "maximum flexibility to develop a menu of relevant solutions" (UNCITRAL, 2019, p. 2). It was also stated that

the shape these solutions take might vary and that states can pick and choose which ones to implement based on their requirements and interests. They explicitly refused to endorse a reform plan designed with a "one-size-fits- all" approach (UNCITRAL, 2019, p. 5). China, Turkey, Costa Rica, Thailand, and Bahrain are among the other countries that prefer a "modest horizontal (from private to public authority) recalibration" (Herranz-Surrallés, 2020, p. 342) of the ISDS over a structural change involving the creation of a MIC.

Perhaps the most blatant and direct opposition to the EU proposal has come from Bahrain. In its submission, Bahrain allocated a whole section to a list of potential issues that may arise from the establishment of a permanent multilateral investment court system (UNCITRAL, 2019, pp. 7-14). It is Bahrain's opinion that, rather than addressing the existing concerns about the ISDS, a permanent court would instead introduce new ones. One of the most serious concerns raised in the section was the politicization of judicial appointments. The exclusive authority granted to states to appoint judges, in contrast to investors' lack of access to such authority, has been highlighted as the fundamental reason for this politicization.

To support this argument, the report prepared by the Geneva Center for International Dispute Settlement was quoted (UNCITRAL, 2019, p. 9). According to the cited report, in light of the fact that the election of judges in international courts has historically been driven by political factors, “creating a permanent body could mean reintroducing politics into Investor-State Dispute Settlement and would be contrary to the fundamental purpose of the regime, which, in turn, may affect its legitimacy” (Kaufmann-Kohler & Potestà, 2016, p. 20). Another aspect of the problem noted in the report was the question of the impartiality of tenured judges appointed and paid by the states. Putting faith in the decisions of people who have been nominated and compensated by only one of the contending parties would be highly problematic. This issue of judicial impartiality is more significant than it may appear, given that the state party is the one whose conduct is being evaluated in the arbitration.

In addition, Bahrain claimed in its submission that the EU proposal to establish an investment court system fails to address the current problems of conflicts of interest, underrepresentation of some regions, and excessive procedural costs (UNCITRAL, 2019, pp. 11-12). It also highlighted the practical limitations of a permanent body's capacity to promote consistency in the ISDS jurisprudence. Among the reasons for these limitations is the fact that certain states may opt not to join the MIC and not to update all of their existing BITs to permit an appeals court to review them. With these illustrations, it is clear that even if the MIC existed, there would be room for divergent interpretations of treaty rules. In addition to its inadequacies in addressing current issues, it was stated that the proposed system will exacerbate the problem of lengthy and expensive procedures.

4.9. Chapter Summary

The WGIII session discussions echoed all these concerns about the MIC. Nonetheless, Anthea Roberts and Taylor St. John (2022) claim that since the 42nd session of WGIII, there has been a shift away from seeing the creation of a new permanent tribunal and the continuation of ad hoc arbitration as a zero-sum game. Since then, they argue, the negotiations have been guided not by an "either/or" but by a "both/and" strategy. They point to Singapore's position during negotiations on the composition of the ISDS tribunal as an example.

As it was indicated in Working Paper 213, state nomination was the first proposal for selecting arbitrators (UNCITRAL, 2022). According to the second alternative, anybody who meets the criteria may submit an application to participate in the selection process, or civil society, bar associations, academic institutions, and relevant groups in the investing community may make nominations. Singapore suggested during the discussion of these options that they are not mutually exclusive, in contrast to the positions taken by certain other governments, and stated, “We would therefore be happy to further explore a draft provision that merges these two options for

nomination and expresses them as different possible routes to nomination rather than as binary choices as they are currently set out" (Roberts & John, 2022).

Consequently, it appears that the WGIII's current trend does not allow for the creation of the permanent investment court in the manner that the EU desires. The EU's proposal has not been given precedence over the other alternatives. States are more likely to evaluate a variety of reform options within the context of their interests. As such, rather than completely rejecting the EU proposal, many states seek to incorporate aspects of the MIC into their reform agenda so long as they serve their interests. In this context, it is unlikely to achieve the level of centralization of the ISDS that the EU is aiming for. In the subsequent chapter, another proposal for centralizing investor-state dispute settlement, albeit in another form, will be analyzed.

CHAPTER 5

HOW TO REFORM THE ISDS FROM A TWAIL POINT OF VIEW?

After a comprehensive analysis of how the *First World* intends to reform the ISDS, it is time to examine the expectations of the *Third World* from the reform process. This chapter will attempt to answer the question of how to reform the ISDS from a TWAIL perspective. In the very first lines of this chapter, it is crucial to clarify that the connotation of the *First World* and the *Third World* does not indicate geographical differences between the North and the South, but a conceptual approximation to the divide in epistemology between the positivists and the post-positivists, as suggested by Smith (1995).

Accordingly, TWAIL can be classified as post-positivist (Smith, 1995, pp. 24-26) for rejecting the objectivity of knowledge and emphasizing instead the strong relationship between power and knowledge. True emancipation, according to TWAIL, requires the deconstruction of the framework of political interests that generates all knowledge. Since TWAIL assumes the possibility of achieving justice, freedom, and equality for all, it seeks the reconstruction of a genuinely pluralistic set of international legal arrangements following the deconstruction of the current system. All of these claims suggest that TWAIL adheres to the foundationalist camp of post-positivism (Smith, 1995, pp. 24-30).

TWAIL, in more specific terms, might be defined as a post-colonial approach to international law. It is post-colonial in the sense that it is concerned with the perpetuation of colonial relations of dominance and subordination in the name of international law. It reflects post-colonial concerns that established frameworks in

international relations—such as international order, international society, and international law—are not value-neutral. Each has roots in European colonialism and is an instrument of the well-entrenched power-knowledge nexus of the West. TWAIL is also postcolonial in its rejection of the settled assumption that Europe is the source of advanced forms of reason, morality, and law. It calls into question the coercive imposition of Western values on the rest of the world as universal ideals, as well as the justification of the use of force in the name of these values. TWAIL, like post-colonialism, questions the function of international law in upholding the dialectical relationship between "total European virtue" and "total Oriental barbarism" (Grovogui, 2013, p. 255) or between the “civilized West and an impoverished, underdeveloped and uncivilized Third World” (Krishna, 2017, p. 72).

Now that the theoretical underpinnings of TWAIL have been laid, it is time to discuss what TWAIL is and how it attempts to "center the rest rather than merely the West" (Okafor, 2005, p. 177) in international law. This is what the next section is for. After defining TWAIL in these terms, the remainder of the chapter will examine TWAIL's criticisms of the ISDS and the ISDS reform process. The chapter will conclude by describing the characteristics of the dispute resolution mechanism TWAIL intends to establish.

5.1. What is TWAIL?

In a nutshell, TWAIL is "an oppositional and transformative set of commitments and ideas for rethinking the international legal order" (Gathii, 2022, p. 153). It opposes to the current framework of international law primarily because it serves to legitimize, reproduce, and sustain Western dominance over the Third World (Mutua, 2000, p. 31). Its main aim is to reform the illegitimate hierarchies, inequalities, and oppressions that define international law. It envisions a new international legal system that is truly inclusive and pluralist, wherein the Third World communities are also rule-makers rather than rule-takers.

Indeed, this opposition has deep historical roots, going all the way back to the decolonization movement. For some scholars, TWAIL was born at the Bandung Conference in 1955 (Mutua, 2000, p. 31). It was a meeting of 29 states that sought to alter the status quo by rendering newly independent states *real* subjects of international law. *The spirit of Bandung*, which was formed by actively rethinking, modifying, and prefiguring the laws of the global order (Eslava, Fakhri, & Nesiah, 2017), was the inspiration for TWAIL. The key argument of TWAIL is derived from this spirit: the rationality and universality claims of international law serve colonial interests in the post-colonial era. In response, TWAIL calls for the development of a “truly universal” (Eslava, Fakhri, & Nesiah, 2017, p. 22) set of principles for international law, the aim accepted at the Bandung Conference. Bandung Spirit has thus identified TWAIL's primary issue and the strategic means by which to address it.

5.1.1. TWAIL's First Goal: Deconstruction of International Law

Makau Mutua, one of the pioneers of the outlook behind TWAIL, states that the first of TWAIL's three basic goals is "to understand, deconstruct, and unpack" (Mutua, 2000, p. 31) how international law has been used to establish and maintain "a racialized hierarchy of international norms and institutions" (Mutua, 2000, p. 31). The definitions of the terms used in the above sentence are extremely important since they will serve as the foundation for the chapter's remaining conceptual framework. The concept of *racialized hierarchy*, as used in this particular context, refers to prevailing the power dynamics in which Europeans have traditionally asserted their superiority in the establishment and shaping of international norms and institutions. Consequently, it is thought that these norms and institutions were developed in Europe and then transmitted to other parts of the world as enduring components of international law. According to TWAIL, the main problem with international law is this racist hierarchy, which is ostensibly Eurocentric.

Mutua believes that raising an awareness of Europe's hierarchical dominance in international law is the first step toward addressing this issue. After this understanding

has been formed, the main goal of TWAIL is the *deconstruction* of international law (Mutua, 2000, p. 31). Deconstruction, as used by Mutua in the context of TWAIL, does not, however, seem to be a Derridean concept. TWAIL aims to utilize deconstruction to critically analyze and dismantle international law as "a reified, de-historicized, and de-politicized concept" (Polat, 1998, p. 456) to reconstruct another form of it. TWAIL does not, however, share Derrida's belief in the transformational power of deconstruction due to its "radical undecidability" (Polat, 1998, p. 458).

In other words, Derrida (1992, p. 30) argues that the possibility of a deconstructive operation is dangerous because it could result in the creation of yet another set of rule-governed procedures or methodologies. For Derrida, “the interest of deconstruction, of such force and desire as it may have, is a certain experience of the impossible” (Derrida, 1992, p. 30). Deconstruction, on the other hand, is a practice that TWAIL believes can be used to rewrite international law (Pluckrose & Lindsay, 2020, p. 71). In contrast to Derridean deconstruction, which targets both the constitution and reconstitution of any totality, TWAIL seeks to reconstitute an international law that is "universal in its scope" (Anghie, 2012, p. 313) after *deconstructing* its *racialized hierarchy.*

For this chapter, the concept of deconstruction should be viewed from the perspective of TWAIL as a method for dismantling the European hierarchy in international law. As a first step toward its second and ultimate goal of establishing a new, more equitable, and just international order, TWAIL seeks to deconstruct several of "the received myths of international law" (Mutua, 2000, p. 31).

5.1.1.1. Deconstructing the Modern State

In this manner, reifying the modern state as a preset or privileged category is the first and founding myth of international law that is established on binaries. TWAIL challenges concepts such as state sovereignty and self-determination because of their

role in sustaining European hegemony in international law. According to Koskenniemi, Europe serves as the conceptual, political, and geographical epicenter of all of these ideas (Koskenniemi, 2011, p. 154). European history has been "the silent referent of knowledge" (Koskenniemi, 2011, p. 155) for determining the criteria to define a state under international law.

For TWAIL, the Westphalian definition of a state is the mere codification of Europe's customary family-of-nations approach, which requires a defined area, a permanent population, a functioning government, and international recognition (Baxi, 2016, p. 18). In this context, functioning means acting in accordance with the European norms, and international recognition means, in general, being accepted as a member of international organizations that were founded by European states and operate in accordance with the rules formulated by them. Therefore, TWAIL believes that the modern state is inherently exclusionary. It is simply an example of how a particular European norm has been adopted as a core universal principle of international law. That's why some call the modern state and international law "mythical siblings" (Eslava, Fakhri, & Nesiah, 2017, p. 16): one can't exist without the other.

In a similar vein, TWAIL deconstructs the binaries that surround the concept of the state. The foremost binary is evident in the classification of states as civilized and uncivilized. According to Anghie (2004, p. 52), one of the forefathers of TWAIL, this distinction provided the legal justification for establishing different standards for the two types of states. He uses an imaginary scenario to illustrate his point. Accordingly, when the uncivilized state's aspirations for itself clash with what the civilized state deems best for this state, what the civilized state determines always wins (2004, p. 55).

The reason is that international law only allows "one-way traffic" (Okafor, 2014, p. 72). Under international law, the only possible route for the transfer of knowledge is from the *civilized* Europe to the *uncivilized* Third World. Because European history is thought to be the genesis of civilization and the West to be the repository of all imaginable knowledge, the Third World is seen as a student with a lot to learn from

them. It assumes that the Third World has little to no understanding of civilization and must do as the West teaches (Okafor, 2014, p. 72).

The greater significance of this difference lies in its implications for the right to sovereignty. While *civilized* European states were granted sovereignty under classical international law, *uncivilized* non-European states were not. To emphasize the importance of this point, consider that only sovereign states can be subjects under international law, with all the rights and authorities entailed. According to TWAIL, this "dynamic of difference" (Anghie, 2004, p. 37) is merely one of the conceptual instruments used by colonialism to create a gap between Europeans and non-Europeans. TWAIL believes that this gap served primarily to justify Europe's self-proclaimed purpose of *civilizing the uncivilized* by casting it as superior to the rest of the world. Until the Third World became as *civilized* as the West, it was denied the right to exercise sovereignty or to make legal claims under international law (Anghie, 2004, p. 55).

TWAIL additionally asserts that this lack of sovereignty justified all actions taken by sovereign states against non-sovereign entities that were deprived of the legal authority to voice opposition under international law (Anghie, 1999, p. 3). According to Mutua (2000, p. 33), a prime example of this is how European colonization of non-European territories, including the use of ruthless force, was legitimized. He claims that the distinction created between sovereign and non-sovereign states was basically the distinction between freedom of conquest and the necessity to accept occupation.

Given that Europeans were the only sovereigns under international law, colonial expansion was their "manifest destiny" as well as good for non-Europeans, who lacked sovereignty (Mutua, 2000, p. 33). In other words, colonial expansion was justified by arguing that Europe had a responsibility to *civilize* the rest of the world. This is the main reason for TWAIL's critique of the division between civilized and non-civilized states. According to TWAIL, "believer/infidel," "white/black," and "advanced/prime" were other problematic classifications of classical international law because they

supported and legitimized colonialism through the force of the law (Eslava & Pahuja, 2012, p. 196).

In its belief in the "moral equivalence of cultures" (Mutua, 2000, p. 36), TWAIL holds that international law is predicated on a false dichotomy between the *rightlessness* of the Third World and the *rightfulness* of the West, or between the superiority of colonial states and the inferiority of colonized states (Baxi, 2016, p. 21). Moreover, these binaries did not disappear with the end of the colonial era. They are still relevant and may be seen in modern dichotomies like the distinction between developed and developing states (Beard, 2007). In this classification, Western hegemony over non-Western states is writ large. It also creates the false impression that the developing world needs Western intervention for its development. That the countries outside of Europe need Europe to essentially *teach* them how to develop is a myth, according to TWAIL. It believes that this myth functions as a vehicle for promoting the European economic model and values as the global standard for development (Gathii, 2008, p. 256).

Another reason for TWAIL's criticism of the post-colonial era is the role of the UN in preventing the Third World from exercising political independence. This is why Mutua refers to the first paragraph of the UN Charter Article 1, which argues that the role of the UN is to uphold the *global order* via peace, security, and collaboration. According to him, the global order that the UN aims to uphold is founded not on the idea of equal rights across nations, as is asserted in the second paragraph of Article 1, but on European hegemony. For Mutua, the most telling evidence of this argument is the fact that the most powerful UN organ is the Security Council, made up of the five *great powers*, rather than the General Assembly, which is dominated by the Third World states (Mutua, 2000, p. 34).

Similarly, Otto claims that the UN was founded on European roots, despite its indicated mission to eliminate colonial forms of dominance (Otto, 1996, p. 339). She contends further that Europe maintained its 18th and 19th century positioning as the

epicenter of world history and dominance in the 20th century, with the support of the UN. It is suggested that the UN has served to maintain preexisting power hierarchies. “The shift from European domination to the control of the Great Powers…simply changed the form of European hegemony, not its substance" (Otto, 1996, p. 340).

5.1.1.2. Deconstructing the Universality Claim

The universality of international law's rules and practices is the second myth that TWAIL seeks to deconstruct. TWAIL believes that international law's purportedly universal rules, norms, and values are, in fact, contingent on Europe. In other words, the existing rules and institutions of international law arose from purposeful European efforts to universalize European particulars. For TWAIL, the primary goal of such attempts is to reify a European view of international law as universal, thereby preventing any examination of how international law maintains and reproduces European hegemony (Eslava & Pahuja, 2012, pp. 199-200). For Baxi, TWAIL's challenge to the universality of international law is a challenge to the "legalized hegemony of the Great Powers in relation to the Other" (Baxi, 2016, p. 31).

According to Mutua, the primary concern for TWAIL in this regard is the imposition of these particular European norms and regulations on the non-European world via international law sanctions. It has been notably relevant in the areas of human rights and trade. Universal human rights are not universal, he says, and free trade is not above other economic values in importance. The European practice of imposing them on the rest of the world and reifying them as "eternal, inflexible truths" is intended to safeguard Western economic and military interests (Mutua, 2000, pp. 37-38).

Okafor's *the hell/heaven binary* is a helpful conception for illustrating TWAIL's criticism of international human rights. Accordingly, TWAIL challenges the acceptance that the West is the source of all good and the Third World is the source of all bad, an argument that holds water in the context of human rights as well. The claim that the West is a *heaven* for human rights while the Third World is a *hell* is therefore

called into question. Okafor goes on to say that this problematic heaven/hell binary is reproduced in the creation of international law. One key method of reproduction is the disproportionate focus on human rights violations in the Third World compared to the West. This reinforces the assumption that the West is good and devoted enough to guarantee the protection of human rights without any further investigation into allegations of violations. In contrast, the Third World, which is hell on earth when it comes to human rights, is worthy of actual concern (Okafor, 2014, p. 67).

Similarly, Mutua challenges the current state of international human rights law in his formulation of the *savages-victims-saviors triangle*. This triangle is founded on a critique of how international human rights law depicts the Third World. According to Mutua, the Third World states are portrayed as *savages* in international law, victimizing their population via violence against human rights. The *victims* of the Third World are in desperate need of a *savior* to rescue them from *savage* authorities. These long-awaited *saviors*, under the norms of international law, are the Western states. Mutua deconstructs this long-held belief in international law. He claims that the formation of this triangle is a smokescreen to hide the colonial mindset in international human rights law (Mutua, 2001, p. 201).

Therefore, according to TWAIL, efforts to universalize Eurocentric norms and rules in the name of international human rights are merely another method of colonial state establishment and perpetuating the supremacy of specific European economic, social, and political models. For TWAIL, international trade law is the other crucial area in which Europe aims to universalize its rules and principles. This objective has been substantially attained, according to TWAIL, by utilizing Eurocentric international organizations to regulate international trade (Mutua, 2000, p. 35). The Bretton Woods Institutions—the World Bank, the IMF, and first the General Agreement on Tariffs and Trade (GATT) and now the WTO—have been the primary subjects of this concern.

TWAIL criticizes these organizations for maintaining the dependence of Third World states on the West, allowing the former imperial powers to continue exploiting these countries (Mutua, 2000, p. 35). It believes that rules and practices of international trade law, determined primarily by these institutions, perpetually reproduce the dialectic between *marginal* Third World states dependent on Western capital and experience and the West as the *normative* source of wealth and trade expertise. They have accomplished this with the aid of the label *universal*, which functions as a cloak to conceal the inherent inconsistencies and Eurocentric bias in international trade law.

5.1.2. TWAIL's Second Goal: Reconstruction of International Law

All these attempts at deconstruction are what TWAIL uses to show how modern international law is designed and applied to legitimize and maintain European hegemony. In response, it opposes the imposition of Eurocentric norms, rules, and values of international law on peoples whose cultures and histories are fundamentally different from those of Europe. This resistance serves as the foundation for TWAIL, which is anti-hierarchical, anti-hegemonic, and skeptical of universal creeds and truths (Mutua, 2000, pp. 36-37). It leads us to TWAIL's second goal: reconstructing a new perspective on international law.

What this means is that TWAIL's goals extend beyond just drawing attention to the influence of imperialism on contemporary international law. It aspires to bring a "renaissance" to international law (Baxi, 2016, p. 31). This effort to achieve a renaissance is a call for a more inclusive and equitable international legal order, as well as for more representation in international decision-making. Having such an international law that moves beyond its Eurocentric roots and colonial/imperial legacies is the first stage in TWAIL's reconstruction of international law.

This can be illustrated by the way Okafor and Agbakwa used a remark from Ghanaian Catholic Archbishop Peter Sarpong in their reimagining of international human rights education (Okafor & Agbakwa, 2001, p. 586). According to this quotation from the

Archbishop, the issue with international human rights education is not how to *Christianize Africa*, which entails bringing so-called universal human rights rules to Africa. The fundamental issue, according to him, is how to *Africanize Christianity*, which entails appreciating the importance of each culture's human rights corpus and ethos in human rights teaching. Upon recognizing the orthodoxies that need to be transcended, the primary objective of Okafor and Agbakwa's re-imagination is to explore ways to expand the content and methodology of international human rights education. This expansion aims to provide a more inclusive and efficient platform for voices that have hitherto been marginalized within the dominant human rights discourse (Okafor & Agbakwa, 2001, p. 587).

With regard to the overarching objective of TWAIL, this particular illustration underscores the necessity for the recreation of international law to be firmly rooted in a sincere and inclusive exchange of ideas between societies. There is no "receiving end" or "others" in the international legal system that TWAIL seeks (Eslava & Pahuja, 2012, p. 195). International law sites are intended to be platforms for inclusive international law authorship. The purpose of this inclusiveness is to provide those who have been historically marginalized a voice in the process of rewriting international law. Similarly, Gatthi contends that the Third World is not just a site of receipt for international legal knowledge but also an epistemological site of creation. This shift challenges the view that the West is the exclusive source of international legal knowledge, with the rest of the world looking to the West for guidance on how to implement it (Gathii, 2021, p. 379).

It is also important to note that TWAIL's goal of "cultural and civilizational plurality and diversity" (Baxi, 2006, p. 714) cannot be attained just by Third World governments' authorship of international law. Anghie and Chimni claim that governments in Third World countries frequently act in ways that are detrimental to their citizens' interests. Accordingly, it is argued that the attainment of genuine global justice necessitates the active participation and contribution of individuals and communities from the Third World in the process of reconstructing international law

(Anghie & Chimni, 2003, pp. 78-79). The imperative to address the challenges faced by these individuals living under the dual burdens of state tyranny and Western hegemonic control is an essential aspect of the paradigm shift in international law.

TWAIL also strongly favors a rethinking of universality in international law. Since the universality idea of modern international law serves to de-historicize it, TWAIL envisions an alternative kind of universalization that aims to historicize international law. Its aspirations for universality go beyond the proposals of some scholars, such as Jenks (1958), to incorporate Third World issues and locales into the current framework of international law. It seeks to reevaluate and rewrite international law in light of the development of modern political and legal power relations. It is important to insert a little bracket there to illustrate what exactly this re-historicization means by using TWAIL's perspective on international human rights as an example.

As was previously stated, the fundamental issue TWAIL has with international human rights is its assumed universality. TWAIL aims to achieve the reconstruction of human rights norms as a continuous and evolving process that acknowledges the cultural diversity of human experiences. Therefore, the international human rights that TWAIL envisions should not be exclusively controlled or dominated by any particular culture or group of people. The development of a comprehensive understanding of international human rights necessitates an examination and incorporation of diverse cultural perspectives through the process of cultural mining.

After conducting this cultural mining in Africa, Elias and Akinjide discovered that the native conceptions of governmental authority in African law are comparable to those of Locke, Rousseau, and even Grotius in terms of the social contract. According to their argument, it can be observed that individuals in the majority of African civilizations are obligated to comply with the authority of their rulers, under the condition that these rulers exercise equal and just governance. Justice is the fundamental factor that bestows legitimacy. Thus, they contend that the basis of the African idea of government is reciprocal rights and obligations between the ruler and

the ruled, just as it is in the theories of social contract (Elias & Akinjide, 1988, pp. 36-37).

Similarly, Lenzerini contends that even a brief review of pre-colonial communities in Africa demonstrates unequivocally that these nations' understanding of human rights was on par with that of Europe. He thus challenges the prevailing notion that non-Western norms are inferior to Western norms by asserting that the development and expression of rights based on distinct cultural patterns do not necessarily indicate their inefficacy. Contrarily, the author draws a comparison between how the right to access justice was safeguarded in Africa and Europe during the twelfth century. It is argued that in Africa, the fundamental acknowledgment of human dignity and the reverence for individuality formed the foundation for people's ability to seek justice. In contrast, in Europe, the Inquisition's singular-tiered tribunals employed methods of torture to get confessions from individuals. He also cites instances of indigenous Akan, Akamba, and Dinka societies in Africa that uphold the idea that everyone is born equal and has a certain set of rights that are inherent in their dignity as human beings (Lenzerini, 2014, pp. 19-25).

