DOCTORAL (PhD) DISSERTATION

Ninjin Bataa

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LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT IN ASIA

Candidate:

Ninjin Bataa

Supervisor:

Dr. habil. Zsolt Hajnal PhD, Assistant Professor of Law

Doctoral Program: Changes of State and Law in Central- and Eastern-Europe
Head of the Doctoral School: Prof. dr. József Szabadfalvi, DSc, Professor of Law

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NYILATKOZAT

Alulírott, _____**Ninjin Bataa**_____ (név), büntetőjogi felelősségem tudatában kijelentem, hogy a Debreceni Egyetem Marton Géza Állam- és Jogtudományi Doktori Iskolában a doktori fokozat megszerzése céljából benyújtott, ___**Legal Aspects of Foreign Direct Investment in Asia**_____ című értekezésem saját önálló munkám, a benne található, másoktól származó gondolatok és adatok eredeti lelőhelyét a hivatkozásokban (lábjegyzetekben), az irodalomjegyzékben, illetve a felhasznált források között hiánytalanul feltüntettem.

Kijelentem, hogy a benyújtott értekezéssel azonos tartalmú értekezést más egyetemen nem nyújtottam be tudományos fokozat megszerzése céljából.

Tudomásul veszem, hogy amennyiben részben vagy egészben sajátomként mutatom be más szellemi alkotását, vagy az értekezésben hamis, esetleg hamisított adatokat használok, és ezzel a doktori ügyben eljáró testületet vagy személyt megtévesztem vagy tévedésben tartom, a megítélt doktori fokozat visszavonható, a jogerős visszavonó határozatot az egyetem nyilvánosságra hozza.

Debrecen, 10.05.2021

aláírás

Recommendation

Student: Ninjin Bataa

Title: LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT IN ASIA

Ninjin Bataa has started her studies in the frame of the LLM course 5 years ago. Since her successful application to the doctorate studies, she has focused on the chosen current topic. During her studies she regular consulted, built up the structure and the agenda of the research and the dissertation, she passed all the requirements of the Doctorate School doubtless. This long and fruitful period resulted now the application for the workplace defense of her dissertation.

This dissertation focuses on foreign direct investment regime in Asia. In particular, the dissertation analyses host countries' reactions towards influence of international investment regime on the examples of Asian states such as Mongolia and ASEAN Member States. International investment regime or investment treaty regime is represented by international investment agreements and investor-state dispute settlement mechanism.

Dissertation begins with reviewing evolution of the investment system as a whole including its origin, sources and definition of core elements. Further, the dissertation addresses individual regions' investment regime: Mongolia, ASEAN and the European Union. The author chose these regions due to their economic dependency on foreign direct investment flow, relatively smaller economies and less researched areas. Individual regions are explored in detail in their policy towards foreign direct investment. The European Union's inclusion was motivated by the fact that the EU has concluded several new generation free trade agreements and investment protection agreements with Asian countries, which directly affected their investment regime. And lastly, the dissertation analysis is directed to the recent criticism towards investor-state dispute settlement mechanism that became the trigger of various negative reactions from host countries. The negative reaction in the sense of this dissertation entails renegotiating and termination of existing bilateral investment treaties; removing investor-state dispute settlement mechanism from their investment regime and denouncing ICSID. Moreover, not only individual countries but international organizations and institutions, including the EU, UNCITRAL and ICSID, are negotiating possible reform of international investment regime.

The author concluded that both positive and negative reactions of host countries exist and none of them presided over another. Some countries are keeping the traditional foreign investment regime by maintaining the status quo. And others are taking more drastic measures by terminating bilateral investment treaties unilaterally and removing investor-state dispute settlement mechanism from their investment regime altogether.

She presented a very high niveau first draft for the workplace defense, which was defended. Based on the reviewers' opinions there were a few moderate changes and amendments necessary, which were properly considered by working on the second draft for the public defense.

I honestly think, that Ninjin Bataa has worked properly on her dissertation, she showed a researcher's attitude of high niveau, and presented the first draft of her dissertation right in time for workplace defense. The dissertation meets all the necessary requirement, so I suggest the Doctorate Council to initiate the defense procedure.

Debrecen, 10.05.2021.

supervisor

1. Table of Contents

Introduction

a. Scope of the research.

This dissertation focuses on foreign investment regime of Asian countries including Mongolia and Association of Southeast Asian Nation's Member States, and their general response to the prevalent international investment regime. These regions of Asia were chosen due to their relatability to the topic on the basis of the following: foreign investment flow, relatively smaller economies and less explored areas in previous scholarly works.

This research aimed to review host countries' reactions towards influence of international investment regime (IIR) presented by international investment agreements (IIA) and investor-state dispute settlement mechanism (ISDS). Usually, the international investment regime influences all the global actors of the system. However, host states are more susceptible for such influence than the investors or the home country of foreign investors. The dissertation suggests that the international investment regime influences the investment regimes of host states and as a result host states respond to said influence: a) by improving and amending their investment legislation in order to facilitate foreign investors or b) by attempting to reform existing regime and enacting changes to its investment legislation.

In order to analyze the reactions of the Asian host states, the dissertation reviews the historical development of the investment policy and evolution of the foreign investment related legislation in the regions. Further it explores the involvement of the European Union, its new free trade and investment protection agreements with Asian countries. Most importantly the dissertation analyses the investor-state dispute settlement mechanism, its recent criticisms and reaction of host countries and global actors to the recent criticism. Deeper analysis of investor-state dispute settlement and its criticism shed light on the responses of the host countries to the developments, as seemingly unsuccessful investment treaty arbitrations commenced series of negative reactions towards ISDS from traditional host countries. In regard to this issue, another question came to light: whether the criticism and its responses were towards the investor-state dispute settlement system or international investment law (IIL) regime as a whole.

Therefore, to answer the research questions regarding the influence of international investment regime and host countries' counter reaction towards it, the dissertation focused on following topics. Firstly, the evolution of the investment system as a whole, including its origin, sources, fundamental economic theories and definition of core terminologies and

problematics of named areas. Defining the basic notions of the international investment field was crucial in understanding its need for reform and criticism that it's facing now. Secondly, the dissertation addressed the three individual regions and their investment regimes: Mongolia, ASEAN and the EU. The selected Asian regions were relevant to the topic due to their traditional host country status which presented perfect examples to reflect the reaction towards the international investment regime. Traditionally host state countries such as Mongolia and ASEAN Member States heavily depended on foreign investment flow and reformed their foreign investment policies in order to attract more investment into their economy. In their foreign trade and investment history, the roots of different policies towards foreign investment and reactions to international investment regime as a whole can be observed.

The inclusion of the European Union was necessary due to its grand role in shaping the future of investment agreements and novelty dispute settlement mechanisms not only in the EU but in Asia as well. Its foreign investment policy was facilitating to understand Asian investment and trade tendencies. In recent years EU have concluded several new generation Free Trade Agreements and Investment Protection Agreements with number of Asian countries including Singapore and Vietnam. These new generation agreements could fully demonstrate certain reactions towards the traditional international investment regime.

Thirdly and lastly, the dissertation explored the investor-state dispute settlement mechanism. ISDS initiated the process of reform as countries started taking bold measures after being exposed and defeated in investment arbitral proceedings. Such reforms would entail 'negative' effect as the traditional system is being abolished.

Therefore, by exploring the host countries' (Mongolia and ASEAN Member States) the research questions were answered. Precisely, by researching the evolution and historical aspects of investment regimes and investor-state dispute settlement mechanism that came under harsh criticism that initiated the reform process in many countries. ISDS was more relevant than other topics as ISDS was the fundamental feature of the international investment law that was targeted in reform initiatives.

b. Methods.

The dissertation was approached from a legal – historical and comparative perspectives. The legal – historical method includes normative legal analysis of core legal texts including international treaties and domestic legislation. The analysis incorporates core objectives of the legal texts, basic standards of investment protection and inclusion of investor-state

dispute settlement clause. Exploring the foundations of the selected regions delivers a perspective of current investment regime, thus it was important to include to development of the investment legislation and regime in the dissertation. Research focused on the regional legislation and investment regime in some Asian countries, including Mongolia and ASEAN countries, focusing more on the regional organization rather than all member states. Needless to say, some member states needed more individual observation than others depending on their participation in international investment law regimes. For instance, the dissertation assesses Indonesia's bold strategy towards investor-state dispute settlement system.

Historical methodology provides foundation of current investment regimes around the world, dichotomy of developed and developing countries and understanding their future trends. This method was selected as it facilitates to examine the reaction of the countries towards international investment law regime. More precisely, it helps to understand the current objectives, regimes and policies of some countries and to determine the causal link of current decisions and past experiences. It is essential to apprehend the historical aspects of investment policy development in order to perceive the overall response to international investment regime. Furthermore, the dissertation integrates methodologies of other discipline such as politics and economy in order to provide the understanding of evolution of international investment law and the economic theories at its basis.

Secondly, the regional investment policy aspects of Asian countries and the European Union were analyzed by utilizing the comparative methods between each other and within themselves. The comparative method is used to demonstrate the differences of investment regimes in traditional host countries (Mongolia and ASEAN) and home countries of foreign investor (EU). Furthermore, it is used to exhibit the potentially differing responses of Mongolia and ASEAN Member States to the general international investment regime. Primarily, the past foreign investment legislations and policies were compared to current instruments. Therefore, the policy shift and its reasoning became apparent. Later the historical aspects of aforementioned regions were compared to one another in order to clarify the world trend on international investment regime influence, especially towards the potential reform of international investment law and investor-state dispute settlement system.

The methods fit the question as it dissects the historical evolution of regimes and presents the current system. The topics that need to be covered in order to explain the methods are investment regime and legislation of individual counties of Asia.

c. Conceptual background.

International investment law is unarguably one of the most important fields of international law. It covers foreign investment regime, cooperation of host and home countries of foreign investment, and protection of investment by all means. The biggest push to the foreign direct investment flow started with the collapse of communism more than 20 years ago. This event unleashed a historically unprecedented process of economic restructuring and political transformation in the former communist countries. It was a lengthy process which did not happen over a year: there was a transition period. This transition process involved certain changes in the politics and in the economies of the countries involved, including democratization, institution building and for the economic sector, - marketization, liberalization, restructuring. In the transition process, foreign direct investment proved to be the most effective instrument.

The notion of international investment law became of importance when countries started concluding more precise and targeted treaties on investment besides the traditional trade agreements. The purpose of investment treaties was to ensure protection of foreign investor's properties in foreign land. So to speak the home country of the investor was ensuring that property of their nationals would be regarded with utmost care in foreign land, where the regulation differ. Around 1990s with the increase of investment treaties, the number of disputes regarding the investment also increased, therefore making the investment regime complete with its legislation and dispute settlement mechanisms.

Traditionally, international investment law was targeted to protect the interest of capital exporting countries and capital importing countries were accepting any terms of agreement that were presented to them as it entailed economic gain in the future through flow of foreign investment.[1] Therefore, host countries tend to amend their legislation and improve economic and legal atmosphere to make it more favorable for foreign investors. For example, host countries would offer foreign investors advantages from custom and tax incentives that would make the transaction smoother; non-tax incentives including social benefits; and most importantly host countries waive their right to regulate the foreign investment by offering ISDS in their treaties and domestic legislation. More recent reactions of the countries include harsher strategies including denunciation of ICSID, removing ISDS from their existing bilateral investment treaties or terminating the BITs altogether. Therefore, the hypothesis

[1] RUDOLF DOLZER & CHRISTOPH SCHEUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2, Oxford University Press (2008).

requires to research what are the reactions of Asian host countries towards the international investment regime and the reason behind it.

This dissertation sets out to examine the reaction of host countries to the international investment regime, including investment agreements and investor-state dispute settlement mechanism. As a general rule, the international investment agreements and dispute settlement mechanisms one way or another are influencing the host countries of foreign investment. For instance, host countries amend their legislation, introduces various incentives and consent to resolve disputes in the international tribunal in order to make their economic and legal environment more attractive for foreign investment flow. At a first glance we can say that overall reaction of host countries towards international investment is positive as they aim to strengthen their rule of law and consequently attracting more foreign investment flow. However, deeper study is needed to understand if that is the case, especially for Asian countries regarding this research.

Positive influence would entail that host countries adopt more friendly regulations regarding entry and admission of foreign investment and its utmost protection. Negative influence would reflect mostly on investor-state dispute settlement mechanism, therefore host countries would reform the ISDS or completely abolish it. Further negative influence can entail in termination of investment treaties including numerous bilateral investment treaties. Another influence presents in regulatory chill of host countries regarding their environmental and basic human right regulations in order to avoid potential investment arbitration proceedings.

Until recently most Asian countries were mainly host countries of the foreign investment. Many researches targeted bigger economies such as China, India, Japan and South Korea. Thus examining the investment regime of minor economies was more relevant. Mongolia was of relevance as a less researched yet quite popular investment destination. And ASEAN countries were more popular in academic world, however recent reforms in the region made it pertinent to this research. The foreign investment is one of the biggest clogs that move market economy in selected regions. More precisely, Mongolia and southeast Asian countries receive the biggest share of foreign investment in Asia after mega economies such as China and Japan.[2] Global investors find ASEAN's service sector and Mongolia's mining sector attractive with their generally welcoming incentives for foreign

[2] China's investment inflow in 2019 in billion USD – 155.8; Japan – 37.1, Databank of the World Bank, Foreign Direct Investment net flows (Nov. 26, 2020, 15:30), https://databank.worldbank.org/reports.aspx?source=2&series=BX.KLT.DINV.CD.WD&country=.

investment. For instance, in 2019 Mongolia have received 2.4 billion USD in foreign investment flow and it covers 15% percent of whole economy of the country.[3] As for the ASEAN countries the numbers were much higher.[4]

Therefore, with much of the spotlight on selected regions, importance of international investment regimes was inevitably grand. On top of that, recently the international investment law and regime were scrutinized harshly resulting in radical changes in some countries and initiated further reform in global actors of the field. Hence researching the regime and analyzing its impact on these regions were the purpose of my thesis.

The relevance of the hypothesis became apparent after completing almost half the research. After exploring Mongolia and ASEAN countries it became more evident that there was certain reaction towards international investment regime. Most host countries react positively to international investment regimes but recently some countries started taking step that would entail more negative reaction towards it.

d. Structure.

Brief on scope of the dissertation would be the following. Firstly, present dissertation includes legal analysis of Mongolian investment law. Since Mongolia became a democratic country in 1991 investment law was amended four times. This research focused on each legislation as it reflected the investment regime and policy in the country for relevant time period, consequently resulting in current regime. Furthermore, it includes analysis of two important arbitration cases where Mongolia participated as the Respondent. The cases of Khan Resources and Paushok were chosen depending on their relevant importance regarding the subject area they have touched upon.

Secondly, the dissertation analyzed the ASEAN's investment regime evolution as a regional integration and its current strategies to turn away from traditional investment regulations. Ultimately, reviewing Mongolia's and ASEAN member states' status as host state and their investment regime development facilitated to understand their investment policy nowadays. More importantly, it was necessary for the exploration of the influence of international investment regime and response of host states towards that influence.

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[3] Quarterly Economic Repot, Central Bank of Mongolia (Nov. 26, 2020, 15:30), https://www.mongolbank.mn/documents/statistic/chartpack.pdf.

[4] For instance, in 2019 foreign investment flow in ASEAN countries were following (in bn. USD): Singapore – 105,4; Indonesia – 24.9; Vietnam – 16.2; Philippines – 7.6; Malaysia – 7.6; Thailand – 6.1; Cambodia – 3.6; Myanmar – 2.2; Lao PDR – 0.5; and Brunei Darussalam – 0.3. Databank of the World Bank, Foreign Direct Investment net flows (Nov. 26, 2020, 15:30), https://databank.worldbank.org/reports.aspx?source=2&series=BX.KLT.DINV.CD.WD&country=.

Influence of international investment regime is demonstrated through international investment agreement which have investment protection clauses that limit host country's regulatory power and through investment dispute settlement mechanism. The importance of ISDS is that arbitral tribunal's award binds the parties including the host country with no regards to their sovereignty. The Respondent (host country) must abide by the award with good faith as consequences of opposite action would be economically dire. Not enforcing the arbitral awards would wound the country's reputation in global arena and show negative impacts on credibility of the country.

Structure of the thesis is as follows: Chapter one and two will assessed evolution of international investment law, fundamental doctrines, its sources and nuances of core terminologies of the field; Chapter three covered Mongolia's investment regime as relatively young field of law in the country and examine its focus points regarding foreign investment. Chapter four examined ASEAN's investment regime as a regional integration and its agenda; Chapter five researched on foreign investment policy of the European Union and its new generation agreements with third countries. And lastly, Chapter six reviewed the investor-state dispute settlement mechanism as whole and current criticism towards it. Chapter seven explored the criticism points more deeply on the example of ICSID tribunal.

CHAPTER 1

Evolution and sources of International Investment Law

1.1.Evolution of international investment law and investment protection

The origins of international investment can be found in the expansion of European trade and investment activity from the seventeenth to early twentieth centuries. Historical development of the foreign investment and its protection can be distinguished into four different phases: early 17th century, phases during and after World War two, and the present global era[5]. This part of the Chapter one will follow the footsteps of aforementioned timeline: (a) 17th century and origin of minimum standard principle; (b) pre-World War II period and treaties of friendship, commerce and navigation; (c) post-World War II period and global attempts to internationalize the investment law; and (d) global era of bilateral investment treaties (BIT).

The first commercial treaty can be traced back to 1778[6] when the United States and France concluded their cooperation treaty. It was followed by new treaties between the US and its European allies and Latin American States. Further examples of 17-18 century investment regulation can be presented in times when the United States and the British Parliament signed the Jay Treaty in 1795, that provided, among other things, protection of their national's assets in each other's territory.[7] The rules on foreign investment protection evolved throughout the 'colonial encounter', as a tool to protect the interest of capital exporting states and their nationals.[8] The genesis of the international investment law on foreign investment was in the obligation created by the law to protect the alien[9] and his physical property and state responsibility arising from the failure to perform that obligation.[10] These investment protections started with tangible assets only, but later it started to cover intangible assets[11] too.

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[5] KENNETH VANDEVELDE, A BRIEF HISTORY OF INTERNATIONAL INVESTMENT AGREEMENTS, 157, 12 U.C. Davis Journal of International Law & Policy, 2005.
[6] In 1778, US and France formed alliance with Treaty of Alliance.
[7] Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, Ratified June 24, 1795 [the Jay Treaty].
[8] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW EMPIRE 19, Cambridge University Press 2013.
[9] The alien in the context represented foreigners on territory of America, mostly migrants from Mexico.
[10] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 10, Cambridge University Press (2010).
[11] By that time intangible assets consisted of contractual rights, lease, mortgage, liens and loan.

In case of dispute, it was resolved diplomatically between the home state[12] of the investor and the host state[13] of the investment. Such claims could be brought only through diplomatic channels and based on the communication between two countries ad hoc tribunals were constitutes. Around 1870s Mexico and the United States established a Commission to resolve thousands of claims that were brought by American nationals after Mexico expropriated their lands. Later in 1917 the Mexican agrarian revolution also triggered mass expropriations and in course of their diplomatic communications with the US to resolve the claims between each other, the Hull formula was established.[14] Hull formula alongside with Calvo doctrine will be examined later in this Chapter. Claims of this period illustrates the traditional objective of international investment law to protect interests of investors from capital-exporting countries and subsequently confrontation of national treatment and international minimum standard.

Prior to establishment of bilateral and multilateral investment treaties, governing law of international investment law was the customary international law and domestic law. Customary international law in State responsibility principle included rules regarding protection of alien's assets, their life and security as well. However, for investors and their home states equal treatment was not enough, thus international minimum standard started to develop further as it stipulated compensation for expropriation.

In the Pre-World War II period, besides the customary international law, the Treaties of friendship, commerce and navigation (FCNT) became primary instrument of global economic relations. Initially they became the primary instruments since the late eighteenth century, and their sole purpose was to establish beneficial commercial cooperation between contracting parties. Historically, FCNTs were the predecessors of bilateral investment treaties. These treaties included provisions of full protection and security of investment; fair and equitable treatment for investors. Yet, even though these treatises were bilateral in form, they did not aim at establishing preferential treatment between the contracting parties, but envisaged – as illustrated by the most-favored-nation (MFN) clauses they contained – participation in international commerce on non-discriminatory basis.[15] Treaties of friendship, commerce and navigation regulated the standard of treatment of foreign investor. There are group of multinational agreements from this period, that regulated entry and

[12] Home state is the state where the foreign investor is from. Where the investor originated.
[13] Host state is where the investment is made. The receiver of investment.
[14] See below part 1.2. Calvo Doctrine and Hull Formula.
[15] STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 29, Cambridge International Trade and Economic Law (2009).

admission of foreign investment. Such treaties provided commercial equality of opportunities in certain territories.[16] Similar regime was established after the World War I under the League of Nations through so called so-called A- and B-mandates that contained comparable provisions on equal opportunity. It established the principle of equal opportunity for former African colonies (B-mandates) and for so called A-mandates which were established by individual country.[17] Furthermore, these treaties did not offer preferential treatment, as it was political agenda to prevent a country to become too powerful on other countries territory. States were more inclined to protect their sovereignty. Generally, the policy of international economic and therefor investment related cooperation at this time was focused on a general non-discriminatory principles and equal standards.