These examples convincingly challenge the claim that human rights are predominantly lacking in civilizations such as Islamic, African, Chinese, and Indian (Donnelly, 1982, p. 303). In this regard, TWAIL aims to re-historicize international law by including all these diversified and long-ignored histories and experiences. It aspires to establish a *normative universality* in contrast to the *geographical universality* that now governs international law due to the 19th-century imperial expansion that subjected the Third World people to European conquest and rule (Enyew, 2022, p. 445). In other words, the most essential feature that makes international law universal is its ability to reflect variations in interest (Anghie, 2004, p. 201). Thus, TWAIL rejects “a linear, unidirectional progression of history led by the West” (Mutua, 2000, p. 36) and its “descriptively omissive” (Bradley, 2018, p. 334) portrayal of the Third World. Instead, the objective is to establish a more inclusive framework of international law by

facilitating dialogic exchanges that encompass historical precedents, cultural norms, and geographical disparities.

TWAIL thus believes in the potential of international law to act as a means of liberation rather than oppression, as long as it effectively prevents the historical division between the Western and non-Western world and promotes inclusive thinking and functioning (Polat, 2021, p. 190) (See also (Gathii, 2022, p. 41)). It does not reject international law altogether but instead asserts that international law has the potential to address long-standing injustices and inequalities experienced by the Third World. This potential can only be realized by actively constraining and opposing the underlying power structures and dominant influences within the international legal framework. In this manner, the goal of TWAIL is not to abolish international law but to establish a more just global legal system (Gathii, 2008, p. 262).

According to Chimni, a major concern for TWAIL is how to promote global justice. Responding to demands for redistribution, recognition, and representation is what he means by global justice. For distributive justice to improve, there must be a shift in global patterns of production, and improvements in global relations of recognition can be made through cultural changes. Moreover, to achieve representational justice, the current international institutions, through which international policies are negotiated and accepted, need to undergo a fundamental transformation (Chimni, 2007, pp. 200-213). Therefore, TWAIL believes that global justice can only be ensured by preventing the use of all kinds of illegitimate force against Third World people and states, as well as eliminating global poverty and inequality.

To put it in terms of the categories developed by Eslave & Pahua, TWAIL's struggle might be described as reformist. Accordingly, TWAIL considers disobedience to the established norms and rules of international law to be a just and legitimate action given that these norms and rules are themselves illegitimate. However, the type of disobedience that TWAIL advocates for is more reformist than revolutionary. It is

more interested in enhancing the current institutional frameworks of international law than in completely replacing them (Eslava & Pahuja, 2012, pp. 204-205).

5.2. TWAIL in a Nutshell

So far, the references to TWAIL scholars have been used to demonstrate why and how TWAIL seeks to deconstruct and reconstruct international law. The phrase "the imperialism of the Same" (Baxi, 2006, p. 714) best captures TWAIL's critique of international law. However, what if, by establishing a binary between the same and the difference, this definition itself leads to the creation of another imperialism? What if, while attempting to dismantle some Eurocentric hierarchies in international law, they unintentionally create new ones by drawing dichotomies between cultures and societies?

This is evident in the above-described and frequently cited *hell/heaven binary* of Okafor (2014, p. 67) and *the savages-victims-saviors triangle* of Mutua (2001, p. 201). TWAIL needs to be conscious of the reality that simplistic binaries like these serve to reinforce rather than challenge established power structures. According to Polat, the homogeneity produced by these types of mutually exclusive images of the West and the non-West serves the interests of the powerful (Polat, 2021, p. 191). Refuting a static picture of an international law that is "permanently exterior legal order" (Eslava & Pahuja, 2012, p. 216) is not enough for TWAIL to utilize the system's potential to achieve justice. To reconstruct international law that reflects the interests of all people as well as cultural and civilizational plurality, TWAIL should refrain from painting a vision of the world in established binaries. They should work towards reforming the current knowledge production system to end “epistemic silencing of the Third World” (Gathii, 2021, p. 402). Given that this critique of TWAIL will serve as the central argument in the forthcoming chapter, no further elaboration will be provided therein. However, it is important to keep in mind these considerations while assessing what TWAIL thinks of the ISDS and the ISDS reform process.

5.3. What Does TWAIL Think of the ISDS?

International investment law is one of TWAIL's primary areas of focus due to the premise that international legal knowledge is covertly produced and reproduced under the veil of the technical or the commercial (Eslava & Pahuja, 2012, p. 219). The Third World critics of the international investment law point to the ISDS as a prime example of the "informal empires" (Gathii, 2022, p. 4) that support Western dominance and repression. As a pillar of the international investment system, the ISDS is a target of TWAIL scholars who envisage its deconstruction and replacement with a more *just* investment dispute settlement system.

5.3.1. The Need to Historicize the ISDS

As a first step in its deconstruction, TWAIL aims to place the ISDS in its historical context. TWAIL's goal in historicizing the ISDS is to show that it is simply the post-colonial moniker for exploitative and unfair colonial power hierarchies. After the end of colonialism, it became impossible to keep the extraterritorial courts of colonial powers in effect in the formerly colonized areas. Therefore, the ISDS was created to serve as a backstop for the imperial powers' economic and political interests. The provisions of the ISDS, which were primarily intended to defend the private rights of Western investors in the territories of Third World states, have institutionalized unequal relations between the West and the rest. For TWAIL, then, the ISDS tribunals that purport to aim at the *de-centralization* of investment disputes are no different from the extraterritorial courts of colonial powers exercising in the colonized territories.

TWAIL argues that the principal motivation for creating the ISDS was to maintain colonial-era raw material acquisitions from newly independent Third World states and safeguard Western investors' privileged status in these areas (Hippolyte, 2015, p. 199). This desire on the part of Western governments, coupled with the urgent need of the Third World to attract investment, led to the emergence of the ISDS as the primary

regulator of the international investment environment. However, according to TWAIL, Third World countries' participation in this investment landscape was not on par with First World countries.

According to Alvarez, the BIT negotiations between the US and Latin American states are more like a game of "take what we give you or leave empty-handed" than a dialogue between sovereign equals (Alvarez, 1992, pp. 552-553). Thus, TWAIL is critical of the role of the Third World in international investment rule-making, where it is seen as a recipient rather than a participant, even though it is home to the majority of the world's population and the biggest share of some vital raw commodities (Mutua, 2000, p. 35). This is because the rules of the ISDS are designed to safeguard the rights of foreign investors by imposing obligations on host states. As such, the dispute settlement system developed by and for Western powers places duties on Third World, as the host states, rather than rights. This leads TWAIL to conclude that the ISDS is a tool that perpetuates colonial power dynamics.

In light of this, TWAIL criticizes the imposition of the ISDS on much of the world as a morally and politically justifiable prerequisite of modern civilization, notwithstanding the special Western interest it serves (Alvarez, 2009, p. 841). Therefore, the ISDS is only another pretext for building a false picture of a divided world between *civilized* governments that accept the obligations it brings and *uncivilized* ones. Gathii uses this lens to construct *The Regime Bias Approach,* which argues that the deep integration of Third World economies into the established norms of investment regime should not be seen as inevitable. As a response to the double standards on which the international investment system was built, Gathii argues that the Third World countries should refuse to participate in it. Otherwise, they will contribute to the maintenance of an illegitimate system that protects the interests of international capital at their expense and gives them no negotiating power (Gathii, 2008, pp. 261-263).

This approach also demonstrates the biased character of the ISDS tribunals' interpretation and application of international investment rules and regulations. It seeks to demonstrate how despite their assertions of impartiality and objectivity, tribunals have contributed to the disempowerment of the Third World and empowerment of the First World (Gathii, 2008, pp. 263-265). This is where TWAIL may find Tucker's table illustrating regional outcomes of investment arbitration cases from 1990 to 2017 to be useful. The table indicates that advanced economies had a far higher rate of winning (77.4%) in the ISDS tribunals than other countries (42.1% for Sub-Saharan African states and 43.4% for Latin American and Caribbean states) for the period studied (Tucker, 2018, p. 62).

These numbers refute the claims made by the system's proponents, who contend that governments win more often than they lose in the ISDS tribunals (Tucker, 2018, p. 2). It also contradicts what Bolivian president Evo Morales has said "Governments in Latin America, and I think all over the world, never win the cases. The transnationals always win" (Tucker, 2018, p. 60). As such, it may be argued from a TWAIL viewpoint that only Western states and investors win more often than they lose in the ISDS tribunals.

5.3.2. The Need to Expose the ISDS's Biased Nature

The second step in TWAIL's deconstruction of the ISDS is to reveal the system's inherent bias towards newly independent governments (Van Harten, 2011, p. 5). According to TWAIL, international investment law is a key intersection between neoliberalism and international law, providing justifications for the spread of neo-liberal ideas. This is done mostly by portraying Third World countries as "wallowing in corruption, chaos, and anarchy and the need for taming and discipline" (Gathii, 2022, p. 15). So the argument goes that the only way for developing countries to become *as developed as the West* is through this investment system. The ISDS is portrayed as a panacea for the corrupt and politicized domestic courts of these nations, and investment treaties are seen as a tool to introduce the rule of law there. Douglass

North, winner of the Nobel Prize, and Richard Posner, father of the law and economics school of thought, both claim that judges and courts in developed countries are more honest, ethical, and trustworthy than those in developing countries (Tucker, 2018, p. 68).

According to TWAIL, the Third World's submissive and dependent status in relation to its former colonial powers and to multinational capital interests has been preserved through this systematic racism camouflaged in the adjudication process of the ISDS tribunals (Gathii, 2022, p. 25). In his interviews with arbitrators from 18 different countries, Tucker uncovered several instances of this. A direct quote from one of his interviews provides a crystal-clear and astounding illustration of how arbitrators view the Third World: "If you take Africa, for example, the governments are so corrupt! It is so common in Africa to have this kind of abusive conduct; Developing countries have corrupt people" (Tucker, 2018, p. 70). The arbitrator's repeated and easy use of the strong adjective *corrupt* to describe Third World nations and people is particularly astonishing.

The most remarkable comment from the arbitrators about the ISDS appears to be: “This is a good government operation. Fucking little countries should be grateful! We are to teach them how to govern themselves” (Tucker, 2018, p. 79). Similarly, most arbitrators who were interviewed saw value in the ISDS beyond its immediate benefits. One of them claims that compared to their "parochial beginnings", the Third World countries have benefited more from BITs because they have been introduced to a "universal culture" (Tucker, 2018, p. 80). To further his case, the arbitrator states that these agreements allowed the "lazy man" of the Third World to "bypass...traditions and sort of handicaps what he inherited" and become "civilized" (Tucker, 2018, p. 80).

Tucker expands on this by citing their views on a number of countries. One arbitrator quoted therein argues as much: “Then along comes the Venezuelans! [Laughter] Make no bones about it, by God, we are going to send in the troops and unfurl the banners with a picture of the glorious leader. We’ve got us an old-fashioned Stalinist

expropriation!" (Tucker, 2018, p. 71). Another arbitrator characterizes using Chinese courts instead of investment arbitration as "a joke" (Tucker, 2018, p. 72). Conversely, most arbitrators have faith in the domestic courts of Western states like Canada and the United States. Foreign investors, they say, are treated "in a very mature manner" by these states. This is not like the Third World countries; "they are grown up" (Tucker, 2018, p. 78).

All in all, Schneiderman contends that international investment law is colonial mainly because of the role that its arbitration processes play in maintaining the narratives of development, rule of law, and good governance. He continues by saying that international investment law persists to uphold the colonial era's "civilized justice principles" by being suspicious of local self-rule and creating legal enclaves (Schneiderman, 2019, p. 3).

Here, the preferences of major capital-exporting states continue to set the boundaries of what is known and what is legally binding in the field of international investment law. By stressing the importance of this power-knowledge nexus, TWAIL contends that Europe's colonial interests formed the basis for the ISDS, which has served to sustain and strengthen European dominance over the Third World. Nevertheless, the ISDS is promoted as the standard that assures investors of a secure investment environment free from the corruption and injustice they could encounter in the Third World.

On the other hand, Alvarez contends that *empires of law* rather than *the law of empire* better characterize the ISDS or the international investment system in general today. The author's notion of empires of law delineates an intellectual empire that is deeply intertwined with colonialism, distinct from the concept of the law of empire, which pertains to the exertion of hegemonic control by a specific national empire. Alvarez argues that present-day international legal frameworks no longer resemble colonial empires founded upon the hegemonic control of conquered populations. Instead, these

regimes are more inclined to employ the law as a tool for preserving their colonial interests (Alvarez, 2009, pp. 815-816).

Alvarez gives a specific example from the U.S. to illustrate his point. He posits that the safeguarding of the interests of U.S. foreign investors presently relies more on the provisions offered by international investment treaties than on the potentiality of violence or the imposition of unilateral economic sanctions (Alvarez, 2009, p. 822). He explains this change by arguing that more complicated patterns have taken the place of the conventional north-to-south investment flows. Accordingly, the U.S. now holds the position of one of the top exporters and the top importers of global capital flows. Among the top recipients and exporters of capital are Brazil, Russia, India, and China. This reciprocal investment flow between the First and Third Worlds significantly constraints Western predominance in the international investment system (Alvarez, 2009, p. 832). He succinctly sums up all these changes by saying, "Today's BITs bite the metropole back" (Alvarez, 2009, p. 835).

5.4. What Does TWAIL Think of the ISDS Reform?

The previous chapters have already discussed how these changes in the international investment regime has driven the ISDS reform efforts. What matters for this chapter is TWAIL's perspective on the reform process. Will it be able to provide the ISDS the inclusivity that TWAIL envisioned? A resounding *no* appears to be the correct answer, since TWAIL believes that the reform process itself is being used as a mechanism for keeping the ISDS's "justice bubbles for the privileged" (Vastardis, 2018, p. 279) intact.

TWAIL's principal concern regarding the ongoing ISDS reform is the marginalization of critical voices from the Third World, and Africa in particular (Akinkugbe, 2021, p. 10). This argument of marginalization primarily rests in the fact that UNCITRAL

WGIII recognized three broad categories[1] of concerns for which it deemed reform desirable; nevertheless, Third World concerns were relegated to the fourth category, *the other concerns*. Despite being a set of fundamental issues at the heart of the Third World's widespread dissatisfaction with the system, WG III has not yet allocated time or agenda to discussing what falls under *the other concerns* category. In fact, the very name of this category implies that concerns affecting the Third World have been disregarded in favor of those impacting the First World. For TWAIL, it is a glaring example of how the Third World is being excluded from the ISDS reform process (Van Harten, Kelsey, & Schneiderman, 2019).

TWAIL's issue with these three categories is also related to the fact that they focus on dispute settlement procedures rather than the substance of the pertinent laws. TWAIL posits that the current reform process, which only prioritizes procedural matters, is "cosmetic and window-dressing" (Gathii & Akinkugbe, 2020, p. 2). It does not address the fundamental inequalities that TWAIL believes exist within the ISDS. Thus, TWAIL asserts that the current reform efforts under UNCITRAL are focused on expanding the substantive rights of investors rather than addressing the problems with the ISDS that derive from its colonial character (Gathii, 2021, p. 2).

The right to participation by affected parties and the jurisdiction of domestic courts are cited as two essential problems that are listed in *the other concerns* but must be tackled as a major reform area during the discussions (Van Harten, Kelsey, & Schneiderman, 2019, p. 3) There are apparently other concerns that TWAIL believes should be the focus of the reform process but which have hitherto been overlooked by WGIII (Gathii, 2021, p. 2). In particular, it is argued that WGIII should address the structural unfairness and asymmetry that arise from giving investors exclusive rights at the expense of domestic regulatory choices and from the status of states as duty-bearers with no legal recourse (Gathii, 2021, p. 2).

[1] 1. Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals
2. Concerns pertaining to arbitrators and decision makers
3. Concerns pertaining to cost and duration of ISDS cases

Market failures, it is said, stemming from the incentive structure of the international investment law system, should also be addressed in the reform processes. This is important to address because it permits investors to avoid responsibility for the huge social, political, and environmental costs of their investments (Gathii, 2021, pp. 2-3). Gathii criticizes the prioritization of enhancing investors' substantive rights above addressing these concerns in the reform process, resulting in their relative neglect and postponement to a subsequent phase. Thus, he defines the reform process as being "ISDS-centric" (Gathii, 2021, p. 4), which reproduces the inequity, unfairness, and injustice inherent in the ISDS.

The reform process is argued not to concern with changing the "private system of justice" (Gathii, 2021, p. 2) in international investment law but rather with strengthening the ISDS. For instance, there is no mention of the asymmetry in the identified concerns that results from the fact that only investors can bring arbitration claims against host states. The identified concerns also fail to highlight the imbalance between the number of Western and non-Western arbitrators. Furthermore, the Working Papers provide no evidence of a concrete effort to safeguard principles like environmental and human rights. For this reason, TWAIL argues, the ISDS reform is just like the ISDS itself: It is mostly defined and dominated by Western voices while silencing the rest (Anghie, 2023, p. 96).

The bulk of these arguments appears to have been submitted by the government of South Africa to UNCITRAL WGIII as well. The government emphasizes that any discussion about reforming the ISDS must be conducted in the context of a larger dialogue. Accordingly, the ultimate objective of these discussions should be to create an inclusive and mutually beneficial dispute settlement system. To this end, it believes, there should be no distinction between procedural and substantive issues in reform discussions, since they are closely intertwined. The only way to properly resolve issues with the ISDS would be to implement systemic change in both substance and procedures (UNCITRAL, 2019).

In this manner, the government of South Africa makes it plain that the first step in reforming the international investment system should be to change the regime's objective, which has been to protect and facilitate foreign investors' operations. It additionally argues that the reform should be geared at establishing a responsible investment framework that safeguards the rights of indigenous and local communities. This also points to its desire that reforms should focus on fostering the accessibility of dispute-settlement mechanisms. As a result, some of the reform principles that South Africa supports include the protection of fundamental and human rights, policy space for regulation, balanced rights and duties of host countries and investors, and inclusion (UNCITRAL, 2019).

5.5. How Does TWAIL Propose Investor-State Disputes Be Settled?

Until now, it has been abundantly apparent that TWAIL criticizes the ISDS and the ongoing reform process to improve it. TWAIL claims that the European strategy to keep its privileged position in international investment law includes advocating "otherwise untenable reforms of the international legal order seemingly necessary and even imperative" (Okafor, 2005, p. 173). After deconstructing Eurocentric and imperialist nature of the ISDS, the next step for TWAIL is to reconstruct it. The immediate question is: What kind of investor-state dispute resolution mechanism does TWAIL desire?

5.5.1. TWAIL Proposal in Theory

TWAIL seems to envision a structure that prioritizes the critical voices of Third World countries in order to reflect non-European interests and values. But the essential question is whether TWAIL intends to replace the ISDS's existing repressive system with moderate improvements or radical transformations. While moderate reforms seek to revise the ISDS's foundations in light of the Third World's experiences, radical

reforms aim to construct an entirely new system based on national independence and state sovereignty (Akinkugbe, 2021).

From a moderate perspective, the ISDS should be rearranged by paying attention to the demands from below and the needs of the non-European states. It must break the link between the interests of powerful corporations and the international investment law. It is argued that the regime should be reformed to increase the value placed on domestic regulatory preferences rather than the privileges granted to foreign investors (Gathii, 2021, p. 2). It is also proposed to reform the ISDS to defend the rights of local and indigenous peoples who are harmed by foreign investment (Van Harten, Kelsey, & Schneiderman, 2019, p. 3). Consequently, moderate perspective of TWAIL looks for building a new regime based on "the will of domestic communities, the public interest, and democratic control" (Linarelli, Salomon, & Sornarajah, 2018, p. 272). However, due to their belief that "justice is a matter for inside the state only" (Linarelli, Salomon, & Sornarajah, 2018, p. 272), both literature and the actions taken by the Third World states have mainly endorsed the radical alternative.

In its radical form, TWAIL seeks to restore the role of domestic courts in resolving investment disputes under their respective national constitutions. If the dispute is transferred to international mechanisms after national remedies have been exhausted, it should be subject to a state-to-state arbitration, not an investor-state arbitration. While some have argued that going back to the pre-investment arbitration system is undesirable due to a lack of faith in the impartiality and rule of law of Third World state courts (Kaufmann-Kohler & Potestà, 2020, p. 99), many in the literature argue for a "forward-looking project of rebel imagination" (Nesiah, 2018, p. 317) (See also (Dagbanja, 2020), (Akinkugbe, 2021)). This is because moderate reforms are widely believed to result in the reproduction of the same inconsistencies, reifications, and entrenched positions that are criticized in the current system (Sornarajah, 2015).

This yearning is referred to as “A Return to Calvo” by Alvarez (2021, p. 263). Here, Alvarez conjectures a future in which only the domestic courts of the host state will hear and adjudicate the complaints of foreign investors. Carlos Calvo, who is commonly recognized for creating the Calvo Doctrine, is the inspiration for Alvarez's naming of this possible scenario. It is because Calvo advocated bringing all investors, both foreign and domestic, under the jurisdiction of the reigning country, as is the case here. There is no mechanism for re-nationalizing investment disputes outside the exclusive jurisdiction granted to state-to-state dispute settlement under BITs. Importantly, before the investor's home state may utilize this international dispute settlement process, the foreign investor must first have exhausted all local remedies in the host state. Thus, once it is *returned to Calvo*, resorting to an investor-state dispute settlement mechanism is out of the question (Alvarez, 2021, pp. 263-266).

5.5.2. Putting TWAIL Proposal into Action: The Case of South Africa

Empirical evidence from the field confirms these theoretical insights of TWAIL. As TWAIL recommends, some countries are reverting to domestic remedies to solve disputes with foreign investors. In this regard, South Africa serves as a model. Probably the most explicit example of this is the fact that foreign investors in South Africa are now subject to the same rules and regulations as South African investors under the new legislation in force. This is a challenge to centuries of institutionalized skepticism regarding the effectiveness of national courts in Third World countries.

For a long time, South Africa has maintained a firm stance against the ISDS, as is publicly known. Nonetheless, many people were undoubtedly surprised by South Africa's decision to terminate the bulk of its BITs following a thorough evaluation (Mbengue & Schacherer, 2017, p. 442). With European countries, it canceled nine BITs between 2012 and 2014 and the Argentine-South African BIT in 2017 (Schlemmer, 2018, p. 213). It did the same with Argentina in 2019 and Greece in 2021. With the passage of the Promotion and Protection of Investment Bill in 2015, which

became effective in 2018, this position is now backed by law. So that the government has effectively rejected the ISDS in favor of its national investment law.

Paragraph 4 of Article 13 of the Bill states that foreign investors have no recourse to the ISDS for disputes involving governmental action, but only to domestic courts. The next paragraph of the same Article adds that even if the Government agrees to Inter-State arbitration with the investor's home state on a case-by-case basis, such arbitration is still subject to the exhaustion of local remedies. This clause also has the consequential effect of preventing investors from initiating arbitration proceedings against the government in the event of a dispute involving an investment, without the participation of their home states. Therefore, the South African approach rejects the possibility of the ISDS and develops new concepts of law such as ‘fair administrative treatment instead of the fair and equitable treatment standard existing in the BITs (Protection of Investment Act, 2015).

5.6. Chapter Summary

Some people think that what TWAIL recommends, and what Third World countries like South Africa have already adopted, is the "wisest course for governments" (Foley, 2019). There are two main reasons for making this claim. The first focuses on the substantial cost of the ISDS to the host states with no corresponding advantages. The second focuses on the current efforts to reform the ISDS. It has been criticized for failing to address the underlying systemic injustice and conflict of interest in the system, focusing instead on cosmetic adjustments. Therefore, it is argued that states are still at the risk of increasing the ISDS liability and growing substantive investor rights under the proposed reform alternative
es. “Moving away from ISDS altogether ... and these damaging substantive standards is the wisest course of action” (Foley, 2019).

Simply put, TWAIL believes that the principal beneficiaries of the ISDS system are best served by the ongoing reform initiatives. The ISDS reform process, in TWAIL's

view, is just another example of "an allocation of advantages based on the power of actors who control the making of law in any given historical period" (Linarelli, Salomon, & Sornarajah, 2018, p. 272). Therefore, TWAIL seeks to centralize the resolution of investor-state disputes within the national courts of the host states. It aspires to return to the pre-ISDS era.

This proposal to replace the existing ISDS by delegating exclusive jurisdiction to national courts shares the same goal of centralizing the system as the EU reform plan. TWAIL and the EU concur that centralization is the best course of action for resolving the ISDS legitimacy crisis. However, they diverge as to where the ISDS tribunals' authority should be centralized. In contrast to the EU's call for more supranational governance at the Multilateral Investment Court's core, TWAIL proposes lessening supranational governance in favor of nation-state control. However, it is important to note that neither of these alternatives possesses the inherent capacity to successfully enhance the legitimacy of the ISDS framework. The upcoming chapter will elucidate the reasons why the centralization of the ISDS is not a viable resolution to address its legitimacy crisis. It will be clarified using Koskenniemi's critical legal perspective that the only way to increase the legitimacy of the ISDS is to increase the ways of interpretation and principle of justice.

CHAPTER 6

IMAGINING A "HAPPILY EVER AFTER" ISDS

This chapter aims to tell a different story than the ongoing reform efforts led by the EU and the reform proposals of TWAIL. The distinctive feature of this chapter is that it aims to address the problems in the investor-state investment dispute system by increasing opportunities for critical thinking. This contrasts sharply with the EU's and TWAIL's reform proposals, which seek to replace the current system with one that consolidates more decision-making authority within the administrative system and organizational structure (Abbott & Snidal, 1998, p. 9). Put simply, the reform proposals outlined in the preceding sections aim to enhance the centralization of the ISDS. However, the reform proposal presented in this section will elucidate the rationale behind the imperative need for enhanced decentralization within the existing system.

At its core, the story of this chapter is inspired by Martti Koskenniemi's grasp of critical international law. The chapter, thus, begins with an extensive analysis of Koskenniemi's critical stance on the law. His attempt to deconstruct the assumption that international law is objective and show that nothing in the law is independent of politics has received significant focus in this section, serving as the central argument of the chapter. In the section that follows, the ISDS is critically evaluated using this theoretical perspective. This theoretical framework is also applied in the next section to a critical evaluation of the EU and TWAIL reform proposals, focusing on the question of whether their recommendations are effective in resolving the so-called legitimacy crisis of the ISDS. In particular, this section looks at whether

centralization—either at the supranational level, as the EU argues, or at the national level, as TWAIL argues—can effectively address the issues surrounding the ISDS.

The requirements for an ISDS to live happily ever after are specified in the last section of the chapter. The initial prerequisite is that the ISDS must be conceptualized as a continuous endeavor rather than a system with pre-determined boundaries and rules. The foundational ideas of the critical legal approach should guide this effort, with the most important tenet being that it is deeply rooted in social and political life. Given these deep roots in social and political life, the system's legitimacy rests on its capacity to adjust to the continually evolving social and political context. This is why it should not be designed as a formal and centralized organizational structure that is often slow to adapt to change. Further decentralization is what the ISDS needs to solve the legitimacy issues. Redefining it as an open-ended project focused on collective imagining, reimagining, development, and transformation is what guarantees its existence happily ever after.

6.1. Koskenniemi's Critical Legal Approach

6.1.1. Exploring International Law: From Apology to Utopia

Martti Koskenniemi is a prominent figure in the development of the critical legal approach and his book, "From Apology to Utopia" (2006), serves as the primary source for assessing his critical viewpoint on international law. The book critically analyzes international law, emphasizing the inherent inconsistencies that arise due to its liberal interpretation. The primary issue with modern international law is its extensively constructed dichotomous structure in relation to international politics. The dichotomy between the purported formality and objectivity of international law and the purported subjectivity and informality of international politics gives rise to the fundamental challenges faced by international law. To address these issues, he aims to "politicize law" and "legalize politics" (Koskenniemi, 2006, p. 13) by deconstructing the imagined binary between the two realms.

He begins by identifying the primary components of international law's purported objectivity, which is thought to define it and distinguish it from international politics. They are normativity and concreteness. The coexistence of these two components is believed to confirm the objectivity of international law. On the one hand, international law is intended to establish norms that are independent of any particular state's behavior, desires, or interests. On the other hand, it is also expected to be grounded in the actual behaviors, desires, or interests of states. Put simply, international law is anticipated to dissociate itself from legitimizing the current power dynamics between states while also remaining consistent with the actual state of affairs (Koskenniemi, 2006, p. 17).

Although the independent nature of international law relies on the coexistence of these two assumptions, they are inherently contradictory. The presence of one directly negates the presence of the other. Concreteness requires that the law be applicable in relation to a concrete will, behavior, or interest of a state, while normativity requires the law to be applicable even against a state that opposes its application to itself. Put differently, the normativity condition is met when state consent is overcome to make legal regulations generally applicable, while the concreteness condition is met when state consent is met. There is no issue as long as the states agree to the rules' application. Nevertheless, this line of reasoning breaks down when it comes to the case where a state declines to submit to an international legal rule. And indeed, this case represents the overall trend in international law. As a result, according to Koskenniemi, contemporary international law is in a perpetual state of normativity or concreteness crisis. He characterizes the former as an instance of "apology" and the latter as an instance of "utopia" (Koskenniemi, 2006, p. 17).

Accordingly, international law must maintain a certain distance from the actions, desires, and concerns of states to avoid the apology trap. It is believed that the norms and regulations of international law, which are the product of a diplomatic and political process, will be applicable notwithstanding their source. Everyone is expected to abide by them, irrespective of the state's interests or stances that are being challenged. It

needs to be normative in the sense that it can be impartially determined and applied. The apology will be the result otherwise. International law should also stay away from utopia. Principles of international law ought to be based on the consent of states and the constitutive diplomatic and political procedures. Maintaining the legitimacy of international law requires it to be responsive to changing state behavior, will, and interest with regard to the argument that international law does not stem from any inherent morality but from the dynamics of power politics. It would appear utopian if it could not provide credible evidence of its validity (Koskenniemi, 2006, pp. 18-19). Therefore, international law described by Koskenniemi is a linear composition between apology and utopia.

Herein is the recurring dilemma of international law: law is only independent of politics if it is objective. The law is objective only if it is both concrete and normative. These two dimensions of objectivity, however, are mutually exclusive, because it is impossible to be both concrete and normative at the same time. Law, from a concrete standpoint, is an artificial construct that mirrors the realities of the social environment in which it operates. The validity of rules and regulations, thus, depends on how accurately they reflect the actions, desires, or interests of the states. On the contrary, from a normative standpoint, state will and interest are subordinate to the law. It should be applied to all states without their consent and even states that hold opposing views on rules and regulations should nonetheless adhere to them. The law should not be influenced by the political tendencies of the state.

Therefore, Koskenniemi contends that any attempt by the contemporary legal system to reconcile normativity and concreteness to produce an objective international law eventually comes out as blatantly contradictory. This suggests that the claim of objectivity in contemporary international law is no longer tenable, and the liberal principles on which international law is based are no longer applicable (Koskenniemi, 2006, pp. 64-69). This line of reasoning is crucial in demonstrating that the objectivity of international law is, in fact, a product of liberal interpretation rather than an inherent characteristic. This, consequently, raises the question of what should constitute the

basis of international law to address its inherent inconsistencies and strengthen its legitimacy. To find an answer to this question, we must examine the evolution of modern international law and consider what we may learn from it to build a new framework. A brief review of liberal understanding of law is also important before beginning this analysis.

6.1.2. Unraveling the Liberal Foundations of Domestic Law

Koskenniemi argues that liberal theory posits the individual will as the primary origin of law and rejects the notion of an underlying normative hierarchy separate from individuals. All current legal norms are derived from individuals. Hence, this constructed legal framework is considered valid as long as it efficiently satisfies individuals' particular desires and concerns. However, it is also acknowledged that once a law is established, it should apply to all individuals, regardless of their initial consent. The law functions as a social mechanism designed to safeguard individuals from infringements upon their wills. Since it is the best means of safeguarding their interests, individuals are believed to have a legitimate motive to assent to the law (Koskenniemi, 2006, pp. 21-22). This viewpoint leads to the following conclusion: Law exists to safeguard individual will, and individual will is the only foundation for it.

The conclusion noted above emphasizes the longstanding division established by liberal ideology between the individual and society, the private and public spheres, subjectivity and objectivity, justice and law, and other similar dichotomies. Macpherson asserts that the origins of these dichotomies can be traced back to Hobbes (Macpherson, 1990, p. 1). The reference to the name of Hobbes in this argument pertains not to his interpretation of liberalism, as it diverges from the traditional liberal understanding, but rather to how Hobbes substantiates his arguments. In other words, Hobbes argues that social order is contingent upon the presence of free will, and the primary function of law, society, and justice is to safeguard the interests and aspirations of individuals. Given the inherent freedom and equality of all individuals,

it is impossible to prioritize one person's desires over another's. To safeguard individual freedom in the absence of a universal moral standard for evaluating personal preferences, a social order was created based on legal rules as an impartial benchmark (Hobbes, 1997, pp. 129-148), see also (Macpherson, 1990, p. 2).

The concepts put forward by Hobbes mark a significant departure from the medieval school of thought. Individuals were inherently integrated into the social order in medieval thought, with no distinct private domain apart from the public realm, in contrast to the individual-centrism and division of private and public realms in Hobbesian views. During the evolution of legal theory, the harmonious relationship between the person and social order was disrupted. As a result, the focus shifted towards prioritizing the individual, while the importance of social order became secondary.

One such characteristic of medieval thought was that people were linked to the social order to fulfill a divine or moral purpose rather than their well-being and that the natural law served as the main foundation for establishing each individual's rights and responsibilities within society. The rejection of natural law and the construction of rigid boundaries between oneself and others in utilitarianism and liberalism upended this medieval line of legitimacy. To provide the external legitimacy that legal theory required, the objectivity of the rule of law was developed. Since then, the presence of objective legal rules has served as an intermediary between individual freedom and social order.

As Koskenniemi put it: “Concreteness at the level of rule-creation presumes normativity at the level of rule-ascertainment” (Koskenniemi, 2006, p. 22). According to liberal ideology, individuals are believed to possess the authority to create rules. Since they are seen as being free and existing outside of society, the will of individuals is the source of all laws. Nevertheless, the concreteness in the creation of legal rules is open to criticism for its tendency to defend or justify certain actions or ideas. It follows that normativity in the application of the law is required to prevent it from becoming

apologist. Everyone in the society should be subject to the rules, regardless of whether they initially agreed to them.

However, this statement directly opposes the liberal notion that the fundamental nature of individuals is to be free from relying on the desires or intentions of others (Macpherson, 1990, p. 3). It thus becomes a question of how to justify the imposition of rules on non-consenting parties. Assumed normativity in the application of the law exposes it to criticism as utopian since it cannot be justified by free will. Thus, in the liberal legal understanding, the fear of being an apologist at the level of rule creation culminates in being utopian at the level of rule ascertainment.

One might wonder how liberalism has managed to persist despite these inherent contradictions. Legality is the only formula that allow liberalism to survive in the absence of politics and ethics (Koskenniemi, 2006, p. 82). The critical aspect of legal knowledge for liberal thought lies in its presumed objectivity, which distinguishes it from the subjectivity of politics and ethics. In this dichotomous structure of liberal thought, the definition of self is contingent upon the definition of its conceptual opposite. The conceptual opposite is inherently subordinate to the self, as the self is primary and the other is merely a reflection of it. Namely, to preserve the objectivity of law, it is necessary to uphold the assertion of subjectivity, and consequently, the subordinate status of politics and ethics. Macpherson asserts that, subsequent to Hobbes, the market system has dictated all values based on individual interests. Subsequently, it is argued that there is no longer a need for moral principles that are derived from sources external to these facts (Macpherson, 1990, p. 80). Legality, in the liberal sense, has thus excluded what is deemed to be subjective.

In fact, the assertion of objectivity in the rule of law functions as a reification mechanism to prevent it from being questioned. As long as the law maintains the claim of objectivity, liberalism will persist by concealing its inherent inconsistencies. The removal of the veil of objectivity within the legal system will expose the vulnerability of liberal ideals. The process of reification relies on the creation of comprehensive and

logically structured written codes of law, the careful wording of these codes, and the subsequent emphasis on the independence of the judicial function (Koskenniemi, 2006, p. 88).

This raises the question of how to uphold objectivity while interpreting legal rules and applying them to actual cases. Should judges interpret those rules based on principles of justice or consent? To ensure normativity, the interpretation of the law should rely on principles of justice. Conversely, for concreteness, it should be grounded in the concept of consent. None of these scenarios enable the maintenance of objectivity in the rule of law, as it necessitates the simultaneous presence of normativity and concreteness. Basically, the objectivity that liberal legal discourse built itself upon is actually threatened by its very structure (Koskenniemi, 2006, p. 515).

Koskenniemi, thus, argues that there is a growing inclination towards reconciliation in practical terms. Legal professionals examine normativity with a focus on concreteness, and concreteness with a consideration of normativity (Koskenniemi, 2006, p. 514). Put simply, they attempt to interpret rules by being attuned to the social context and by refraining from providing absolute justification for any specific behavior or interest. For them to do this, they must regularly invoke their discretionary power to make decisions. Koskenniemi raises the question of why there is room for discretion in the legal system but no room for evaluation (Koskenniemi, 2006, p. 24). Put differently, he asks whether there is a real difference between exercising discretion to make a legal decision and using evaluation to make a political decision.

The truth is that there is no distinction between them. The answer is intricately linked to Koskenniemi's concept of pragmatic eclecticism, which denotes a middle ground between the legal system's autonomy from politics, history, and morality, and its flexibility in responding to these non-legal contexts. One of the fundamental principles of liberalism is that an objective legal system should be free from the influence of politics and ethics.

However, legal professionals often require the use of political and ethical principles to make decisions in real-life cases. A prime example of this is the repeated use of terms like good faith and equity. Ad hoc legal decisions have thus become commonplace, and specialists in the field have felt obliged to emphasize the context-dependent nature of each implemented solution. This calls into question the system's self-imposed emphasis on objectivity and universality. The outcome of all this has been the development of an "impoverished and unreflective pragmatism" to maintain the system (Koskenniemi, 1990, p. 12).

6.1.3. Unraveling the Liberal Foundations of International Law

Similar inconsistencies can also be observed in the realm of international law. Polat argues that the primary cause of problems in international law can be attributed to the 19th century, when the dual framework of sovereignty and justice was disturbed, resulting in sovereignty becoming the exclusive foundation of the state system. In contrast to the harmonious coexistence of justice and state sovereignty that characterized the state system in the 17th and 18th centuries, a false dichotomy was created in the latter half of the 19th century, wherein justice was reduced to a mere reflection of state sovereignty (Polat, 1999, pp. 51-52). Indeed, this is consistent with the liberal understanding of domestic law, which places a strong emphasis on the free will of the person while downplaying the importance of natural justice and social norms. The concept of individual will assumes the form of state sovereignty in international law, serving as the primary determinant of the legal framework. Polat calls this a case of the system losing its axis (Polat, 1999, p. 61).

The argument posits that political relations between states have been conducted on the basis of equality and independence since the 19th century. This equality and independence of states is also thought to be the sole foundation of the international legal order. Given the argument that there are no inherent pre-existing values in international law before state consent, the states' sovereign rights remain the only basis for it. Since each state has an equal entitlement to pursue its interests and safeguard its

freedom, the preservation of the modern state system relies on the presence of objective international legal rules that govern the interactions between. The liberal line of reasoning thus goes as follows: the consent of sovereign states expressed through diplomatic initiatives, is the foundation for the establishment of the international legal system. However, once established, the system gains independence from the political preferences of states and possess a normative power that compels these states to conform. Stated differently, the foundation of objective international law is said to be based on the idea of state sovereignty, which is also anticipated to impose restrictions on that sovereignty through normativity it gains.

This argumentative structure seemingly culminates in the same contradictions found in domestic law, as articulated by Koskenniemi, with one aspect leaning towards apology and the other towards utopia. International law cannot simultaneously derive its authority from the sovereign will of states and possess the ability to enforce its rules independently of the consent of those states. In other words, international legal rules can't be both closely related to and distant from any one state's interests or actions. The objectivity of international law thus is impossible to achieve since concreteness and normativity, the two requirements for objectivity, are mutually exclusive (Koskenniemi, 1990, p. 8). Consequently, there is no distinction between international politics and international law, as their differentiation relies on objectivity, which is proven to be impossible. Therefore, the lack of objectivity undermines the established dichotomy between international law and international politics. All matters of international law are also matters of international politics.

A clear sign of this argument is the frequent dependence of judges in international courts on moral standards such as equitability, reasonability, and proportionality. However, Koskenniemi contends that the frequent invocation of these non-legal principles contradicts the purported objectivity of international law. This is because determining what is equitable, reasonable, and proportionate involves subjective and political evaluative choices, which have traditionally been excluded from the international legal framework (Koskenniemi, 2006, pp. 534-535). Notwithstanding

this inconsistency, the imperative felt by international courts to depend on these non-legal concepts for decision-making highlights the insufficiency of the rules of international law.

The International Court of Justice's (ICJ) ruling in the *North Sea Continental Shelf Cases* (1969) serves as a prominent illustration of this. The Federal Republic of Germany, one of the Parties in each case, bases its legal argument on the idea that each coastal state has a right to "a just and equitable share" (North Sea Continental Shelf, Judgement, 1969, p. 9) in the process of determining the boundaries of the continental shelf. In its assessment of Germany's claim, the Court references the Truman Proclamation of 1945 as the foundation of the applicable legal framework. The Proclamation established the key principle that the boundaries of the continental shelf should be determined based on equitable principles (North Sea Continental Shelf, Judgement, 1969, pp. 32-33). Moreover, the Court declares that all ICJ rulings must by definition be just and equitable, independent of the legal justification (North Sea Continental Shelf, Judgement, 1969, p. 49). Ultimately, the Court decides that a delimitation should be implemented in the cases based on equitable principles that will result in a difference between the length of the coastal state's coast measured in the general direction of the coastline and the extent of the continental shelf areas that belong to it (North Sea Continental Shelf, Judgement, 1969, p. 54).

Reading the aforementioned decision's subtleties is, nevertheless, of the utmost importance. While the Court's decision appears to be based on moral values like justice and equity, it repeatedly stresses the rule of law's supremacy over moral standards throughout its legal reasoning for the decision. In paragraph 83 of the ruling, the Court explicitly declares that the Parties are not obligated to adhere to moral values, such as the principle of equity unless it is mandated by the rule of law. The Parties are only bound by the rules and principles of law. In the same paragraph, the Court also emphasizes that the inclusion of moral standards in the ruling does not imply a deficiency in international legal norms (North Sea Continental Shelf, Judgement, 1969, p. 47).

It is better illustrated by a direct quote from paragraph 85 of the ruling: “It is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles” (North Sea Continental Shelf, Judgement, 1969, p. 47). This quotation highlights the notion that justice, as an abstract moral principle, lacks inherent value. Its importance, in the opinion of the Court, stems from the requirement that an international legal rule call for its application. Simply said, this quotation encapsulates the view that international law regards political and moral principles as mere mimesis, or something supplementary to the purportedly objective rules of law (Polat, 1998, p. 449). The Court's apparent reluctance to be accused of becoming politicized and undermining the presumed objectivity of international law may explain why it places an excessive emphasis on the rule of law rather than abstract justice.

However, Koskenniemi argues that the fundamental principles of international law founded on sovereignty have evolved into a broad demand for just and equitable means of resolving disputes. Concepts such as interpretation, contextuality, equitable principles, and so on have become central to international law as a result of the field's shift in emphasis from a balance between justice and state sovereignty to a single emphasis on state sovereignty since the 19th century. A clear example of this balancing the claims and justifying the decisions on what is equitable or what a theory of justice requires can be seen in the settlement of disputes between foreign investors and the host states (Koskenniemi, 1990, pp. 19-30).

6.2. The ISDS as Seen Through a Critical Legal Lens

Recalling earlier chapters, there are arguments that the ISDS lacks legitimacy. The primary criticism leveled at the ISDS is that, despite being designed to depoliticize investment disputes, it has in fact become politicized. Understanding the flaw in this argument requires revisiting the meaning of politicization and depoliticization in this specific setting. Prior to the establishment of the ISDS, the exclusive recourse for settling disputes between a foreign investor and a host state was through diplomatic

protection. As the investor lacked the legal power to sue the host state in international courts, the home state was the sole authority capable of initiating diplomatic protection. This was done to safeguard the foreign investor and seek compensation for the wrongdoing of the host state. Therefore, there was a real risk that a disagreement over investments may escalate into a political issue between states.

Thus, the ISDS was created as a depoliticization measure that aims to prevent political conflicts by successfully balancing the interests of foreign investors and host States within the legal framework (ICSID, 1965, p. 33). As a substitute for diplomatic protection, it envisions the creation of an international judicial mechanism to resolve investment disputes. Under this system the authority was granted to foreign investors to pursue compensation for the host state's wrongdoings through a pre-established dispute settlement procedure. It follows that the intention behind granting this legal authority was to keep investment disputes within the legal framework, thereby preventing them from turning into political disputes.

A closer look at the preparatory documents regarding the history of the ICSID Convention reveals the same false binary between politics and international law upon which the ISDS was built. There, it was stated that the Convention's main goal was to "offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy" (ICSID, 1968, p. 242). Put simply, the ISDS plane shifts the dispute from the realm of subjective politics to the realm of objective law. The purpose of this legalization was to reassure investors that their foreign investments would not be subject to arbitrary judgments or political subjectivity, but would instead be guided by objective rules of international law. The failure to uphold the dichotomy of international law and international politics during the implementation of the ISDS is the source of the criticism that it is politicized.

The claim of politicization shapes around the arbitrators' purported lack of impartiality and independence, as well as their inconsistent decisions and inadequate control mechanisms, as mentioned in earlier chapters. (See also (Kaufmann-Kohler & Potestà, 2016, pp. 10-15) Given that all criticisms of the ISDS have been thoroughly examined in the corresponding chapter, the main focus here is to critically assess three specific criticisms that have resulted in the conclusion that the ISDS has become politicized.

Concerning the independence of arbitrators, the primary issue raised by critics pertains to the appointment of arbitrators by the parties involved and the exclusive authority granted to foreign investors to initiate cases. Because of this, it is believed that the arbitrators are biased toward serving the interests of the investors in order to secure their reappointment (Kaufmann-Kohler & Potestà, 2016, p. 12). Van Harten suggests that one way to improve arbitrators' independence is to give them a fixed term of office, a guaranteed income, and appointment by elected officials, much like tenured judges. He continues by saying that their independence may also be enhanced by the transparency of their judgments and the availability of an appeals process (Van Harten, 2007, p. 168).

He does concede, though, that since "judges are human after all," (Van Harten, 2007, p. 168) none of these prerequisites can ensure their complete independence. Regardless, he asserts that the esteemed reputation and reliance on the judiciary in democratic societies, stemming from their perceived independence from other branches of government and non-governmental entities, will aid arbitrators in preserving their impartiality even when faced with pressures to be biased (Van Harten, 2007, p. 168). Harten, regrettably, ignores a crucial point: arbitrators do make decisions in the political realm even when they have lifetime appointments, a fixed salary in the millions of dollars, and the utmost respect from the public. Regardless of these factors, the fundamental reality remains that the entire arbitration process is a political one. Arbitrators hold political views; appointments of arbitrators follow evaluative determinations; decisions are rendered by a panel of arbitrators, which requires compromises; and enforcement decisions are determined by the relevant

governments. The common characteristic among all these processes is their inherent political nature.

In relation to the previous point, the system's lack of coherence is another criticism that contributes to the idea that the ISDS has become politicized. Coherence, in this context, pertains to the consistent interpretation of rules and the establishment of a precedent. Due to the broad latitude granted to arbitrators under the ISDS and the fact that they are not constrained by prior decisions, it has been suggested that the ISDS has become political and lost its objective predictability.

It is argued to make the investment arbitration regime unreliable, ineffective, and unpredictable (Garcia, 2004, pp. 340-341). What makes matters worse, it is contended, is the absence of adequate control mechanisms (Spoorenberg & Viñuales, 2009, p. 95). The ad hoc nature of the ISDS is pointed as the source of all these criticisms and that doing so would turn the ISDS into a "legal casino" (Werner, 2003, p. 782) where states and investors bet on the court's decision. The proposed solution to the alleged politicization of the ISDS is to raise the level of institutionalization of the ISDS by creating a permanent appellate court (Werner, 2003, pp. 782-785).

Those who support the independence of the law from political interference may find the idea of a permanent appeal court appealing, but it's important to understand that this will not address the purported politicization issue. Stated differently, attempts to further institutionalize the legal framework of the ISDS in order to bolster the law's purported objectivity are futile because the law itself lacks objectivity. Research on voting behavior in the US Courts of Appeals has shown that political attitudes of the judges provide a broad description of their judicial behavior (Goldman, 1975, p. 504). Consequently, this suggests that an appellate court is unable to provide an impartial ruling, just like any other court. The justices' political, economic, ethical, and other perceptions will influence every decision made by the court. Because of the importance of the political agenda that they shape, Huston even argues that the highest courts are the most political of all courts (Huscroft, 2006, p. 35).

6.3. A Critical Legal Analysis of the ISDS Reform Plans

The previous chapters extensively examined the proposals put forth by the EU and TWAIL to address the legitimacy concerns surrounding the ISDS. These critiques are mostly related to its purported politicization. Given the factual analysis presented in earlier chapters on these proposals, it is now imperative to critically evaluate them to determine if they can effectively address the issues they aim to resolve.

It may be recalled that the EU reform plan is based on establishing a permanent investment court with two levels of adjudication and permanent arbitrators. It is the responsibility of the first-instance tribunal to examine the evidence and apply the relevant laws. If there were major mistakes in the evaluation of facts or the application of the law, the appellate tribunal could overturn the decision. The alternative, put forth by TWAIL, is to completely dissolve the ISDS and replace it with a new investor-state dispute settlement system that would be governed by nation-states. In other words, TWAIL seeks to restore the situation that existed before the ISDS, when all disputes within a nation-state were resolved by domestic courts.

6.4. A Critical Look at the EU Reform Proposal

Firstly, to restate the previous argument, any court that follows a political procedure—from appointing arbitrators to putting rulings into effect—will be a political entity. This is the first thing to keep in mind about the EU proposal. This implies that the EU proposed MIC, which they regard as a means of resolving the politicization of the ISDS, will be political in and of itself. The political character of the MIC is apparent in different parts of its Draft Statute. According to Article 4 of Part I, the members of the MIC can be states or international organizations that have the power to sign investment agreements. Additionally, Article 7 of the same part states that the budget of the MIC will be funded by its members, with each member's contribution determined by their proportion of foreign direct investment relative to the total investment of all MIC members.