After the World War II, legal uncertainty covered the international field of trade and commerce. Economically and politically devastated countries aimed to create a world that cooperated in harmony, peace and in prevention of future conflicts through stability and sustainability. The instrument that could achieve this goal was to establish international norms that bind the major powers. Thus the process of internationalization of many fields in trade and commerce, including investment protection started. The purpose of certain and stable investment regulation was to re-establish the severed economic ties around the world. This movement initiated the start of treaty-based investment protection that could remedy the limitations of previously used customary international law.

The Bretton-Woods System of monetary management that established International Monetary Fund and International Bank for Reconstruction and Development, now part of World Bank Group.[18] The Bretton-Woods System envisaged the global regulation of trade and investment along with supranational institutions that would oversee the regulation as the third pillar of the system. However as one of the result of aforementioned resistance, the Havana Charter[19] which was to establish an investment regime did not materialize.

The division and legal uncertainty of this process started when the capital exporting states faced strong opposition of capital importing states. Capital importing stated deemed that such multilateral agreements would only serve the interests of capital exporting states

[16] *Ibid*, page 30.
[17] Article 22(5), Covenant of the League of Nations, entered into force January 10, 1920, The United States Office of the Historian (Jan. 15, 2021, 23:59), https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1.
[18] Bretton Woods Monetary Conference, July 1944, The World Bank (Jan. 15, 2021, 23:59), https://www.worldbank.org/en/about/archives/history/exhibits/bretton-woods-monetary-conference.
[19] United Nations Conference on trade and Employment, Final Act and Related Documents, Havana 1948, World Trade Organization (Jan. 15, 2021, 23:59), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

and neglect their own. After the WWII, many of the capital importing countries were intensely protective of their newly found sovereignty, thus were extremely skeptical to the attempts of developed nation to influence their economy and consequently their domestic affair. Once the host state permits to the foreign investment, it will be subject to wide scope of obligations towards the foreign investor including, international minimum standard. And with the newly signed investment treaty, BIT or any other agreement regarding foreign investment, the state's obligation to protect foreign investment will become valid. In addition to that, the socialist countries lead by the Soviet Union favored state regulation and rejected free market principles.

In response to the resistance, capital exporting countries especially the United States, started concluding new series of FCNTs that included national treatment, most favoured nation status and dispute resolution clauses that consented to jurisdiction of the International Court of Justice. Nonetheless, these treaties were again mainly focused on the trade and commerce rather than on investment.

Further attempts to establish the global regulation of trade and commerce were made in establishing the OECD. When negotiator from Germany Hermann Josef Abs, called for global instrument to protect foreign investment, which would establish standards of protection along with the permanent arbitral tribunal, it initiated the draft of Organization for Economic Cooperation and Development (OECD) by Hermann Josef Abs and Sir Hartley Shawcross.[20] This initiation was the starting point for the OECD in Abs-Shawcross Draft.[21] Next drafts of the convention was still unsuccessful due to the clause that Organization for Economic Cooperation and Development would not only be applicable to its members but to non-members as well, which triggered the clash between capital importing and exporting states once more. Eventually, the OECD contented itself with merely recommending the draft as a model for the conclusion of bilateral investment treaties by its member states.[22]

In 1970s the coalition of opposing countries challenged the customary international law in the United Nations. As result of the lengthy discussions, the UN General Assembly adopted the Declaration of the New International Economic Order that recognized state

[20] RUDOLF DOLZER & CHRISTOPH SCHEUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9, Oxford University Press (2008).
[21] General Advocate van Hecke, Le project de convention de l'OCDE sur la protection des biens étrangers 68, (Revue générale de droit international public 1964).
[22] RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 2, Martinus Nijhoff Publishers (1995).

sovereignty over natural resources and other economic activities. Furthermore, the General Assembly also adopted the Charter of Economic Rights and Duties of States. The Charter recognized the right of States to expropriate and the compensation requirement following the expropriation was rather suggestive than obligatory.[23] Therefore, even the result of the coalition of countries with opposing views on investment protection, could not bring tangible results. The situation of foreign investors was still vague and with not enough guarantee of protection.

The current global era of international investment law and investment protection started forming with the bloom of bilateral investment treaties. The global actors of international investment law started increasingly concluding bilateral investment treaties. The first BIT was the Treaty for the Promotion and Protection of Investments between Germany and Pakistan from 1959[24]. Consequently, other European countries followed Germany's path and concluded their first investment treaties starting with Switzerland in 1961[25] and France in 1972.[26]

BITs enabled foreign investors to get the protection from host state's actions such as direct and indirect expropriation, nationalization; to be less dependent on diplomacy between home and host states; and they no longer needed to exhaust local remedies in the host state.

Moreover, countries sought to implement ad hoc international investment tribunals, rather than resolving it in the public international law tribunals or in domestic courts. The establishment of ICSID extended the possibility of such dispute resolution. General Council of the World Bank in 1961, Aron Broches, debated the idea of having impartial settlement of disputes, without attempting to seek agreement on substantive standards. At first sight, the idea seemed to be simple and modest. Nonetheless, in 1965 he built the design of what was to become the Convention on the Settlement of Investment Disputes between States and

[23] The Charter used the wording 'should' not 'must. United Nations General Assembly, Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX).

[24] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, (1963) 457 UNTS 23 (entered into force 28 April 1962). On a separate note, Germany's interest in such agreements emanated from the fact that Germany had lost its foreign investments after settlement of 1949 negotiations on repairing the damage brought by violating international law during World War II. In the heat of the event, Germany launched a bilateral program for number of treaties to protect foreign investment of its companies in the future. The concept was simple: to protect the investment according to the laws of the host state.

[25] Treaty between Switzerland and Tunisia terminated, replacement treaty entered into force in 2014. UNCTAD Investment Policy Hub (Jan. 16, 2021, 00:05), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2997/switzerland---tunisia-bit-1961-.

[26] Treaty between France and Tunisia terminated, replacement treaty entered into force in 1999, UNCTAD Investment Policy Hub (Jan. 16, 2021, 00:05), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3605/france---tunisia-bit-1963-.

Nationals of Other States (ICSID Convention) establishing the ICSID. As we know now, it was one of the most innovative ideas came to life, becoming the big step of international cooperation in the matter of the role and protection of foreign investment. The ICSID have five applicable features: (a) foreign companies and individuals can directly bring a suit against their host state; (b) state immunity is restricted; (c) international law can be applied to the relationship between the host state and the investor; (d) the local remedies rule is excluded in principle; (e) ICSID awards are directly enforceable within the territories of all states parties to ICSID.

As a general rule, object and purpose of BITs do not vary fundamentally. And arbitral tribunals often refer to the object and purpose of the treaties. It is reasonable to assume that the purpose and object of the international investment treaties are solidly tied to the nature of foreign investment and its attractiveness; to the reciprocity of benefits for host state and investors; to the preconditions that are necessary for the development of foreign investment; and on contrary, to the removal of obstacles that may block the way of entering of the investment to the host state. Hence, the purpose of investment treaties is to reach the typical risks of a long-term investment project and therefore to contribute for the stability and predictability in the sense of an investment-friendly climate. Nonetheless, the problem of reciprocity arose when the BITs theoretically included reciprocal obligations, but they were essentially working for the benefit of developed, capital exporting states.[27] According to Dolzer and Schreuer, it does not mean that there is no reciprocity at all, it simply means that the host state gives up a bit of their sovereignty for certain new opportunity to attract foreign investment through the investment treaty.[28] It was reasoned that the regulations of the BIT took over a segment of a domestic law. In this particular case of international investment regulation, BITs took over the regulatory space of foreign investment and their dispute settlement from the host countries.

Bilateral investment treaties were usually concluded between developing and developed countries. Developed countries agenda was to protect the investment of their nationals in the territory of the host state, and for developing states the agenda for BITs was to attract more investments in order to boost their economy. However, nowadays the number of BITs between two developed or two developing countries are increasing and subsequently the line between capital importing and capital exporting states getting more blurred.

[27] LEON TRAKMAN: REGIONALISM IN INTERNATIONAL INVESTMENT LAW 20. Oxford University Press (2013).
[28] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22, Oxford University Press (2008).

Additionally, number of regional investment agreements started to take place. The most notable examples are North American Free Trade Agreement (NAFTA) which was concluded in 1992 between the US, Canada and Mexico. But in November 2018, the United States-Mexico-Canada Agreement (USMCA) was signed to replace the NAFTA.[29] However, it is just the first step, the governments of three countries still need to ratify the USMCA. Other regional agreements that contain investment protection clauses were established under the auspices of Mercado Común del Sur (MERCOSUR), the Association of Southeast Asian Nations (ASEAN), and finally Energy Charter Treaty (ECT), one of the pioneers of sectoral agreements.

Therefore, evolution of investment international law started in 17th century with simple trade cooperation and to the comprehensive bilateral investment agreements. In global era, the development of international investment law is being made by investment tribunals through their arbitral awards, newly concluded new generation multilateral agreements and bold strategic moves by individual countries in their investment regime.

1.2.Calvo Doctrine and Hull Formula

In 1917s to 1938 the clash between north and south America took place. In regard of that differences of two nations, two contradicting doctrines surfaced in international investment law.

1.2.1. Calvo Doctrine

The idea originated in those countries which were skeptical in accepting international minimum standards as they would suggest that no country should offer more protection for foreigners than that of offered for the nationals. The objective of the view lied in the equality of treatment, and non-discrimination against foreign investors, therefore abiding by the rules of customary international law. On economic and political regard, these countries were not confident in their level of development to provide higher standard of treatment for the foreign investors. It is important to remember that these two contradicting doctrines were developed around 1917-1920s. Thus the independence of most 'developing' states, that were also majority of host states for foreign investment, was newly gained.

[29] United States – Mexico – Canada Agreement, Office of the United States Trade Representative (Jan. 16, 2021, 00:26), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

In regard to this situations, Argentinian jurist Carlos Calvo developed the Calvo doctrine in validation of national treatment and host state's right to expropriate the foreign investor's assets. According to the Calvo doctrine, the state should not offer more protection to the investors, that to its nationals. By stating the equality of treatment between national and foreign investors, the doctrine resonates the National Treatment clauses in modern international investment law. If the investor's rights were violated, foreign investor should address the claim to the national courts of the host state, where they reside or invest. And the local remedies must be exhausted prior to resorting to the international adjudication, therefore superiority of national courts prevail.

According to Verwey and Schrijver, the Calvo doctrine stipulates the basic notions of state's territorial sovereignty principle. It includes (a) the principle of absolute equality before the law between nationals and foreigners; (b) the exclusive subjection of foreigners and their property to the laws and juridical regimes of the State in which they reside or invest, and (c) strict abstention from interference by other governments, notably the governments of the States of which the foreigners are nationals, in disputes arising over the treatment of foreigners or their property, meaning abstention form diplomatic protection.[30] Therefore, in Calvo doctrine the land and other natural resources deemed to be the property of the state.

The time period when the doctrine was developed coincided with the period when the part of the world was undergoing serious state structure changes and revolutions. For example, the Bolshevik revolution of 1917 nationalized all the banks, lands and natural resources. Thus the assets of the foreign investor was expropriated with a little or without compensation.[31] It was an attempt to take the notion of national treatment to its extreme.[32] And similar event occurred in the Mexico during their agrarian revolution of 1917. Even though Mexico offered compensation, it was not efficient and adequate, as Mexico was not exhibiting a promising economic prospect.

The supporters of the Calvo doctrine were mostly developing states as the doctrine puts host countries interest above else. Countries such as Mexico, Peru and Venezuela implemented the Calvo doctrine in their foreign investment regimes and their constitutions. For example, Article 17 of the Constitution of Peru of 1939 stated that 'Commercial companies, national or foreign, are subject, without restrictions, to the laws of the Republic.

[30] 15 VERWEY, W.D. AND SCHRIJVER, N.J., THE TAKING OF FOREIGN PROPERTY UNDER INTERNATIONAL LAW: A NEW LEGAL PERSPECTIVE? 3-96, Netherlands Yearbook of International Law (1984).
[31] SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE 15, Hart Publishing (2008).
[32] *Ibid*.

In every state contract with foreigners, or in the concessions which grant them in the latter's favor, it must be expressly stated that they will submit to the laws and courts of the Republic and renounce all diplomatic claims.' International treaties such as the American Treaty on Pacific Settlement also known as Pact of Bogota of 1948 also included that superiority of national courts clause.[33]

Consequently, the home states of the foreign investors, whose rights were violated by the expropriation as a result of change of regimes, started to seek redress of the situation. On the other hand, developed countries were suggesting that proper compensation must be paid for the expropriated properties. Such dialogue started between Mexico and the US, which initiated to the Hull formula.

1.2.2. Hull formula

Lengthy discussions and correspondence exchange between Mexico and the US took place after the Mexican agrarian revolution of 1917. And the parties set in motion diplomatic communications in order to satisfy the claims of the injured investors and initiate the process of compensation. Within the communications, the US Secretary of State, Cordell Hull incorporated US views on compensation and the that development of compensation notions became known to the world as the Hull formula.

The Hull formula states that the compensation must be prompt, adequate and effective. Prompt, adequate and effective means that the compensation must be granted as soon as the event that caused that expropriation of the investor's property occurred; payment must be the equal amount of the total value of expropriated investment and it must be paid in a freely transferable currency respectively.

Cordell Hull mentioned in his letter that the taking of property without compensation is confiscation.[34] He goes on stating that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor.[35]

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[33] Art 7 of the American Treaty on Pacific Settlement (Pact of Bogota, 1948) reads: 'The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.' 30 UNTS 55, The Organization of American States, https://www.oas.org/sap/peacefund/resolutions/pact_of_bogotá.pdf.

[34] Letter of the US Secretary of State to Mexican Ambassador to the United States, 21 July 1938, The United States Office of the Historian (Jan. 16, 2021, 00:50), https://history.state.gov/historicaldocuments/frus1938v05/d662.

[35] *Ibid*.

The communication between two countries reached its finale in 1927 when Mexico agreed to compensate the injured American investors. At the end, US recognized Mexico's right to expropriate foreign investor's assets, given that expropriation would be accompanied with the obligation to make adequate, effective and prompt compensation.

In international law, the Hull formula is also known as full compensation, which does not differentiate whether the expropriation was lawful or unlawful. Meaning that full and corresponding compensation must be paid. It is no surprise that the Hull formula was widely supported by developed states whose nationals were mainly investors in developing states. Later the Hull formula found its way in international investment law and got accepted by majority of nations. Developing states also accepted that besides having a sovereign right to expropriate, nationalize assets, that can be realized under certain conditions including corresponding compensation for the injured party.

The formation of Hull formula and Calvo doctrine was a notable step towards development of international investment law as the debates defined important aspects of the field, expropriation and its compensation.

1.3.Fundamental economic theories of foreign investment

In order to understand the origins and development of international investment law, we must look into fundamental and conflicting economic theories of foreign investment. Economic theories can be analyzed through the economic development of the host and home states of the foreign investor.

As Sornarajah differentiates, there are two contradicting economic theories of foreign investment: the classical theory and the dependency theory.[36] The *classical theory* believes that the foreign investment brings ultimately only benefits to the economy of the host state, including increasing domestic capital, bringing new technology and creating more workplace. In a bigger picture, it means that foreign investments are generating wealth and developing the public sectors for the benefit of the host state.

As positive contributions the foreign investor brings financial capital, facilities, machinery; advanced technology including production technique and know-how; managerial expertise that enables national personnel to become compatible in global market by engaging in international business activities more efficiently which consequently

[36] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 47, Cambridge University Press (2010).

develops the host state's economy. In ideal settings foreign investor also could boost the competitiveness in the host state and thus create bigger market with increased demand and production. Furthermore, it can create a positive impact on public welfare, since it offers consumers new products, improved quality, and lower prices, contributes to the amelioration of local infrastructure, and generates employment opportunities and higher labour standards, thus raising standards of living. The advantages also cover the home country of the foreign investor. For instance, exported capital facilitates increase the worldwide competitiveness, therefore increasing economic growth and provides stimulus for export and participation in global value chains.[37]

In international investment law, the classical theory enables the reasoning of foreign investment protection by international law from objective of policy related aspects. Therefore, with the guaranteed protection of the international law, the foreign investors would confidently invest in developing countries and consequently facilitate their development too. Such positive theory would encourage the movement of multinational companies that make most of the investing around the world through their subsidiaries. The classical theory is based on the notions of economic liberalism that have been supported by investment exporting states and international organizations such as World Trade Organization and International Monetary Fund. The results of economic liberalism were reflected in the acceptance of the World Trade Organization with its new international agreements such as The Agreement on Trade-Related Aspects of Intellectual Property Rights, The General Agreement on Trade in Services and The Agreement on Trade-Related Investment Measures.

In early 2000s, some scholars were debating that development of FDI protection was hijacked by special interests of global institutions.[38] It was believed that the obstruction-free movement of foreign investors would advance the global integration in spite of the fact that there was no empirical evidence that supported existence integration caused by the foreign investment flow.[39] Also UNCTAD's yearly World Investment Reports found no empirical

[37] See generally, Bekzod Abdullaev and Douglas H. Brooks and Sauvant and Mallampally.
[38] See further on the debate: Leon Trakman, Regionalism in international investment law; Bernard M. Hoekman & Michel M. Kostecki., The Political Economy of the World Trading System: The WTO and Beyond (3rd Ed, 2009); Lori Wallach & Michelle Sforza, The WTO: Five Years of Reasons to Resist Corporate Globalization (2000).
[39] Nadide Sevil Tuluce et al., *The relationship between FDI and Regional Economic Integration: An Empirical Analysis of BSEC Countries*, 5(1) International Journal of Advances in Management and Economics, 1, 7-8 (2016).

evidence that BITs influence the flow of the investment.[40] In addition to this, developing states that have been the host state for decades would argue that there were no development in their economy after many years despite the fact that they are rich in resources.[41]

The next economic theory of foreign investment is the *dependency theory* that directly contradicts the views of the classical theory. It states that foreign investment will not bring meaningful economic development to the host state, instead it will maintain the regular business objectives of the foreign investors and generate revenue for the business only. For example, in employment generating theory, it is explained that the foreign investor's managerial positions that develops that human resources seldom filled by the national personnel and new technologies that are introduced in the host state would be irrelevant. This theory was developed by Raul Prebisch in 1949 in his work 'The Economic Development of Latin American and its Principal Problems'.[42]

As Sornarajah charted out the logical sequence of reasoning the dependency theory is that the majority of foreign investment is made by the subsidiaries of the Multinational Corporations which act according to the agenda of their parent companies. The parent company, the Multinational corporations in return serve the interests of their home country, where their headquarters are located.[43] In this case the foreign investor keeps developing their home state through central economy. Such sequence of business models can only benefit the home state of the investor and the elite minority of the host state.[44]

The theory of dependency sees economic development as meaningful distribution of wealth to the people of the host state, not the flow of resources. Therefore, it seeks to integrate non-economic interests, such as human rights and the protection of environment. According to dependency theory view, in order to be a development, the people of the host state must be free from poverty. Which seems almost an impossible goal to achieve in a lifetime of an investment agreement.

However, in today's globalized world, shift is happening between developing and developed states. The distinction that developing country is a host and the developed

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[40] See UNCTAD World Investment Reform, FDI Policies for Development: National and International Perspectives, 2003, 89; UNCTAD World Investment Reform, FDI from Development and Transition Economies: Implications for Development, 2006, 184-194.

[41] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 48, Cambridge University Press (2010).

[42] See more in R. PEET, GLOBAL CAPITALISM: THEORIES OF SOCIAL DEVELOPMENT (1991); B. HETTNE, DEVELOPMENT THEORY AND THE THREE WORLDS (1988); SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2010).

[43] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 54, Cambridge University Press (2010).

[44] *Ibid.*

countries are home country is no longer relevant. Investment movement started to occur between two developing countries and two developed countries making each category of countries both investor and host state. Such shift resulted in strengthening the economy of the developing states, making them more confident in their international trade and investment management. Furthermore, developing countries included screening process for the investment flow in order to protect their national interests. And BITs aimed at protecting the interests of both parties.

Multinational corporations loosened their knots with their home countries, and over influence from home state also loosened. Modern academic literature started drifting away from the notions of classical theory regarding Multinational Corporations. Instead it revealed possible negative impacts of Multinational corporations on the economic regime of the host country by implementing overprotective clauses in international agreements. For example, when transferring a new technology to the host state, the multinational corporations would have strict clauses that restricts the use of the new technology to its full potential.

Factors that influence the investment decision are determined not by legal, but by economic considerations. One of the legal factors is legal security in the host country. Thus the assumption that the international legal dimension would itself prompt an increased flow of foreign investment is far from realistic. But having a strong and reliable legal stability will only support positive decision on the part of the investor.

The two economic theories of foreign investment help us to understand historical and current trends in international investment law overall. For instance, how host countries come to decision to be more open and welcoming to foreign investors or in contrast the introduction of strict rules on investment regime in order to protect their right to regulate.

1.4.Sources of International Investment Law

International investment treaties are treaties between states that governed by public international law. But the subjects of such treaties are judicial entities and individuals who are investors in foreign country. Furthermore, international investment law falls within the scope of both international economic law and international public law in wider sense. Therefore, investment arbitration cannot be categorized as neither public international or private transnational dispute settlement due to its dual characteristic.