It is stated in Part II that a Plenary Body, comprising representatives from all Members, will be established. Furthermore, Part III specifies that the selection of judges for the MIC will be entrusted to a subcommittee of this Body. The subcommittee will evaluate candidates from a roster submitted by each member of the MIC (Bungenberg & Reinisch, 2020, pp. 1-5). All of these aspects of the proposed MIC highlight a cosmetic change from “expansionist arbitrators” to “activist judges” in the ISDS (Sornarajah, 2015, p. 62).

Put another way, Sornarajah’s argument against expansionist arbitrators is based on their alleged pro-investor interpretations of treaty provisions. It is thought that arbitrators make use of their wide discretionary power to favor foreign investors, since arbitrators are only appointed to serve if the investors initiate the arbitration case. However, the EU's proposed system is strikingly similar, with the judges heavily reliant on nation-states, which would work to the advantage of the state parties. The judges of the MIC appear to closely resemble what Sornarajah identifies as activist judges, who possess the capacity to interpret the law in a manner that favors the state party involved in the case. A number of factors lend credence to this claim, including the fact that the MIC is open only to states and organizations founded by states, that states pay for it, and that states nominate and their representatives appoint judges. Therefore, it would appear that Sornarajah's claimed goal of bringing objectivity to the ISDS cannot be fulfilled by the EU's proposed permanent court system. (Sornarajah, 2015, p. 62).

Another way of looking at the EU's proposal to create the MIC is through the lens of "constitutionalism" (Koskenniemi, 2007, p. 15). Here, constitutionalism should be seen as a reaction to the growing area-specific fragmentation of international law. The widespread occurrence of functional diversity in international law, exemplified by areas such as trade, human rights, and environment, has generated concerns about the potential erosion of overall control and coherence in the international legal framework (Koskenniemi & Leino, 2002, p. 556). Ultimately, this concern led to a significant increase in efforts to establish international law as a formal system, with a particular

emphasis on centralizing ad hoc legal systems. Koskenniemi contends that these efforts, which involve advancing the hierarchical priority of institutions representing general international law and the superiority of certain norms of general law over others, bear a resemblance to the process of international constitution-making (Koskenniemi, 2007, p. 19).

Even when assessed in the context of constitutionalism, the MIC is far from meeting expectations. First and foremost, it is important to keep in mind that the difficulties and inadequacies of the centralized legal framework that was in place at the time led to the need for the establishment of an ad hoc dispute settlement mechanism for international investment disputes. In contrast to the claim that decentralization undermines "the credibility, reliability, and, consequently, the authority of international law" (Hafner, 2004, p. 856), the establishment of the ISDS as a decentralized mechanism was a deliberate reaction to the inherent contradictions of international law and the ineffectiveness of the institutions tasked with enforcing it in the field of international investment. Stated differently, "If the law is unjust, or unworkable, little virtue lies in applying it coherently" (Koskenniemi & Leino, 2002, p. 560).

Similarly, Koskenniemi argues that the emergence of the expert rule, fragmentation and the subsequent rise of managerialism and utilitarianism can be attributed to deliberate efforts to remove politics and ethics from international law (Koskenniemi, 2007, p. 29). The fact that the ISDS is part of a larger effort to create an objective law and elevate international law to a purely technical, politically neutral domain is what jeopardizes its legitimacy. Hence, it is apparent that the process of centralization is incapable of resolving the issues in this field. As Sornarajah argues, "Wiping the slate clean seems to be the only possible way forward" (Sornarajah, 2015, p. 408) to solve the legitimacy problem of the ISDS. The question is, how to wipe the slate?

6.5. A Critical Look at the TWAIL Reform Proposal

This leads to an analysis of the another significant ISDS reform proposal: TWAIL's proposal. As detailed in the previous chapters, TWAIL advocates for the complete elimination of the ISDS and the transfer of its jurisdiction to domestic courts in the host state to resolve investment disputes. It is in keeping with their belief that key international legal regimes and international institutions serve the interests of global capital rather than the welfare of populations in developing countries (Chimni, 2011, p. 20). Given that international investment law and the ISDS are integral components of these regimes, TWAIL contends that they are also biased in favor of developed countries. In order to eliminate the constraining effect of international law on state sovereignty and enable Third World States to fully control their natural resources, TWAIL supports going back to the pre-ISDS era. Accordingly, the resolution of disputes related to foreign investment is argued to fall under the legal authority of the host state, similar to any other dispute that arises inside that country.

TWAIL is proposing to put an end to the system of "adventurist arbitrators" (Sornarajah, 2015, p. 143), which it believes protects neo-liberal ideas and Third World states' inferior position in negotiations relative to developed states or multinational capital (Gathii, 2008, p. 262), by placing national courts in charge of resolving disputes. While TWAIL's stated goal is to put an end to "mutations of neo-liberalism in international investment law" (Sornarajah, 2011) with this proposal, it seems that the potential repercussions are not being considered. The proposal's unintended consequences may be better understood by rephrasing it as follows: TWAIL contends that the current ISDS system, which grants arbitrators broad discretion, should be replaced with one that grants the judiciary of the host state broad discretion.

Firstly, it is crucial to acknowledge that claims made under international investment law are highly contentious and vague, hence decision-makers need to have a broad scope of discretion (Sureda, 2012, p. 3). Whether within the jurisdiction of an

international tribunal or a domestic court, the decision-maker in an international investment dispute necessitates the freedom to interpret. Hence, the sole distinction between the TWAIL proposal and the existing ISDS lies in the nationality of the decision-makers, rather than the extent of their interpretive authority. TWAIL suggests having judges from the host state make the ultimate decisions, as opposed to the ISDS's stipulation that arbitrators not be citizens of either party to the dispute.

Therefore, TWAIL's criticism of international arbitrators for expanding the law to suit their philosophical and ideological inclinations (Sornarajah, 2015, p. 148) ignores the fact that national judges will almost certainly follow suit when making decisions in the context of settling investment disputes. Should TWAIL's claim that the ISDS permits the instrumental application of the law under neoliberal principles (Sornarajah, 2015, p. 148) be deemed valid, TWAIL must be prepared to acknowledge the counterargument that its proposal permits the instrumental application of the law under national interests. All of these demonstrate how TWAIL's proposal is far from bringing about the "cosmopolitan global justice" (Sornarajah, 2015, p. 417) that it aims for.

This raises another criticism of TWAIL's proposal, contending that it is ultimately futile since it serves as another of several endeavors to de-politicize investment disputes. TWAIL suggests legalizing and preventing the politicization of these crucial decisions by keeping them inside the borders of national law, much as the ISDS was established to handle investor-state disputes to keep them from becoming politicized. So that the essential flaw of TWAIL is this persistence in drawing the false dichotomy between legal and political disputes. Given that politics is inevitably involved in disputes involving states as one of the parties and the issues at hand are those of state policy and regulation, this approach is particularly troublesome (Sureda, 2012, p. 2).

Another argument against TWAIL's proposal is based on Koskenniemi's assertion that societies do not have uniform or well-defined functional requirements or interests that can be satisfied by legal institutions (Koskenniemi, 2006, p. 604). In other words, the justice that TWAIL seeks cannot be achieved simply by granting decision-making

power to domestic courts and so bolstering state sovereignty in the settlement of investment disputes. Throughout human history, there have been numerous instances where the people of the Third World have been subjected to injustices perpetrated by their own compatriots, rather than by the First World or multinational corporations. TWAIL's proposal therefore contains the fundamental fallacy of assuming that society is homogeneous and that a stronger role for national legal institutions in dispute resolution will ensure justice for all. Likewise, one of TWAIL's forefathers, Chimni, has pointed out that we should proceed with care when dealing with legal control mechanisms in state jurisdictions since they might be used to legitimize unilateral actions that harm the interests of the Third World peoples (Chimni, 2011, p. 25).

6.6. An Evaluation of the Current ISDS Reform Proposals

As has been described thus far, centralizing the international investment dispute settlement system, either under the auspices of a multilateral court or in the hands of domestic courts, does not solve the system's current problems. What could help in solving these problems is rethinking the ISDS in light of the social impact of the rules and regulations governing dispute settlement, as opposed to the EU's and TWAIL's proposals to alter the system's technical or procedural aspects. The decision regarding the institutional structure, whether it be international arbitration, a multilateral court, or a domestic court, does not significantly impact the acquisition of legitimacy for the investment dispute settlement system.

As Koskenniemi argues, the legitimacy of the ISDS derives from the positive impact it is expected to have on the relationship between national governments and foreign investors, especially when the national government is preparing to enact a policy that will affect investors' interests (Koskenniemi, 2017, pp. 351-352). Therefore, any proposal to reform the ISDS should prioritize enhancing the beneficial social interaction between nation-states and international investors.

Thus, strengthening the principle of justice, which has been neglected in favor of the principle of sovereignty since the late 19th century, should be the top priority when it comes to reforming the ISDS. An arbitration system founded on the right axis of the principles of sovereignty and justice can produce the desired societal influence on the conduct of legal entities. This idea is predicated on the understanding that issues with international law have mostly stemmed from the detachment of law from politics and the disregard for the principle of justice. Therefore, the first step in any major effort to reform international law should be the deconstruction of legal objectivity and the traditional dichotomy of justice, politics, and law. The next step would be to create a project consisting of a collection of rules, organizations, and customs that will allow for "the forms of collective life to be constantly imagined, debated, criticized, and reformed, over and over again" (Koskenniemi, 2011, p. 69).

6.7. What Does "Happily Ever After ISDS" Entail?

In this regard, the study has attempted, so far, to deconstruct the myths surrounding international law as they are portrayed in both the current ISDS and the proposed ISDS reforms. It is now time to describe what a happily ever after ISDS should entail. The foundation of this imagination rests on the recognition that all disputes are inherently political, necessitating political discourse, assessment, decision-making, and implementation to find a resolution. The legitimacy of this decision can be ensured by adhering to the principle of justice. The function of international law in this context should primarily be a linguistic tool for expressing alternate preferences and executing strategic maneuvers, rather than providing pre-determined solutions to problems (Koskenniemi, 2011, p. 68). It, thus, aims to challenge the prevailing influence of positivism in international law, which argues for the limitation of the role of human agency in legal decision-making.

One of the essential requirements for building the happily ever after ISDS should be maintaining its decentralized nature and even expanding its degree of decentralization, in contrast to the current reform proposals of centralizing the ISDS. This argument is

grounded in the premise of Koskenniemi that the law functions as a commitment to uphold justice and that justice lacks a pre-established institutional structure. He maintains that due to the inability to define justice in terms of specific values, interests, or objectives, centralization/ institutionalization itself is incapable of delivering justice (Koskenniemi, 2018, p. 48). Whatever the level of institutionalization, an unjust rule of law will always lack legitimacy and face opposition that will force it to change. The aforementioned cycle will persist until the fundamental tenet of justice is achieved.

This particular form of imagination presents a clear and direct opposition to the positivist understanding of law. In contrast to the positivist perspective that characterizes law as a harmonious framework of objective rules and regulations that set how people behave within a given society, the present argument is predicated on recognizing that international law is highly contextualized. As Koskenniemi argues, international law is not primarily a logical system but rather a medium through which divergent interests and values can be articulated and deliberated upon, with the aim of finding just resolutions to these disputes. Hence, the primary objective of the envisioned ISDS should be to determine the priority between conflicting interests, whether to prioritize the private rights of a foreign investor or the economic needs of the host state, to have a just solution (Koskenniemi, 2012, p. 59).

Undoubtedly, this calls for a political assessment and an increased level of decentralization within the organizational structure of the ISDS. Due to the inherent contextual character of legal problems and the lack of readily available solutions, establishing a centralized dispute resolution mechanism that prioritizes the development of precedent and consistency is not a viable option. Depending on the particulars of the issue at hand, a just resolution created for one case may be an unjust conclusion for another. Consequently, justice is served in an international investment arbitration when an arbitrator evaluates the arguments and viewpoints of the parties involved and finds a compromise between them. Stated differently, each ruling in international investment arbitration represents a political choice made by a legal decision-maker striving to uphold the notion of justice. Justice, as a fundamental goal,

would not be achieved in a centralized dispute resolution system that aims to depoliticize disputes and establish objective norms to which state-appointed judges must adhere.

From another perspective, Abbott and Snidal find permanent courts, such as the European Court of Justice, to be more successful than ad hoc panels, such as those under the ICSID (Abbott & Snidal, 1998, p. 23). The authors contend that a centralized organizational structure offers a stable platform for negotiation, enabling timely responses to rapid developments. They also assert that this structure should be valued for its capacity to improve operational efficiency and reduce transaction costs. The key principles that they believe are present in centralized organizations but absent in decentralized ones are neutrality, depoliticization, and specialization (Abbott & Snidal, 1998, pp. 9-10). Thus, they contend that the need for centralization grows as the number of actors and the complexity of the issues at hand do, as is the case with the ISDS (Abbott & Snidal, 1998, p. 15).

The aforementioned line of reasoning is challenging to accept and needs correction from two distinct yet interconnected perspectives. The primary issue stems from the presumed division between politics and law and the preference for the latter due to its supposed objectivity. The wall of centralized legal bodies that aims to keep politics out of the legal system is constructed upon this foundation. Tenured and supposedly unbiased judges who base their decisions more on pre-established general principles than on the particular facts of each case are entrusted to preserve these walls. The objective of this system is to unify all potential methods of legal interpretation into a singular prevailing approach that should be adhered to in every case. In other words, the proposed centralization of the ISDS is part of a larger effort to keep law outside of politics and within its borders, even though justice requires multiple possibilities of interpretation as the number of actors and the complexity of the issues addressed grow.

There is a second, related problem with Abbott and Snidal's argument: they claim that a legal body's success is dependent on its ability to remain politically impartial. The fundamental flaw here is to ignore whether the principle of justice, which should be the main criterion for evaluating the success of a legal institution, is met in the decisions taken. Put simply, the success of a judicial body should not be measured by how far its rulings are from politics, but by how closely they adhere to the principle of justice. Depoliticization does not always result in justice, and no legal body can be considered successful if the principles of justice are not upheld.

It is evident that the arguments presented thus far align with Derrida's concept of justice, which is based on the notion that "deconstruction is justice" (Derrida, 1992, p. 15). Justice, in his view, cannot be deconstructed since it is not constructible, in contrast to law, which he considers deconstructible due to its constructibility. The essence of justice resides in the capacity of deconstruction, as its primary objective is the endless search for justice (Derrida, 1992, p. 22). In other words, justice is not inherently constructible due to its "infinite" and "incalculable" nature that defies rules and symmetry (Derrida, 1992, p. 22). It is also "heterogeneous" and "heterotropic" (Derrida, 1992, p. 22). On the other hand, law, which can be described as the application of justice, is constructible and deconstructible. It can be stabilized and regulated, with calculable and "coded prescriptions" (Derrida, 1992, p. 22). Consequently, the reification of any specific rule, regulation, institutionalization, precedent, etc., even when it is lawful, is what gives rise to injustice.

Derrida argues that for a legal decision to be considered just, the judge must have broad discretion in resolving the dispute, as if there were no existing legal rules applicable to the case. In this view, the judge essentially creates a new law for each case, even if it involves the same topic that has been addressed previously. The judge must apply rules that he deems crucial and indispensable for the just resolution of each disagreement. Simply following a previous decision that has been utilized in similar situations or being obligated to follow specific legal principles in specific conflicts could result in conclusions that are legal but unjust (Derrida, 1992, p. 22). The essence

of his argument can be succinctly captured in the following quote: “No exercise of justice as law can be just unless there is a “fresh judgment”” (Derrida, 1992, p. 23).

The articulation of *fresh judgment* is critical in this context because it refers to a judge's reestablishing, reimagining, and autonomously determinative interpretation to arrive at a just conclusion. A judge who formulates a *fresh judgment* prioritizes justice over the traditional and repetitive nature of judgment (Derrida, 1992, p. 23). Just decisions are based on unique interpretations of the circumstances of each case, free from generalizations, biases, or predetermined rules. Blindly applying a just decision to a similar situation, as precedent, may lead to an unjust outcome. Every case possesses an "irreducible singularity," (Derrida, 1992, p. 25) where the reevaluation of the specific conditions establishes justice.

These arguments make it evident that centralization in legal institutionalization and applying pre-established legal principles consistently to all cases will not lead to justice. Justice necessitates a constant reevaluation of the particular circumstances of a case, and politics is an inevitable part of it. This is the reason Derrida contends that every progress in politics necessitates a reassessment and subsequent reinterpretation of the fundamental principles of law, as they were previously determined or defined (Derrida, 1992, p. 28). Hence, in light of the paramount objective of justice, any attempts to reify legal norms and principles by separating them from political ones should be rejected.

That is why the ISDS needs to break down the wall that separates law from politics and society if it wants to have a happy ending. In conjunction with political norms and rules, the primary goal of international investment law norms and regulations should be to establish a linguistic framework that will assist arbitrators in fairly assessing the case's specifics. This, indeed, is merely a formulation of the process that arbitrators intuitively use to decide an investment dispute. Arbitrators in international investment arbitration adhere to internal processes similar to those outlined above when making decisions on cases. They are primarily guided by a sense of justice, although the

specific terms used to describe their reasoning may differ, such as public interest, economic necessity, political stability. Koskenniemi believes that by institutionalizing this "critical-normative practice," (2006, p. 545) the ongoing struggle of international law between apology and utopia will come to an end. The transparency of the decision-making procedures in this new system eliminates any accusation of apology, while the absence of universally applicable pre-established principles prohibits any accusation of utopianism (Koskenniemi, 2006, p. 545).

One further benefit of this new dispute settlement mechanism will be its ability to compel decision-makers to assume moral responsibility for their decisions. This system of "normative conversations" (Koskenniemi, 2006, p. 546), which rejects formal rules that adhere to particular ideologies and abstract natural law principles, is consistent with Moorhead Wright's criteria for the ethic of responsibility (Koskenniemi, 2006, p. 546). These criteria state that a legal system is legitimate if it is responsive to the needs or claims of others, calculates likely consequences and fairly evaluates claims; holds people accountable or liable for their choices, decisions, and judgment calls in the context of applicable rules or laws; and exercises discretion in a morally sound manner (Wright, 1982, p. 161). It is clear that the proposed system of investment dispute settlement meets these requirements.

The fulfillment of these requirements highlights the integration of this suggested system into the realities of social life, setting it apart from the current ISDS and the existing reform proposals in terms of effectiveness. In other words, the proposed dispute settlement system acknowledges disputes as a common aspect of social life and proposes resolving them by remaining flexible and allowing the creation of legal decisions, as long as the principle of justice is upheld to determine between opposing arguments. The system is capable of adjusting to constant changes and transformations of social conditions because it does not contain any pre-determined rules but rather relies on the strength of arguments and the idea of justice. This in turn contributes to the legitimacy and efficacy of the system.

6.8. Chapter Summary

This chapter has provided a previously undisclosed account of the ISDS and has presented a critical, unique perspective to assess the reform ideas for reforming the ISDS. The arguments presented in this chapter may seem highly unusual to readers accustomed to the standard analysis found in the body of literature on the technical issues with the ISDS and new technical solutions for solving these issues (See (Arato, Claussen, & Langford, 2023), (Langford, Potestà, Kaufmann-Kohler, & Behn, 2020), (Roberts, 2018)) This novel approach to reforming the ISDS is founded on the notion that the primary issues with the system arise from the positivist interpretation of international law, which asserts that law is objective while politics is subjective, thus inevitably conflicting.

Being aware of this inherent flaw in international law, this chapter argues that the concept of justice within a social and political context must supersede the conventional, uncritical application of the law. The real strength of the reform proposal indicated in this chapter, and what distinguishes it from other reform proposals, is that it has been able to escape from the trap of apology and utopia, which is the fundamental dilemma of international law. Stated differently, this proposed reform is not apologist because it is far from serving any interest and it is not utopian because it is not detached from social reality. This makes it, in comparison to other reform proposals, the best possible reform alternative and the most efficient long-term solution.

Promoting decentralization, as opposed to the centralization proposals put forth by the EU and TWAIL, would be the most efficient approach to resolving the concerns associated with the ISDS. In this way, the principles of justice can guide the decision-making process while still reflecting the parties' true intentions. The proposed approach is based on the acknowledgment that people should have freedom of choice within reasonable limits set by the principle of justice. One of the most distinctive aspects of this proposal is its vision for a new institutional model that accounts for the

ever-changing nature of social and political life. This model would allow us to go beyond the constraints of our current awareness and the assumptions that underpin it.

CHAPTER 7

CONCLUSIONS

With more than 3,000 international investment agreements, the ISDS is a unique decentralized mechanism. It establishes an exception to the host state's absolute legal capacity to set the laws for the natural and legal persons within its borders. When a foreign investor has a dispute with the state in which they invested, the ISDS allows them to directly use international arbitration procedures. Under this system, international investors are not required to exhaust domestic remedies. Through international agreements, the states agreed that foreign investors would have the option to settle investment issues with the host states via domestic courts or international arbitration. Nevertheless, only foreign investors were given this privilege to select from several adjudicative processes. Domestic courts have exclusive jurisdiction over domestic investors.

Over time, this unique structure has started to be criticized because of its perceived legitimacy crisis. The argument contends that despite the system's initial goal of removing politics from investment disputes, it eventually became politicized and lost its effectiveness. The assertion of politicization pertains to the fundamental characteristics of the system, which arise from its decentralized form. These include the arbitrators' considerable margin of appreciation, their party-appointed status, and the absence of appeal procedures. All of these characteristics have been identified as hindering the system's ability to form objective judgments, which is considered to constitute the system's legitimacy crisis. Given these concerns, efforts to reform the system were initiated, initially at the bilateral level and subsequently at the multilateral

level. As part of the ongoing reform process under the UNCITRAL framework, several reform proposals have been put out.

As a result, the main question in this thesis is how these proposals suggest reforming the system and to what extent they have the potential to address the alleged legitimacy crisis. This study has aimed to address this question by examining two reform proposals developed from two different perspectives: The EU and TWAIL. Remarkably, the study reveals that both parties concur on the notion that the present system can only be enhanced by centralization, despite their divergent proposals on how to achieve it. Nonetheless, by assessing both the existing system and the two reform options through the lens of critical international law, the study concludes that centralization lacks the expected potential to remedy the system's shortcomings. This study's main argument is that increasing the degree of decentralization makes the principle of justice more effective in the functioning of the system and, by extension, increases its legitimacy.

This thesis consists of seven chapters, including an introduction and conclusions. Chapter 2 presents the tortuous development path of the ISDS. The chapter begins by outlining the initial requirements for the development of international arbitration. It was created in response to the need for a new mechanism to settle conflicts between the state and investors in the post-colonial era. This era, along with prohibiting the use of force to settle investment disputes, signaled the end of imperial law's application in formerly colonized areas that have been sovereign states since then. Given that these ex-colonial powers were mostly capital-exporting countries, it was obvious that they needed to devise new strategies for protecting and promoting their investments abroad.

This leads us to the history of the ISDS, which is covered in more detail in the chapter's second section. To protect their investors and encourage investment in this new period, Western states have mostly relied on the BITs. The first in this pattern was the 1959 BIT between Germany and Pakistan. The main feature of these BITs from 1959 up until the 1990s was their signing between a capital-exporting Western country and a

former colonial country. To further ensure the safety of Western investments in newly independent territories, the ICSID was established in 1966. In the post-colonial period, thus, capital-exporting countries had an effective framework to safeguard their interests in the form of the ICSID, the first international institutional effort dedicated exclusively to investment protection. Another measure implemented was the inclusion of language in BITs that imposed explicit obligations on the host state to safeguard foreign investment and investors. The first of its type was the 1968 Netherlands-Indonesia BIT, which contained certain clauses resembling the ISDS clauses found in contemporary investment agreements.

Section 3 further elaborates on the historical development of the ISDS. Over time, the initial move toward incorporating precise language in BITs to offer legal protection to foreign investors evolved into the ISDS sections, now standard in investment treaties with more robust and expansive phrasing. Since then, the ISDS has been a unique feature of international law, whereby sovereign states assign private arbitrators the authority to evaluate the validity of their regulatory actions against foreign investors. One of the defining features of this legal privilege is that foreign investors can sue the host states in international tribunals without having to go through domestic procedures first. This system, based on treaties, is notable for its significant decentralization and the judicial discretion of arbitrators. Therefore, what caused the host countries to consent to this system is a compelling topic for investigation.

At first, the newly independent governments were hostile to the ICSID and the ISDS in general because they felt that they served the interests of capital-exporting countries to the detriment of capital-importing states. They demanded that the government have total authority over all national resources. However, the late 1970s and early 1980s called into question their initial assessment of the new system. In order to break out of the stagflationary cycle during that period, newly established administrations needed either quick foreign investment or international financing.

To safeguard their investments in these countries, however, capital-exporting states requested systemic reforms. In the same vein, the World Bank and the IMF exerted significant pressure on them to deregulate the framework for foreign investment in order to provide credit. These conditions forced them to renounce the initial investment objectives and sign the ICSID Convention. By the 1990s, one of the most important aspects of the global investment climate was the transfer of authority to the ICSID for the settlement of investor-state disputes. However, since the early 2000s, there have been multiple reasons for questioning the legitimacy of the ISDS.

The subsequent sections provide a comprehensive explanation of the ISDS's operation, using the ICSID as an example and elucidating the primary reasons for questioning its legitimacy. The main reasons for criticism of the system include a lack of transparency, inconsistency in award decisions, a lack of impartiality and independence among arbitrators, difficulties correcting legal mistakes, high expenses, and long durations of arbitration proceedings. These systemic issues have led to the argument that the ISDS is experiencing a legitimacy crisis.