There are no finely defined general code for international investment law. For instance, International Centre for Settlement of Investment Disputes (ICSID) Convention became a

procedural convention that sets up machinery for settling the investment disputes.[45] In the negotiation period of ICSID, the idea of incorporating substantial law for foreign investment was rejected in order to preserve the flexibility of the institution to bear differing cases. Couple of decades later, the attempt to codify international investment law was restarted again by the Development Committee of the World Bank. Subsequently, it enacted Guidelines on the Treatment of Foreign Direct Investment and identified the formal sources of international investment law. The formal sources are BITs, multilateral agreements, national legislation and general principles of law drawn from arbitral awards.[46] A major evolution therefore occurred between 1964, when the negotiators of the ICSID Convention chose not to incorporate any principle of foreign investment law therein, and 2013, when authors readily recognize the existence of a body of foreign investment law.[47]

In early stages of investment dispute settlement, tribunals referred to the domestic laws and international law was of complementary character. It is related to the fact that investment disputes then were contractual disputes, not treaty based disputes.[48] However, later international law started to prevail over domestic laws in situations when domestic law deemed inconsistent with international law or when domestic law is deemed consistent or contrary to international law.[49] Furthermore, internationalization of applicable law in foreign investment disputes that stems from bilateral investment treaties became a large part of international investment law.

As for the sources we can differentiate bilateral investment treaties, multilateral agreements, customary international law, general principles of international law and domestic law. In current international investment law and arbitration, mostly used sources in investment arbitration are BITs and multilateral agreements. Bilateral investment treaties are an important source of international investment law as they include important standards as fair and equitable treatment, Most Favoured Nation, National Treatment, expropriation. Usually, bilateral investment treaties have very broad definition of these standards, which gives arbitrators more interpretational power.

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[45] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 80, Cambridge University Press (2010).

[46] Legal Framework for the Treatment of Foreign Investment, Report to the Development Committee and Guideline on the Treatment of Foreign Direct Investment, 1992, The World Bank (Jan. 16, 2021, 01:02), http://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf.

[47] FLORIAN GRISEL: THE SOURCES OF FOREIGN INVESTMENT LAW 214 (Douglas et al eds., The Foundations of International Investment Law: Bringing Theory into Practice, Oxford University Press) (2014).

[48] See Chapter 7: ICSID.

[49] Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a* Ménage À Trois*,* 15(2) ICSID Review - Foreign Investment Law Journal, 401, 409 (2000).

Multilateral treaties cover other big part of sources in investment arbitration. Notable multilateral treaties are North American Free Trade Agreement and its successor United States-Mexico-Canada Agreement, Energy Charter Treaty, MERCOSUR and Association of Southeast Asian Nations. As of November 2020, 85 claims were brought under ECT and 34 claims under NAFTA. Altogether, almost 10% of total claims brought in ICSID tribunal. For instance, ECT provides that in case of dispute, the tribunal 'shall decide the issues in accordance with this Treaty and applicable rules and principles of international law'.[50] And MERCOSUR provides that tribunals 'shall apply the Protocol itself, the contracts relating specifically to the investment, and the applicable principles of international law.[51]

The next source of international investment law is customary international law. One of the commonly referred principle of customary international law is the principle of prohibition of expropriation without compensation, also known as the Hull Doctrine. Other principles include state responsibility, state of necessity and compensation for wrongful expropriation.[52] However, view on customary international law have divided into two: whether customary international law sets a 'floor' or 'ceiling' to the fair and equitable treatment standard. On one hand, a minority of tribunals take the side that customary international law sets 'floor' of FET principle, therefore FET principle can require a treatment additional to, or beyond that of, customary law.[53] On the other hand, a majority of tribunals agree that customary international law is a 'ceiling' in interpretation of FET principle. For instance, NAFTA Commission stated that 'FET does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[54] As discussed earlier, such diverging interpretations root in imprecise wording in investment treaties. Therefore, customary international law is important to arbitral tribunals, but only as a complementary instrument.

Besides customary international law, general principles of law is another source of international investment law. General principles of law are broadly defined basic principles that are used to 'fill the gaps' where specific treaty clauses failed to give a clear answer and define vaguely formulated international investment law standards. General principles of law has a wide ranging character, recognised in most states' legal system and transposable to

[50] Article 27(3)(g), Energy Charter Treaty.
[51] Article 9(5), MERCOSUR.
[52] Christoph Schreuer, The ICSID Convention: a commentary 177, Cambridge University Press (2009).
[53] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award of 22 May 2007, para 258.
[54] North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

international law , meaning that the principles are appropriate for application in international law community.[55] Examples of general principle of law that are relevant in international investment law are unjust enrichment and acquired rights (in relation to the expropriation and its compensation); due process; and fair and equitable treatment that is derived from good faith principle of law.[56] However, nowadays tribunals rarely refer to the general principles of law as the investment treaties suffice as the source of international investment law. Despite its limited use as a source of international investment law, the general principles of law are often accepted by international tribunals and domestic authorities.[57] Moreover, general principles of law have much more potential as it can enforce stability and order in highly diverse international investment law.[58]

Next source of international investment law is domestic legislation. Traditionally, public international tribunals consider domestic laws as 'facts'.[59] This approach was adopted by Permanent Court of International Justice[60], International Court of Justice, European Court of Human Rights, European Court of Justice and World Trade Organization's Appellate Body.[61] Investment arbitration applies domestic law alongside with the international law. Therefore, it deems domestic law more than a 'fact'. For instance, domestic law applies to investment arbitration when the applicable BIT makes an express reference to the domestic law and when the domestic law is referee as 'choice of law' in the agreement. In addition, arbitral tribunal can apply the domestic law as the application of general principle of law.

Lastly, the most conflicting element of sources of international investment law is precedent. International investment arbitration, precisely ICSID, does not include precedent in sources of international investment law. According to Article 53(1) ICSID Convention, the award shall be binding to the parties hence not binding for non-parties.[62] Furthermore,

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[55] MOSHE HIRSCH, SOURCES OF INTERNATIONAL INVESTMENT LAW 23 (Andrea K. Bjorklund & Davis August eds., International Investment Law and Soft Law, Edward Elgar Publishing Limited) (2012).
[56] Total v. Argentina, ICSID Case ARB/04/1, Decision on Liability of 27 December 2010, para 111.
[57] For instance, see Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award, para 77, (2009). It states that international agreements like the ICSID Convention and the Bilateral Investment Treaties have to be analyzed with due regard to the requirements of the general principle of law, such as the principle of non-retroactivity or the principle of good faith.
[58] STEPHAN W. SCHILL: SOURCES OF INTERNATIONAL INVESTMENT LAW MULTILATERALIZATION, ARBITRAL PRECEDENT, COMPARATIVISM, SOFT LAW 1095 (Besson et al eds.: The Oxford Handbook of The Sources of International Law, Oxford University Press) (2017).
[59] FLORIAN GRISEL: THE SOURCES OF FOREIGN INVESTMENT LAW 222 (Douglas et al eds.: The Foundations of International Investment Law: Bringing Theory into Practice, Oxford University Press) (2014).
[60] See German interests in Polish Upper Silesia, Germany v. Poland.
[61] *Ibid*.
[62] Article 53(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership explicitly mentioned that the award mad by the tribunal has binding force only for the disputing parties of the specific case.[63] In this sense, generally previous cases and award have no value as a precedent, they simply coexist. Therefore, these arbitral decisions have no binding effect for non-parties to the dispute.

Nonetheless, this non-binding effect does not stop arbitral tribunals and counsellors to refer to them in order to build their cases. Consequently, questions regarding the legalization of precedents are being discusses in ongoing amendment proposals of different international organizations and tribunals, including ICSID and UNCITRAL. In spite of this evolution, the majority view remains that investment awards have no binding effect since investment tribunals settle ad hoc disputes that are independent from one another.[64] The argument is that investment arbitrations do not belong to a system which allows rule of precedent. But with current proposals regarding change of international investment tribunal system, rule of precedent is not a far-fetched view.

Conclusion

Since 17th century, international investment law has evolved long way. Dispute resolution of investment disputes evolved from applying only domestic laws to having specific bilateral investment treaties that regulate investment matters between states. Foundations of bilateral investment agreements started with treaties of friendship, commerce and navigation. Now BITs are the most important instruments of international investment law. It includes the main principles of international investment law such as most favored nation, national treatment, principle of fair and equitable treatment and compensation for expropriation. Other sources of international investment law are multinational agreement, customary international law, domestic law and debated rule of precedent. In current international investment regime, with ongoing amendment negotiations and proposals, the precedent could become legitimate source of international investment law.

[63] Article 9.29.7 Comprehensive and Progressive Agreement for Trans-Pacific Partnership. See further Chapter 4 of this Dissertation.
[64] FLORIAN GRISEL: THE SOURCES OF FOREIGN INVESTMENT LAW 224 (Douglas et al eds.: The Foundations of International Investment Law: Bringing Theory into Practice, Oxford University Press) (2014).

CHAPTER 2

Investor and Investment in International Investment Law

2.1. Investors: Individuals and Corporate Nationalities.

As a general rule, the investors are either natural or juridical persons. The foreignness of the investment is determined by the investor's nationality[65] and subsequently it determines the treaties from which the investor will benefit. For example, for treaties such as United States – Mexico – Canada Agreement, Energy Charter Treaty and International Centre for Settlement of Investment Disputes, the parties to the dispute must be signatories or participants to these treaties. The investor's nationality is relevant for two purposes. The substantive standards undertaken in a treaty will only apply to the corresponding nationals. And the jurisdiction of an international tribunal is determined, inter alia, by the claimant's nationality. More precisely, if the host state's consent to jurisdiction is given through a treaty, it will only apply to nationals of a state that is a party to the treaty.

In defining the nationality of the investor, there are two important points. Firstly, the time when the nationality was acquired. According to ICSID Convention, critical date for nationality possession is the date on which disputing parties consent to submit the arbitration[66]. Since investment treaties contain offer of the host state to arbitrate, actual initiation of the arbitration procedure by the investor seems to be the date of mutual consent. In other words, investor accepts the offer of the host state by requesting the arbitration. ASEAN Comprehensive Investment Agreement sets two different dates when the investor ought the possess the nationality: when the investment is being made and when the investor seeks treaty protection.[67]

Secondly, the circumstances of the nationality acquisition matters as the time of the nationality possession may not be entirely sufficient by itself. Investors can deliberately change their nationality prior to or in the early stages of the proceedings in order to become eligible for one or another treaty protection. There are two techniques that investor use in order to get a treaty protection. Some investors add the 'foreign' element to their domestic entities by transferring funds to a foreign country and then redirecting it back to their home

[65] Anthony C. Sinclair, *The substance of nationality requirements in investment treaty arbitration*, 20 ICSID Review-Foreign Investment Law Journal 357, (2005); Robert Wisner & Nick Gallus, *Nationality requirements in investor-state arbitration*, The Journal of World Investment and Trade 927, (2004).
[66] Article 25 (1) and (2) ICSID Convention.
[67] Article 4, ASEAN Comprehensive Investment Agreement.

country as an investment.[68] Thus the investor will have a treaty protection from its home state as a usual foreign investor would and this technique is called round-tripping. Other investors acquire nationality solely for the purpose of litigation. For example, in Phillip Morris Asia Ltd. v. Australia, the investor changed its nationality by selling its shares to a Hong Kong entity when the government of Australia announced an intention of implementing plain-packaging regulation. Phillip Morris Asia's sole purpose was to challenge Australia's plain-packaging regulation when it would come into force. The tribunal found that such act constituted an abuse of rights, as the corporate restructuring occurred at a time when there was a reasonable prospect that the dispute would materialize.[69]

Tribunals seems to support the round-tripping[70] and nationality acquisition for purpose of getting treaty protection is frowned upon.[71] It is still questionable why one technique is deemed legitimate and other deemed as an abuse of rights.

2.2. Nationality of individuals

Nationality of individuals primarily determined by the law of the country whose nationality is claimed. As a general rule, a certificate of nationality[72], issued by the competent authorities of the state, is a strong and sufficient evidence for existence of the nationality of that state. Nonetheless, due to the easy access to public information and possibility to fraud, such evidence may not be necessarily conclusive.

For instance, in *Soufraki v. United Arab Emirates*[73] case, the claimant had produced several Italian certificates of nationality. The tribunal found that the claimant had lost Italian nationality as a consequence of the acquisition of Canadian nationality, a fact that was evidently unknown to the Italian authorities.[74] As a Canadian national, he was unable to rely on the BIT between Italy and the UAE. Therefore, ICSID jurisdiction was unavailable, since Canada was not a party to the ICSID Convention that time.[75] The tribunal found that the

[68] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 329, Cambridge University Press (2010).
[69] Phillip Morris Asia Ltd v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, para 588, 17 December (2015).
[70] In Hulley Enterprises Ltd v. Russia, UNCITRAL PCA Case No. 2005-03AA226, the tribunal found that round-tripping was a legitimate technique and did not violate the ECT.
[71] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 238, Cambridge University Press (2018).
[72] Depending on the country, it could be birth certificate, identification card, passport and other documents of such kind.
[73] Soufraki v United Arab Emirates, Award, 12 ICSID Reports 158, (2004).
[74] *Ibid*, para 26.
[75] Canada signed ICSID in 2006 and it entered into force in 2013, The World Bank (Jan. 16, 2021, 01:47), https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST26.

nationality is within the domestic jurisdiction, however when nationality is challenged in international tribunal, the tribunal is bound to decide that issue.[76] Having found that the claimant did not have Italian nationality, the tribunal did not find it necessary to deal with the respondent's contention that in the absence of genuine link this nationality would have been ineffective.[77]

In case the investor has dual nationality, it would be tribunal's obligation to establish the effective nationality. Principle of effective nationality requires proof of 'predominant' connection between the individual investor and the State of the investor's professed nationality.[78] Predominant connection can entail habitual residence, economic and financial interest, family ties, taxation and so on. Furthermore, effective nationality can be the permanent residency in another country. In *Karpa v. Mexico*, the tribunal placed citizens and permanent residents on equal stand in the Home state, but not in the Host state of the investment.[79] Marvin Karpa was a citizen of the US but had his permanent residence in Mexico. The tribunal found that Mr. Karpa had factually predominant connection with Mexico, thus according to the Article 25(2)(a) of ICSID Convention nationals cannot claim treaty protection from their Home state.[80] Therefore, Mr. Karpa was not eligible for a treaty protection.

2.3. Nationality of Companies/Corporations

In investment law corporate nationality usually supposes legal personality. It is more complicated to determine as it involves mixture of legal and factual deliberations. A legal entity can take different forms such as shell or holding company and every form could affect the eligibility for the treaty protection. Legal systems and treaties use a variety of characteristics to determine whether a juridical person is a national of particular country or a foreign investor. Some of the treaties contain different definitions of investor. The most common types of characteristics that determine corporate nationality are incorporation, real seat of the business and the foreign control of the company. Some countries use one of the criteria and others use the combination of them.

[76] Soufraki v United Arab Emirates, Award, para 55, (2004).
[77] *Ibid*, Para 42-46.
[78] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 241, Cambridge University Press (2018).
[79] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, (2002).
[80] *Ibid*, para 36.

2.3.1. Incorporation theory

Some treaties enact incorporation theory, meaning that criteria for determining the investor's nationality would be the place of the company's incorporation or registration. Energy Charter Treaty's (ECT) definition of 'investor' includes 'a company or other organization organized in accordance with the law applicable in that Contracting Party'.[81] Incorporation theory comes under scrutiny when a shell or holding company claim for treaty protection. For example, nationals of A state incorporated company in state B and invested in C through the company in B. When dispute arises owners of the company B claim for treaty protection under treaty between A and C. Article 17(1) of ECT gives right to shell companies as long as they are owned or controlled by the nationals of Contracting Party other than the Host state of the investment.[82] Combination of these two characteristics prevent the possibility of forum shopping. It could coincide with 'denial of benefits' clause, which allows the host state to deny the treaty protection to a company, under certain circumstances, which is controlled by national's non-party.

Denial of benefits is an action taken by some treaties against treaty shopping. This clause covers investors who try to organize its investment in a way that affords maximum protection under existing treaties. Usually, it is done through the establishment of a company in a state that has favorable treaty relations with the host state and accept incorporation as a basis for corporate nationality. Then that company will be used as a conduit for the investment. Hence, some treaties include 'denial of benefits' clause by which the state party to the Treaty is entitled to deny the treaty protection to investors incorporated in one of the state's party to the treaty but under control of investors of a third country not party to the treaty or when they do not have any substantial activity in the country of incorporation.

To explain more about the incorporation theory, we can examine very popular two cases. In *Tokios Tokelés v Ukraine*,[83] the claimant was a business enterprise established under the laws of Lithuania. However, nationals of Ukraine owned 99% of its shares. Article 1(2)(b) of the Lithuania-Ukraine BIT defines 'investor' in respect of Lithuania, as 'any entity established in the territory of the Republic of Lithuania in conformity with its law and regulations'. As a contrary, the respondent argued that the claimant was not a genuine entity of Lithuania because it was owned and controlled by Ukrainian nationals. But the Tribunal held that Tokios Tokelés was a Lithuanian investor under the Lithuania-Ukraine BIT as the

[81] Article 1(7)(a)(ii), Energy Charter Treaty.
[82] *Ibid* Article 17(1).
[83] Tokios Tokelés v. Ukraine, Case No. ARB/02/18, Decision on Jurisdiction, (2004).

later defined corporate nationality by incorporation theory. The Tribunal held that according to the ordinary meaning of the terms of the Treaty, the Claimant is an 'investor' of Lithuania as it was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations; and the Treaty contains no additional requirements for an entity to qualify as an 'investor' of Lithuania."[84] Nonetheless, Ukraine argued that the tribunal should deny jurisdiction on the ground that the Ukrainian owners had incorporated the company in Lithuania for the sole purpose of availing themselves of the protection of the Lithuania-Ukraine BIT. Although the Tribunal acknowledged that a number of investment agreements provide for the denial of benefits to entities controlled by the host state's own nationals, it noted that the Ukraine-Lithuania BIT did not do so: it is not for Tribunals to impose limits on the scope of BITs not found in the text.[85] The tribunal found that there was no abuse or fraud as the founding of Tokios Tokelés predated the Lithuania-Ukraine BIT.

The second case is *Saluka v The Czech Republic*[86], in which the claimant was a legal person incorporated under the laws of the Netherlands. Saluka Investments BV, a Dutch Company, which had acquired shares of the Czech state-owned bank IPB (Investicní a Postovní Banka), claimed a violation of Article 5 (deprivation of investment) and Article 3 (fair and equitable treatment) of the BIT between the Netherlands and the Czech Republic. The respondent objected that Saluka was merely a shell company controlled by its English-registered company, Nomura Europe which was a subsidiary of the Japanese Investment Bank. Czech Republic stated that the claimant did not have real economic interest in the IPB shares therefore it failed to meet the definition of an investor under the BIT. The tribunal rejected these arguments on basis of the treaty language which defined the investor as "legal persons constituted under the law of one of the Contracting Parties". The tribunal considered the disadvantages of the formalistic test, in particular the risk for "treaty shopping", but respected the contracting parties' choice of definition of investor.[87] Tribunal's competence usually does no go beyond the treaty wordings and the parties' intent.

2.3.2. Real seat theory

Real seat theory refers to the entity's principal seat of business. In order to avoid treaty shopping some states require a legal person should not only be constituted or incorporated

[84] *Ibid,* para 28.
[85] *Ibid*, para 36.
[86] Saluka Investments B.V. v. The Czech Republic, under UNCITRAL Rules, Partial Award (2006).
[87] *Ibid*, paras 240-241.

in the host country but also have its seat and/or effective management there. As an example, Germany-China BIT[88] , which defines 'company' in respect of Germany "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany […]". In France-Singapore BIT[89] and Italy-Libya BIT[90], real seat of the company is one of the necessary conditions saying that investor is juridical persons organized under the law of the contracting state and having in that territory its *siege social* or main headquarters.

ASEAN Agreement for the Promotion and Protection of Investment[91] also contained a combination of the criteria of the place of incorporation and the company seat. This provision firstly was applied in *Yaung Chi Oo v. Myanmar*.[92] The claimant was incorporated in Singapore, a party to the agreement. The tribunal found that the effective management clause was originally included in the ASEAN Treaty to avoid forum shopping, which is the adaptation of a local corporate form in absence of any real economic connection in order to bring a foreign investment within the scope of treaty protection. It finally held that the claimant was a Company of a Contracting State other than Myanmar. It noted that unless some indication of improper forum shopping exists, the company would be a company of the state of incorporation when the legal requirements of that state on this issue are satisfied and there are some other indication of management in that state.[93] The tribunal decided that the real seat requirements were satisfied. It found that the claimant's director was resided in Singapore and the claimant conducted certain business activities, more precisely procurement, from Singapore. Therefore, the tribunal found that the nationality of the company's shareholders was irrelevant, as was the source of the capital. In context of the real seat theory, investors have to open a branch of their business or have a representative in the Host state that is incorporated according to the domestic laws. Hence foreign control in the domestic entity is the next point in determining the corporate nationality.

[88] Germany-China BIT, entered into force on 11 November 2005.
[89] France-Singapore BIT, entered into force on 18 October 1976.
[90] Italy-Libya BIT, entered into force on 20 October 2004.
[91] ASEAN Agreement for the Promotion and Protection of Investment , Association of Southeast Asian Nations (Jan. 16, 2021, 17:03), https://asean.org/?static_post=the-1987-asean-agreement-for-the-promotion-and-protection-of-investments.
[92] Yaung Chi Oo v Myanmar, Award, 31 March 2003, 8 ICSID Reports 463.
[93] *Ibid,* paras 49 and 62.