Chapter 3 explores the reform initiatives to address the alleged legitimacy crisis of the ISDS. The first two sections of the chapter examine the economic and social context of the events surrounding the ISDS to provide the necessary explanation of the factors that gave rise to the structural problems and demands for reform. On the economic front, nationalist ideology and a return to state control have gained momentum since the beginning of 2000, while neoliberal institutions and ideas have been losing in favor. Consequently, the main goal of the international investment regime is no longer to protect foreign investments. States aim to achieve a balance between safeguarding their regulatory rights and encouraging foreign investment, both through institutional and individual means. Therefore, the ongoing reform of the ISDS marks a move away from giving private sector interests priority and toward reassessing the importance of the public good.

The present reform endeavor, of greater significance, represents a transformation in the global political hierarchy. While the developed world is experiencing a decrease in influence, the developing world is simultaneously experiencing economic and political growth. This is a clear indication of the increasing importance of China and India in trade and investment flows. This is in contrast to the diminishing influence of the United States and the European Union. This shift has overturned the traditional role of developed countries as net exporters of capital, requiring them to become net importers of capital. These developments led them to an encounter with a new aspect of the ISDS. They are now aware of the negative consequences of the ISDS on host states because they have started to appear as respondents in arbitration tribunals. While they have been the primary architects of the existing ISDS, they now advocate for reforming the system by enhancing the rights afforded to states within it. For this reason, the following sections provide further information about the ISDS's transitional phase and purported legitimacy crisis.

The chapter's remaining sections examine the early reform initiatives that arose in response and how they became institutionalized. Indeed, a variety of independent unilateral, bilateral, and institutional reform attempts were the first steps taken in response to these criticisms. The states' responses varied from denunciation of the ICSID Convention and termination of investment treaties to the development of new model treaties, the replacement of arbitration with a court system, and substantive revision of existing treaties and agreements. From an institutional standpoint, the ICSID and other arbitration centers have updated their formal procedures to address the difficulties. Since late 2017, when states tasked the UNCITRAL WGIII with reforming the ISDS, the calls to reform have taken on a coordinated and multilateral approach.

The WGIII has been given a comprehensive mandate to examine the issues within the system that are believed to contribute to the crisis of legitimacy. Between December 2017 and October 2019, WGIII examined and identified the ISDS-related concerns, concluding that the expressed concerns warranted reform. The Group then spent

October 2019 through September 2022 creating and categorizing concrete reform measures. The September 2022 summit functioned as a platform for deliberating on possible strategies for enacting reforms. Since then, the regular and intersessional meetings of the Group have served as the primary forum for discussing the reform recommendations.

There exist variations in the reform preferences of different countries. Many developed countries have aligned themselves with the systemic reformers group, which promotes substantial changes to the ISDS, such as establishing an appellate body and a multilateral investment court. They propose that member states appoint judges for these entities in order to achieve a fair compromise between state and investor concerns. However, several developing countries belong to the paradigm shifter group, which supports eliminating the existing system and providing alternative structures to maintain state sovereignty. Both of them believe that a centralized system should replace the current decentralized one. Their differences lie in the proposed location of centralization. Developed states request international centralization, whereas developing states propose national centralization of the investment dispute resolution mechanism. However, both parties consider centralization to be the most efficient approach for resolving the problems associated with the existing decentralized system.

Chapter 4 provides a detailed explanation of the EU's proposal for reforming the ISDS, which attempts to centralize the system under newly constituted international bodies. The fundamental driver behind this EU desire for reform is a significant change in the balance of power: While European countries were previously the primary sources of foreign investment, they are now also the main recipients. Their experience as the host countries has led to accusations that the ISDS does not offer enough assurance of impartiality and predictability, even though they were the main architects of the system. The EU suggests centralizing the ISDS by creating a permanent MIC, citing the system's ad hoc structure as the root of the issue. This chapter illustrates the details of the proposed EU reform within the broader context of EU politics. The chapter's

main goal is to demonstrate how European legal perspectives on investor-state dispute settlement have been contextually entrenched in the evolution of European politics.

The first section, thus, sets the stage by discussing the crises of European integration. It explains how these repeated crises of European integration have affected the policies of the EU. It is contended that the EU is, in fact, the outcome of a never-ending cycle of ups and downs, with roots that date back to the 1950s. The political upheavals of the 1960s dashed the optimistic expectations for European integration in the 1950s. Following, a brief period of progress toward integration ensued but was again derailed by economic crises in the 1970s. Even though there was a noticeable increase in integration during the 1980s, the 1990s saw the start of new political turmoil that hindered the process.

The challenges of the deepening were augmented by the challenges of the widening following the end of the Cold War. Following the inclusion of East Germany as part of the reunification of the two Germanies, membership was expanded to include the Cold War neutrals Austria, Sweden, and Finland. Above all else, the accession of ten member nations from the former Soviet bloc marked a turning point for the European Union, signifying a profound and symbolic change. The process of deepening took the brunt of this rapid widening. Between the rejection of the idea of a European Constitution in 2001 and the signing of the Lisbon Treaty in 2007, the EU underwent another period of crisis. Despite anticipating optimistic trends in enlargement and deepening throughout the post-2007 period, the global economic crisis of 2008 compelled the European Union to deal with both the economic and the ensuing political crises before it could fully recover from the political crises.

The EU went through a period of relative economic and political recovery towards the end of 2010, but the outbreak of the Syrian War in 2011 and the ensuing flood of migration brought about a new crisis. This migration waves and the persistent effects of the economic crisis on households contributed to the growth of far-right parties, which in turn started to alter member states' perspectives on the European Union and,

more broadly, the idea of integration. The emergence of the COVID-19 pandemic contributed further to this changing perspective of member states towards the EU and integration. The pandemic's sense of uncertainty consolidated the power of far-right parties and ushered in a new era where nationalist approaches publicly questioned supranational structures and policies.

In the face of all these crisis cycles, the Union has developed different strategies to guarantee the effectiveness of its policies and even its survival. A key policy instrument available to the European Union is the Lisbon Treaty's expansion of the Commission's authority to establish common trade policies to include foreign investments. The Union has attempted to make the best use of this recently acknowledged competence to strengthen common policies in the face of growing policy divergence amongst Member States. Given this, the Commission signed The Comprehensive Economic and Trade Agreement (CETA) with Canada as the first agreement to include specific clauses on foreign investment. Though CETA was meant to strengthen common policies, its provisions on investment arbitration in particular caused a great deal of controversy in civil society and among Member States, raising concerns about the Commission's authority to make such decisions.

Ever since then, the ad hoc character of the ISDS has sparked political debate in Europe, particularly over the claim that it permits a systemic bias in favor of foreign investors. The European Parliament and civil society urged the Commission to revise the ISDS clauses in bilateral investment treaties like TTIP and CETA and start a multilateral reform process. The key element of both reform efforts has been the establishment of an investment court system to replace the ad hoc and decentralized ISDS. The chapter illustrates the specifics of the EU proposal for establishing the investment court by using the example of the CETA reform process to represent the bilateral level and the UNCITRAL negotiations to represent the multilateral level.

Under CETA, the EU proposal to establish the Investment Court System (ICS) has four main features. Mediation rules would apply before the case is submitted to the court, and binding rules would be established for the interpretation of the facts of the case. The tribunal is intended to be a two-level tribunal with an appellate court, and ICS members would be subject to a code of conduct. With this proposal, the EU seeks to protect the state's right to regulate in a way that maximizes the public interest and eliminate the risk of the system serving the interests of foreign investors.

In parallel to the aim of the establishment of ICS in its bilateral investment treaties, the Commission has also worked at multilateral level to reform the existing form of the ISDS. The center of this is the establishment of a MIC, which is also intended to replace the ICS eventually. The EU proposes establishing a first-instance and appeals court as two tiers of the permanent MIC. As with national courts, judges are to be appointed and granted terms by the states. The rulings of the MIC are intended to be conclusive, precluding any further avenues for an investor to initiate a case against a state. Since 2015, the EU has been actively pursuing the creation of the MIC through several multilateral initiatives and, more recently, through WGIII.

An evaluation of the EU proposal's capacity to address the purported ISDS issues leads this section to its conclusion. This chapter contends that the European Union proposal is unlikely to effectively address the purported issues with the ISDS. Given the highly fragmented and complex network of bilateral investment treaties, regional agreements with investment chapters, and preferential trade agreements, the proposal to centralize the ISDS in the form of a permanent court is truly utopian. In addition, the EU proposal does not clearly state what will happen to the existing preferential, bilateral, or regional agreements once the MIC is implemented. The proposal indicates its intention to replace the current ISDS clauses in these agreements with the adoption of the MIC for resolving disputes between investors and states. Nevertheless, it is still uncertain how to proceed if the parties involved in the agreement wish to uphold their existing agreement.

Another significant issue with the proposal lies in the assertion that centralization will result in impartiality, consistency, transparency, and predictability in the ISDS. While the idea of establishing a permanent tribunal and allowing states to appoint judges is undoubtedly a political endeavor, it is not possible to argue that this proposal will ensure impartiality within the system. Furthermore, applying similar procedures to the Court of Appeal, whose rulings are considered conclusive, would heighten doubts about the claim that this proposal will improve the system's impartiality. It is crucial to understand that the topic of discussion in this chapter is not the shortcomings of the methods suggested to improve the system's impartiality, but rather the dubious nature of the assertion that the establishment of a permanent court and the appointment of state-appointed judges will impart impartiality to an inherently political system. Although the idea that a permanent court and uniform rules for all cases can improve consistency and predictability may hold water, it is still unclear how these additions will contribute to the system's main objective of rendering just decisions. What is the value of consistent and predictable rulings if they fail to achieve justice?

Therefore, the chapter posits that the EU reform proposal prioritizes serving the EU's interests over upholding the principle of justice, particularly in light of its recent multiple crises. The proposal to centralize the ISDS aims to invigorate the spirit of the common European rules during a period marked by conflicting interests among member states, high levels of uncertainty, and the rise of nationalistic far-right parties, all of which pose serious threats to the continued relevance of implementing the common rules. Therefore, the EU's position on reforming the ISDS indicates that a legal process that is separate from political priorities and requirements is not possible, and that nothing is outside of politics. The EU proposal to centralize the ISDS is a politically charged idea, even with its robust legal foundation designed to conceal its true nature. A thorough analysis of the proposal makes this clear.

Chapter 5 explains how the proposal of Third Way Approaches to International Law (TWAIL) to reform the ISDS is comparable to the EU's proposal to centralize the system, except that the proposed center is different. The first section of the chapter

defines TWAIL and outlines its fundamental ideas. Accordingly, TWAIL is a critical framework that examines the complex dynamics between imperialism and international law, challenging oversimplified notions of the Third World. Its fundamental objective is to change the oppressive systems, unequal power structures, and unjust hierarchies that characterize international law. It envisions the establishment of an international legal system that is truly inclusive and pluralistic, allowing the communities of the Third World to actively participate in shaping the rules rather than passively accepting them. To that end, TWAIL aims to reconstruct international law after first deconstructing it.

Nevertheless, it is important to acknowledge that TWAIL and Derrida have distinct interpretations of deconstruction. The primary distinction lies in the fact that TWAIL seeks to reconstruct an international legal framework that is genuinely pluralistic and inclusive, following the deconstruction of its colonial characteristics. This is not the same as Derridean deconstruction, which rejects both the constructing and the reconstructing of any totality.

According to TWAIL, the modern state, along with concepts like state sovereignty and self-determination, should be the primary focus of deconstruction. This is because these conceptions significantly contribute to upholding European hegemony in international law by enforcing the European interpretation of the state as an exclusive and universally accepted fact. According to TWAIL, the contemporary concept of the state is essentially a systemized version of the European concept of the state, which is fundamentally discriminatory and excludes the Third World.

Another target of deconstruction for TWAIL is the claim of universality, which also serves to uphold colonialism in international law. TWAIL argues that the so-called universal principles, standards, and ideals of international law are in fact European definitions. The existing structure of international law originated from intentional European efforts to establish the universal applicability of European principles. TWAIL highlights that these efforts primarily aim to impose Europe's

interpretation of international law as a universal reality, thereby hindering any critical analysis of the ways in which this construct of international law has sustained and expanded Europe's colonial dominance.

Consequently, the second goal of TWAIL becomes clear: the reconstruction of an alternative international law. The main goals of this reconstruction are to create a more equitable and inclusive international legal system and ensure broader representation of diverse populations in international decision-making. A first step in this direction would be for international law to shed its Eurocentric past and the effects of colonialism and imperialism. A second step would involve the reconstruction of an international law firmly grounded in a genuine and inclusive exchange of ideas among societies. Within this new system, every society is expected to actively engage in decision-making rather than passively conforming to pre-established regulations.

TWAIL asserts, following its previously stated position on international law, that the goal of international investment law is to sustain Western imperialism. In particular, the ISDS has been its focus of criticism, claiming that it has played a key role in preserving Western dominance over the Third World. Therefore, TWAIL's objective is to deconstruct the ISDS by historicizing it and revealing its anti-Third World bias.

By offering a historical framework, TWAIL seeks to demonstrate that the term ISDS is merely a post-colonial label for oppressive and unjust systems of power that originated in the colonial period. During the post-colonial era, the previously colonized regions were no longer subject to the extraterritorial laws imposed by colonial powers. To safeguard their political and economic interests in these regions, the imperial powers established the ISDS. TWAIL posits that the ISDS regulations, purportedly designed to safeguard the private rights of Western investors operating in Third World countries, have engendered an inequitable framework of relations between Western countries and other states.

TWAIL also aims to deconstruct the fundamental dichotomy on which the ISDS is based: the civilized and developed West versus the uncivilized and undeveloped Third World. It challenges the ISDS's image as a comprehensive solution to the alleged corruption and politicization of domestic courts in the Third World. Similarly, it demonstrates that portraying investment treaties as a method for introducing the rule of law to countries thought to have a poor understanding of legal principles is essentially a ploy to maintain colonialism. Therefore, it is not unexpected that TWAIL would want to reconstruct an alternative mechanism for resolving disputes between investors and states.

On the other hand, TWAIL claims that the current ISDS reform process under UNCITRAL is mainly about how to maintain the legalized colonial system. Rather than tackling the structural injustice and conflicts of interest at their root, TWAIL contends that the ISDS reform process has only focused on superficial changes. It believes that neither of the reform proposals can effectively address the system's issues stemming from its colonial origins. TWAIL believes that the current reform efforts best serve the Western powers, who are the major beneficiaries of the ISDS system.

Therefore, it proposes repealing the ISDS and establishing a new, centralized investor-state dispute resolution mechanism under nation-state jurisdiction. TWAIL, pointing out that the ISDS imposes a significant cost on host states and offers no corresponding advantage, argues that the best alternative to the ISDS for settling disputes between foreign investors and host states is the transfer of exclusive jurisdiction to the host states' national courts. Simply put, the idea is to return to the pre-ISDS era.

TWAIL's proposal has a resemblance to the purpose of the EU reform plan, which seeks to centralize the investor-state dispute settlement system. Surprisingly, TWAIL concurs with the EU that centralizing the system would be the best solution to the present issues with the ISDS. Concerning the location of the system's centralization, however, TWAIL and the EU hold differing opinions. Whereas TWAIL argues that sovereign nations should be empowered to settle conflicts between international

investors and host countries, the European Union urges a supranational body, namely the MIC, to do so.

However, as with the EU case, TWAIL's proposal to centralize the investment dispute settlement system by delegating full authority to national courts is unlikely to yield the desired results. While TWAIL's approach may present a potential answer to the problem of legalizing a system with colonial origins, it also faces other significant challenges. The main shortcoming of the proposed approach lies in the assumption that politics should be completely excluded from the judicial system. One of the key points in the TWAIL reform proposal that national courts are impartial and should therefore replace the ISDS, which is biased in favor of international investors. It is assumed that the current system's issues would be substantially resolved by the devolution of jurisdiction to national legal systems, which are purportedly independent of national politics and free from colonial influence. The discussion in the following chapter will make it clear why this assumption is incorrect.

Chapter 6 presents a completely different approach to the ISDS reform than the ones covered in the previous chapters. It uses Martti Koskenniemi's critical legal perspective to argue that improving the interpretation methods and principles of justice is the only way to bolster the ISDS's legitimacy. This perspective eventually calls for increased decentralization of the current system, in contrast to the arguments put up by the EU and TWAIL in favor of centralization. The rationale behind this unique approach to the ISDS reform is that the positivist interpretation of international law, which holds that politics is subjective and law is objective, is the root cause of the system's problems.

Since this chapter is inspired by Koskenniemi's critical understanding of international law, it begins with a comprehensive analysis of his perspective on law. Most prominent in this analysis is Koskenniemi's deconstruction of the assumption that international law is objective, arguing that nothing in the law is independent of politics. He argues that the fundamental issue with contemporary international law is that it is constructed

as 'the other' of international politics. The alleged objectivity of international law is said to be the basis of its uniqueness, as opposed to the alleged subjectivity of international politics. Koskenniemi examines the fundamental elements of international law's assertion of objectivity and their interplay in establishing said objectivity.

These two fundamental elements are normativity and concreteness. International law's objectivity is thought to be proven by the coexistence of these two components. However, this argument is fundamentally inconsistent. From a normative standpoint, international law aims to establish standards that are not influenced by the actions, preferences, or interests of any specific state. From a concrete standpoint, international law is also supposed to be based on the real actions, aspirations, or interests of states. Stated differently, the objectivity of international law requires both being consistent with the real world and separating itself from the legitimization of the existing power relations between states. It is evident that establishing a rule that is both independent and dependent on the current power structures is not a feasible approach. Normativeness and concreteness are mutually exclusive, and a rule cannot be both. The incoherence in this line of reasoning is at the heart of the current problems in international law.

Nevertheless, this is not an intrinsic characteristic of international law, but rather the outcome of a liberal interpretation of it. Since the 19th century, the liberal interpretation of international law has disrupted the previously established equilibrium between justice and state sovereignty within the state system. This disruption has resulted in a shift in emphasis, prioritizing sovereignty over justice. As a result, sovereignty has become the sole basis of the state system, while justice has diminished in significance. Thus, the basis of the international legal system came to be recognized as the consent of sovereign states expressed through diplomatic acts. However, once established, it was argued that the system became independent of the political inclinations of states and possessed normative authority, compelling them to comply. The contradiction between claiming that international law derives its legitimacy solely from the

sovereign will of states and seeking to apply it as a higher authority than the state's will in concrete cases is the source of the current challenges facing international law.

The argument that international law is objective and thus independent of international politics was developed to maintain international law's legitimacy in the face of these inherent contradictions. However, this argument, which is unfounded for the reasons indicated above, has become a source of further contradictions. As a result, international law has become trapped in a never-ending cycle of contradictions. The key to breaking this vicious cycle is to restore the balance between justice and sovereignty, which has been distorted by liberal thinking. In this case, there would be no need to claim that international law is objective, and many of the problems in international law would be solved by recognizing that what is legal is necessarily political.

The second section of the chapter provides a critical examination of the ISDS from this perspective. The key points of criticism there are claims that the ISDS aims to depoliticize investment disputes and the idea that its politicization has led to a crisis of legitimacy. The primary issue with these arguments is that they align with the erroneous underlying principle of international law: that the ISDS should ensure objectivity in settling investment disputes and serve as a crucial mechanism to prevent its politicization. When it fails to achieve this, which is indeed an impossible to achieve, it is asserted to be in a state of legitimacy crisis and requiring reform.

As discussed in previous chapters, the argument that the ISDS has become politicized centers on the arbitrators' alleged bias, lack of independence, inconsistent rulings, and insufficient oversight. Indeed, the purported need for objectivity in international law is at the heart of all these arguments. This framework requires arbitrators to make their decisions based on a requirement of objectivity and to prevent any political consideration. Thus, the primary critique of the ISDS is that it grants arbitrators the latitude to decide without being bound by this purported need, considering the particulars of each case and exercising their discretion. Since the decentralized

character of the system and the absence of a final control mechanism are thought to be the primary causes of this so-called problem, efforts to reform the system have largely focused on centralizing it.

In light of this, the third section provides a critical analysis of the reform proposals put forth by the EU and TWAIL, with a particular emphasis on the question of whether or not these suggestions effectively address the so-called legitimacy crisis of the ISDS. It specifically examines whether centralization, advocated by the EU at the supranational level or by TWAIL at the national level, can effectively resolve the concerns related to the ISDS. It is argued in the section that the choice of institutional structure, such as international arbitration, a multilateral court, or a domestic court, does not have a substantial impact on the legitimacy of the investment dispute settlement system.

If the underlying causes of the issues in the ISDS are not addressed, it is unrealistic to expect technical or legal reforms to be effective. Changing the decision-making hierarchy and the selection processes of decision-makers would only change the focus of persistent criticism. That being said, criticism of the ISDS will persist so long as the rules and regulations governing dispute settlement are not reevaluated in relation to the principle of justice and the ISDS maintains its role as a protector of objectivity in international investment law.

The chapter concludes by imagining what a happily ever after ISDS should be like. This imagination is based on the understanding that all conflicts are fundamentally political and that, to resolve them, political discourse, analysis, decision-making, and action are required. Thus, it aims to challenge the prevailing influence of positivism in international law, which argues for the limitation of the role of human agency in legal decision-making. Instead, it aims to create a framework for resolving conflicts that becomes a part of social life, governed by increasing individual involvement, and centered around the collective reshaping, building, and changing of individual and community identities. The argument is that decision-making in this system ought to be

based on the social and political context-integrated principle of justice, which would take the place of uniformly applying the law as it currently exists without question.

The thesis, in general, critically examines the ISDS and brings forward some important findings. The first, and perhaps most central, finding is that all legal conflicts are inherently political. Investment disputes between foreign investors and host states are consistent with this principle. Based on this finding, the study also underscores the importance of political assessment in resolving these conflicts. This implies the necessity of enhancing the role of human agency in the decision-making process. This novel perspective challenges the conventional understanding of the ISDS as an objective legal body, whose aim is to depoliticize investment disputes by applying pre-determined rules in a consistent and centralized way.

Another crucial conclusion of the study is that we must create a new framework to replace the current one. This framework must be constructed on numerous fundamental ideas. To guarantee equity and fairness in the resolution of disputes, the new system should be based on the principle of justice. This fundamental premise necessitates enhancing the decentralization of the current system to accurately represent the prevailing social and political reality. It will foster and promote inclusivity, mitigate power imbalances, and ensure a broader range of perspectives. Contrary to the positivist perspective that sees law as a consistent set of objective rules and regulations, the present argument recognizes the significant influence of specific circumstances on decision-making in international law.

A further implication of this is the necessity to enhance the interpretative scope available to arbitrators in their decision-making procedures. This requires heightened judgment in understanding the facts that led to the dispute and the interests of the involved parties to achieve a just resolution. It will enable customized solutions that address the unique intricacies of each dispute and ensure fairness in every case. In other words, the main objective of this proposed new system is to decide, taking into account the specific circumstances of each case, whether to prioritize the special rights

of a foreign investor or the regulatory needs of the host country in order to uphold the principle of justice. Predetermined and generally applicable rules available in centralized systems, which are the focus of reform proposals in the literature and practice, are unlikely to support this principle. We should encourage interpretative approaches, as proposing effective solutions to the system's problems requires recognizing and addressing the unique circumstances and context of each case.

Based on these principal findings, the primary conclusion of this study is that the sole method for ISDS, comparable to all legal systems, to attain legitimacy and credibility is through a more effective integration of the principle of justice inside its decision-making processes and overall operations. The connection between justice and systemic functionality enhances faith in the system and its results, hence contributing to its overall success and international acceptance. This summary delineates the essential principles of an ISDS that has effectively surmounted its legitimacy problem and lives happily ever after.

Regarding the study's contribution to the literature, this thesis significantly enhances the existing body of knowledge on the ISDS reform by filling in crucial gaps and offering novel perspectives. First, it redefines the problem of the ISDS's legitimacy crisis and develops a perspective on this issue that is not common in the literature. It rejects outright the common understanding in the literature that the ISDS is an objective institution designed to depoliticize investment disputes, that its politicization leads to a crisis of legitimacy, and that this crisis can only be resolved through the centralization of the system.

On the contrary, this thesis argues that depoliticization of a legal dispute is unattainable, taking into account the fact that every legal decision or practice is also an inherently political one. From this perspective, a legal body is incapable of rendering objective decisions; therefore, the fundamentally political nature of the ISDS does not result in a crisis of legitimacy. Conversely, the design of the rules and structures intended to ensure objective decisions leads to a legitimacy crisis.

Given this nature of the problem, this thesis highlights a solution that reverses current reform proposals. It advocates for enhanced decentralization of the system to facilitate contextual interpretation of cases. More decentralization and indeterminacy in the system will also give arbitrators more power and freedom to handle disputes in a way that supports the principle of justice and fits the unique circumstances of each case. All these proposed changes will in turn contribute to the integration of the principle of justice in the system. They underline a reimagination of the ISDS as a more just, more effective, and more reliable way to settle international disputes.

This thesis proposes a decision-making process that is based on a political assessment of the case's key facts, respects the sincere intentions of all parties involved, and adheres to the principle of justice. This represents its real strength together with the dynamic nature of the proposed system, which makes it appropriate for the changing demands of justice and equity. By balancing the principles of justice, operational efficiency, and contextual adaptability, the proposed framework addresses the systemic issues in a holistic and forward-looking manner. Therefore, the proposal indicated in this thesis appears as the most promising reform alternative and the most effective long-term solution when all these strong features are taken into account and compared to other existing reform proposals.