2.3.3. Control

ICSID article 25(2)(b) includes the nationality of controllers into criteria of determining the corporate nationality. As most countries require a domestically incorporated entity in order to make an investment, solely relying on incorporation theory for determining the eligibility for treaty protection would be a dire consequence for the foreign investor. Thus ICSID Article 25(2)(b) permits a local corporation to assume the nationality of its foreign controller.[94] As explained by *Aron Broches*, the purpose of the control test in the second part of Article 25(2)(b) is to expand the jurisdiction of ICSID. He said:

> *"There was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national in the host country, it becomes readily apparent that there is need for an exception to the general principle that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention"*[95]

Foreign control in local corporations can be manifested directly or indirectly. Directly would assume that the foreign national is present, is a sole shareholder, whereas indirect control would entail juxtaposition of foreign national's position through shareholding. The tribunals decide on the presence of foreign control on case-by-case basis. As a general rule the foreign control would appear in following situations: (a) foreign national is a sole or a majority shareholder; (b) foreign national has significant decision-making power through voting rights; and (c) foreign national has significant influence in appointing managerial personnel.[96]

Number of international treaties include foreign control as determining pillar of corporate nationality. The Multilateral Investment Guarantee Agency Convention requires incorporation and seat or, alternatively, control. Under Article 13(a)(ii)[97] a juridical person

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[94] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 248, Cambridge University Press (2018).
[95] Aron Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 136, Recueil des Cours de l'Académie de Droit International, 331 at 358, 359 and 361 (1972).
[96] *Ibid*, 249.
[97] The Multilateral Investment Guarantee Agency Convention, MIGA The World Bank Group (Jan. 16 2021, 17:06),
https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20(April%202018).pdf.

will qualify as an 'eligible investor' if such juridical person is incorporated and has its principal place of business in member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above case. The Draft 4th Edition of the OECD Benchmark Definition of Foreign Investment[98] emphasizes the percentage of ownership or voting power in a company as the measure of control, constituting the quantitative approach and states that the criterion recommended for determining the foreign control is majority of ordinary shares or voting power with more than 50% of the capital is held by a single foreign direct investor or by a group of associated investors.

As illustration, in Champion Trading v. Egypt[99], the tribunal applied the BIT between Egypt and the United States. The treaty, in its Article I(b), requires incorporation and control by nationals of the state of incorporation: "(b) 'company of a Party' means a company duly incorporated, constituted or other-wise duly organized under the applicable laws and regulations of a Party or its political subdivisions in which (i) natural persons who are nationals of such Party … have a substantial interest". The corporate claimant was incorporated in the United States but was owned by five individuals most of whom were dual Egyptian and US nationals. The tribunal found that it had jurisdiction over the corporation, since the BIT did not exclude dual nationals as controlling shareholders.[100]

The Netherlands-Bolivia BIT[101] includes the control criteria as 'controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party'. And this BIT was the fundament of *Aguas de Tunari, S.A. v Republic of Bolivia*.[102] It relied on the definition of 'national' in Article 1(b) of the Bolivia-Netherlands BIT, which included legal persons incorporated in the host state but controlled by nationals of other state. The tribunal found that the controlling Netherlands companies were more than just corporate shells set up to obtain jurisdiction over the dispute before it.

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[98] OECD Benchmark Definition of Foreign Investment (Draft) – 4th edition, DAF/INV/STAT (2006)2/REV. 3, (2007).
[99] Champion Trading Company v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award (2006).
[100] *Ibid,* paras 206-323.
[101] Netherlands-Bolivia BIT used as an illustration, terminated in 2009.
[102] Aguas de Tunari v. Bolivia, ICSID case No. ARB/02/03, Decision on Jurisdiction (2005). The background of the dispute concerns Bolivia's international tender process to privatize water, sewage services and an electricity generation license in 1998. Aguas de Tunari (AdT) is the locally incorporated Bolivian entity for a consortium led by International Water, Ltd., incorporated in the Cayman Islands, and 100% owned by Bechtel Enterprise Holding, a US company. A concession agreement between the Bolivian government and AdT took effect in 1999, and provided for a 40-year relationship between AdT and the Bolivian water and electricity authorities. The concession agreement resulted in significant public controversy in Bolivia, especially among labor organizations and civil society groups.

Thus, it found that the BIT's nationality requirements were fulfilled.[103] The tribunal concluded "that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity".[104]

2.4. 'Divisible' investors

Nationality requirement in investment law protects the Host state from being sued by their own nationals through investment treaties. However, it does not protect the host state from being sued by the same investor under different investment treaties. Such investor would be the 'divisible' investor. The CME v. Czech Republic[105] and Ronald S. Lauder v. Czech Republic[106] illustrates this issue of 'divisible' investor.

CME, a Dutch company fully owned by Mr. Lauder, is a majority shareholder in Czech broadcasting company. When Czech Republic terminated the broadcasting license of CME, it brought claims under the Netherlands – Czech Republic BIT (1991), whereas Mr. Lauder brought claims against Czech Republic under US – Czech Republic BIT (1991). Despite the fact that CME and Mr. Lauder have different legal personalities, it would have been absurd for CME to bring claims without the majority shareholder Mr. Lauder's consent. Mr. Lauder's action makes what could have been one case into two. Therefore, making him a 'divisible' investor. The Czech Republic opposed in both proceedings claiming that it was a 'abuse of process'. Nonetheless, the tribunal disagreed. According to the tribunals, there was no abuse of the Treaty regime by Mr. Lauder in bringing identical claims under two separate treaties. The fact that the two different treaties grant remedies to the respective claimants deriving from the same facts and circumstances, does not deprive one of the claimants of jurisdiction.[107] Furthermore, Lauder v. Czech Republic tribunal stated that the existence of numerous proceedings do not undermine Parties' right and the present proceedings are the only place where the Parties' rights under the Treaty can be protected.[108] The tribunal dealt with the propriety of the investor directly and verified if the investor meets the nationality requirement of the Treaty under question, then the investor would be the protected investor.

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[103] *Ibid*, paras 206-323.
[104] José Luis Alberro-Semerana, one of the arbitrators, issued a declaration of dissent where he maintained that Bolivia could not have consented to face arbitration from an unlimited "universe of beneficiaries" and that the tribunal should have undertaken further inquiry as to the "motivations and the timing" of Bechtel's decision to restructure the corporate ownership of the claimant company.
[105] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award (2001).
[106] Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award (2001).
[107] CME v. Czech Republic, UNCITRAL Partial Award, para 412 (2001).
[108] Ronald S. Lauder v. Czech Republic, UNCITRAL Final Award, para 174 (2001).

Nonetheless, in the sense of Article 25(2)(b) of ICSID Convention, the different legal entities can be disregarded for the purpose of nationality but not in the context of parallel proceedings.[109] Extension of Treaty protection to the 'divisible' investors could increase the risk of double recovery. When investor brings multiple claims in his own name and in the name of the entities that he controls, then the state could end up paying double for the factually and circumstantially similar cases. Consequently, double payment will prompt unjust enrichment of the investor at the expense of the host state.[110]

Such scrutiny came under other tribunals attention in Ampal-American v. Egypt case.[111] Ampal-American Israeli Corp. brought claims against Egypt when the latter terminated a gas supply contract with local companies. Ampal-American Israeli Corp. was a shareholder in local company, and brought claims under US – Egypt BIT. Second claim was brought by Mr. Maiman, the CEO of Ampal, under the Poland – Egypt BIT.[112] Both Ampal and Mr. Maiman suffered losses in connection to their shareholding local company's contract termination. The tribunal directed Ampal group to discontinue their second claim in UNCITRAL tribunal. The tribunal found that it is a double pursuit of the same claim in respect of the same interest and results in an abuse of process.[113] Further, the tribunal clarifies that this abuse was not intended by the Claimants, it is merely the result of the factual situation.[114] Therefore, the tribunal suggested that the Claimants would discontinue their second claim in sake of the good faith and just process.

However, such decision of the tribunal does not end the issue with the 'divisible' investor and the host state remain exposed to multiple proceedings. Eligibility of 'divisible' investors remain under discussion. Older generation of arbitral tribunals tended to accept 'divisible' investors under the Treaty protection. However, present time tribunals tend to drift the other way and see that the risk of double recovery is distressingly high.

2.5. Definition of the 'Investment' in International Investment Law

There is no common definition for what constitutes a foreign investment. This absence of common legal term is due to the fact that the meaning of term investment varies according

[109] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 253, Cambridge University Press (2018).
[110] See further, C. Schreuer, *Unjust enrichment in international law*, American Journal of Comparative Law 281, 281-391 (1974).
[111] Ampal-American v. Egypt, ICSID case No. ARB/12/11, Decision on Jurisdiction (2016).
[112] Yousef Maiman and others v. Egypt, UNCITRAL, pending.
[113] Ampal-American v. Egypt, ICSID case No. ARB/12/11, Decision on Jurisdiction, paras 331. 334 (2016).
[114] *Ibid.*

to the object and purpose of different investment instruments which contains it. Historically, the term investment in international law meant the obligation created by law to protect the foreigner and his physical property. It also implied the responsibility of the state when it fails to perform so. Customary international law and earlier international agreements did not use the notion of investment but the one of "foreign property" dealing in a similar manner with imported capital and property of long-resident foreign nationals.[115]

Traditionally, the investment has two different types: direct or portfolio investments. Portfolio investments are the ones which are issues as a bond to the financial markets by the governments of developing country. The actual difference between these two investments lay in two categories: risk and protection in a court of law. In the portfolio investments the investor himself usually takes upon the risk of making such investment. If the investors were to face losses, then they cannot sue the national stock exchange or the public entity that runs the market. Likewise, if he were to suffer loss by buying foreign shares, bonds or other instruments, there would be no basis on which he could seek a remedy.[116] And secondly, because portfolio investments were considered as an ordinary commercial risk, the investors did not have grounds to be protected by customary international law.[117] One view maintains that there should be no distinction between portfolio investments and foreign direct investments as the protection to either is provided by the international investment law. In this case, the risks taken by both portfolio and direct investor are being voluntarily assumed. But this point of view is generally not supported by international law.

Over the time international investment treaties started including not only tangible assets, but also intangible assets. Such as contractual rights; rights associated with the holding of property (lease, mortgage, liens); loans; shares in companies; intellectual property rights; administrative rights. The most argued or discussed assets are, firstly, shares in companies: International Court of Justice (Barcelona Traction Case)[118] held that when company is incorporated in accordance with home state's law, it cannot be protected by international law as the subject cannot be identified as a foreigner. But the solution to this issue was found in Bilateral Investment Treaties, since parties started including shares in companies to the list of investments. Secondly, intellectual property rights: when a new invention has to be

[115] UNCTAD, Scope and Definition, 2 UNCTAD Series on issue in international agreements, (1999).
[116] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8, Cambridge University Press (2010).
[117] But the customary international law protected physical assets of the investors by principles of diplomatic protection and state responsibility.
[118] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (1962), International Court of Justice (Jan. 16, 2021, 21:55), http://www.icj-cij.org/en/case/50/judgments.

manufactured in the developing country or to be transferred by a foreign investor to a local partner within a joint venture, it would be necessary to provide for the protection of the intellectual property rights associated with the venture. And thirdly, administrative rights that foreign investors acquire in the host state. Under administrative rights falls administrative procedures involving environmental licenses for exploitation of natural resources and planning permissions for constructions, which the investor has to secure before he could commerce on his investment project.

Most multilateral agreements or treaties use very broad definition of investment, stating 'every kind of asset'.[119] But there are three major notes the legislator and writers use to narrow down the definition: interpretative note; specified field of activity and negative approach. Interpretative note can be seen in Multilateral Agreement on Investment (MAI), which was composed under auspices of OECD. MAI states: An asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain of profit or the assumption of risk.[120] By these sections international agreements explain what kind of assets fall under the category of investment. Specific field can be seen in Energy Charter Treaty which states: every kind of asset associated with economic activity in energy sector.[121] And lastly, the negative approach is used in NAFTA by stating: investment is every kind of asset excluding money claims arising solely from commercial contracts or the sale of goods and services.

On the other hand, BITs have a purpose to narrow down the categories of definition on investment. But most of them have the same structure specifying investment as every kind of asset, followed by non-exhaustive list of categories of covered investments. The most common categorizations are: movable and immovable property; interest in companies (debt, equity investment); claims to money and claims under a contract with financial value (except NAFTA[122] countries); intellectual property rights; business concession under public law[123]. Majority of them take four basic definitional dimensions into consideration: form of the investment; area of economic activity; duration of the investment; investor's connection with host state. Such a definition is sufficiently broad to encompass FPI as well as FDI. There are

[119] OECD Multilateral Agreement on Investment, The Organization for Economic Cooperation and Development (Jan. 16, 2021, 21:57), http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.
[120] Draft MAI Negotiation Text, The Organization for Economic Cooperation and Development (Jan. 16, 2021, 21:57), http://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.
[121] Article 1(6), Energy Charter Treaty.
[122] North American Free Trade Agreement (1994).
[123] Meaning extraction and exploitation of natural resources.

BITs which include debt instruments as well: bonds, debentures, futures, options and other derivatives. And some BITs include: every asset owned or controlled, directly or indirectly, by an investor, which has the objective characteristics of an investment.

2.6. Two perspectives of an investment

Defining the protected investment under the treaty is of essence as the tribunal's jurisdiction will be established on the fact whether the claim is brought upon a protected investment. When claim is brought to the tribunal, it's first step would be to establish the existence of protected investment in the dispute. If the investment in dispute is not proved to be a protected investment under the applicable treaty, consent to arbitrate a dispute arising from the investment is not established.[124] In international investment law exist two perspectives in defining a protected investment. First perspective is to use the subjective meaning of investment stated in the applicable investment treaty. Second perspective is to use objective meaning of investment which is built up on characteristics of investment such as duration, capital contribution and risk.

2.6.1. The subjective perspective

The subjective definition of investment strictly refers to the wording of the applicable investment treaty. It is usually presented as a non-exhaustive list of the forms that investment can take. It is common that majority of countries choose the ICSID as dispute resolution method when drafting their investment treaties. Therefore, subjective definition of the investment would be found in the text of applicable treaty and Article 25(1) of ICSID Convention or any other international treaty that Contracting Parties have chosen. However, Contracting Parties of ICSID failed to come to consensus on the definition of investment, hence there is no single harmonizing definition of investment in the Convention. Consequently, when deciding the eligibility of the case, the tribunals have to examine closely if the investment in dispute is within the list of assets as applicable investment treaty defines the investment.

As an illustration we will examine MHS v. Malaysia[125] case, where MHS, a British company, sued Malaysia for payment due under marine salvage contract. Sole arbitrator

[124] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 211, Cambridge University Press (2018).
[125] Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (2007).

denied jurisdiction as he could not establish that marine salvage contract was an investment according to Article 1(1)(a) UK-Malaysia BIT.[126] The arbitrator found that marine salvage contract did not present any usual characteristics of a protected investment such as returns of profit, capital outlay, duration and risk.[127] Furthermore, in Electrabel S.A. v. Hungary, the claimant brought expropriation claims but the tribunal established that power purchase agreement itself was not considered as a covered investment and its termination did not deprive the claimant's investment of its value.[128] MHS applied to annul the Award pursuant to Article 52(1) of ICSID and the majority of Ad Hoc Committee agreed that the sole arbitrator exceeded his powers when he denied jurisdiction without considering definition under Article 1(1) of UK-Malaysia BIT. They found that marine salvage contract was in fact a protected investment under Article 1(1)(a). Ad Hoc Committee concluded that the ICSID was the only option for an investor to seek protection under UK-Malaysia BIT and the Contracting Parties intended to include contracts as an investment in accordance with the BIT and its purpose.[129] The main argument in considering the contract as investment was the fact that issue originated in money claim and performance under a contract; contract involved intellectual property rights and the right granted to salvage may be treated as a business concession.[130] Judge Shahabuddeen issued a dissenting opinion, where he stated that the characteristics that sole arbitrator used is the 'outer limit' of investment definition and it is necessary to protect investment from an overly capacious treaty definition.[131]

Nevertheless, the decision touched upon a wide interpretation outside of the treaty interpretation and that cannot be applicable for other treaties. For example, ASEAN's new Comprehensive Agreement of 2009 has more precise definition of the investment.[132]

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[126] Article 1(1)(a) of UK-Malaysia BIT refers to investment as: every kind of asset and in particular, though not exclusively, includes:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stock and debentures of companies or interests in the property of such companies;
(iii) claims to. money or to any performance under contract having a financial value;
(iv) intellectual property rights and goodwill;
(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, UNCTAD Investment Policy Hub (Jan. 16, 2021, 22:09), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1972/download.

[127] Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, para 108-123 (2007).

[128] Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, para 6.53; 6.57-58 (2015). See Csongor Istvan Nagy.

[129] Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, para 61-62, (2009).

[130] *Ibid.*

[131] Dissenting opinion of Judge Mohamed Shahabuddeen, para 7-8, (2009). Italaw, (Jan. 16, 2021, 22:12), https://www.italaw.com/sites/default/files/case-documents/ita0498.pdf.

[132] Article 4 of ACIA. See Chapter 5 ASEAN.

Therefore, such division of opinions whether definition of a protected investment should be looked beyond the treaty wordings or not needs more precise study and attention.

2.6.2. The objective perspective

Given the very broad definition of protected investment, the tribunals refer to fundamental characteristics of the investment. These characteristics determine if the investment has the basic qualities of a protected investment and contains the intent of application by Contracting Parties of a treaty. Such objective approach was applied in MHS v. Malaysia case and later supported by the dissenting opinion of Judge Shahabuddeen. Regarding the application of such characteristics in determining whether the subject of the dispute falls within the scope of protected investment, the Salini v. Morocco is the most scrutinized case. In Salini Costrutori S.P.A. and Italstrade S.P.A. v. Morocco[133] the arbitral tribunal held that a civil construction contract was an investment within the meaning of the Italy-Morocco BIT since it created "a right to a contractual benefit having an economic value' covered by Article 1(c) as well as a 'right of economic nature conferred by contract' under Article 1(e). The tribunal observed that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre, which cannot be diluted by the consent of the parties. The Salini-test is derived from the aforementioned case. It contains few criteria to decide whether certain undertakings were a protected investment. The criteria are: a substantial commitment or contribution; a certain duration over which the project is implemented; regularity of profit in return; sharing of operational risk (assumption of risk); a contribution to the host state's development. The only thing that differs from a regular business activity is contribution to the development of the host country.

Nonetheless, the last criteria of a contribution to the host state's economy in the test is extremely difficult to prove. The tribunal in Phoenix v. Czech Republic found that the contribution of an investment to the development of the Host state is impossible to ascertain as there are vast views on what constitutes a development.[134] Therefore, using the remaining set of tests as duration, risk and elements of contribution would be more suitable.[135] Similar decision was made in LESI v. Algeria case and the tribunal stated that it is not necessary for the contribution to meet certain requirements as aiding the economic development of the

[133] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (2001).
[134] Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award, para 85, (2009).
[135] *Ibid.*

Host State.[136] Furthermore, the contribution to the Host State's economy criteria of Salini test came under scrutiny of other tribunals, it has become the starting basic template for tribunals to use. Usually the subsequent tribunals are using the contribution, duration and risk criteria. And cases such as LESI v. Algeria and Phoenix v. Czech Republic verified the existence of protected investment using the objective criteria.[137]

Nevertheless, the Salini test is more of a complementary definition of investment characteristics, rather than mandatory test that all investment must go through. For example, the tribunal in Phillip Morris v. Uruguay stated that the Salini test does not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction.[138]

Conclusion

As a general rule, investors take a form of individual investors or corporations. Their nationality depends on factors such as place of incorporation, place of effective management and nationality of controlling shareholders. For individual investors their nationality is determined by their factual nationality and in cases of dual nationality the effective residency prevails. Investor's nationality issue sprung an abuse of the protection provided for foreign investors. Precisely, when the foreign investor as a corporation and its shareholder as an individual investor both sue the respondent in factually the same case. However, it is not against the regulations of the full protection clause, therefore the tribunal can only suggest the divisible claimants to show a good faith and end one of the proceedings.

There is no common definition of investment in international and bilateral treaties. It differs from the purpose and instrument of applicable treaty. International tribunals use one of the two meanings of investment: subjective and objective. Subjective refers to the strict wording of applicable investment treaty and does not cross its border. And objective meaning refers to the usual characteristics that can be deduced form the investment. Objective meaning protects investments that fell behind the treaty protection. It reflects the nature of such investment and the intent of the Contracting Parties.

[136] LESI v. Algeria, ICSID Case No. ARB/03/8, Decision, para 72(iv) (2006).
[137] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, 223, Cambridge University Press (2018).
[138] Phillip Morris v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, para 206, (2013).

CHAPTER 3

Construction of Mongolian legal framework on foreign investment: history and challenges

Protection of foreign investment and related regulations are primarily based on international investment treaties and domestic investment laws of the subjected host country. Coexistence of these two is important as domestic laws acknowledge the supremacy of international treaties and international tribunals refer to the domestic laws as part of the governing law in investment arbitration. Importance of domestic laws lay in its relevance as it incorporates definition of foreign investment and investor; rules on entry and admission of foreign investment; investment protection clauses; and special privileges that are presented for the foreign investors. Above mentioned clauses are core of the international investment law and are crucial in investment treaty arbitrations.

Domestic investment laws incorporate complete and detailed rules on foreign investment regulation and represent the host country's policy towards foreign investment. They aim to control and promote the foreign investment flow in the country. However, for developing countries such as Mongolia that heavily depend on investment flow, the promotion factor is prevailing than the controlling factor. Moreover, domestic investment laws include more or less similar clauses as international investment treaties. For instance, investment protection clauses (NT, MFN, expropriation, free transfer of funds) and most importantly investor-state dispute settlement. It usually contains a unilateral legal offer by the host state to resolve disputes in independent international tribunal by invoking investor-state dispute settlement mechanism. Inclusion of investor-state dispute settlement and openness to international arbitration is crucial in order to strengthen the foreign investor's belief in the favorable investment climate of the host country. Nonetheless, domestic investment laws are instrument of the host state and represents its authority. Therefore, there is a greater risk that it would be subject of amendment and termination much easier than international investment treaties.

This chapter reviews Mongolian foreign investment regime through its investment laws and related regulations. The review of foreign investment laws in detail formulates the country's investment regime and its coherence with international investment regime. Since the very first investment law, Mongolia aimed to enact every suggestion from foreign investors and international organizations into its legislation. Moreover, Mongolia's few

investment treaty arbitrations demonstrated its investment regime's flaw, which gave Mongolia chance to develop the regime further.

3.1. Historical timeline of investment law in Mongolia

Mongolia is one of the fastest growing economies in the world.[139] According to the World Bank Group, Mongolia is among the most open economies for foreign investment in the Eastern Partnership region.[140] Following international developments in trade and investment liberalization, most economic sectors in Mongolia are open to foreign participation. According to the OECD Index on Regulatory Restrictiveness to FDI -which considers four types of measures: (i) foreign equity restrictions, (ii) screening and prior approval requirements, (iii) rules for key personnel, and (iv) other restrictions on the operation of foreign enterprises for 22 sectors- only a few sectors have significant restrictions to FDI, including air, transport, and mining and quarrying.[141]

For the last two decades, Mongolia has attracted more foreign investment than in any other time in the history of the country.[142] Historically it is related to dissolution of Soviet Union as Mongolia was an ally and under heavy influence of its northern neighbor. Consequently, in 1991 Mongolia became a democratic country with its own parliament and constitution. Since then number of specialized laws were introduced that would innovate economic and social developments in the country.

Foreign investment legislations were one of the very first projects which started after the transition to democracy and introduction to market economy. First investment law draft was introduced in 1990, but it was not adequate for the establishment of long-term investment operations due to the applicable rules limited the acquisition of foreign-owned shares in Mongolian business entities to 49%.[143] The next Foreign Investment Law (FIL) was enacted in 1993[144] with alignment of domestic laws of continental European doctrines and the new Constitution of 1992[145]. Later in 2002, FIL of 1993 was amended in order to comply with

[139] See World Economic Forum, Global Competitiveness Report (2019); International Monetary Fund, World Economic Outlook (2019).
[140] World Bank Group, *Investment reform map for Mongolia policy paper* 16, (2018).
[141] *Ibid,* at 40.
[142] Mongolia's International Investment Position Statistics (2019), Central Bank of Mongolia (Jan. 16, 2021, 22:20), https://www.mongolbank.mn/liststatistic.aspx?id=4_2.
[143] The Organization of Economic Cooperation and Development, *Investment Guide for Mongolia policy paper* 49, (2010), OECD (Jan. 16, 2021, 22:21), https://read.oecd-ilibrary.org/finance-and-investment/investment-guides-investment-guide-for-mongolia-2000_9789264189607-en#page50.
[144] Foreign Investment Law, Official State Journal Toriin Medeelel No. 4–5, (1993).
[145] Constitution of Mongolia, Official State Journal Toriin Medeelel No. 1, (1992).

the World Trade Organization's requirements and domestic companies' equal and fair competition requirements. In 2012-2013, Mongolian investment regime encountered major challenges. As the government enacted Law on Foreign Investment in Strategic Sectors[146] (SEFIL), it backfired quite swiftly resulting in the substantial drop of foreign investment flow into the country. As a reconciliation, Mongolia introduced the present-day Mongolian Investment Law (MIL) in October 2013 and abolished its predecessors: FIL and SEFIL.

Throughout its evolution of the investment law, Mongolia has amended its laws and regulations to facilitate existence of a good investment climate. A good investment climate is one which provides opportunities for all investors: public and private, large and small, foreign and domestic. Furthermore, Mongolia did not show attempt to modify the existing international investment law but facilitated its existence by maintaining the status quo.

3.2. The Foreign Investment Law of 1993

The Foreign Investment Law of 1993 was the first investment law in the country and it introduced definitions of foreign investment and investor; made clear distinction between foreign and domestic investors; enacted special tax preferences exclusively for foreign investors; aimed to encourage entry of foreign investment to the country; and established the rules of investor protection.

The Foreign Investment Law defined 'foreign investment' as: 'Every kind of tangible and intangible property which is invested in Mongolia by a foreign investor for the purpose of establishing a business entity with foreign investment within the territory of Mongolia or for the purpose of jointly operating with an existing business entity of Mongolia'.[147] As stated in Article 6 of FIL, foreign investments could be made in the following forms: (a) by establishing a wholly foreign-owned business entity or a local branch or subsidiary of a foreign enterprise; (b) launching a joint-venture with local investors; (c) making a direct investment through the acquisition of stocks, shares, and other securities of Mongolian business entities, and (d) by acquiring rights under law, concessions, or product sharing contracts for the exploitation and processing of natural resources. In particular, foreign investments were permitted in all territories across the country and in all production and service areas, unless expressly prohibited by national law.[148] It is safe to say that FIL defined

[146] Law on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors, Official State Journal Toriin Medeelel No. 23, (2012).
[147] Article 1, Foreign Investment Law 1993.
[148] *Ibid*, Article 4.

'investment' in broadest sense and gave greatest amount of freedom to invest. It reflects Mongolia's policy to open the market to foreign capital by attracting foreign investors with more privileges and preferences.

One of the special privileges for foreign investor was quite high exception of taxations. Foreign Investment Law gives definition of "business entity with foreign investment"[149] in order to grant special investment preferences and privileges to these entities. Article 11 states that business entity with foreign investment is an entity incorporated under the laws of Mongolia with foreign capital contribution of not less than 20%. Furthermore, Article 12 requires the approval by the then Mongolian Ministry of Trade and Industry for the establishment of such business entities. Within 60 days, application of an investor was examined by the Ministry in compliance with domestic legislation, environmental and health impact requirements, and level of technology and innovations used in the investment operation. Preferences for investors started as exempt from custom duties and trade taxes of technological equipment and machinery contributed as business capital and all business-related imported parts, materials and spare parts. Further far-reaching exemptions from income taxation are included in Article 20. Activities of business entities with foreign investment in relation to power and thermal plants and grids, highways, railways, air cargo, engineering constructions, and telecommunication networks received an income tax exemption of 10 years and then a 50% tax rate relief during the following 5 years. Mining (except of precious metals), oil and coal, metallurgy, chemical production, machinery, and electronics investments enjoyed a 5-year tax exemption and 50% tax relief in the following 5 years. Other business entities with foreign capital could be exempted from income taxation for 3 years and by 50% for 3 more years if more than 50% of the goods produced were exported. If income was reinvested in the income-generating business entity, the future income tax of the business entity was reduced by the value of the re-investment.[150]

Substantive law provisions of the Foreign Investment Law were mostly concentrated on investment protection. Legislators acknowledged the supremacy of international treaties over domestic laws in the event of conflict of law. As for substantive legal treatment and investment protection, Article 8.1 generally stated that foreign investments enjoy "legal protection guaranteed by the Constitution, this law and other legislation which is consistent

[149] *Ibid*, Article 11.
[150] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 150, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).

with those laws and as guaranteed by the international treaties to which Mongolia is a party". Under FIL, expropriation is unlawful unless foreign investments were expropriated in the public interest, under due process of law, on a non-discriminatory basis, and against full compensation. As states in Article 9, foreign investors enjoyed an express national treatment guarantees such as: "to possess, use, and dispose of their property including the repatriation of investments which contributed to the equity of a business entity with foreign investment"; "to manage or to participate in managing a business entity with foreign investment"; and "transfer their rights and obligations to other persons in accordance with the law."

Furthermore, it expressly secured the free remittance of income, profits, and payments of foreign investors outside the host country. Nonetheless, Foreign Investment Law did not only have preferences to investors, but included legal duties of an investor. These duties were to comply with domestic laws and corporate partnership agreements, to protect and restore the natural environment, "to respect the customs and traditions of the people of Mongolia"[151], and to primarily employ Mongolian citizens.[152]

Procedural law provisions on the settlement of investor-state dispute settlement was explicitly 'local-jurisdiction requirement'. This meant that any legal dispute arising from investments between foreign investors and Mongolian natural or legal persons, including the State and its authorities, had to be resolved in the national courts, unless provided otherwise by an international treaty or by a contract between the disputing parties.[153]

Foreign Investment Law of 1993 was amended dramatically in 2002. These amendments were made as to comply with requirements of WTO and local investors in the country. The domestic investors were frustrated and demanded an amendment due to the fact that only foreign investors could benefit from tax exempt according to FIL. Foreign investors, on the other hand, demanded less administrative bureaucracy in relation to the granting necessary administrative law permits, invoked a broader scope of application of the domestic Foreign Investment Law, and criticized uncertainties concerning the further stabilization of their domestic legal environment.[154] After conducting a survey in 1999, Parliament of Mongolia started drafting the amendments to FIL and finalized it in January 2002.

[151] Article 10.2 Foreign Investment Law 1993.
[152] *Ibid*, Article 24.
[153] *Ibid*, Article 25.
[154] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 152, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).

The amendments of 2002 increased the percentage of foreign capital in business entity from 20% to 25%; abolished the bureaucratic special approval system for investments and reduces business activity exclusions from formerly 36 areas to only six.[155] Furthermore, the 2002 Foreign Investment Law amendment removed all taxation preferences that exclusively applied to foreign investors and referred to the otherwise applicable domestic laws instead.[156] Nonetheless, general tax law of Mongolia still favored foreign investors over domestic ones.[157] The most essential modification of 2002 was the introduction of "stability agreements", which were legal guarantee for a stable legal environment to conduct business activities. Such agreements were given upon request to the investors who have invested over 2 million USD.[158]

Main agenda of stabilization agreements was to secure investors' tax conditions for certain period of time, which differentiated depending on the investment amount. For example, when investors made an investment in Mongolia between USD 2 and 10 million or an investment of more than USD 10 million, the Government was authorized to sign a stability agreement for 10 or 15 years respectively. As counter measure for secured investment, Government of Mongolia enacted a clause where the investor should repay awarded tax exemptions in case of unilateral termination of the investment activity before the end of the stability agreement term. Exception to this clause was bankruptcy.

In the Investor-State arbitration of *Paushok v. Mongolia*, the Tribunal dealt with a stabilisation agreement issued under the 2002 FIL. The Tribunal defined it as an agreement: "Between a State and an investor for the purpose of stabilizing (freezing), at least to a certain extent and for a certain period of time, the taxes payable by an investor and/or other legislative, regulatory or administrative measures affecting it".[159] Investment protection and dispute settlement clauses were not changed, except the slightly extended right to freely remit incomes, profits and payments. The clause on supremacy of domestic courts in investment disputes was not changed too.

Foreign Investment Law of 1993 aimed to encourage FDI by defining special tax preferences and privileges and had clear distinction between foreign and domestic investor.

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[155] OECD, Investment Guide for Mongolia policy paper 55, (2000).
[156] Article 18, Foreign Investment Law, Official State Journal Toriin Medeelel No. 1, (2002).
[157] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 153, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).
[158] Article 19 Foreign Investment Law (2002).
[159] Paushok v Mongolia, Award on Jurisdiction and Liability, para 97, (2011). UNCTAD Investment Policy Hub (Jan. 16, 2021, 22:27), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/276/paushok-v-mongolia. See 3.1.

It introduced the basic rules of investment protection; and defined 'investment' and 'business entities with foreign investment' in the broadest sense and gave greatest amount of freedom to invest. However, 1993 FIL was amended in 2002 as a result of complaints from domestic investors regarding foreign investor exclusive tax preferences and requirements of WTO regarding safety and stability of investments.

3.3. Law on Foreign Investment in Strategic Sectors

The Law on the Regulation of Foreign Investment in Entities operating in Strategic Sectors (SEFIL) was introduced by the Parliament of Mongolia in May 2012.[160] Purpose of the new law was to retain the control over the Mongolia's natural resources, the exploitation of which was becoming more and more dynamic at that time.[161]

By the end of 2010 investors were benefiting from fairly carefree provisions of 1993 and 2002 Foreign Investment Laws, which offered the investors greater freedom in investing. These liberal provisions attracted great number of foreign investment to the country. In 2011 and 2012, the Mongolian GDP rose by incredible 17% and 12% to one of the highest in the global economy.[162] Mining being the main area of foreign investment, exploitation scales of natural resources skyrocketed. Government of Mongolia started to fear about the mineral wealth in the country and it became sensitive political issue.[163] International organizations were of the same idea regarding the problem Mongolia was facing.[164] It is understandable that a landlocked country between two great nations must widen the areas of investment in the country after such rapid economic growth. According to the UNCTAD's 2012 study on Mongolia's investment policy, China had a leading source of FDI inflows with a 32% share in 1990 – 2012, followed by the Netherlands, Luxemburg, the British Virgin Islands and Singapore.[165]

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[160] Law on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors, Official State Journal Toriin Medeelel No. 23, (2012).
[161] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 154, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).
[162] World Bank, Mongolian Quarterly Economic Update 7, World Bank working paper No. 70210 (2012).
[163] SUKHBAATAR SUMIYA, LAW AND DEVELOPMENT, FDI, AND THE RULE OF LAW IN POST-SOVIET CENTRAL ASIA: THE CASE OF MONGOLIA 137 (Gerald Paul McAlinn & Caslav Pejovic eds., Law and Development in Asia) (2012).
[164] In UNCTAD Investment Policy Review: Mongolia 36, UNCTAD noted that importance of mining deposits has raised legitimate policy concerns related to national security and economic interests, including control over national resources (2012). The data was made solely on the basis of immediate investors and not the ultimate beneficiary owner/investor.
[165] *Ibid*, at 26-27.

As stated in the Article 1 of Law on Foreign Investment in Strategic Sectors, the purpose of the law was to regulate investment related cooperation between domestic entity and foreign investor, particularly in strategically important sectors that impact national security. To put it in a simple way, Mongolia was trying to pertain control over foreign investments in sectors of public interest, as further development of mineral resources was at stake. Besides, Government of Mongolia had to restore its reputation of reliable and liberal investment partner.[166]

The law defined the sectors mining, banking and finance, media, information, and communications as strategic 'for the purposes of national security with a view to ensure the basic needs of the population, the independence, the normal operations of the economy and the national revenues and affirming the national security'.[167] Furthermore, Article 9 set a clause that every transaction in breach of the requirements of SEFIL is null and void.

Articles 4 and 6 of SEFIL, established an obligation for investors to obtain permission on certain contracts and transactions, between domestic business entity and foreign investor, from Government of Mongolia. Such permission should be obtained through a domestic business entity registered in Mongolia. SEFIL started differentiating investors into private and state-owned. And by categorizing as such, Article 5 enabled requirements to obtain before mentioned permission to be different for each investor. Namely, investments made by foreign business entity partly or fully owned by a foreign government were subject to undeniable permission requirement, regardless of the sector in which the investment is made or the percentage of shares and interests in Mongolian business entity. On the other hand, private foreign investors were either subject to either a simple formal registration or had to obtain Government permission as well, depending on the amount of investment and its respectable sector.

Such permissions were necessary (a) if a foreign private investor acquired one third or more of the shares of a business entity operating in Mongolian strategic sectors; (b) if any foreign investment transaction conferred an unconditional right to elect the executive management, the majority of the joint executive management and the board of directors; (c) if contracts touched upon a right to veto the decision of the executive management of an entity operating in a strategic business sector; (d) if transactions conferred 'rights to enforce

[166] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 154, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).
[167] Article 5, SEFIL.

the directions of the management, determine its decisions and exercise the economic activities; (e) if contracts were "likely to ascertain the buyer's and the seller's monopoly in the commercialization of raw minerals and their products at the international and Mongolian markets'; and (f) 'to impact directly or indirectly the market or the price of Mongolian mining products for export'. [168]

In situations where foreign investment in domestic entities operating in one of the defines strategic sectors exceeded 49% and the amount of MNT 100 billion, the Parliament of Mongolia were in charge of granting permissions or not.[169] In continuation of the strategic policy on mineral resources, in May 2014 the Parliament of Mongolia took another important step and adopted a national 'mineral resource policy strategy' with effect until the year of 2025. The political mineral resource strategy aimed to reduce the negative impacts of natural resource exploitation on environment and to maximize the revenue while preserving the nation's mineral wealth. The balance was to make profit but to the limit where it would harm the natural environment.

The Law on the Regulation of Foreign Investment in Entities operating in Strategic Sectors awarded the public law authorities ample discretionary powers when screening the entry and admission of foreign investment in Mongolia.[170] It implemented a strict screening process among the foreign investments due to concerns regarding protection of natural resources in the country and consequently national security. In SEFIL's coverage national security covered exploitation of natural resources in proportionally and maintaining the market monopoly free. Hastily drafted SEFIL of 2012 resulted in major concerns from established and potential investors who were puzzled with uncertainty. SEFIL was cited numerous times for having contributed to the significant decline in FDI inflows along with external factors such as the slowdown of Chinese economy and the fall in commodity prices.[171] The law was in force for only seventeen months, and it was self-evident that Mongolia needed a new complex legislation on investment matters.

[168] *Ibid*, Article 6.
[169] *Ibid*, Article 4.7.
[170] UNCTAD, Investment Policy Review: Mongolia 40, (2013).
[171] World Bank Group, Invest Reform Map of Mongolia policy paper 39, (2018).

3.4. Mongolian Investment Law

In 2013 as a relief from SEFIL, a new Mongolian Investment Law was developed and enacted.[172] Mongolian Investment Law entered force in November of 2013[173] and other relevant laws such as Law on the registration of Legal Entities, the General Taxation Law, the Mineral Law and the Nuclear Energy Law were modified accordingly.

3.4.1. Scope of Mongolian Investment Law[174]

Article 3.1.1 of Mongolian Investment Law gives a definition of investment as any 'tangible and intangible assets attributed to the joint capital and reflected in financial statement of the business entities which are for profit oriented activities in territory of Mongolia'. Further, a foreign investor is a foreign legal entity or individual (a foreign citizen or stateless person who is a non-resident in Mongolia as well as a Mongolian citizen residing permanently in a foreign country) that makes investment in Mongolia.[175] And a business entity with foreign investment (BEFI) is defined as a business entity incorporated according to the applicable legislation in Mongolia and has overall equity of US$ 100,000 or more (or equivalent in Mongolian tugriks or MNT), not less than 25 percent of which is invested by a foreign investor(s).[176] This is the minimum capital requirement for foreign entities. In order to start business operations in Mongolia, it must be incorporated either as a business entity with foreign investment or as a representative office. For the investors who are willing to make smaller investments at first instead of putting full amount, the mandatory minimum foreign contribution can be a burdensome requirement. There is no minimal equity requirement for representative office as they work on proxy basis but it does not have the power to earn revenue from business activities in Mongolia.[177]

According to the MIL, investments may take different forms: (a) establish a new business entity solely or jointly with other investors; (b) purchase shares, bond/debentures and other types of securities; (c) make an investment by a way of wholly acquiring or merging

[172] UNCTAD, Investment Policy Review: Mongolia 40-1 (UN, 2013): In summer 2012, national parliamentary election was held and new coalition started the discussion of new fundamentally revised domestic investment law system to send a clear message to investors. In UNCTAD's opinion, "revision was necessary to restore adequate legal certainty and provide a coherent message to regarding the country's openness to investors, while public concerns regarding competition, environment and health are protected".
[173] Mongolian Investment Law, Official State Journal Toriin Medeelel No. 41, (2013).
[174] An unofficial English translation, UNCTAD Investment Policy Hub (Jan. 16, 2021, 22:37), https://investmentpolicy.unctad.org/investment-laws/laws/124/mongolia-investment-law.
[175] Article 3.1.1. Mongolian Investment Law 2013.
[176] *Ibid*, Article 3.1.5.
[177] *Ibid*, Article 3.1.6.

companies; (d) establish of concession, product sharing, marketing and management and other agreements; (e) financial leasing or franchise; and (f) any other forms which are not prohibited by the specified laws.[178]

The Article 4.2, which states that that any investor, domestic or foreign, may invest in any sector without any limitation or Government approval, unless otherwise prohibited by the government. The exception generally applies to foreign state-owned enterprises (SOE) that seeks to acquire more than third (33% or more) of the equity of a Mongolian company in a few strategic areas such as mining, media and telecommunication, banking and financial sectors.[179] These SOEs must submit their applications with necessary documentations in Mongolian language to the Government's investment agency through a representative office and a representative authorized in Mongolia.[180] According to Article 22.4, submitted applications will be reviewed in following aspects: (a) compatibly with the country's national security concept; (b) compliance with applicable domestic laws; (c) restriction of competition and dominance in the business sector concerned and (d) serious and adverse impacts on the budget revenue and/or other policies and activities of the Mongolian State.