In sum, this thesis makes important contributions to the literature by providing a critical reassessment of ISDS, introducing innovative analytical approaches, and proposing a transformative framework for reform. These contributions provide a solid foundation for advancing both the theoretical and practical understanding of ISDS in the context of global dispute resolution and share with the reader the secret of how ISDS can live happily ever after.

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Zeitlina, J., Nicoliaand, F., & Laffan, B. (2019). Introduction: The European Union Beyond The Polycrisis? Integration and Politicization in An Age of Shifting Cleavages. *Journal of European Public Policy, Vol.26 No.7*, 963-976.

APPENDICES

A. CURRICULUM VITAE

WORK HISTORY

- 2023-07 - Current **Academic Events Manager**
  Turkish Radio Television Corporation (TRT), Ankara, Türkiye

I am in charge of TRT World Forum's management and supervision, as well as NEXT by TRT World Forum and Geleceğin İletişimcileri Yarışması.

TRT World Forum: TRT World Forum is a premier gathering that brings together global leaders in Istanbul, Türkiye. The event is an opportunity for academics, journalists, politicians and members of civil society to grapple with the challenges of our time and contribute to advancing peace, security and prosperity throughout the world. For more information: https://www.trtworldforum.com/

NEXT by TRT World Forum: NEXT by TRT World Forum aims to provide an international platform where young pioneering journalists, academics, activists, NGO members and entrepreneurs can voice and exchange ideas while addressing the most controversial issues of our time to shape a more inclusive and sustainable future. For more information: https://next.trtworldforum.com/

Geleceğin İletişimcileri Yarışması: TRT Geleceğin İletişimcileri Yarışması, which has been organized since 2015, offers a communication-oriented platform where young people who will shape the media of the future can express themselves. It also creates

an important opportunity for young people to produce qualified works with various categories in the fields of radio broadcasting, visual - digital broadcasting and communication campaign. For more information in Turkish: https://www.trtgeleceginiletisimcileri.com/

- 2023-11 - Current **Attorney & Mediator**
  Self-employment, Ankara, Türkiye

- 2022-01 - 2023-07 **Advisor to Deputy Director General**
  Turkish Radio Television Corporation (TRT), Ankara, Türkiye

    - Managing social media accounts,
    - Coordinating between international channel departments,
    - Overseeing projects and programs in 2 TV and 6 digital channels,
    - Suggesting new projects and programs,
    - Preparing multilingual presentations,
    - Participating in local and international meetings and conferences

- 2016-04 - 2022-01 **Research Assistant**
  Middle East Technical University, Ankara, Türkiye

    - Conducting research,
    - Collecting and analyzing data,
    - Following the latest developments in the field,
    - Preparing research papers and policy recommendations,
    - Supervising undergraduate students

- 2012-12 - 2016-04 **Assistant Trade Specialist**
  Republic of Turkey, Ministry of Economy, Ankara, Türkiye

    - Coordinating import regime and policies of the Republic of Türkiye,

- Following developments in trade and making necessary changes in Turkish import policies,
- Representing the Republic of Türkiye in multilateral meetings of the World Trade Organization,
- Preparing the concession list of Turkey and negotiating it with the other party in Free Trade Agreement negotiations,
- Contacting with Turkish private sector and other governmental institutions to learn about their sensitivities and priorities before bilateral and multilateral negotiations

- 2012-05 - 2012-12 **Advisor to Deputy**
  Turkish Grand National Assembly, Ankara, Türkiye

  - Preparing speeches of the Deputy and provide necessary background information regarding the topic of speech,
  - Drafting recommendation papers to the Deputy in relation to his special task within the National Assembly,
  - Accompanying the Deputy in his visits both within Turkey and abroad,
  - Assisting him in developing contacts with foreign people

- 2011-10 - 2012-01 **Trade Intern**
  U.S. Embassy, Foreign Commercial Service, Ankara, Türkiye

  - Managing different tasks regarding trade and investment as well as translation and interpretation,
  - Active role in preparation and organization of 'Trade Mission December 2011',
  - Preparing presentations and evaluating a variety of data regarding the U.S. Investment in Türkiye and Turkish investment in the U.S.

- 2010-01 - 2010-07 **Student Assistant, Researcher**

  Tilburg University, Cross Cultural Psychology Department, Tilburg, The Netherlands

  - Working closely with Dr. Radosveta Dimitrova by helping her with her Ph. D thesis,
  - Conducting surveys with Turkish people in Turkish and translating the data into English and Dutch,
  - Entering the data into the computer system and evaluating the results

- 2009-09 - 2009-12 **Procurement Intern**

  United Nations Development Program, Ankara, Türkiye

  - Creating bids and evaluating them,
  - Translating legal documents and UN official documents from Turkish to English and from English to Turkish

EDUCATION

- 2018-09 - Current **Ph.D. in International Relations**

  Middle East Technical University – Ankara, Türkiye

  GPA: 4.0/4.0

  Thesis Title: From Divergent Paths to the Same Trap: The Legitimacy Crisis of the Investor-State Dispute Settlement Mechanism

- 2016-09 - 2018-06 **M.Sc. in International Relations**

  Middle East Technical University - Ankara, Türkiye

  GPA: 3.93/4.0

  Thesis Title: The Impact of Lisbon Treaty on the European Union Foreign Policy Actorness: The Case Study of Arab-Israeli Conflict

- 2015-09 - 2019-06 **B.Sc. in Law**
  Kırıkkale University - Kırıkkale, Türkiye
  GPA: 3.09/4.0

- 2012-09 - 2017-06 **M.Sc. in European Studies**
  Middle East Technical University - Ankara, Türkiye
  GPA: 3.5/4.0
  Thesis Title: Rethinking the European Union-Turkey Customs Union Agreement in the light of Neo-Functionalist Premises

- 2008-09 - 2013-06 **B.Sc. in Management**
  Anadolu University - Eskişehir, Türkiye
  GPA: 2.93/ 4.0

- 2007-09 - 2012-06 **B.A. in International Relations (Full Scholarship)**
  Bilkent University - Ankara, Türkiye
  GPA 3.97/4.0 (The top student in the department and the faculty)

- 2008-01 - 2012-06 **Minor Degree: Political Science (Full Scholarship)**
  Bilkent University – Ankara, Türkiye
  GPA: 3.9/4.0

SKILLS & OTHER INFORMATION

- WTO Online Courses Completed:
  - WTO and Trade Economics: Theory and Policy,
  - Trade and Environment,
  - Trade and Development,
  - Trade Finance and the WTO,
  - Introduction to WTO,
  - Legal Underpinnings,

- The Multilateral Trade Agreements,
- Accession to WTO,
- Agriculture in the WTO,
- Market Access for goods and Non-Agricultural Market Access Negotiations,
- Sanitary and Phytosanitary Measures,
- Technical Barriers to Trade,
- Trade Remedies and the WTO,
- Trade Related Aspects of Intellectual Property Rights,
- WTO Market Access Databases,
- Regional Trade Agreements and WTO

- Other Certificates:
  - Seminar on Legislation Process in Turkey, 2012,
  - Basic Marketing Training, 2009,
  - Personal Development Seminary Certificate, 2008,
  - B-Class Driving License, 2008

LEADERSHIP ROLES

- United Nations Associations of Turkey Youth Section
  Head of Young Diplomats Project
  - Coordinating a range of visits to several embassies with group members,
  - Through visits, asking questions to ambassadors especially considering their foreign policy regarding Turkey and UN

- Association of *Genç Bilkentliler*
  Member of Executive Committee
  - Encouraging Bilkent students to take an active part both in business life and political environment,

- Preparing seminars with political figures and company CEO's to learn about their experiences

- Bilkent's Information Office for Prospective Students
  Organization team leader
  - Arranging tours with high school students in Bilkent University campus in order to give them information about the university and specific departments in the University,
  - Giving several informations to foreign students in the University

- Bilkent *Toplumsal Duyarlılık Projeleri*
  Member of *Manevi Evlat* Project
  - Regularly visiting Ümitköy rest home and spending time with people living in there

HONORS & AWARDS

- 2007, University Entrance Exam, Türkiye
  - 360,244/380, 501

- 2007-2012, Bilkent University, Ankara Turkey,
  - High Honor Student & Top Student in the Faculty and the department

PUBLICATIONS

- Zabunoğlu, H.G. & Sönmez, E.Y. (2023), Terörün Finansmanının Önlenmesine İlişkin Uluslararası Düzenlemeler Kapsamında Teröre Finansman Sağlama Suçu ve Lafarge Örneği, *Uluslararası İnsan Çalışmaları Dergisi*, *6 (11)*, 99-117.

- Zabunoğlu, H.G. & Sönmez, E.Y. (2021), Uluslararası İnsan Hakları Hukukunda Üçüncü Dünya Yaklaşımları, *İnönü Üniversitesi Hukuk Fakültesi Dergisi, 12 (1)*, 258-270.
- Sönmez, E.Y. (2020). Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de Kadına Yönelik Şiddetin Önlenmesi. *İstanbul Üniversitesi Kadın Araştırmaları Dergisi, 20*, 1-17.
- Arslan, C. B. & Sönmez, E. Y. (2019). Uluslararası Ticarette Yeni Korumacılık ve Ticaret Savaşları. Social Sciences Studies Journal (SSSJournal), 5(32), 1756-1764.

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- Sönmez, E.Y. (2021). Avrupa Birliği Üyeliği Sürecinin Askıya Alınması: Gümrük Birliği'nin Modernizasyonu. *Lisansüstü Öğrenci Konferansı. Avrupa Çalışmaları: Türkiye, AB ve Ötesine İlişkin Perspektifler.* İstanbul Bilgi Üniversitesi, 25 Şubat.
- Sönmez, E.Y. (2020). Avrupa Adalet Divanı: Ütopyadan Yasallaştırmaya. *I. Avrupa Birliği Hukuku ve Hukuki Boyutuyla Türkiye – Avrupa Birliği İlişkileri Konferansı*. Ankara Üniversitesi Hukuk Fakültesi Avrupa Birliği Hukuku Anabilim Dalı, Avrupa Toplulukları Araştırma ve Uygulama Merkezi (ATAUM), 8 Ekim.

LANGUAGES

Turkish (native); English (fluent); Spanish (intermediate); French (beginner)

B. TURKISH SUMMARY / TÜRKÇE ÖZET

Bu tez, Yatırımcı-Devlet Uyuşmazlık Çözüm Mekanizması'nın (ISDS) içinde bulunduğu iddia edilen meşruiyet krizinin detaylı ve eleştirel bir araştırmasını sunmaktadır. Bu tezi literatürdeki diğer çalışmalardan ayıran temel noktalardan birisi, bahse konu meşruiyet krizini bir veri olarak almak yerine böyle bir krizin gerçekten var olup olmadığını derinlemesine sorgulamasıdır. Teze ilişkin bir diğer özgün nokta ise, Martti Koskenniemi'nin görüşleri çerçevesinde, hem mevcut sisteme hem de bu sistemi refom etmek için geliştirilen alternatiflere daha önce bakılmayan eleştirel bir açıdan yaklaşmasıdır.

Bu tezde, Avrupa Birliği (AB) ve Uluslararası Hukukta Üçüncü Dünya Yaklaşımları (TWAIL) tarafından geliştirilen öneriler, ISDS reform sürecine ilişkin iki farklı bakış açısını yansıtacak şekilde eleştirel bir perspektifle incelenmektedir. Reform önerilerinde tespit edilen sorunlara ise tezin son bölümünde ayrıntılı olarak ele alınan özgün reform önerisi çerçevesinde çözüm önerileri sunulmaktadır. Bu çalışma, mevcut reform önerilerinden farklı olarak, ISDS'deki sorunlara çözümün merkezileşmenin artırılmasında değil, âdem-i merkeziyetçiliğin güçlendirilmesinde yattığını savunmaktadır. Ayrıca, bu yaklaşımda uzun süredir ana akım hukuki yaklaşımlar tarafından göz ardı edilen bir kavram olan adalet prensibi merkeze alınmaktadır. Bu açıdan, bu tez, ana akım uluslararası hukuk yaklaşımlarındaki içsel çelişkilerin, Koskenniemi'nin işaret ettiği üzere, adalet prensibinin sağlanması yoluyla aşılabileceğini ortaya koyma çabasının bir parçasını oluşturmaktadır.

Esas itibarıyla ISDS, 3.000'den fazla uluslararası yatırım anlaşmasının oluşturduğu benzersiz bir âdem-i merkeziyetçi mekanizmadır. Bu mekanizma, ev sahibi devletin sınırları içerisindeki gerçek ve tüzel kişiler için yasaları belirleme konusunda sahip

olduğu mutlak yasal yetkiye bir istisna teşkil etmektedir. Bu bağlamda, ISDS, yabancı yatırımcılara yatırım yaptıkları devletle bir anlaşmazlık yaşadıklarında, doğrudan uluslararası tahkim prosedürlerini kullanma imkânı sunar. Bu sistemde, uluslararası yatırımcıların uluslararası tahkime başvurmadan önce ulusal hukuk yollarını tüketmesi zorunlu değildir.

Yabancı yatırımcılara bu denli geniş haklar tanıyan bu sistemin temelinde, devletlerin imzaladıkları uluslararası anlaşmalar yoluyla, yabancı yatırımcıların yatırım anlaşmazlıklarını ev sahibi devletlerle ulusal mahkemeler ya da uluslararası tahkim yoluyla çözme seçeneğine sahip olacağını kabul etmeleri bulunmaktadır. Ancak burada dikkat çekilmesi gereken önemli bir nokta, farklı yargı süreçleri arasından seçim yapma ayrıcalığının yalnızca yabancı yatırımcılara tanınmış olmasıdır. Oysa, aynı ülkede yatırım yapan yerli yatırımcılar, devletle yaşadıkları yatırım anlaşmazlıklarının çözümünde yalnızca ulusal mahkemelerin münhasır yargı yetkisine tabi bulunmaktadır.

1990'ların başından beri uluslararası yatırım hukukun vazgeçilmez unsurlarından biri haline gelen bu benzersiz yapı, zaman içerisinde meşruiyet krizi içerisinde bulunduğu iddası ile eleştirilere hedef olmaya başlamıştır. Buna göre, sistemin içinde bulunduğu son durumda politikleştiği ve başlangıçta ortaya konulan yatırım anlaşmazlıklarını siyasetten uzaklaştırma hedefini etkin bir şekilde sürdüremediği iddia edilmektedir.

Burada ortaya bir sorun olarak konulan sistemin politikleşmesi ve etkinliğini kaybetmesi iddialarının temelinin ise sistemin âdem-i merkeziyetçi yapısından kaynaklanan özellikleri olduğu öne sürülmektedir. Bunlar arasında hakemlerin önemli ölçüde takdir yetkisine sahip olmaları, taraflarca atanmış olmaları ve alınan hakem kararlarının kesin olması ile temyiz aşamasının bulunmaması yer almaktadır. Tüm bu özelliklerin, sistemin objektif kararlar verme kabiliyetini zayıflattığı ve bu durumun sistemde bir meşruiyet krizi yarattığı değerlendirilmektedir. Bu endişeler doğrultusunda, başlangıçta ikili düzeyde, ardından çok taraflı düzeyde olmak üzere sistemi reforme etme çabaları başlamıştır. Çok taraflı reform çabaları, 2017 yılından

bu yana Birleşmiş Milletler Uluslararası Ticaret Hukuku Komisyonu (UNCITRAL) çatısı altında yürütülmekte olup, bu süreçte farklı reform önerileri müzakereye sunulmaktadır.

Tüm bu gelişmeler bağlamında, bu tezin temel sorusu, ISDS reform önerilerinin sistemin hangi alanlarında ve ne şekilde değişiklik öngördüğü ve bu önerilerin iddia edilen meşruiyet krizini ne ölçüde çözme potansiyeline sahip olduğudur. Bu bağlamda çalışma, çok taraflı ISDS reform sürecinin detaylı bir analizini sunmanın yanı sıra, AB ve TWAIL perspektiflerinden geliştirilen reform önerilerini örnek olarak ele alarak bu soruya yanıt aramayı amaçlamaktadır.

Çalışmada ortaya konulan en önemli tespitlerden biri, AB ve TWAIL'in, birbirine zıt teorik ve pratik kutupları temsil etmelerine rağmen, ISDS reform süreci konusunda dikkat çekici benzerliklere sahip olduğudur. Daha açık bir ifadeyle, her iki reform önerisi de sistemin mevcut sorunlarının ancak merkezileşme yoluyla çözülebileceğini savunmaktadır. Ancak bu iki yaklaşım, merkezileşmenin hangi odakta gerçekleşmesi gerektiği konusunda farklı çözüm yolları önermektedir. AB, uluslararası daimi bir yatırım mahkemesi kurulmasını ve bu mahkeme etrafında sistemin merkezileşmesini savunurken, TWAIL, ISDS öncesi dönemde olduğu gibi, ulusal mahkemelerin yabancı yatırımcılar ile ev sahibi devletler arasındaki yatırım anlaşmazlıklarında tek çözüm merkezi olmasını önermektedir.

Bununla birlikte, bu çalışma, hem mevcut sistemi hem de yukarıda ifade edilen iki reform önerisini eleştirel uluslararası hukuk perspektifinden değerlendirerek, merkezileşme yaklaşımlarının—ister uluslararası bir mahkeme ister ulusal mahkemeler odağında gerçekleşsin—sistemin eksikliklerini gidermek için beklenen potansiyele sahip olmadığını ortaya koymaktadır. Çalışmanın temel argümanı, sistemin meşruiyetini artırmanın, adalet ilkesinin sistemin işleyişinde daha etkin bir rol oynamasını sağlayacak olan âdem-i merkeziyetçiliğin güçlendirilmesiyle mümkün olabileceğidir.

Bu tez beş ana alandan oluşmaktadır: Birinci bölümde ISDS'in tarihsel gelişimi ve mevcut sistemin sorunlarının ele alınırken, ikinci bölümde ISDS reform sürecine giden yol ve uluslararası reform çabaları detaylarıyla incelenmektedir. Takip eden üçüncü ve dördüncü bölümlerde ise sırasıyla AB ve TWAIL reform önerileri ele alınmaktadır. Beşinci bölümde, Koskenniemi tarafından geliştirilen eleştirel hukuk bakış açısının özellikleri sıralanmakta ve bu perspektiften hem mevcut ISDS'in hem de önceki bölümlerde ele alınan ISDS reform önerilerinin analizi yapılmaktadır. Bu analiz sonucunda ise eleştirel hukuk perspektifinde özgün bir ISDS reform önerisi sunulmaktadır.

Birinci bölüm genel olarak ISDS'nin karmaşık gelişim sürecini anlatmaktadır. Bölüm, uluslararası tahkim sisteminin hangi uluslararası ortamda ortaya çıktığını tasvir ederek başlamaktadır. Bu sistem esas itibariyle, sömürge sonrası dönemde ev sahibi devletler ve yabancı yatırımcılar arasındaki yatırım anlaşmazlıklarını çözmek için yeni bir mekanizma ihtiyacına yanıt olarak oluşturulmuştur. Sömürge sonrası dönemde bahse konu ihtiyacın doğmasına neden olan iki temel olay vardır. Birincisi, bu dönemde yatırım anlaşmazlıklarını çözmek için kuvvet kullanımının yasaklanmasıdır. Bir diğeri ise; sömürgecilik dönemi boyunca geçerli olan şekliyle, imparatorluk hukukunun sömürgeleştirilen topraklarda da aynı şekilde geçerli olması prensibinin sömürgecilik sonrası dönemde uygulanma alanı bulamamasıdır.

Sömürgecilik sonrası dönemde bağımsızlıklarını kazanan bu ülkelerde devlet ve yabancı yatırımcılar arasında ortaya çıkan anlaşmazlıklarda ulusal mahkemelerin ve milli hukukun tek çözüm mekanizması olarak ortaya çıkması eski sömürgeci Batılı devletleri bu konuda başka bir çözüm yolu aramaya itmiştir. Başka bir ifade ile bahse konu dönemde dünya üzerindeki yabancı yatırımın neredeyse hepsine sahip olan Batılı devletler eski sömürgelerindeki yatırımlarının güvenliğini ve yatırımcılarının haklarını egemenliklerini yeni kazanan devletler karşısında da sömürgeci dönemde olduğu gibi koruma çabaları ISDS'in ortaya çıkışındaki temel etken olmuştur.

Bu şekilde başlayan ISDS'nin tarihi gelişimi bu bölümün ikinci kısmında daha ayrıntılı olarak ele alınmaktadır. Batılı devletler, bu yeni dönemde yatırımcılarını korumak ve yatırımları teşvik etmek amacıyla çoğunlukla İkili Yatırım Anlaşmalarına (BIT'ler) başvurmuşlardır. Bu modelin ilki, 1959 yılında Almanya ile Pakistan arasında imzalanan BIT olmuştur. 1959'dan 1990'lara kadar olan dönemde bu BIT'lerin ana özelliği, sermaye ihraç eden bir Batı ülkesi ile eski bir sömürge ülkesi arasında imzalanmış olmalarıydı.

Yeni bağımsızlık kazanmış topraklardaki Batı yatırımlarının güvenliğini daha kurumsal bir şekilde temin etmek için, 1966 yılında Uluslararası Yatırım Anlaşmazlıklarının Çözüm Merkezi (ICSID) kurulmuştur. Sermaye ihraç eden ülkeler, yabancı yatırımların koruması amacına haiz ilk uluslararası kurumsal girişim olan ICSID'in kurulması ile sömürge sonrası dönemde de çıkarlarını koruyacak etkili bir çerçeveye sahip olmuşlardır. Batılı devletlerin çıkarlarını korumak için aldıkları bir diğer tedbir, BIT'lere ev sahibi devlete yabancı yatırımı ve yatırımcıları koruma yükümlülüğünü açıkça yükleyen hükümler eklenmesiydi. Bu türde ilk örnek, modern yatırım anlaşmalarındaki ISDS hükümlerine benzeyen bazı maddeler içeren 1968 Hollanda-Endonezya BIT'idir.

Bölümün takip eden kısmında, BIT'ler kapsamında ev sahibi devletlere yüklenen bu yükümlülüklerin zamanla nasıl uluslararası yatırım hukukunun benzersiz bir özelliği haline gelen ISDS'e dönüştüğü incelenmektedir. Devletlerin imzalandığı uluslararası antlaşmalardan kaynaklanan bu sistemde egemen devletler münhasıran yargılama yetkilerini yabancı yatırımcılar özelinde hem de düzenleyici eylemlerinden kaynaklanan anlaşmazlıklarda uluslararası tahkim hakemlerine devretmektedir. Bu tahkim mahkemelerinin *ad-hoc* olarak kuruluyor olması ve hakemlere ev sahibi devletlerin eylemlerini yargılamak için geniş takdir yetkisinin verilmesi özellikle dikkate değer hususlardır. Bu nedenledir ki ev sahibi ülkelerin bu sisteme nasıl ve neden rıza gösterdikleri araştırılması gereken ilgi çekici bir konudur.

İlk başlarda, bağımsızlıklarını yeni kazanmış eski sömürge ülkeler ICSID'e ve daha geniş bir açıdan da ISDS'ye karşı olumsuz bir tutum içersindelerdi. Bu sistemin sermaye ihraç eden Batılı ülkelerin çıkarlarına hizmet ettiğini ve sermaye ithal eden kendilerinin milli çıkarlarına aykırı olduğunu düşünüyorlardı. Bu nedenle de, ICSID'in kuruluşundan 1970'lerin sonuna kadar hükümetlerin tüm ulusal kaynaklar üzerinde tam ve münhasıran yetkiye sahip olduğu bir sistemin sürdürülmesini talep ettiler. Ancak; 1970'lerin sonları ve 1980'lerin başları, yeni kurulan bu yatırım tahkim sistemine yönelik olumsuz değerlendirmelerinin ve sistemin dışında kalma kararlarının yeniden sorgulanmasını gerekliliğini doğurmuştur.

Bu zorunlu değişikliğin temel nedeni, söz konusu dönemde içinde bulundukları stagflasyon döngüsünden çıkmak için hızlı ve yüklü bir yabancı yatırım miktarı ile uluslararası finansman girişine duydukları acil ihtiyaçtı. Bu acil ihtiyacın sağlanması için gereken yatırımı yapmak için ise sermaye ihraç eden Batılı devletler yapacakları yatırımın ve yatırımcılarının haklarının yasal olarak korumasında ulusal mahkemelerin değil uluslararası yatırım tahkim mahkemlerinin yetkili olması koşulu sunmuş ve yatırımın yapılacak ülkelerde sistematik reformlar yapılmasını talep etmişlerdir.

Aynı doğrultuda; bağımsızlıklarını yeni kazanan bu ülkeler, Dünya Bankası ve Uluslarası Para Fonu (IMF) kredilerinden faydalanabilmesi için de ülkelerine yabancı yatırım girişinin serbestleştirilmesi ve bu yatırımların uluslararası yasal araçlarla korunması gerekliliği konusunda da büyük bir baskıya maruz kalmışlardır. Bu şartlar altında, ilk tutumlarından vazgeçerek ICSID Sözleşmesi'ni imzalamak zorunda kalmışlardır. 1990'lara gelindiğinde ise artık yatırımcı-devlet anlaşmazlıklarının çözümü için yetkinin ICSID'ye devredilmesi küresel yatırım ortamının en önemli yönlerinden biri haline gelmiştir. Ancak bu ISDS'e yönelik olumlu yaklaşım çok uzun sürmemiş ve 2000'lerin başlarından itibaren ISDS'nin bir meşruiyet krizi içerisinde bulunduğu iddiaları ortaya çıkmaya başlamıştır.