3.4.2. Taxation Preferences

One of the incentives that attracts investors is the taxation preferences. Mongolian Investment Law defines the types of tax incentives that are granted under Mongolian Taxation Law. Mongolian Taxation Law may allow the depreciation expense to be calculated under the accelerated method and to be deducted from the taxable revenue, the loss to be deducted from the taxable revenue by transferring it to the future revenue, or the employee training expense to be deducted from the taxable revenue.[181]

The main novella of tax incentives in 2013 MIL was the tax rate stabilization certificates purpose of which is to stabilize the rate and amount of tax and payment specified in MIL, to an investing legal body that fulfills the requirements specified in.[182] Tax rate stabilization certificates cover four types of taxes: (a) corporate income tax; (b) custom duty; (c) value-added tax; and (d) mineral resources royalty. The general criteria for issuing the certificates are total amount of investment meets the requiring amount by the law, to have environmental

[178] *Ibid*, Article 5.
[179] *Ibid*, Articles 21 and 22.
[180] *Ibid*, Article 22.1.
[181] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 164, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).
[182] *Ibid*, Articles 3.1.9 and 13.

impact assessment (for required sectors), to create stable workplace and to introduce high tech and technologies.[183] And the duration for issuing the stabilization certificates differ from business sector and region where the investment is made. The business sectors are divided into two main categories[184]:

- Mining extraction, heavy industry and infrastructure sector and
- Other sector.[185]

The tax rate stabilization certificate duration is directly proportionate to the total amount investment made in one or another region. Ulaanbaatar area requires the highest investment amount whereas Western region requires the least. Furthermore, stabilization certificates shall be valid 1.5 times longer when the investment amount is worth 500 billion MNT or more, requires more than 3 years of construction work, and create import substitutes and export oriented products which contributes sustainable development strategy in socio-economic sector of Mongolia.[186] Tax rate stabilization certificates can be invalidated if the investor is liquidated, moved out of the country or most importantly if the investor concluded the investment contract. According to the Article 20, investment contract is concluded by the Government of Mongolia with the investor who is to invest more than 500 billion MNT. Finally, tax rate stabilization does not cover production, import and trade of tobacco and alcohol.

3.4.3. Other incentives for favorable atmosphere

Constitution of Mongolia states that land shall belong exclusively to the citizens of Mongolia.[187] Sentence 3 in Article 6.3. prohibits citizens to transfer the land in their possession to foreign nationals by way of selling, bartering, donating or pledging as well as transferring to others for exploitation without permission from competent State authorities. Mongolian Investment Law consider land as non-tax promotion for investment.[188] Based on the contract, foreign investor may lease land for use up to sixty years and extension is possible for up to forty years. However, the extension is possible only once which limits the use of the land for up to a hundred years. Land law of Mongolia in Article 17.1 states that land lease contracts with foreigners require consent by the Mongolian Parliament.

[183] *Ibid*, Article 16.1.
[184] *Ibid*, Article 16.2.
[185] For further classification and monetary amounts see Articles 16.1.1 – 16.1.2 Mongolian Investment Law.
[186] Article 16.3 Mongolian Investment Law.
[187] Constitution of Mongolia, Articles 6.2 and 6.3.
[188] Article 12.1.1. Mongolian Investment Law.

Mongolian Land Law states local jurisdiction requirement for non-contractual disputes arising from land use of business entities with foreign investment.[189] This means that international arbitration is excluded with respect of non-contractual land use related disputes between host country and the investor. As Scharaw says, this investment-treaty-arbitration exception is likely to follow from Article 10.2 of the Mongolian Constitution, which states that Mongolia shall fulfil obligations resulting from international treaties, and from the prevalence of Mongolia's international treaties over conflicting domestic legislation. But land is not the only non-tax promotional measure. For example, Mongolia offer support for the investors who made investments in areas that could be beneficial for social and cultural development of country. Such areas are information technology, technological parks, infrastructure, innovation, science, and education sectors.

In addition, Government of Mongolia sets the quota of hiring foreign employees for investors. This quota ranges from five to eighty percent, but the default quota is five percent. Furthermore, employers must pay a workplace fee on monthly basis: twice the minimum wage for every foreign employee in the company.[190] The mining sector, as the most popular sector for investments, has a special requirement. Mining license holder and their sub-contractors can have up to ten percent of foreign employees. And if the number of foreign employees exceed the given ten percent, employer must pay ten times the minimum wage for every exceeding employment. On this regard, the World Bank Group mentions that even the relatively new MIL does not provide a consolidated negative list placing restrictions on foreign investment. This makes it difficult the predict on areas of limits on foreign equity participation, partnership requirements, and the identification of restricted sectors.[191]

3.4.4. Investment Protection

Reliable investment protection clauses are the most effective instrument to ensure the foreign investor of a good investment climate. Domestic investment laws usually provide various investment protection that mirror investment treaty protections including FET, NT, compensation of expropriation and free transfer of funds. Mongolian Investment Law contains below mentioned clauses.

[189] Article 60, Mongolian Law on Lands, Official State Journal Toriin Medeelel No. 21, (2002).
[190] Part 2, Government Charter on Employment payment. Mongolian Official Legal Database (Jan. 16, 2021, 22:40), https://www.legalinfo.mn/annex/details/6652?lawid=10913.
[191] World Bank Group and IFC, Investment Reform Map for Mongolia 44, (2018).

a. Expropriation and Compensation

In customary international investment law, there are four main principles that should be followed in case of expropriation: (a) it must be for public need or public purpose; (b) followed by due compensation and payment; (c) completed under due process of law; and (d) be nondiscriminatory.[192]

The fundamental right to property and its consequences when that right is violated is stated in Article 5.2 of the Constitution of Mongolia. It says that the state recognizes all forms of both public and private property and shall protect the rights of the owner of law. However, wording of Article 16.3[193], explicitly mentions only citizens of Mongolia as a landowners, thus only them can benefit from compensation forms of expropriation. In the sense of the Constitution, foreign investors are not covered in expropriation clauses deriving from land owning clauses. According to the Constitution of Mongolia, expropriation will be considered legal if the it was done in public need, with due compensation and payment[194], and under due process of law.[195]

MIL of 2013 lays conditions for legal expropriation: properties may be mobilized only for the public interest and on the condition of full compensation of expropriated properties and in accordance with the procedures specified in the law.[196] Article 6.5 of MIL mentions the methods of calculating the compensation for expropriation. It shall be valued at the market rate of the assets when it was mobilized or notified to the investor or the public. On this regard, the important novelty of MIL is that it filled the gap of foreign investor protection, which was covered vaguely in the Constitution. Mongolian Investment Law removed the definition of foreign and stopped differentiating foreign and domestic investors, bringing them together under the umbrella definition of the investor.

b. Free transfer of funds and capital

The next fundamental guarantee of investment protection for foreign investor is the ability to freely repatriate funds and capital from the host country. In other words, it is a security to exit the host country without hassle when the investor sees it appropriate.

[192] See Subedi (2008); Sornarajah (2010).
[193] Article 16.3 of Constitution of Mongolia reads: "Right to fair acquisition, possession and inheritance of moveable and immoveable property. Illegal confiscation and requisitioning of the private property of citizens shall be prohibited. If the state and its bodies appropriate private property on the basis of exclusive public need, they shall do so with due compensation and payment".
[194] Article 16.3 of Constitution of Mongolia.
[195] *Ibid*, Article 5.3.
[196] Article 6.4

Domestic law can make alterations by adding specific requirements such as the fulfillment of all fiscal duties by the foreign investor, subject the legal guarantee to foreign exchange regulations; or confer upon the host governments the right to limit the free transfer of funds and capital during balance of payment difficulties.[197]

Exhaustive list of assets and revenues that investors can transfer out of Mongolia is given in Article 6.7 of MIL. Precondition to transfer is to properly fulfill the tax obligation in the territory of Mongolia.[198] The exhaustive list includes profits of business activities and dividends; license fee for use of their intellectual property rights and service charges; payment of principle amounts and interests of overseas loans; an investor's share of leftover properties after liquidation of a business entity; and other properties gained or owned legally.[199] Investors transferring monetary assets specified in the Article 6.7 MIL, shall be entitled to convert their assets into any internationally freely convertible currency.[200]

c. National treatment

National treatment is mostly preferred in developed countries in order to provide same privileges as for nationals to the foreigners. However, some countries put foreign investors higher in privileges than their nationals: for example, 1993 FIL provided comprehensive tax preferences to the foreign investors and the application for such tax preference could not be invoked by the locals. Nonetheless, national treatment does not mean that the foreign investor would have all the rights that nationals have, such as political rights. As for 2013 MIL, it does not contain direct or explicit clauses of national treatment for foreign investors. Yet MIL removed the wording "foreign" of its title, and Article 4.1 states that law applies to investments "made by foreign and domestic investors in the territory of Mongolia". By contrast, Article 9 of the 1993 and 2002 FIL included a direct national treatment guarantee, according to which "Mongolia shall accord foreign investors no less favourable treatment in respect of the possession, use, and disposal of their investments than that accorded to Mongolian investors."

d. Fair and Equitable Treatment

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[197] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 175, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).
[198] Article 6.7 MIL.
[199] *Ibid*, Article 6.7.1 to 6.7.5.
[200] *Ibid*, Article 6.8.

Internationally acclaimed fair and equitable treatment guarantee is not included in 2013 MIL. Usually, it is provided by the vast majority of international investment treaties thus national legislator don't see the need to include the clause in domestic laws.[201] This does not mean that investors should be alarmed. As stated in the Constitution, Mongolia shall adhere to the universally recognized norms and principles of international law.[202] Hence, even if the 2013 MIL does not contain directly FET principles as investment protection guarantee, the investors will be protected by international norms and treaties.

e. Investor – State Dispute Settlement

Investor-State dispute settlement (ISDS) clauses are the important part of investment protection framework. Especially, in the situations where the investor is not protected by international investment treaty, which usually allows investors to initiate ISDS based on international investment treaty clauses. As a general rule, foreign investment protection principles are derived from the minimum standard of the customary international law. Thus the domestic investment protection clauses are focused on customary international law and international investment treaties with their substantive standards of investment protection and Investor-State dispute settlement mechanisms.

Traditionally, ISDS is subject to jurisdiction of the host state. Unless, the host state has consented to investment arbitration in international treaty clause as a signatory, mutual arbitration agreement such as ISDS contract or investment contract with the foreign investor, and host state's domestic legislation. Inclusion of arbitration clauses in domestic laws is a self-standing and unilateral offer to settle arising disputes in independent international tribunal.[203] And this unilateral offer stated in special domestic laws should be accepted by the investor, usually by starting the ISDS procedure itself. Downside of the standing offer is that the host state could revoke the offer anytime by amending the law. On contrary to the issue of revoking, it is suggested to perform some reciprocal act to perfect the host state's unilateral arbitration offer.[204] Furthermore, once perfected consent acquires the status of

[201] Antonio R. Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, ICSID Review Vol 7, 428-452 (1992).
[202] Article 10.1 Constitution of Mongolia.
[203] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9, Oxford University Press (2008).
[204] BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 180, 2 European Yearbook of International Economic law, (Springer International Publishing) (2018).

legal statute and should not be revoked.[205] However, the host state might include some preconditions and general rules for investor-state dispute settlement issues such as negotiation period, exhausting the local remedies before invoking ISDS.

1993 FIL and 2012 SEFIL did not express direct consent to ISDS nor contain standing offer to arbitrate disputes with foreign investors in international tribunals. Investment related disputes were solely under competence of national courts of Mongolia.[206] But 2013 MIL has corrected that situation and included an expressive arbitration offer in Article 6.9, which states that "unless it is provided by law or in the or in the international treaties, to which Mongolia is a party, an investor is entitled to select an international or domestic arbitration to settle any disputes which may arise regarding the contract concluded with the state authority of Mongolia". However, this offer is limited to disputes arising in respect of 'investor-state contracts'.

3.5. Khan Resources v. Mongolia

So far Mongolia has been a Respondent to five investment treaty arbitrations. However, Khan Resources and Paushok cases had more impact on the domestic legal regime.

CAUC Holding Company Ltd (CAUC Holding), a British Virgin Islands (BVI) company investing in the Dornod Project through its majority-owned Mongolian subsidiary Central Asian Uranium Company (CAUC); Khan Resources B.V. (Khan Netherlands), a Dutch company investing in the Dornod Project through its fully-owned Mongolian subsidiary Khan Resources LLC (Khan Mongolia); and Khan Resources Inc. (Khan Canada), a Canadian company that wholly owns both CAUC Holding, through a Bermuda vehicle, and Khan Netherlands brought the claim against Government of Mongolia. They claimed that their investment in a uranium exploration and extraction project in the Mongolian province of Dornod (the Dornod Project) were wrongfully and indirectly expropriated when the Government of Mongolia annulled their licenses. CAUC operated in the Dornod Project under a mining License 237A initially covering two deposits, but which later, on CAUC's application, was reduced to exclude a segment aimed at tax and fee savings. Such excluded segment was later acquired by Khan Mongolia and covered by a separate mining License 9282X.

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[205] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9, Oxford University Press (2008).

[206] Article 25 of both FIL and SEFIL stated that generally settled in competent national courts, unless Mongolia gave consent to international arbitration in BITs, ECT or via direct arbitration agreement with the foreign investors.

In October 2009, Nuclear Energy Agency (NEA) suspended Claimants' Licenses 237A and 9282X among others. Invalidated licenses were waiting for re-registration under the Nuclear Energy Law of 2009.[207] In March 2010, after inspecting the Dornod Project, NEA concluded that the project failed to rectify violations mentioned during the time of license invalidation. In April 2010, NEA declared that Licenses 237A and 9282X remain invalidated and could not be re-registered to the claimants. The claimants initiated the arbitration in 2011; Khan Canada and CAUS Holding invoked 'Founding Agreement', which created joint venture 'CAUC'. They claimed that the suspension and invalidation of the licenses constituted an unlawful expropriation, in breach of Mongolia's obligations under the Founding Agreement, Mongolian law and customary international law. Khan Netherlands invoked Energy Charter treaty via umbrella clause on the allegations of Mongolia's breach of Foreign Investment Law.

The case presented two jurisdictional challenges. Firstly, whether Khan Canada, non-signatory of the Founding Agreement can be a party in the dispute. On Mongolia's objection to the tribunal's jurisdiction over Khan Canada the tribunal fount that latter is not a signatory, however, non-signatory could become a party to the agreement and consequently to the dispute if it shared the common intention with the signatory/Claimant.[208] As burden of proof of the matter in hand was on the Claimant, the tribunal held that the evidence the Claimant presented sufficed to prove such common intention between CAUC Holding and Khan Canada. Secondly, whether the Government of Mongolia and MonAtom is different entities. Mongolia further argued that it should not be bound by the arbitration clause of the Founding Agreement, as it was not a party. However, based on the claimant's legal expert's testimony, the tribunal found that MonAtom, a Mongolian company wholly owned by the state, acted as Mongolia's representative and undertook obligations that only a sovereign state could fulfil, namely, committing to reduce the natural resource utilization fees to be paid by CAUC, thereby giving the tribunal personal jurisdiction over Mongolia under the Founding Agreement.[209]

Also Tribunal disagreed with Mongolia on the interpretation of Mongolian law. Mongolia first argued that the mining licenses were not covered investments under its Foreign Investment Law, which defined "foreign investment" as "every type of tangible and

[207] Article 22-26 Nuclear Energy Law of Mongolia, Official State Journal Toriin Medeelel No. 29, (2009).
[208] Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL PCA Case No. 2011-09, Decision on Jurisdiction, para 329-330, (2009).
[209] *Ibid*, para 345.

intangible property." Mongolia further argued that mining licenses were not property under Mongolian law, as a decision of the Mongolian Supreme Court has held that "[a] mining license […] is possessed but not owned by any entity, and therefore there is no legal ground to consider such mining license to be a property right which is transferable to the ownership of others".[210] The tribunal held that general notion the rights under licenses as well as contractual rights to exploit natural resources constitute intangible property[211], hence invalidating the Mongolian Supreme Court's interpretation. On validation of licenses the tribunal conducted a proportionality analysis and concluded that penalty of invalidating was not appropriate for the alleged violations. The tribunal stated that Mongolia failed to "point to any breaches of Mongolian law that would justify the decisions to invalidate and not re-register" the mining licenses.[212] During the analyzing the evidences, the tribunal found that Mongolia's motive of license invalidation was to develop the Dornod project deposits at greater profit with a Russian partner.[213] The tribunal found that Mongolia had an obligation to re-register the mining licenses as there was "no legally significant reason why the Claimants would not have fulfilled the [prescribed] application requirements". By failing to do so, Mongolia denied due process of law.[214]Based on all these reasons, the tribunal concluded that the Mongolian Government had breached the ECT by invalidating licenses of uranium mining of CAUC ltd. Consequently, when tribunal found that Mongolia breached Foreign Investment Law, it also found its violation of ECT under umbrella clause. In calculating damages, the tribunal valued the investment of Dornod Project by analyzing offers received from 2005 to 2010. Thus the final damages were 80 million USD as opposed to 358 million USD claimed by investors.

3.6. Paushok v. Mongolia

Sergei Paushok, sole shareholder of CJSC Golden East-Mongolia (GEM) and CJSC Vostokneftgaz brought the claim against the Government of Mongolia in 2007 following the introduction of windfall profit tax law[215] (WPT) by Parliament of Mongolia that put 68% tax on gold sales which exceeded 500 USD per ounce. Furthermore, Claimant was affected by newly enacted Mineral Law clause that imposed monthly penalty of 10 times the

[210] Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL PCA Case No. 2011-09, Award on the Merits, para 303, (2009).
[211] *Ibid*, para 302.
[212] *Ibid*, at para 319.
[213] *Ibid*, at para 340-342.
[214] *Ibid*, at para 359-360.
[215] Law on Imposition of Price Increase (Windfall) Taxes on some Commodities, (2006).

minimum wage for every foreign employee that exceeded usual 10% quota of foreign workers.[216] By the time the arbitration proceedings were initiated, 50% of GEM's employees were Russian nationals. GEM invoked Russia-Mongolia BIT of 1995 and claimed that the Respondent breached treaty obligations on fair and equitable treatment, expropriation and compensation, full protection and security by introducing discriminatory tax rates and employment rules.

According to the Claimant, its competitor KOO Boroo Gold, a Canadian owned gold mining company, was not affected by the WPT as it had a stabilization agreement with the Government of Mongolia.[217] Negotiations between GEM and Mongolia were not successful as GEM was not willing to make long-term future investments requested by the Government of Mongolia. When WPT came into force, GEM entered into a contract with the Central Bank of Mongolia (MongolBank), according to which gold was placed under the custody of the Bank for safekeeping and subsequent sale, and GEM would get 85% of the sale price.[218] However, Bank of Mongolia without notifying GEM used the gold for refinement purposes in the United Kingdom. Following this issue, Tribunal found that even Mongolia was not a party to the contract between the MongolBank and GEM, it breached its fair and equitable treatment obligation by removing ownership of GEM's gold in contravention of the safe custody contract with the MongolBank.[219] By default, Government of Mongolia was liable for actions of the MongolBank under the international law rules of attribution.[220] With respect to introduction of WPT, the tribunal did not find breach of BIT stating that breach of an investment treaty did not automatically occur only because a legislative act may be considered as ill-conceived, counter-productive or excessively burdensome.[221] And the tax rate increase was one of the great risks that investor ought to know, especially in the developing states.[222] On the foreign employee penalty, the tribunal decided that the Respondent could not violate 'fair and equitable treatment' as stated in Article 3.1 of the BIT by enacting the Mining Law of 2006 and increasing the penalty for exceeding the 10% quota of foreign employees.[223] Consequently, tribunal brought other mining company's

[216] Mineral law of Mongolia, Official State Journal Toriin Medeelel No. 30, (2006).
[217] See part 2.1.
[218] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftgaz Company v. The Government of Mongolia, UNCITRAL 2011-04, Award on Jurisdiction and Liability, para 111.
[219] Roland Klager, Case comment: Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftgaz Company v. The Government of Mongolia, ICSID Review 27, 2012.
[220] *Ibid*, para 576.
[221] *Ibid*, para 298-299.
[222] *Ibid*, para 302, 305.
[223] *Ibid*, para 360-362.

example and noted that 10% foreign employee quota was manageable and setting a foreign worker quota would not qualify as a breach of FET.[224] The bottom line was that in such circumstances investor should enter a stability agreement covering taxation and other matters, otherwise the investor would face much more difficult task to demonstrate that breach of a BIT occurred.[225]

Conclusion

This chapter focused on Mongolian foreign investment regime and its domestic legal statutes. Effectiveness and predictability provided by domestic laws have a great impact on attracting new investments to the country. Thus having a strong legal system and favorable investment climate are important pillars for a developing country, that depends on foreign investment flow.

After several attempts of implementing a foreign investment law, Mongolia enacted present day Mongolian Investment Law in 2013. As seen from the historical pattern of investment legislation, Mongolia aimed to improve and refine its investment climate. It amended the legislations in question in order to meet requirements of the investors and international community. MIL was enacted to cover all the gaps that its predecessors left. For instance, it applies to both foreign and domestic investors and avoids reverse discriminations of the latter; keeps to control the entry of State-owned investments and their investment in sectors of mining, banking and financing, media and communications remained subject to permission requirements of Mongolian government alongside with their intentions to acquire 33% or more of the shares issued by a business entity in Mongolia operating in above mentioned sectors.

Mongolian Investment Law introduced tax stabilization certificates, which is issued by the Government of Mongolia to the investors who qualify to certain requirements of the law; made an open offer to arbitrate investment treaty related disputes in international arbitration and enacted number of clauses to sustainable development of host country.

Investment protection clauses of Mongolian Investment Law in essence reflects internationally accepted rules and investment protection standards. It contains, FET, national treatment, free transfer of funds and a standing odder to arbitrate disputes in international tribunals. And lastly, Mongolia's attempt to improve domestic investment laws in order to

[224] *Ibid*, para 368.
[225] *Ibid*, para 370.

meet international standards and requirements of the foreign investors reflect that country is leaning towards maintaining the status quo of the international investment regime.

CHAPTER 4

ASEAN Investment Regime, its fundaments and development

This Chapter explores foreign investment regime of Association of Southeast Asian Nations as a regional integration. The exploration carried out through its regional and international investment agreements and "ASEAN Way" lenses. ASEAN's modern foreign investment regime and related policies are heavily influenced by its Member States' pursuit to keep their sovereignty intact as most of them gained independence recently. Furthermore, the chapter explores ASEAN Comprehensive Investment Agreement in great detail including novelties that it introduced; and comparing it to the previous foreign investment regulation instruments.

Introduction

Association of Southeast Asian Nations (ASEAN) has been the most attractive destination for foreign investment in Asian continent after China and India. Its fast growing economy is based on progressively developing service oriented foreign direct investments. It is situated between India and China – two biggest competitors and collaborators; and located on the old Maritime Silk Road, which covered trade between the Middle East, China, Korea and Japan and the South China Sea, the Straits of Malacca and the Straits of Singapore, three of the busiest shipping lanes in the world. Furthermore, ASEAN vision 2020 was made in 1997 when GDP was USD 694 million[226] and ASEAN's Compound Annual Growth Rate predicted that ASEAN's economy would reach USD 1 trillion by 2005 and USD 2 trillion by 2020. However, ASEAN reached USD 1 trillion benchmark on 2006 and USD 2 trillion by 2011, nine years earlier that predicted by Compound Annual Growth Rate.[227] These statistics showed that ASEAN is one of the biggest markets in Asian continent with high population and relatively cheap work force. The sum of these characteristics made ASEAN extremely attractive in the eyes of foreign investors.

This Chapter examines the ASEAN Way, a relation-based governance, and its impact on its investment regime and innovations towards investment regime in ASEAN's Comprehensive Investment Agreement (ACIA). ASEAN Way is a very specific type of

[226] Gross Domestic Product data, World Bank (Jan. 17, 2021, 18:54), https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=1997&locations=8S&most_recent_year_desc=true&start=1995.

[227] ASEAN Vision 2020, Association of Southeast Asian Nations (Jan. 17, 2021, 18:54), https://asean.org/?static_post=asean-vision-2020.

diplomacy between the Member States that has been there since the establishment of the ASEAN. In recent years with the expansion of the market, Member States started questioning the relevance of the ASEAN Way and began the process of implementing changes. One of the legal instruments that has the greatest impact on ASEAN investment regime is ASEAN's Comprehensive Investment Agreement. However, scholars argue on ACIA's nature that it can be viewed as a multilateral treaty and as an instrument of regional governance. Its innovations are the biggest step towards comprehensive investment regime within the region.

Furthermore, we examine the newly signed Regional Comprehensive Economic Partnership (RCEP) and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, formerly known as TPP). Comprehensive and Progressive Agreement for Trans-Pacific Partnership is a renewed version of Trans Pacific Partnership, that implemented some changes as the United States backed up from the partnership. This chapter analyses how RCEP and CPTPP can impact the ASEAN's foreign investment regime and its potential clash with existing international investment agreements. ASEAN's own way of not eliminating previous BITs when new treaties are implemented creates a fundamental collision of the two. These collisions give the investors possibility to do treaty shopping and gives rise to number of questions that have different answers in different treaties, BITs and FTAs.

4.1. 'ASEAN Way' and its impact on investment regime of the ASEAN

Since its foundation, ASEAN was governed by the relation-based governance opposed to the world's rules-based regulation. The ASEAN Way is a regional governance based on the personal relations of the state leaders through discussions, consultations and consensus.[228] Relation-based governance relies on the personal relationship of the actors to establish the parameters of their cooperation; agreements are based on the mutual relations of the actors, and depend on knowledge of and familiarity with each other.[229] The "ASEAN way" has relied to a large extent on the personal approach of congenial parties who had the same goal to develop their region and make their market open to international trade. This approach reflected, to an extent, the reluctance to cede any sovereignty to a supranational

[228] See Paul J. Davidson, Sungjoon Cho and Jurgen Kurtz.
[229] Paul J. Davidson, *The role of international law in the governance of international economic relations in ASEAN,* Singapore Yearbook of International Law and Contributors 12, 213-224, (2010).

body by states, many of which had just recently gained their independence.[230] In ASEAN Member States' opinion strict rules and regulations put them in difficult position and threatened their sovereignty. However, it became impossible just to rely on relation-based governance given the developments and complexity of modern economic and political changes.[231] As the number of economic partners increase, and the new age of international trade becomes more complex, ASEAN faced complications to interact with partners on the basis of personal knowledge of the parties.[232] The ASEAN way was not progressive enough to keep up with their elaborate relationship with its rights and obligations.

From its time of formation ASEAN did not identify with international law and treaties. It has been regarded as a group of sovereign nations operating on the basis of ad hoc understandings and informal procedures rather than within the framework of binding agreements through formal processes.[233] The prominence of economic objectives within Member States' cooperation led to need for more expanded legal framework.

Beginning of this shift from relation-based governance to rules-based governance started with ASEAN Charter. Discussions about drafting a universal instrument to work as a constitution of the ASEAN started on 11th ASEAN Summit in Kuala Lumpur in December 2005. On that Summit heads of the government and ministers of ASEAN signed Kuala Lumpur Declaration on the Establishment the ASEAN Charter. The drafting process of the charter had two stages. Firstly, Eminent Persons Group (EPG)[234] was formed to examine and provide practical recommendation on the charter with regards to the fundamental principles, values and objectives of the ASEAN. Secondly, High Level Task Force was formed by the foreign ministers of the ASEAN Member States in order to complete the drafting process upon EPG's recommendations. EPG's final recommendations were introduced on December 2006. Subsequently at 12th ASEAN Summit in January 2007, heads of the governments have endorsed the final recommendations of the EPG and tasked the High Level Task Force to start drafting the Charter. Finally, at 13th ASEAN Summit in November 2007 the final draft of the ASEAN Charter was introduced and it entered into force on 15th of December 2008.

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[230] *Ibid.*
[231] Article 3, ASEAN Charter.
[232] Li Shuhe, *The Benefits and Costs of Relation-Based Governance: An Explanation of the East Asian Miracle and Crisis* (1999), (Jan. 17, 2021, 18:59), https://ssrn.com/abstract=200208 or http://dx.doi.org/10.2139/ssrn.200208.
[233] Paul J. Davidson, *The role of international law in the governance of international economic relations in ASEAN*, Singapore Yearbook of International Law and Contributors 12, 213-224, (2010).
[234] EPG is group of highly respected individuals from member states that will represent and look over the processes of given task.

The ASEAN Charter recognized ASEAN as an inter-governmental organization with legal personality, which is separate from domestic governments of the Member States. Article 2 states as one of the principles of ASEAN:

> *"…(n) adherence to multilateral trade rules and implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy".*

The Charters aim was to codify and legalize existing rules, norms and principles of the organization. It mentions that ASEAN agreements signed and other instruments adopted before the establishment of the Charter shall continue to apply and be legally binding where appropriate.[235]

One of the important characteristics of the rule-based regulation is to have an independent judicial institution and ASEAN Charter had covered the area of dispute settlement.[236] Charter is determined to put in place a system of compliance monitoring and a system of compulsory dispute settlement for non-compliance.[237] ASEAN's dispute settlement mechanism mirrors the World Trade Organization's Dispute Settlement Mechanism. This mechanism takes more juridical approach where the awards are adopted unless there is a consensus not to adopt. Therefore, there is much more "automaticity" to adoption of awards, even though the final say is still in the hands of the WTO's Dispute Settlement Body. The Protocol on Enhanced Dispute Settlement Mechanism follows this procedure.[238]

According to Tommy Koh[239] and Paul J. Davidson, ASEAN Way will not be done right away. Instead it will be supplemented by a new culture of novel and more complex rules. Thus the ASEAN Way has not been completely abandoned. One of the reasons to believe that before mentioned statement is that non-compliance with the recommendations, decisions of the dispute settlement mechanisms are to be referred to the ASEAN Summit, which is a political body.[240] Further attempts to become rules-based governance continued

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[235] Article 52, ASEAN Charter.
[236] *Ibid*, Article 25.
[237] Tommy Koh et al., *Charter makes ASEAN stronger, more unified and effective*, The Straits Times (2007), Lee Kuan Yew School of Public Policy (Jan. 17, 2021, 19:02), https://lkyspp.nus.edu.sg/docs/default-source/ips/pa_tk_st_charter-makes-asean-stronger-more-united-andeffective_0808071.pdf?sfvrsn=4d43730a_2.
[238] Article 9, The Protocol on Enhanced Dispute Settlement Mechanism.
[239] Tommy Koh was Singapore's representative to the High Level Task Force (HLTF) on drafting the ASEAN Charter.
[240] The referral is stated in Article 12, The Protocol on Enhanced Dispute Settlement Mechanism

in number of international agreements, including ASEAN Comprehensive Investment Agreement.

4.2. ASEAN Comprehensive Investment Agreement

4.2.1. Innovations of ACIA

ASEAN Economic Community (AEC) established in 2015 and introduced the 'AEC Blueprint 2025' which includes liberalization and facilitation of investment in the region as one of the objectives.[241] The Blueprint aims to enhance the attractiveness of investment flow to the region and focuses on establishing an open, transparent and predictable investment regime.[242]

History of liberalization and promotion of investment in ASEAN region starts with two agreements: ASEAN Agreement for Promotion and Protection of Investment (IGA) that was established in 1987 that focused on ISDS-backed protection; and Framework Agreement on the ASEAN Investment Areas (AIA) established in 1998 which focused on liberalization commitments underpinned by inter-state arbitration procedures. In 2009 these two agreements were succeeded by ASEAN Comprehensive Investment Agreement (ACIA) that incorporated all the focus areas of its predecessors. It came into force only in 2012 and has four additional protocol, only one of which is not in force yet.[243]

ASEAN Comprehensive Investment Agreement was founded by ASEAN Economic Ministers on 26th of February 2009 and came into force on 29th of March 2012. It consolidated two previously existing agreements, namely, ASEAN Investment Guarantee Agreement and Framework Agreement on ASEAN Investment Area. Main agendas of the ACIA are to transform ASEAN into region with free movement of investment, increase intra-ASEAN investments and improve ASEAN's competitiveness in attracting foreign investors. ACIA aims to enhance four pillars: liberalization, facilitation, protection and promotion.[244] Furthermore, ACIA provides full protection and security and fair and

[241] AEC Blueprint 2025. Available at: https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf.
[242] *Ibid*, Article A.3. para. 14.
[243] First to Amend the ASEAN Comprehensive Investment Agreement provided modification for the Reservation lists by the Member States and to definitions of the 'natural persons'. Second Protocol will extend nationality to permanent residents and substitutes a "best efforts" requirement for non-WTO members for the earlier requirement to comply with WTO restrictions on performance requirements. Third Protocol will make a minor change to Thailand's reservations. And lastly, the Fourth Protocol amended prohibition of performance requirements. List of protocols available at: https://asean.org/asean-economic-community/asean-investment-area-aia-council/agreements-declarations/.
[244] Article 1 of ASEAN Comprehensive Investment Agreement.

equitable treatment;[245] pre-establishment NT and MFN for investors[246] and transfers of capital;[247] compensation for losses caused by civil strife;[248] and limits performance requirements to those permitted under WTO rules;[249] restricts the imposition of nationality requirements for senior management and directors;[250] limits expropriation and requires payment of compensation;[251] also it includes ISDS[252] as well as inter-state arbitration.

The principle of progressive liberalization follows the mechanism that is used in World Trade Organization[253], especially in relation to the liberalization of the services sector the General Agreement on Trade in Services (GATS).[254] Previously GATS approach was adopted by ASEAN in the ASEAN Framework Agreement in Services. Intra-ASEAN liberalization facilitates efficient distribution of capital within the region. Liberalization of investments are to be reached by lowering the entry and post-entry barriers faced by domestic and foreign investors. It covers five sectors including manufacturing, fisheries, agriculture, forestry, mining and quarrying with its related fields.[255] Moreover, as additional security measure, the governments of Member States cannot revoke decisions on liberalizing named sectors. They should not backtrack or reintroduce restrictions that have been removed.[256]

Facilitation and transparency focuses on information regarding investment regulations, restrictions and licensing. This leads to believe that higher the transparency, the lower the political risks. ASEAN Member States are obliged to present all active treaties so the investors can have a broader view and complete understanding of the legal atmosphere of the country.[257] However, under Article 21(2) ACIA, Member States are not obliged to disclose any confidential information, including that concerning particular investors or investments, if such disclosure would impede law enforcement, or be contrary to the public

[245] *Ibid*, Article 11.
[246] *Ibid*, Articles 5 and 6.
[247] *Ibid*, Article 13.
[248] *Ibid*, Article 12.
[249] *Ibid*, Article 7.
[250] *Ibid*, Article 8.
[251] *Ibid*, Article 14.
[252] *Ibid*, Article 33.
[253] Article 7(1) of ACIA mentions: "The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement (TRIMs), which are not specifically mentioned in or modified by this Agreement, shall apply, mutatis mutandis, to this Agreement."
[254] GATS recognizes the need for the developing countries to liberalize their economy and trade over time. Article XIX of the GATS calls for achieving progressive higher liberalization and promoting the interest of all participants on a mutually advantageous basis and for securing and overall balance of rights and obligations.
[255] Article 3(3), ASEAN Comprehensive Investment Agreement.
[256] The ASEAN Secretariat, ACIA Guidebook for Businesses and Investors 18, (2015).
[257] Article 21, ASEAN Comprehensive Investment Agreement.

interest, or would prejudice legitimate commercial interests of particular public or private juridical persons.[258] Thus, Member States have clear obligation to inform investors fully but with a flexible way-around if the information is deemed to be confidential.

Protection of investment in ACIA covers FET principle, prohibition against direct or indirect expropriation without compensation, full protection and security, and free transfer of funds. According to the Article 11 of ACIA, FET principle will be extended to the "covered investment"[259] which means that ASEAN Member States' decision will be in coherence with rules, regulations and principles, rather than arbitrary. ACIA includes a very specific clause of protection of investors in times of riot, insurgence and strife.[260] If the investment will be affected by riot, insurgence and strife, the host state will provide compensation for the investors who suffered loss as a result of these events in a nondiscriminatory manner. This certain rule follows the full protection and security clause, which covers physical damages of the investments during conflict situation.

In case of expropriation, direct or indirect, Member States will provide monetary compensation according to the market value of the investment.[261] In order for expropriation to be lawful, number of basic principles should be followed: the expropriation must have a public purpose, carried in a non-discrimination manner and under due process of law. However, there are two exceptions to this general rule.[262] Firstly, Member States have right to acquire land, subject to the investment, if the expropriation process and compensation payment meets requirements of domestic law. Secondly, Member States have right to impose compulsory licensing for intellectual property according to the domestic intellectual property law. Annex 2, paragraph 3 of the ACIA provides that for a measure or series of measures to be indirect expropriation, there must be a case-by-case, fact-based inquiry that considers at least the following cumulative factors: whether the action creates an adverse effect on the economic value of an investment; whether the action breaches the government's prior binding written commitment to the investor (by contract, license, or other legal document); and whether the government action, including its objective, is disproportionate to the public purpose. In addition to these protective measures, ACIA provides freedom to transfer

[258] *Ibid*, Article 2.
[259] According to Article 4 of ACIA, covered investment is means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing1 by the competent authority of a Member State.
[260] *Ibid*, Article 12.
[261] *Ibid*, Article 14.
[262] The ASEAN Secretariat, ACIA Guidebook for Businesses and Investors 18, (2015).

funds[263], which covers contribution to capital; profits, capital gains, dividends, royalties, license fees or any other fees, interest, or other income from the investment; proceeds from the total or partial sale or liquidation of its investments; payments under a contract, including a loan agreement; payments of compensation in cases of strife or lawful expropriation; payments from settlement of a dispute; and earnings or other remuneration of personnel who are employed and allowed to work in relation to the investment in that territory.

Promotion of investment entitles Member States to cooperate in enhancing awareness of ASEAN as an integrated investment area in order to increase foreign investment flow in the region. Member States' cooperation areas should cover encouragement of growth and development of small and medium enterprises alongside with multinational enterprises; enhancement of industrial complementation and production networks; development of regional clusters; support the organization of various seminars on investment opportunities and investment laws.[264]

ACIA does provide for liberation, facilitation, promotion and protection of the investment. However, its scope is limited to number of areas including manufacturing, agriculture, fisheries, forestry, mining, quarrying and their related services. As we mentioned before, in the regional treaties Member States have a broad discretionary power. In addition to the limited areas, Member States of the ASEAN have extensive list of reservations on ACIA's scope.[265] Member States shall submit a reservation lists to the ASEAN Secretariat. It seems to reflect the historically defensive approach of Member States to their sovereignty. Such policy has started from ASEAN-Way and continues to the coverage of the ACIA through very extensive reservation lists.[266] Fundamentally, it gives host states right to exclude investors or investments from ACIA's coverage on their discretion. Nonetheless, ASEAN is working its way to eliminate or lessen the restrictive measures of ACIA. For instance, AEC 2025 Consolidated Strategic Action Plan (CSAP) set out to eliminate or improve investment restrictions and identify appropriate approaches to the phasing out or reduction of ACIA's Reservation Lists.[267]

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[263] Article 13 ACIA.
[264] *Ibid*, Article 24.
[265] *Ibid*, Article 9. Reservations regarding National Treatment and Senior Management and Board of Directors. The list of reservations can be quite broad. For example, Brunei Darussalam does not apply National Treatment in any fishery activities and Indonesian authority can require sale of shares to domestic investors in case foreign investor own 100% of the shares.
[266] On ASEAN-Way, see 4.2.
[267] ASEAN Economic Community 2025 Consolidated Strategic Action Plan, (2018), Association of Southeast Asian Nations (Jan. 17, 2021, 19:07), https://asean.org/asean-updates-aec-2025-consolidated-strategic-action-plan-csap/.

4.2.2. Investor-State Dispute Settlement in ACIA

As its agenda is liberation, facilitation, promotion and protection of the investment, the ACIA provides for Investor-State Dispute Settlement provisions. General provisions of ISDS in ACIA provide that the disputing investor may submit a claim to their preferred tribunal including but not limited to courts or administrative tribunals of the disputing party; under ICSID Convention; under ICSID Additional Facility Rules; under UNCITRAL Arbitration Rules; Regional Centre for Arbitration at Kuala Lumpur or any other ASEAN regional arbitration tribunal.[268] The governing law of arbitration shall be ASEAN Comprehensive Investment Agreement, other applicable agreements between Member States, applicable rules of international law and any relevant domestic law of disputing Member States.[269]

However, ISDS is limited to disputes that arise from specific provision breaches. For example, breaches of provision such as post-establishment national treatment, most favored nation, senior management, treatment of investment, compensation in cases of expropriation, strife that caused the investor to suffer losses and damages.[270] And arbitral awards are limited to monetary damages and any applicable interest; and restitution of property, in which case the award shall provide that the disputing Member State may pay monetary damages and any applicable interest in lieu of restitution.[271]

Similar restrictions can be found in ASEAN's Free Trade Agreements with third countries, including China, Australia, Korea and Hong Kong. ASEAN-Korea FTA provides the investment protection only when all requirements of the investment are fulfilled, including written approval. ASEAN-China Agreement and ASEAN-Australian-New Zealand Agreement limit the scope of the breaches that can initiate ISDS. The latest FTA between ASEAN and Hong Kong does not provide for ISDS at all.

Dispute resolution in ACIA covers disputes that have arisen after ACIA entered into force on 29th of March 2012. According to Article 29, ACIA shall apply to investment disputes between an ASEAN Member State and an investor of another Member State that has incurred loss or damage by reason of an alleged breach of any rights. Investors do not have an obligation to exhaust all domestic judicial mechanisms prior to requesting the alternative dispute settlement methods including arbitration. However, in case of arbitration,

[268] Section B, Article 33 of ASEAN Comprehensive Investment Agreement.
[269] *Ibid*, Article 40.
[270] *Ibid*, Article 32(a).
[271] *Ibid*, Article 41.

investors must waiver, in writing, its right to initiate or continue any domestic court proceedings.[272] The only exception to this rule is when investor seeks interim measures in order to secure its rights and obligations regarding the investment, and does not involve the payment of damages or resolution of the substance of the matter under dispute.[273] Arbitration is not the only alternative dispute settlement method that parties can choose. Parties can choose conciliation, consultation and negotiation. Nonetheless, if consultation and negotiation fails to resolve the dispute within 180 days, the parties should request for an arbitration.[274]

4.2.3. ACIA's two images: multilateral treaty and regionalized governance

ACIA received various comments that it belongs to the either international agreements or to the regional agreements.