Bölümün sonraki kısımlarında ise, ISDS'nin işleyişini kapsamlı bir şekilde ve ICSID örneği üzerinden açıklanmıştır. Ayrıca sistemin öne çıkan sorunları ve bu sorunların

hangi gerekçelerle bir bütün olarak meşruiyet krizine neden olduğuna da detaylı olarak yer verilmektedir. Bu kapsamda, sisteme yönelik eleştirilerin ana nedenleri arasında şeffaflık eksikliği, farklı mahkemelerin aynı konuda aldığı kararlar arasındaki tutarsızlıklar, hakemlerin tarafsız ve bağımsız olmadıkları iddiaları, sistemsel olarak hukuki hataları düzeltme zorlukları, yüksek masraflar ve tahkim süreçlerinin uzun süre alması yer almaktadır. Sisteme dair öne çıkan bu sorunlar ISDS'nin bir meşruiyet krizi yaşadığı yönündeki argümanlara yol açmıştır.

İkinci bölüm ise, ISDS'nin iddia edilen meşruiyet krizine çözüm bulmak için geliştirilen reform önerilerini incelemektedir. Bölümün ilk iki kısmında, sistemde var olan yapısal sorunları ve reform önerilerini daha iyi analiz edebilmek amacıyla 2000li yıllardan itibaren ISDS'i etkileyen olayların ekonomik ve sosyal bağlamını incelemektedir. Ekonomik bağlam dikkate alındığında; milliyetçi ideoloji ve devlet kontrolüne geri dönüş fikirlerinin 2000'li yılların başından bu yana ivme kazandığı gözlemlenirken, neoliberal kurumlar ve fikirler önceki dönemlere kıyasla geri planda kalmaya başlamıştır. Buradan hareketle, yeni dönemde uluslararası yatırım rejiminin ana hedefinin artık yalnızca yabancı yatırımları ve yatırımcıları korumak olmadığı sonucuna varılabilir. Bu yeni bağlamda devletler, çok taraflı ve tek taraflı girişimlerle düzenleyici haklarını koruma ihtiyacı ile yabancı yatırımı teşvik etmek arasında bir denge kurmaya çalışmaktadırlar. Bu nedenledir ki; ISDS reform sürecinin ana ekseni, sistemi yabancı yatırımcının çıkarlarına öncelik vermekten uzaklaştırmaya ve kamu yararının önemini yeniden değerlendirmeye doğru bir yönelime işaret etmektedir.

ISDS reform süreci, ekonomik bağlamdaki dönüşümü tamamlayıcı bir şekilde küresel siyasi hiyerarşik yapıda da bir dönüşümün sonucunu temsil etmektedir. Başka bir ifade ile küresel siyasi dengelerde özellikle 2000'lerden sonra gelişmiş dünya olarak tasvir edilen Batılı devletlerin etkisi azalırken, gelişmekte olan ülkelerin ekonomik ve siyasi etkisi eş zamanlı olarak artmaktadır. Bu durumun en açık göstergelerinden biri, Çin ve Hindistan'ın uluslararası ticaret ve yatırım akışlarındaki artan önemidir. Çin ve Hindistan'ın bu artan önemi ve rolünün en direkt sonucu ise, Amerika Birleşik Devletleri'nin ve Avrupa Birliği üyesi devletlerin uluslararası yatırım ve ticaret

akışlarındaki azalan rolüdür. Bu değişim, gelişmiş ülkelerin net sermaye ihracatçısı olarak geleneksel rolünü tersine çevirmiş ve net sermaye ithalatçısı olmalarını gerektirmiştir.

Tüm bu gelişmeler ise onları ISDS'nin yeni bir yönüyle karşı karşıya getirmiştir. Bu zamana kadar yabancı yatırımcıların ve yatırımın korunmasına ve dolayısıyla kendi çıkarlarına uygun olan yönü ile deneyimledikleri sistemi artık yatımların yapıldığı ev sahibi ülke olarak da deneyimlemeye başlamaları onların sistemin ev sahibi ülkeler üzerindeki olumsuz sonuçlarının farkına varmalarını sağlamıştır. Daha da önemlisi, tahkim mahkemelerinde artık davalı olarak yer almaya başlamaları onlar için sistemin o zamana kadar fark etmedikleri bir yönünü ortaya çıkarmıştır. Dolayısıyla, sistemin bu yeni farkına vardıkları yapısı sistemin kurucuları olan bu devletler tarafından eleştirilmeye başlamış ve sistemi kuranlar sistemin uluslararası reform sürecinde de yine başı çeken ülkeler olmuştur. Yabancı yatırımın ve yatırımcının korunması amacıyla oluşturulan bu sistemin değişen ekonomik ve siyasi bağlamda bu sefer de ev sahibi devletlere sistem içerisinde tanınan hakların artırılması yoluyla reforme edilmesini savunmaktadırlar.

Bölümün ilerleyen kısımlarında, bu eleştirilere yanıt olarak ortaya çıkan ilk reform girişimleri ve bunların nasıl kurumsallaştığı incelenmektedir. Yukarıda kısaca ifade edilen eleştirilere cevap olarak ev sahibi devletlerin ilk tepkileri çeşitli ve birbirinden bağımsız tek taraflı, iki taraflı ve kurumsal reform girişimleriydi. Bu girişimler, bazı ülkeler için ICSID Sözleşmesi'nin ve yatırım anlaşmalarının feshi şeklinde olurken bazı diğer devletler için yeni model yatırım anlaşmalarının geliştirilmesi, uluslararası tahkim yerine mahkeme sistemi getirilmesi önerileri ve mevcut anlaşma ve sözleşmelerin esaslı bir şekilde revize edilmesi önerilerine kadar çeşitli ve geniş bir yelpazede gelişim göstermiştir. Kurumsal açıdan bakıldığında ise, ICSID ve diğer tahkim merkezleri sistemin eleştirilen noktalarına cevap vermek üzere bazı resmi prosedürlerinde güncelleme yapma yoluna gitmiştir. Devletlerin Birleşmiş Milletler Uluslararası Ticaret Hukuku Komisyonu Çalışma Grubu III'ü (UNCITRAL WGIII) ISDS çok taraflı reform sürecinin sürdürülmesi konusunda tam ve münhasıran yetkili

kıldıkları 2017 yılı sonlarından bu yana ise, reform çalışmaları farklı bir boyut kazanmıştır.

UNCITRAL WGIII'e ilk olarak, sistemin içerisinde bulunduğu iddia edilen meşruiyet krizinin altında yatan sebepleri araştırması ve raporlaması konularında kapsamlı bir yetki verilmiştir. Bu yetkiye dayanarak UNCITRAL WGIII, Aralık 2017 ve Ekim 2019 tarihleri arasında sisteme ilişkin eleştirilere konu hususları araştırmış, incelemiş ve sonucunda sistemin kapsamlı bir reforma ihtiyaç duyduğu önerisiyle birlikte Komisyan'a raporlamıştır. Bu rapora dayanarak Ekim 2019- Eylül 2022 arasındaki sürede sistemin tespit ettiği sorunlarına karşılık somut reform tedbirleri oluşturmuş ve bunları da kendi içlerinde ana başlıklara ve kategorilere ayırmıştır. Çalışma Grubu'nun Eylül 2022 zirvesi, reformların hayata geçirilmesi için olası stratejilerin müzakere edildiği bir forum işlevi görmüştür. O tarihten bu yana, UNCITRAL WGIII olağan ve olağanüstü toplantıları, ISDS çok taraflı reform sürecinin yürütülmesinde ve reform önerilerinin üyelerce tartışılmasında birincil platform olarak hizmet etmektedir.

İkinci bölümün son kısmında ise farklı ülkelerin reform tercihlerindeki farklılıklar sunularak bu tercihlerin ayrıntıları ele alınmıştır. Buna göre, birçok gelişmiş ülke ISDS'de sistemik reformlar yapılmasını önermektedir. Burada bahsedilen sistemik reformun temelinde ise ISDS'in mevcut âdem-i merkeziyetçi yapısının daimi bir temyiz organı ve çok taraflı bir yatırım mahkemesi kurulması yoluyla merkezileştirilmesi önerileri yatmaktadır. Bu önerinin ayrıntıları arasında devletlerin egemenlik hakalrı ile yatırım ve yatırımcının güvenlik ihtiyacı arasında adil bir denge sağlanması gerektiği argümanına dayanarak bahse konu daimi yargı organlarına seçilecek kişilerin anlaşmazlığın taraflarınca değil üye devletler tarafından atama yoluyla belirlenmesi ve bu kişilerin ulusal yargıçlara benzer hak ve sorumluluklara sahip olması öngörülmektedir. Diğer taraftan, bazı gelişmekte olan ülkeler ise paradigma değiştiriciler olarak nitelendirilebilecek reform önerileri sunmaktadır. Buna göre, devletin egemenlik yetkilerinin korunması amacıyla, mevcut sistemin tamamen ortadan kaldırılması ve ISDS öncesi döneme dönülerek ulusal mahkemelerin yabancı yatırımcılarla ev sahibi devletler arasında doğacak yatırım anlaşmazlıklarında aynı

yerli yatırımcılarda olduğu gibi tek çözüm mekanizması olması gerektiği savunulmaktadır.

Her iki yaklaşım birlikte değerlendirildiğinde ise benzerlikleri ve farklılıkları açıkça ortaya çıkmaktadır. Hem sistemik reformu savunanların hem de paradigma değiştiricilerin ortak noktası mevcut adem-i merkeziyetçi sistem daha merkezi bir sistemin getirilmesini savunmalarıdır. Her ikisi de *ad-hoc* tahkim mahkemelerinin yerine daimi mahkemelerin getirilmesini ve kararların anlaşmazlığın taraflarınca her bir olay için geçici olarak seçilen tahkim hakemleri yerine daimi olarak atanan yargıçlar tarafından alınmasını önermektedirler. Tüm bu benzer yaklaşımlarına rağmen bu yaklaşımların nasıl hayata geçirileceği konusunda aralarında ciddi farklar da bulunmaktadır. En önemli fark ise sistemin hangi odakta merkezileştirilmesi gerektiğidir. Başka bir deyişle, sistemin kurucusu olan gelişmiş devletler ilk ve ikinci derece aşamaları da içerecek şekilde bir uluslararası bir yatırım tahkim mahkemesi kurulmasını talep ederken, gelişmekte olan devletler yatırım uyuşmazlıklarının ev sahibi devletlerin ulusal mahkemelerinde çözülmesi gerektiğini önermektedir. Bununla birlikte, her iki taraf da merkezileşmenin mevcut merkezi olmayan sistemle ilgili sorunların çözümü için en etkili çözüm mekanizması olduğunu düşünmektedir.

Tezin üçüncü bölümü ve dördüncü bölümlerinde ise sırayla AB'nin ve TWAIL'in ISDS reformu için önerileri örneklem olarak ele alınmıştır. Üçüncü bölüm boyunca, AB'nin ISDS reform önerisi tüm ayrıntılarıyla ele alınmış ve AB tarafından önerilen sistemin merkezileştirilmesinin hangi detaylara dayandığı örneklerle açıklanmıştır. Bu nedenle ilk olarak AB'nin sistemin reformunu neden talep ettiği sorusuna cevap aranmıştır. Buna göre, bu reform çabasının ardındaki temel itici güç küresel ekonomik ve politik dengelerde sistem kurulduğu zamandan bu yana meydana gelen önemli değişikliktir. Avrupa ülkeleri sistem kurulduğu zamanda yabancı yatırımların başlıca kaynağı iken, şimdi aynı zamanda başlıca alıcısı konumuna gelmişlerdir. Ev sahibi ülkeler olarak sisteme ilişkin yaşadıkları yeni deneyimleri, sistemin ana mimarları olmalarına rağmen, ISDS'nin ev shibi devletler için yeterince tarafsızlık ve öngörülebilirlik güvencesi sunmadığına ilişkin eleştirilerine yol açmıştır.

AB, bu sorunların kaynağının sistemin *ad-hoc* kurumları ve âdem-i merkeziyetçi yapısı olduğunu iddia etmektedir. Bu nedenle de, daimi ve çok taraflı bir yatırım mahkemesinin kurularak ISDS'nin merkezileştirilmesini önermektedir. Bu önerilen reformunun detaylarını anlayabilmek için ise, AB'yi bir birlik olarak çevreleyen politik gelişmelerin daha geniş bir bağlam içerisinde sunulması gerekmektedir. Buradaki temel amaç, yatırımcı-devlet uyuşmazlıklarının çözümüne ilişkin AB tarafından geliştirilen reform önerilerinin hukuki olmaktan çok siyasi gerekliliklere dayandığını açıkça ortaya koymaktadır.

Bu nedenle, bölümün ilk kısmında Avrupa entegrasyonunun kuruluşundan beri süregelen krizleri ele alınmakta ve bu krizlerinin AB politikalarının şekillenmesi ne denli yakından etkilediği açıklanmaktadır. 1950'lerdeki kuruluşundan bugüne kadar AB'i oluşturan temel etken aslında bir dizi sona ermek bilmeyen iniş ve çıkış döngüsü olmuştur. 1950'lerdeki Avrupa entegrasyonuna yönelik fazlasıyla iyimser beklentiler 1960'ların başında kendini gösteren siyasi kargaşalarla gölgelenmiştir. 1960'ların takip eden yıllarında entegrasyon açısından olumlu sayılabilecek kısa bir ilerleme dönemi yaşansa da, 1970'lerdeki ekonomik krizlerle AB entegrasyon süreci yeniden sekteye uğramıştır. 1980'lerin entegrasyonun ivme kazandığına dair umutları arttıracak gelişmelerine karşın 1990'lar AB entegrasyonu süreci tıkayan ve hatta gerilemesine neden olan yeni siyasi çalkantıların başladığı bir dönem olmuştur.

AB içerisinde 1990'lara kadar yaşanan derinleşme sürecine dair zorluklara, bu zamandan sonra Soğuk Savaş'ın sona ermesiyle birlikte Birliğin genişlemesini gerektiren koşulların ortaya çıkmasıyla yeni zorluklar eklenmiştir. Bu kapsamda, Doğru ve Batı Almanya'nın birleşmesini takiben Doğu Almanya da Birliğe katıldı ve takiben AB üyesi ülkelerin sayısı, Soğuk Savaş döneminin tarafsız ülkeleri olan Avusturya, İsveç ve Finlandiya'yı da kapsayacak şekilde artmıştır. Her şeyden öte, eski Sovyet bloğundan on üye ülkenin katılımı, AB için derin ve sembolik bir değişimi simgeleyen bir dönüm noktası olmuştur. Bu hızlı genişleme dalgasının ağır yükü kuşkusuz ki derinleşme sürecinde de fazlasıyla hissedilmiştir. 2001'de Avrupa Anayasası fikrinin reddedilmesi ile 2007'de Lizbon Antlaşması'nın imzalanması

arasında, AB bir başka kriz döneminden geçmiştir. 2007 sonrası dönemde genişleme ve derinleşme konusunda iyimser bir eğilim beklenmesine rağmen 2008 küresel ekonomik krizi, AB'yi daha siyasi krizlerden kurtulamadığı bir dönemde bir de ani ve güçlü etkileri olan öncelikle ekonomik ve hemen ardından da siyasi krizlerle başa çıkmaya zorlamıştır.

2010'un sonlarına doğru nispi bir ekonomik ve siyasi toparlanma sürecine giren AB, 2011'de başlayan Suriye Savaşı ve ardından gelen mülteci göç dalgası ile yepyeni bir krizle mücadele etmek zorunda kalmıştır. Bu ardı ardına gelen göç dalgaları ve ekonomik krizin AB üyesi ülkelerdeki haneler üzerindeki kalıcı etkileri aşırı sağ partilerin popüleritesini artırmasına neden olmuş ve bu durum ise üye devletlerin AB'ye ve daha geniş anlamda entegrasyon fikrine bakış açılarını olumsuz anlamda değiştirmeye başlamıştır. COVID-19 pandemisinin ortaya çıkışı, üye devletlerin AB'ye ve entegrasyona yönelik bu değişen bakış açısının ve korumacılık eğilimlerinin daha da şiddetlenmesine katkıda bulunmuştur. Pandeminin getirdiği belirsizlik duygusu aşırı sağ partilerin gücünü pekiştirmiştir ve milliyetçi yaklaşımların, uluslarüstü yapı ve politikaları alenen sorguladığı yeni bir dönemi başlatmıştır.

Tüm bu bitmek bilmeyen kriz döngüleri karşısında, Birlik, politikalarının etkinliğini ve hatta varlığını garanti altına almak için farklı stratejiler geliştirmiştir. Avrupa Birliği'nin elindeki kilit politika araçlarından biri, Lizbon Antlaşması'nın Komisyon'un ortak ticaret politikaları oluşturma yetkisini yabancı yatırımları da kapsayacak şekilde genişletmesi olmuştur. Birlik, üye devletler arasında artan politika ayrışmasına karşı ortak politikaları güçlendirmek amacıyla, yeni tanınan bu yetkiyi en iyi şekilde kullanmaya çalışmıştır. Bu doğrultuda Komisyon, yabancı yatırımlar konusunda özel maddeler içeren ilk anlaşma olarak Kanada ile Kapsamlı Ekonomik ve Ticaret Anlaşması'nı (CETA) imzalamıştır. CETA, ortak politikaları güçlendirmeyi amaçlasa da, özellikle yatırım tahkimi konusundaki hükümleri, sivil toplumda ve üye devletlerin halkları arasında büyük tartışmalara yol açmış ve Komisyon'un bu tür kararları verme yetkisi konusunda endişelere sebep olmuştur.

O zamandan beri, ISDS'nin âdem-i merkeziyetçi yapısı, özellikle yabancı yatırımcılar lehine sistematik bir önyargıya izin verdiği iddiası üzerinden Avrupa'da siyasi tartışmalara yol açmıştır. Avrupa Parlamentosu ve sivil toplum, Komisyon'a Transatlantik Ticaret ve Yatırım Ortaklığı (TTIP) ve CETA gibi ikili yatırım anlaşmalarındaki ISDS maddelerini gözden geçirmesi ve çok taraflı bir reform süreci başlatması çağrısında bulunmuştur. Her iki reform çabasının ortak temel unsuru, ISDS'in ayırt edici öğeleri olan *ad-hoc* tahkim mahkemelerinin ve hakemlerin taraflarca seçilmesi ilkelerinin değiştirilmesi amacıyla daimi ve çift basamaklı bir yatırım mahkemesi sistemi kurulması olmuştur. Bölümün ilerleyen kısımları, AB'in ikili düzeyde yürüttüğü ISDS reform sürecini ortaya koymak amacıyla CETA reform sürecinin ve çok taraflı düzeydeki çabalarını açıklamak için UNCITRAL müzakereleri kapsamında sunduğu yatırım mahkemesi kurma teklifinin ayrıntılarını ortaya koymaktadır.

CETA kapsamında AB, *ad-hoc* tahkim kurallarının uygulanması yerine bir Yatırım Mahkemesi Sistemi'nin (ICS) kurulmasını ve ev sahibi devlet ile yabancı yatırımcılar arasında ortaya çıkacak anlaşmazlıkların bu mahkeme tarafından karara bağlanmasını önermiştir. Bu önerinin dört ana özelliği vardır. Buna göre, dava mahkemeye sunulmadan önce arabuluculuk kuralları uygulanacak ve mahkemece davanın somut gerçekliklerinin yorumlanması için hâkimleri bağlayıcı kurallar belirlenecektir. Mahkeme, temyiz aşamasını da içerek şekilde iki seviyeli ve daimi bir mahkeme olarak tasarlanmıştır. ICS üyeleri ise önceden belirlenmiş davranış kurallarına tabi olacaktır. Bu öneriyle AB, amacının kamu yararını en üst düzeye çıkaracak şekilde devletin düzenleme hakkını korumak ve sistemin yabancı yatırımcıların çıkarlarına hizmet etme riskini ortadan kaldırmak olduğunu savunmaktadır.

İkili yatırım anlaşmalarında daimi bir yatırım mahkemesi kurulmasını hedeflemenin yanı sıra, Komisyon mevcut ISDS yapısını çok taraflı düzeyde de reforme etmek için çalışmalar yürütmüştür. Bunun merkezinde, uzun vadede ICS'nin yerini alması planlanan MIC'nin (Çok Taraflı Yatırım Mahkemesi) kurulması yer almaktadır. AB, aynı ICS kapsamında olduğu gibi MIC'in de iki aşamalı -ilk derece ve temyiz

mahkemesi- ve daimi bir yapıya sahip olması gerektiğini önermektedir. Bu mahkemede görev yapacak yargıçlar aynı ulusal mahkemelerde olduğu gibi devletler tarafından atanacak ve belirli sürelerle görev yapacaklardır. MIC'nin kararlarının nihai olması ve yatırımcıların aynı devlete karşı aynı konuda alternatif bir çözüm mekanizmasında dava açma yolunun kapatılması önerilmektedir. AB bu önerisinin hayata geçirilmesi için 2015'ten bu yana çeşitli çok taraflı girişimler çatısı altında ve 2017'den beri de UNCITRAL kapsamında aktif olarak çaba sarf etmektedir.

Bu bölüm, AB refom önerisinin ISDS ile ilgili iddia edilen sorunları çözme kapasitesinin bir değerlendirmesini sunarak tamamlanmaktadır. Bu değerlendirmeye göre, AB tarafından önerilen şekliyle bir daimi yatırım mahkemesi kurulmasının ve yargıçlarının devletler tarafından atanmasının ISDS ile ilgili iddia edilen sorunları etkili bir şekilde çözme ihtimalinin düşük olduğunu savunulmaktadır. İkili yatırım anlaşmalarının, yatırım bölümleri içeren bölgesel yatırım anlaşmalarının ve tercihli ticaret anlaşmalarının son derece parçalı ve karmaşık yapısı göz önüne alındığında, ISDS'yi kalıcı bir mahkeme özelinde merkezileştirme önerisinin uygulanabilirliği ve etkinliği düşüktür. Ayrıca, AB önerisinin etkin olarak uygulanabildiği senaryoda dahi mevcut tercihli, ikili veya bölgesel anlaşmaların ne olacağı konusu cevapsız kalmaktadır. Ayrıca, yatırım anlaşmasına taraf ülkelerden birinin mevcut anlaşmayı sürdürmek istemesi ve daimi mahkemeye tabi olmak istemediğini belirtmesi durumunda nasıl bir yol izleneceği konusunda da belirsizlik bulunmaktadır.

AB tarafından geliştirilen reform önerinin bir diğer önemli sorunu, merkezileşmenin ISDS'de tarafsızlık, tutarlılık, şeffaflık ve öngörülebilirlik sağlayacağı iddiasında yatmaktadır. Kalıcı bir mahkeme kurulması ve bu mahkemenin yargıçlarının devletler tarafından atanması fikri kuşkusuz siyasi bir girişimdir. Bu açıdan bakıldığında ise, tamamıyla siyasi çıkarlar dikkate alınarak oluşturulacak bir kurumun ve bu kurumda görev alacak kişilerin politikleştiği için sorun yaşadığı iddia edilen bir sisteme tarafsızlık getireceğini savunmak pek de mümkün görünmemektedir. Dahası, bu mekanizmanın kararları kesin olarak kabul edileceği belirtilen bir temyiz mahkemesi

de içerecek olması, bu reform önerisinin sistemin tarafsızlığını artıracağı iddiasına yönelik şüpheleri daha da artıracaktır.

Bu nedenledir ki; bölümün son kısımlarında bu önerinin eksikliklerin ve nasıl giderilebileceğinden ziyade, neden çözüm bulanacağı iddia edilen sorun ile önerilen çözümün birbiriyle tamamen çelişen doğalara sahip olduğu ortaya konulmaktadır. Yabancı yatırımcılarla ev sahibi devletler arasında çıkacak tüm anlaşmazlıkların daimi bir çok taraflı mahkeme tarafından yeknesak ve önceden ayrıntılı olarak belirlenmiş genel geçer kurallar ve yorumlama yöntemleri kullanılarak çözümlenmesi fikrinin tutarlılık ve öngörülebilirliği artırabileceği düşüncesi başta mantıklı görünse de, bu planlamaların sistemin adil kararlar verme amacına nasıl katkıda bulunacağı göz ardı edilmiştir. Tutarlı ve öngörülebilir kararların, adaleti sağlamadığı durumda nasıl bir değeri olabilir?

Tüm bu incelemeler ve özellikle de ve AB'nin son dönemde yaşadığı çoklu krizler dikkate alındığında, bu bölümün sonunda, AB'nin reform önerisinin sistemde adalet ilkesinin gözetilmesinden ziyade AB'nin kendi çıkarlarına hizmet etmeyi önceledeği bir politika aracı olduğu fikrine varılmaktadır. ISDS'yi merkezileştirme önerisi, üye devletler arasındaki çıkar çatışmaları, yüksek düzeyde belirsizlik ve milliyetçi aşırı sağ partilerin yükselişi gibi ortak Avrupa kurallarının uygulanabilirliğini tehdit eden ciddi gelişmelerin yaşandığı bir dönemde, ortak Avrupa kurallarının ruhunu yeniden canlandırmayı amaçlamaktadır. Bu bağlamda, AB'nin ISDS reformuna ilişkin tutumu, siyasi öncelik ve gereksinimlerden ayrı bir hukuki sürecin mümkün olmadığını ve hiçbir şeyin siyasetin dışında kalmadığını bir kere daha ortaya koymaktadır. ISDS'nin merkezileştirilmesine yönelik bu AB reform önerisi, titizlikle geliştirilen hukuki kılıfıyla gerçek doğasını gizlenmeye çalışsa da, özü itibariyle siyasi bir fikir ve girişimdir. Bu önerinin bölüm boyunca farklı açılardan yapılan kapsamlı analizi, bu durumu net bir şekilde ortaya koymaktadır.

Takip eden dördüncü bölüm ise, TWAIL'in ISDS reformuna yönelik önerisinin, merkeze aldığı odak farklı olsa da, mevcut sistemin merkezileştirilmesi amacını paylaşması bakımından AB reform önerisi ile ne kadar benzer olduğunu göstermektedir. Bölümün ilk kısmında; TWAIL'in ne olduğu, bir fikir olarak nasıl evrelerden geçtiği, temel fikirleri ile karakteristik özellikleri özetlenmektedir. Buna göre TWAIL, emperyalizm ile uluslararası hukuk arasındaki karmaşık dinamikleri inceleyen ve Üçüncü Dünya kavramını aşırı basitleştiren yaklaşımlara meydan okuyan eleştirel bir çerçevedir. Temel amacı, uluslararası hukuku şekillendiren baskıcı sistemleri, eşitsiz güç yapılarını ve adaletsiz hiyerarşileri değiştirmektir. TWAIL, Üçüncü Dünya toplumlarının onlara dikte edilen kuralları pasif bir şekilde kabul etmek yerine, bu kuralları aktif olarak şekillendirmelerine olanak tanıyan ve bu yönüyle de gerçekten kapsayıcı ve çoğulcu bir uluslararası hukuk sisteminin kurulmasını öngörmektedir. Bu doğrultuda TWAIL, uluslararası hukuku yeniden yapılandırmayı hedeflemekte ve bunu sağlamak için ise öncelikle mevcut yapıyı eleştirel bir şekilde çözümlemek gerektiğini savunmaktadır.

Bununla birlikte, TWAIL ve Derrida'nın yapısöküm kavramına ilişkin farklı yorumlara sahip olduklarını baştan ortaya koymak önemli ve dikkat çekilmesi gereken bir detaydır. İkisi arasındaki temel fark; TWAIL'in ana akım hukuki yaklaşımların sömürgeci özelliklerini yapısöküme uğrattıktan sonraki ikinci ve asıl amacının gerçekten çoğulcu ve kapsayıcı bir uluslararası hukuk çerçevesini yeniden inşa etmeyi amaçlamasında yatmaktadır. Bu yaklaşım, hiçbir bütünlüğün inşasını veya yeniden inşasını kabul etmeyen Derridacı yapısökümden farklıdır.

Bu kapsamda, yapısöküme uğratılması gereken ilk ve temel kavram modern devlet olmalıdır. TWAIL'e göre, devlet kavramın kendisi olduğu kadar onun tanımlanmasında ana unsurlar olan devlet egemenliği ve kendi kaderini tayin hakkı gibi kavramların da öncelikle ve dikkatli bir şekilde emperyalist kökenlerini ortaya çıkaracak şekilde yapısöküme tabi tutulması gerekmektedir. Bunun nedeni, bu kavramların bir set olarak devleti ayrıcalıklı ve evrensel bir olgu olarak dayatan Avrupa merkezli teorik ve pratik olguları desteklemesi ve uluslararası hukuktaki

Avrupa hegemonyasını pekiştirmeye büyük ölçüde katkıda bulunmalarıdır. TWAIL'e göre, günümüz devlet kavramı, aslında Avrupa devlet anlayışının sistematikleşmiş bir versiyonudur ve bu anlayış temelde ayrımcı olup Üçüncü Dünya'yı dışlamaktadır.

TWAIL'in yapısöküme tabi tutmayı hedeflediği bir diğer kavram, uluslararası hukuktaki sömürgeciliği desteklediğini iddia ettiği evrensellik iddiasıdır. TWAIL, uluslararası hukukun sözde evrensel ilkelerinin, standartlarının ve ideallerinin aslında Avrupa tarafından geliştirilen ve Avrupa'nın çıkarlarına hizmet eden tanımlar olduğunu savunur. TWAIL'e göre, Avrupalı devletler kendi siyasi çıkarlarını korumak amacıyla modern anaakım uluslararası hukuk yapısını geliştirmişlerdir ve bu yapının, bu çıkarları korumaya devam etmesinin temelinde evrensellik kavramı yatmaktadır.

Bu bağlamda, o dönemde Avrupa lehine güç dengelerini yansıtacak şekilde oluşturulan ve dünyanın geri kalanına çeşitli yollarla kabul ettirilen bu ilkelerin evrensel olduğu ve sorgulanmadan uygulanması gerektiği düşüncesi, Avrupa'nın değişen güç dengelerinde bile çıkarlarını korumasına olanak sağlamaktadır. İşte bu nedenle, TWAIL, uluslararası hukukun Avrupa'nın sömürgeci üstünlüğünü nasıl sürdürüp genişlettiğine dair eleştirel bir analiz yapılmasının ne kadar önemli olduğuna dikkat çeker.

Bu yapısökümü takiben TWAIL'in ikinci ve asıl amacı alternatif bir uluslararası hukukun yeniden inşa edilmesidir. Bu yeniden inşanın temel hedefleri, daha adil ve kapsayıcı bir uluslararası hukuk sistemi oluşturmak ve uluslararası karar alma süreçlerinde daha geniş bir nüfusun temsil edilmesini sağlamaktır. Bu yönde atılacak ilk adım, uluslararası hukukun Avrupa-merkezci geçmişinden ve sömürgecilik ile emperyalizmin etkilerinden kurtulmasıdır. İkinci adım ise, toplumlar arasında gerçek ve kapsayıcı bir fikir alışverişine dayalı bir uluslararası hukuk inşa etmeyi içerir. Bu yeni sistemde, her toplumun önceden belirlenmiş düzenlemelere pasif bir şekilde uymak yerine karar alma süreçlerine aktif bir şekilde katılması beklenmektedir.

Uluslararası hukuka ilişkin yukarıda ifade edilen duruşuyla uyumlu olarak TWAIL, uluslararası yatırım hukukunun amacının Batı emperyalizmini sürdürmek olduğunu ileri sürmektedir. Bu bağlamda, TWAIL'in eleştirilerinin temel odak noktası ISDS'dir. Bu mekanizmanın, Batılı devletlerin Üçüncü Dünya üzerindeki hâkimiyetini korumada önemli bir rol oynadığı iddia edilmektedir. Bu nedenle TWAIL, ISDS'nin oluşturulduğu dönemin politik, sosyal ve ekonomik güç dengelerini tarihsel bağlamda eleştirel bir şekilde analiz etmeyi ve bu yolla sistemin Batı lehine, Üçüncü Dünya aleyhine işleyen yapısını açığa çıkararak bu mekanizmayı yapıbozuma uğratmayı amaçlamaktadır.

Başka bir ifadeyle, TWAIL sunduğu tarihsel analizle ISDS'nin, sömürgecilik döneminde ortaya çıkan baskıcı ve adaletsiz güç sistemlerinin post-kolonyal dönemde sürdürülmesi için oluşturulmuş yapay bir mekanizma olduğunu ortaya koymayı amaçlamaktadır. TWAIL'e göre, post-kolonyal dönemde sömürge topraklarının bağımsız ülkelere dönüşmesiyle birlikte bu bölgelerin artık ekstrateritoryal yasalara tabi olmaması, emperyal Batılı güçlerin bu bölgelerdeki siyasi ve ekonomik çıkarlarını koruyabilmek için yeni sistemler oluşturma ihtiyacını doğurmuştur. İşte bu ihtiyaç, ISDS'nin geliştirilmesinin temel nedenini oluşturmuştur. TWAIL, ISDS kapsamında yapılan hukuki düzenleme ve kuralların, iddia edildiği gibi yabancı yatırımcıların haklarını güvence altına almak yerine, Batılı ülkeler lehine adaletsiz bir ilişki sistemini sürdürmeyi amaçladığını savunmaktadır.

TWAIL'in ISDS ile ilgili bir diğer önemli eleştirisi, bu yapının medeni ve gelişmiş Batı ile medeni olmayan ve geri kalmış Üçüncü Dünya ikilemi üzerine kurulmuş olmasıdır. TWAIL, ISDS'nin Üçüncü Dünya ülkelerindeki ulusal mahkemelerin iddia edilen yolsuzluk ve siyasallaşma sorunları karşısında yabancı yatırımcıların haklarını korumak amacıyla kapsamlı bir çözüm olarak sunulan imajını sorgulamaktadır. Ayrıca, yatırım anlaşmalarının, evrensel olduğu iddia edilen hukukun üstünlüğünü ve hukuki prensiplerin yeterince uygulanmadığı varsayılan Üçüncü Dünya ülkelerine bu prensipleri kazandırmaya yönelik faydalı bir araç olduğu söylemini, aslında sömürgeciliği sürdürmeye yönelik bir aldatmaca olarak görmektedir. Bu bağlamda,

TWAIL'in yabancı yatırımcılarla devletler arasındaki anlaşmazlıkları çözmek için alternatif bir mekanizma geliştirilmesini önermesi şaşırtıcı değildir.
Öte yandan, TWAIL, UNCITRAL kapsamındaki mevcut ISDS reform sürecinin esas olarak yasallaştırılmış sömürgeci yapıyı korumaya yönelik olduğunu savunmaktadır. TWAIL'e göre, bu reform çabaları yapısal adaletsizlikleri ve çıkar çatışmalarını kökten ele almak yerine yalnızca yüzeysel değişikliklere odaklanmıştır. TWAIL, önerilen reformların hiçbirinin sistemin sömürgecilik kökenlerinden kaynaklanan temel sorunlarını etkili bir şekilde çözmediğini iddia etmektedir. Aksine, bu reform çabalarının en çok ISDS sisteminin ana yararlanıcıları olan Batılı güçlere hizmet ettiğini düşünmektedir.

Bu nedenle TWAIL, ISDS'nin yürürlükten kaldırılmasını ve ulus devletlerin yargı yetkisi altında yeni, merkezi bir yatırımcı-devlet uyuşmazlık çözüm mekanizmasının kurulmasını önermektedir. TWAIL, ISDS'nin ev sahibi devletlere büyük bir maliyet yüklediğini ancak buna karşılık herhangi bir avantaj sağlamadığını belirterek, yabancı yatırımcılar ile ev sahibi devletler arasındaki uyuşmazlıkların çözümü için en iyi alternatifin, münhasır yargı yetkisinin ev sahibi devletlerin ulusal mahkemelerine devredilmesi olduğunu savunmaktadır. Kısacası, TWAIL'in ISDS reform önerisi ISDS öncesi döneme geri dönülmesi fikrine dayanmaktadır.

TWAIL'in mevcut sistemin merkezileştirilmesine dayanan reform önerisi bu yönüyle bir önceki bölümde ele alınan AB reform önerisi ile benzerlik göstermektedir. Şaşırtıcı bir şekilde TWAIL, mevcut ISDS sorunlarına en iyi çözümün sistemin merkezileştirilmesi olduğu konusunda AB ile hemfikirdir. Ancak, sistemin merkezileştirilmesinin hangi odakta olması gerektiği konusunda TWAIL ve AB farklı görüşlere sahiptir. TWAIL, uluslararası yatırımcılar ile ev sahibi ülkeler arasındaki uyuşmazlıkların çözümünde egemen devletlerin yetkilendirilmesi gerektiğini savunurken, AB bu görevi üstlenecek bir çoktaraflı ve daimi bir yatırım mekanizması kurulmasını önermektedir.

Ancak, AB örneğinde olduğu gibi, TWAIL'in yatırım uyuşmazlık çözüm sistemini merkezileştirerek tam yetkiyi ulusal mahkemelere devretme önerisinin de istenen sonuçları vermesi pek olası görünmemektedir. TWAIL'in yaklaşımı, sömürgecilik kökenlerine sahip bir sistemin yasallaştırılması sorununa potansiyel bir çözüm sunabilse de, başka önemli zorluklarla karşı karşıyadır. Önerilen yaklaşımın en büyük eksikliği, siyasetin yargı sisteminden tamamen dışlanması gerektiği varsayımına dayanmasıdır. TWAIL reform önerisinin temel noktalarından biri, ulusal mahkemelerin tarafsız olduğu ve bu nedenle, uluslararası yatırımcılar lehine önyargılı olan ISDS'nin yerini alması gerektiğidir. Yargı yetkisinin, ulusal siyasetle bağlantısız ve sömürge etkisinden arındırılmış olduğu varsayılan ulusal hukuk sistemlerine devredilmesiyle mevcut sistemin sorunlarının büyük ölçüde çözüleceği düşünülmektedir. Ancak, bu varsayımın neden yanlış olduğunu, sonraki bölümdeki tartışmalar açık bir şekilde ortaya koyacaktır.

Tezin son bölümünde, önceki bölümlerde ele alınanlardan tamamen farklı bir ISDS reform yaklaşımı sunulmaktadır. Bu bölüm, Martti Koskenniemi'nin eleştirel hukuk perspektifine dayanarak, ISDS'nin meşruiyetini güçlendirmenin tek yolunun her bir anlaşmazlığın somut gerçeklerine dayanarak yorumlanması ve adalet ilkesinin sistemde daha etkin bir şekilde uygulanması olduğunu savunmaktadır. Bu yaklaşım, doğası gereği, AB ve TWAIL'in sistemin merkeziyetçiliğini artırmaya yönelik önerilerinin aksine, mevcut sistemin adem-i merkeziyetçi yapısının güçlendirilmesi gerektiğini ileri sürmektedir. Bu özgün reform önerisinin temelinde, pozitifist uluslararası hukukun siyaseti öznel, hukuku ise nesnel bir alan olarak gören anlayışının yaşanan sorunların temel kaynağı olduğu görüşü yatmaktadır.

Bu bölüm, Koskenniemi'nin uluslararası hukuka dair eleştirel anlayışından ilham aldığı için, onun hukuka bakış açısını kapsamlı bir şekilde analiz ederek başlamaktadır. Bu analizde en dikkat çeken nokta, Koskenniemi'nin uluslararası hukukun nesnel olduğu varsayımını yapıbozuma uğratarak, hukukun hiçbir unsurunun siyasetten bağımsız olmadığını savunmasıdır. Ona göre, anaakım uluslararası hukukun temel sorunu, uluslararası siyasetin "diğeri" olarak kurgulanmış olmasıdır. Uluslararası

hukukun varsayılan nesnelliği, uluslararası siyasetin varsayılan öznelliğine karşıt olarak onun benzersizliğinin dayanağı kabul edilmektedir. Koskenniemi, uluslararası hukukun nesnellik iddiasını oluşturan temel unsurları ve bu unsurların bu iddianın inşasındaki etkileşimlerini detaylı bir şekilde incelemektedir.

Bu iki temel unsur, normatiflik ve somutluktur. Koskenniemi'ye göre, uluslararası hukukun nesnelliğinin ancak bu iki unsurun bir arada bulunmasıyla sağlanacağı iddiası, modern uluslararası hukukun kendi içinde bir çelişki barındırmasına neden olmaktadır. Normatif açıdan bakıldığında, uluslararası hukukun herhangi bir devletin eylemleri, tercihleri veya çıkarlarından etkilenmeyen evrensel standartlar oluşturmayı hedeflediği kabul edilir. Ancak, somutluk açısından, uluslararası hukukun devletlerin gerçek eylemleri, hedefleri ve çıkarlarına dayanması gerektiği varsayılır. Başka bir ifadeyle, uluslararası hukukun nesnelliği, hem gerçek dünya ile uyumlu olmayı hem de mevcut güç ilişkilerinin meşrulaştırılmasından kaçınmayı gerektirir. Ancak, bir kuralın aynı anda hem mevcut güç yapılarından bağımsız hem de onlara bağlı olması mümkün değildir. Normatiflik ve somutluk, birbiriyle bağdaşmayan kavramlardır ve bir kuralın her ikisini birden taşıması imkânsızdır. Bu çelişki, uluslararası hukukun temel sorunlarının merkezinde yer almaktadır.

Bununla birlikte, bu durum uluslararası hukukun doğasında bulunan bir sorun olmaktan ziyade, onun liberal bir yorumunun sonucudur. 19. yüzyıldan itibaren geliştirilen bu yorum, uluslararası sistemin temelini oluşturan adalet ile devlet egemenliği arasındaki dengeyi bozmuştur. Bu bozulmayla birlikte, devlet egemenliği adaletin önüne geçmiş ve sistemin en önemli unsuru haline gelmiştir. Egemenlik, devlet sisteminin temel taşı olarak kabul edilirken, adalet sistem içindeki önemini giderek yitirmiştir. Bu süreçte uluslararası hukuk sistemi, diplomatik eylemler yoluyla ifade edilen egemen devletlerin rızasına dayalı bir yapı olarak şekillenmiştir. Ancak sistem bir kez kurulduktan sonra, devletlerin siyasi eğilimlerinden bağımsız bir hale geldiği ve onları uyum göstermeye zorlayan normatif bir otoriteye sahip olduğu iddia edilmiştir. Uluslararası hukukun meşruiyetini yalnızca egemen devletlerin iradesinden aldığı savıyla, somut durumlarda devlet iradesinin üzerinde bir otorite olarak

uygulanmak istenmesi arasındaki çelişki, günümüzde uluslararası hukukun temel sorunlarının kaynağını oluşturmaktadır.

Uluslararası hukukun nesnel olduğu ve dolayısıyla uluslararası siyasetten bağımsız olduğu iddiası, bu yapısal çelişkiler karşısında uluslararası hukukun meşruiyetini korumak amacıyla geliştirilmiştir. Ancak, yukarıda belirtilen nedenlerden dolayı temelsiz olan bu iddia, yeni çelişkilerin kaynağı haline gelmiştir. Sonuç olarak, uluslararası hukuk, bitmek bilmeyen bir çelişkiler döngüsüne sıkışıp kalmıştır. Bu kısır döngüyü kırmanın anahtarı, liberal düşünceyle bozulan adalet ve egemenlik arasındaki dengeyi yeniden tesis etmektir. Bu durumda, uluslararası hukukun nesnel olduğunu iddia etmeye gerek kalmayacak ve hukukun, doğası gereği siyasi bir niteliğe sahip olduğunu kabul etmekle, uluslararası hukukun pek çok sorunu çözüme kavuşacaktır.

Bölümün ikinci kısmı, ISDS'yi eleştirel bir perspektiften incelemektedir. Bu bölümdeki eleştiriler, ISDS'nin yatırım uyuşmazlıklarını apolitik hale getirmeyi amaçladığı iddiasına ve sistemin siyasallaşmasının bir meşruiyet krizine yol açtığı gerekçesiyle reforma ihtiyaç duyduğu savına odaklanmaktadır. Önceki bölümlerde tartışıldığı üzere, ISDS'nin siyasallaştığına yönelik argümanlar, hakemlerin önyargılı olduğu ve bağımsız olmadığı, benzer davalarda tutarsız kararlar verdiği ve sistemin yetersiz bir denetim mekanizmasına sahip olduğu iddiaları etrafında şekillenmektedir. Bu eleştiriler, uluslararası hukukun nesnel olması gerektiği fikrine dayanmakta ve ISDS kapsamında hakemlerin, her bir davanın somut gerçekliklerini dikkate alarak ve takdir yetkilerini kullanarak karar verme esnekliğinin sistemi siyasallaştırdığı iddiasını öne çıkarmaktadır. ISDS'nin adem-i merkeziyetçi yapısının bu sözde sorunun temel nedeni olarak görülmesi, reform çabalarının büyük ölçüde sistemi merkezileştirmeye odaklanmasına yol açmıştır.

Bölümün üçüncü kısmı, bu doğrultuda AB ve TWAIL tarafından öne sürülen reform önerilerini eleştirel bir şekilde analiz etmekte ve bu önerilerin ISDS'nin sözde meşruiyet krizini etkili bir şekilde çözüp çözemeyeceği sorusuna odaklanmaktadır. Özellikle, AB'nin uluslarüstü düzeyde, TWAIL'in ise ulusal düzeyde savunduğu sistemin merkezileştirilmesi önerilerinin ISDS ile ilgili endişeleri giderebilme

potansiyeli incelenmektedir. Bu inceleme sonucunda, uluslararası tahkim, çok taraflı bir mahkeme veya ulusal mahkemeler gibi kurumsal yapı tercihlerinin, yatırım uyuşmazlık çözüm sisteminin meşruiyeti üzerinde belirleyici bir etkisinin olmadığı savunulmaktadır. Bunun temel nedeni, ISDS'deki sorunların kökenine inilmediği sürece, teknik veya hukuki reformların sistemin sorunlarını çözmede etkili olamayacak olmasıdır. Karar alma hiyerarşisini değiştirmek veya karar vericilerin seçimiyle ilgili süreçleri yeniden düzenlemek, yalnızca sürekli eleştirilerin odağını değiştirecektir. ISDS'ye yönelik eleştiriler, uyuşmazlık çözümünü düzenleyen kural ve düzenlemeler adalet ilkesi bağlamında yeniden değerlendirilmediği ve ISDS, uluslararası yatırım hukukunda nesnelliğin koruyucusu rolünü sürdürdüğü sürece devam edecektir.

Bölüm, ISDS için ideal bir "mutlu son" senaryosunun nasıl olması gerektiğini tasvir ederek sona ermektedir. Bu çerçeve, tüm uyuşmazlıkların özünde siyasi olduğuna ve bu uyuşmazlıkları çözmek için siyasi söylem, analiz, karar alma ve eylemin gerekli olduğuna dair bir anlayışa dayanmaktadır. Bu bakış açısıyla, uluslararası hukuktaki pozitivizmin, insani iradenin hukuki karar alma süreçlerindeki rolünü sınırlama yönündeki etkisi sorgulanmaktadır. Bunun yerine, karar alma süreçlerinde bireylerin daha aktif bir şekilde rol aldığı ve alınan kararların toplumsal yaşamın ayrılmaz bir parçası haline geldiği bir sistemin inşasına odaklanan bir reform çerçevesi oluşturulması hedeflenmektedir. Bu yeni sistemde karar alma süreçlerinin, genel geçer hukuk kurallarının sorgusuz sualsiz uygulanması yerine, sosyal ve siyasi bağlamla bütünleşmiş bir adalet ilkesine dayanması gerektiği savunulmaktadır.

Güçlendirilmiş adem-i merkeziyetçilik, önerilen sistemin temel bir bileşeni olarak öne çıkmaktadır, çünkü bu sistem, sosyal ve siyasi gerçeklikler üzerine kurulu bir adalet ilkesine dayanacak şekilde tasarlanmıştır. Hukuku, tutarlı ve nesnel bir kurallar bütünü olarak gören pozitivist bakış açısının aksine, bu yaklaşım, uluslararası hukuktaki karar alma süreçlerinde olayların öznel koşullarının önemli bir etkisi olduğunu kabul etmektedir. Önerilen sistem, anlaşmazlık çözümünde birbiriyle çatışan çıkarlar arasında adalet ilkesi doğrultusunda bir hiyerarşi belirlemeyi ve çözümü bu hiyerarşiye

göre gerçekleştirmeyi amaçlamaktadır. Bu bakış açısına göre, ISDS kapsamındaki anlaşmazlıklarda adil bir çözüm sağlamak için, yabancı bir yatırımcının özel haklarına mı yoksa ev sahibi ülkenin düzenleme yapma haklarına mı öncelik verilmesi gerektiği değerlendirilmelidir. Bu nedenle, hakemlerin karar alırken davanın somut koşullarını göz önünde bulundurarak siyasi bir değerlendirme yapması gerektiği savunulmaktadır. Merkezi bir sistemdeki önceden belirlenmiş ve genel olarak geçerli kurallar, önerilen bu adalet ilkesini desteklemek için yeterli değildir.

Bu bölümde tartışılan reform önerisini diğerlerinden ayıran en önemli özellik, sosyal ve siyasi gerçekliklere bağlı kalmayı başarırken herhangi bir belirli çıkar grubuna hizmet etmemesidir. Bu önerideki karar alma süreci, adalet ilkeleriyle yönlendirilmekte, davanın temel gerçekliklerine dayalı siyasi bir değerlendirmeye dayanmakta ve tarafların gerçek niyetlerini göz önünde bulundurmaktadır. Bu yaklaşım, önerinin en güçlü yanını oluşturmaktadır. Öneri, bireylerin özgürce seçim yapma hakkına sahip olması gerektiğini savunurken, bu seçimlerin kabul edilebilir sınırlarının adalet ilkesi tarafından belirlenmesi gerektiğini öne sürmektedir. Ayrıca, sosyal ve siyasi yaşamın sürekli değiştiğini dikkate alan yeni bir kurumsal paradigma fikri, bu reform önerisinin en özgün yönlerinden biridir. Diğer reform önerileriyle karşılaştırıldığında, bu yaklaşım, uzun vadede en etkili çözüm ve en güçlü reform alternatifi olarak öne çıkmaktadır.

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