Multilateral aspects

ASEAN Comprehensive Investment Agreement can be viewed as a treaty with presiding international standards and principles or as a treaty with more dominant regional governance principles.[275] On one hand, ACIA enhanced its objective in order to meet international standards and enact more multilateral treaty ideologies.[276] Its Preamble states that it aims to establish a forward-looking, comprehensive, rules-based framework with improved features and provision, comparable to international best practices. On the other hand, ACIA still is a regional agreement that mostly favors the Member States by giving them more discretionary power.

Firstly, fundaments of considering ACIA as a multilateral treaty is that it extended ASEAN's principles with international standards, incorporated international treaty principles in investment protection clauses, namely from NAFTA Chapter 11[277] and US Model BIT, and emphasizes investment related objectives over non-investment ones; thus becoming more investor oriented treaty. ACIA's preamble seems stricter on investment protection than the NAFTA and US Model BIT as it does not contain any rules regarding environmental protection or labor rules.

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[272] *Ibid*, Article 32.
[273] *Ibid*, Article 34.1 (c).
[274] *Ibid*, Article 32.
[275] Zuwei Zhong, *The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community*, Asian Journal of Comparative Law, (2011).
[276] Firstly, it was conceptualized in ASEAN Economic Community Blueprint's, which drafted detailed plan to remodel ASEAN into an economically-integrated region by 2015. Para. 5 of the Blueprint states, ASEAN's goal of reginal integration with rules-based framework should be consistent with multilateral rules.
[277] Replaced by United States – Mexico – Canada Agreement, Chapter 14: Investment.

Secondly, definition of investor and investment became closer to the traditional international definitions. Different from its predecessor ASEAN Investment Guarantee Agreement[278], ACIA defines investor as any legal entity duly constituted or organized under the applicable law of Member States.[279] The sole criterion is the place of incorporation. The ACIA's wider definition of an investor expands the jurisdiction of international tribunals over investment flows in ASEAN, and concomitantly erodes the power of host States to regulate investments according to their own laws.[280] Moreover, Annex 1 of the ACIA imposes a political restraint on the use of specific request[281] requirement, to which some investments are subjected according to the host state's laws:

> *"… any Member state wishing to impose this requirements on a covered investment must inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval".*[282]

Additionally, host state must inform the investor of the reason in denying the entry of their investment in writing.[283] Thus the secretion of the Member State to define covered investment is limited, giving the international tribunals considerable discretion.

Lastly, ACIA enacted an improved rule on investor-state arbitration. One of its predecessors, Framework Agreement on ASEAN Investment Area, did not have investor-state arbitration clauses. Thus by combining the ASEAN Investment Guarantee Agreement and Framework Agreement on ASEAN Investment Area, ACIA eliminated the possible confusion of investors who could not rely on ASEAN investor status fully to bring an arbitration claim against the host state. However, it does not mean that ACIA is wholly made of international best practices. It still operates the principles and rules that favor host state more than the foreign investor.

Regional agreement aspects

The main characteristic of ACIA that makes it more regional agreement, is the existence of extended discretion clauses in favor of the host state. For example, the entry of the investment is monitored as it was in ASEAN Investment Guarantee Agreement under

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[278] In ASEAN Investment Guarantee Agreement, a corporate investor had to be both incorporated and effectively managed from in the host state. Article I (2).
[279] Article 4 (e), ACIA.
[280] STEPHAN SCHILL, MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 236-237, Cambridge University Press, (2009); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 116, Oxford University Press, (2008).
[281] Special request for entry of the investment is imposed by government of the host state, depending on their eligibility and according to the laws of host state. See Footnote 1 and Annex 1 of the ACIA.
[282] Annex 1(a), ACIA.
[283] *Ibid,* 1(d).

"specific approval requirement"; and it allows the Member States to make broad sectoral exemptions to the Most Favored Nation and National Treatment clauses. According to the Article 9 ACIA, Member States can submit a reservation list[284] of the MFN and NT clauses to the ASEAN Secretariat. Fundamentally, it gives host states right to exclude investors or investments from ACIA's coverage on their discretion. Another discretionary power can be noticed in the transparency clause where some information of the host state regarding investment regime can be deemed confidential by the host state only.[285]

Furthermore, ACIA includes clause that MFN treatment shall not be applied to the investor-state dispute settlement procedures that are already available in other agreements to which Member States are party.[286] This clause holds back ASEAN by eliminating the use of new and improved International Investment Agreements containing dispute settlement rules that are more favorable to investors in case Member State enters or has entered to such IIA.[287] Moreover, Articles 24-26 on investment promotion provisions go beyond obligations on capital importing Member States to protect foreign investment in their respective territories. It declares that all Member States are obligated to promote an integrated investment area whether they are importing or exporting investments.[288]

Lastly, ACIA's introduction of widely used legality clause "in accordance with host state's laws" creates possibility of host state to preserve discretion in screening and monitoring the foreign investment.

With these characteristics weighed against each other and established set of investment rules that are specific to only ASEAN Member States, it is safe to say that ACIA is more of a regional agreement with elements of international law standards. ASEAN has been shifting to more integrated and comprehensive regional integration in last decades. The culmination was signing of the ASEAN Charter in 2007 which set the formal binding set of rules for the Member States that were used to relations-based approach beforehand. And since then ASEAN enacted number of legal documents crafting more improved economic and political

[284] Reservation list covers National treatment clause in Article 5 and Senior Management and Board of Directors in Article 8. For example, Cambodia reserves right to not apply NT for lawn ownership agreements: "
NT shall not apply to any measure relating to land ownership, leasing, transactions, or use; including conditions on which such land shall be held, including the use of natural resources associated with land.", Association of Southeast Asian Nations, (Jan. 17, 2021, 19:11), https://www.asean.org/wp-content/uploads/images/2012/Economic/AIA/Agreement/Cambodia%20Rsv%20List%20%20(Final%20182010).pdf.
[285] Article 2 ACIA.
[286] Footnote 4 of Article 6 ACIA.
[287] Zuwei Zhong agrees that such rule is against ASEAN's multilateralization of investor-state rules.
[288] Article 24 ACIA.

region which focused on combining two pillars: keeping the independence of the Member States and enacting international law standards.

4.3. Asian engagement with regional and international policies

On regional level, one of the notable Asian multinational initiatives derived from Asia-Pacific Economic Cooperation's (APEC) policy to promote, liberalize and facilitate foreign investment. It started promoting investment protection and liberalization since 1994 by establishing general principles such as due-process, non-discrimination. For domestic investment policy principles such as transparency of law, national treatment, restriction on double taxation, full protection and access to justice. Member States of APEC could adopt these issued principles on voluntary basis and enact them into their own legislation and investment agreements. In recent years, APEC is focusing on negotiation and draft of international investment agreements, as well as investment dispute resolution.[289] APEC implemented number of strategies including Investment Facilitation Plan, that was aimed to increase investment flow in the region through well-established principles on governing investment regime. It's worth mentioning that member states' participation or acceptance of these principles is voluntary. In spite of that, member states of APEC report their progress and subsequently the report is included in the APEC Policy Report Unit.[290] This indicates that the member states of APEC are willfully participating in the shaping of international investment regime within their region.

Regarding individual states on multilateral level of participation in international investment law regimes, some member states of APEC are in the 70 World trade Organization (WTO) that signed Joint Ministerial Statement on Investment Facilitation for Development in December 2017. Joint Ministerial Statement on Investment Facilitation for Development initiative started a platform for WTO members to discuss a possible international framework for foreign investment.[291] Furthermore, several Asian countries,

[289] International Investment Agreements Negotiators, Handbook: APEC/UNCTAD Modules (2012), UNCTAD Investment Policy Hub (Jan. 17, 2021, 21:53), https://investmentpolicy.unctad.org/publications/119/international-investment-agreements-negotiators-handbook-apec-unctad-modules.

[290] For instance, see Facilitating Investment in APEC: Improving the Investment Climate through Good Governance, APEC Secretariat, APEC Policy Support Unit (November 2019), Asia Pacific Economic Cooperation (Jan. 17, 2021, 21:53), https://www.apec.org/Publications/2019/11/Facilitating-Investment--in-APEC.

[291] Baliño S, Bernasconi-Osterwalder N, Investment facilitation at the WTO: an attempt to bring a controversial issue into an organization in crisis (2019), Investment Treaty News (Jan. 17, 2021, 21:53), https://www.iisd.org/itn/2019/06/27/investment-facilitation-at-the-wto-an-attempt-to-bring-a-controversial-issue-into-an-organization-in-crisis-sofia-balino-nathalie-osterwalder/.

including Indonesia, China, South Korea and Thailand, delivered their written submissions to the UNCTAD Working Group III regarding issues on Investor-State Dispute Settlement reform.[292]

On earlier stages, the Asian Development Bank (ADB), that consists of member states from Pacific, Oceania, Central Asia, East Asia, Southeast Asia and South Asia, promoted regional integration through trade and investment.[293] Nowadays, the most important part of Asia's engagement in foreign investment scope on regional and international level is the multilateral free trade agreements such as CPTPP and RCEP.

The long awaited **RCEP** was signed on 15th of November 2020. RCEP consist of 10 member states of ASEAN and the dialogue countries: South Korea, Japan, Australia, China and New Zealand. After eight years since it's negotiations started in 2012, the partnership agreement was finally signed through online conference between contracting parties. The Agreement will enter into force when contracting parties ratify it. Prior to its signature, RCEP was speculated that it will not provide for investor-state dispute settlement mechanism.[294] Nonetheless, the omission of ISDS would not have made a big difference for contracting parties as most of them still have free trade agreements and international investment agreements that are in force and provides ISDS mechanism that are eligible for use. RCEP consists of 20 chapters and is expected to eliminate range of tariffs on imports within 20 years. It is now a modern agreement that updated the coverage of ASEAN Plus One agreements with the dialogue countries. RCEP considers among others e-commerce, micro and small and medium enterprises and regional value chains. It compliments WTO by consolidating its rules into the text of the RCEP.

The investment chapter 10 aims to create an enabling investment environment in the region by implementing the same four pillars as ACIA: investment protection, liberalization, promotion and facilitation.[295] It includes provisions of MFN alongside with the commitments on the prohibition of performance requirement that go beyond their multilateral obligations under the WTO TRIMS. Lastly, the investment chapter allows contracting parties to have reservation list through negative list.[296] RCEP's investment

[292] UNCTAD's Working Group III is focused on possible ISDS reforms. Full list of government's submissions can be found at: https://uncitral.un.org/en/working_groups/3/investor-state.
[293] Regional Cooperation and Integration, Asian Development Bank (Jan. 17, 2021, 21:53), https://www.adb.org/what-we-do/themes/regional-cooperation/overview.
[294] UNCTAD, World Investment Report 109, (2020).
[295] Article 10.2, Regional Comprehensive Economic Partnership.
[296] *Ibid*, Article 10.8.

protection clauses include National Treatment, MFN and minimum standard principles, free transfer of funds, compensation for expropriation.[297]

National treatment clause states that in like circumstances foreign investors should be accorded no less favorable than to its own investors.[298] Assessment of "in like circumstances" must be done case-by-case considering the total circumstances, including whether the relevant treatment distinguishes between investors and investments on the basis of legitimate public welfare objectives.[299] Total circumstances cover the sector of the investment, the location, the aim of measures concerned and its regulatory process.[300] RCEP includes traditional most favoured nation clause stating that each party shall accord the foreign investors with no less favourable treatment than to foreign investors of other Parties and Non-parties.[301] However, MFN clause do not apply to Cambodia, Lao PDR and Vietnam.[302] Furthermore, MFN treatment does not cover any international dispute resolution mechanisms under other existing or future agreements.The minimum standard of treatment includes FET and full protection and security in accordance with customary international law.[303] Further elaboration includes prohibition of denial of justice in any legal or administrative proceedings; fundamental breach of due process; manifestly abusive treatment, such as coercion, duress and harassment.

Chapter 19 Dispute Settlement aims to enact effective, efficient and transparent relies and procedures. The dispute settlement mechanism of RCEP allows conflicting parties to choose their own forum for substantive law disputes, investment included.[304] Therefore, Regional Comprehensive Economic Partnership itself does not include ISDS provision, but transfers it to other international investment treaties that contracting parties are party to. However, under RCEP there can be two types of disputes settled: when it is regarding the interpretation and application of RCEP and when a contracting party's measure is not conforming with the RCEP or a party is not carrying on the obligation under the agreement.[305] In upper mentioned disputes, the complaining party shall request for establishment of panel that would consist of three members chosen by the disputing

[297] Chapter 10, RCEP.
[298] *Ibid*, Article 10.3.
[299] *Ibid*, footnote 17, Article 10.3.
[300] Diane A. Desierto, *ASEAN Investment Treaties, RCEP, and CPTPP: Regional Strengths, Norms, Institutions, and Politics*, 27 Washington Law Review 349, 370-371, (2018).
[301] Article 10.4 RCEP.
[302] *Ibid*.
[303] *Ibid*, Article 10.5.
[304] *Ibid*, Article 19.5.
[305] *Ibid*, Article 19.3.

parties.[306] The panel will examine the matter in hand and objectively assess the facts and applicability of RCEP. Furthermore, the panel assesses whether the measures of a responding party was not conforming to the RCEP or whether responding party was not carrying on the obligations under the RCEP.[307]

As for the **CPTPP,** it is a mega regional agreement with investment chapter. Earlier stages of CPTPP negotiations, the United States had a big impact on investment chapter that follows the NAFTA. NAFTA's investment regime was mostly implemented by developed countries, however more conservative Asian negotiators of CPTPP did not favor it.[308] Ultimately, the US did not ratify the Trans-Pacific Partnership, but NAFTA's impact was left on CPTPP. It entered into force in December 2018. Currently, parties to the CPTPP are Vietnam, Australia, New Zealand, Canada, Mexico, Japan and Singapore. The membership for the agreement remains open and next potential parties are UK and the USA. Nonetheless, Comprehensive and Progressive Agreement for Trans-Pacific Partnership has become a useful example of modern international investment agreement. It contains provisions of negative approach regarding investment entrance that restricts foreign investments in certain sectors of the market. Furthermore, it contains FET principle and full protection and security with the context of international minimum standard; lengthy definition of indirect expropriation in order to eliminate further interpretative measures; and comprehensive provisions of ISDS.[309]

CPTPP has some fairly simple investment protection clauses that has fewer detailed qualification. Its traditional NT and MFN formulation, "in like circumstances" is determined according to the "totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objective".[310] The MFN treatment standard is liberal in scope and is only encompassed from application to dispute resolution mechanisms.[311] This is intended to avoid controversies where third parties accessing the investor-state dispute settlement mechanism through MFN clauses.[312]

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[306] *Ibid*, Article 19.8.
[307] *Ibid*, Article 19.12.
[308] VIVIENNE BATH & LUKE NOTTAGE, INTERNATIONAL INVESTMENT AGREEMENTS AND INVESTOR-STATE ARBITRATION IN ASIA, (Julien Chaisse ed., Handbook of International Investment Law and Policy), Springer Singapore (2020).
[309] See generally, Wolfgang Alschner & Dmitriy Skougarevskiy, *The new gold standard? Empirically situating the TPP in the investment treaty universe*, The Journal of World Investment & Trade 17 (3):339-373, (2016).
[310] Footnote 14 of Article 9.4 CPTPP.
[311] Article 9.5(3) CPTPP.
[312] Diane A. Desierto, ASEAN Investment Treaties, RCEP, and CPTPP: Regional Strengths, Norms, Institutions, and Politics, 27 Wash. L. Rev. 349 (2018), p372. Available at

CPTPP's investor dispute settlement provisions, included in Articles 9.18 – 9.30 are quite controversial. According to the CPTPP, parties to the investment dispute have an option to voluntarily conciliate the dispute prior to the arbitration proceedings.[313] Furthermore, it includes lengthy and detailed rules on procedures from initiation of the arbitration and its proceedings[314]; allows amicus curiae briefs from third parties that are not party to the dispute[315]. More importantly, CPTPP eliminates the arbitrators' interpretational discretion by creating a joint committee to interpret the CPTPP[316] and issued the Code of Conduct for ISDS.[317] Interpretation request of the CPTPP and its Annexes must be submitted to the Commission by the arbitrator, and the Commission shall submit its decision in writing within 90 days.[318] The Code of Conduct for ISDS establishes extended principles for arbitrators to follow even after they cease to act as an arbitrator.[319] As we examined, the CPTPP covered the number of issues regarding investor-state dispute settlement, that were targeted for criticism.

Both Comprehensive and Progressive Agreement for Trans-Pacific Partnership and Regional Comprehensive Economic Partnership clarify the corresponding rules and regulations regarding investor's domicile, permanent residency and naturalization which will make the investor a covered investor.[320] However, these treaties lack to clarify other things. Firstly, Southeast Asia region have a number of unsettled, ongoing maritime and territorial delimitation disputes.[321] It is concerning that any of the treaties, including the regional and international ones, does not include a definition of a "territory" nor aim to clarify it, yet in definitions of "investor" and "investment" the territoriality characteristics exist. Secondly, in most regional treaties and BITs[322] "covered investment" subjects to the

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https://digitalcommons.law.uw.edu/wilj/vol27/iss2/3

[313] Article 9.18, Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

[314] *Ibid*, Articles 9.19 – 9.23.

[315] *Ibid*, Article 9.23(3).

[316] *Ibid*, Article 27.2.2(f).

[317] Code of Conduct for Investor-State Dispute Settlement under Chapter 9 of the CPTPP. Australian Department of Foreign Affairs and Trade (Jan. 17, 2021, 22:05), https://www.dfat.gov.au/sites/default/files/annex-to-cptpp-com-2019-d004.pdf.

[318] Article 9.26, Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

[319] Article 7 of the Code of Conduct for Investor-State Dispute Settlement states that A former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision, order or award of the tribunal.

[320] RCEP Article 10.1 and CPTPP Article 9.1.

[321] See Diane A. Desierto, ASEAN Investment Treaties, RCEP, and CPTPP: Regional Strengths, Norms, Institutions, and Politics, 27 Washington International Law Review 349 (2018); and Alfred Gerstl & Maria Strasakova, Introduction, in UNRESOLVED BORDER, Land and Maritime Disputes in Southeast Asia: Bi- and Multilateral Conflict Resolution Approaches AND ASEAN's CENTRALITY 1 (Allied Gerstl & Maria Strasakova eds., 2017).

[322] Article 2 of the ASEAN-Australia-New Zealand FTA Investment Chapter describes a covered investment as one "which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations

Member State's domestic laws, administrative rules and regulations, policies.[323] Nevertheless, where RCEP includes the legality clause to covered investments, the CPTPP does not. The ambiguity of such different contents of definitions and legality clauses in regional treaties and RCEP draft Investment Chapter with CPTPP's exclusion of legality clause in investment definitions open doors to great uncertainties.

These uncertainties create opportunities for denying treaty protection for future investors as well as dispute settlement mechanisms. Latter one is connected to the fact that burden of proof of investment illegality cases falls on the host state. Case laws divide into several opinions on how they see the "according to the laws, regulations and policy" clause. Early ones took the opinion that these legality clauses cover only fundamental principles of the host state. The following options are a) non-trivial violations of Host state's legal order; b) violation of Host State's investment regime; c) fraud; d) criminal acts such as bribery and corruption; e) host state's procedural rules of investment acceptance.[324]

As we mentioned before, in the regional treaties Member States have a broad discretionary power. According to the Article 9 ACIA, Member States can submit a reservation list of the MFN and NT clauses to the ASEAN Secretariat. Fundamentally, it gives host states right to exclude investors or investments from ACIA's coverage on their discretion. Reservation lists are not unfamiliar in RCEP and CPTPP as well.

Conclusion

As one of the most attractive destinations for the foreign investment, Association of South East Asian Nation tried to keep its independence from strict standard treaty rules for a very long time. This over cautiousness correlated to recently gained independence for the majority of the Member States. But ever changing and developing market demanded a change of the regime from relation-based regulation to the rules-based one. The culmination of such transition was signing of the ASEAN Charter in 2007 which set the formal binding set of rules for the Member States. Since then ASEAN introduced number of legal instruments that facilitated in crafting more improved economic and political region which

and policies. Article 1 of the ASEAN-China Investment Agreement broadly defines investment as "every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter." And more importantly, the latest ACIA defines legality clause of investment in Article 4 "been admitted according to its laws, regulations, and national policies".

[323] See further ASEAN Investment Guarantee Agreement; ACIA Guidebook for Businesses and Investors of ASEAN Secretariat; and Article 4 and Footnote 1 and Annex 1 of the ACIA.

[324] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 165 (2013) (footnotes omitted) (citations omitted), Italaw (Jan. 17, 2021, 22:11), https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf. Points a, b and c are mentioned here.

focused on combining two pillars: keeping the independence of the Member States and enacting international law standards. However, it did not mean to change the regulative policies completely. Rather ASEAN decided to combine the two by making the treaty rules flexible and in favor of host state's discretionary powers.

The biggest leap towards internationalization of investment rules started with the ASEAN Comprehensive Investment Agreement. Because of the flexible discretionary powers of the host state, views on ACIA being a multilateral agreement or a regional one have divided. But it is safe to say that ACIA is more of a regional agreement with elements of international law standards. It combined the existing agreements under one document and introduced international treaty standards on investment protection and its liberalization, facilitation, promotion. These are the four innovations pillars of ACIA. It's aim to complete and consolidate the investment regulations that were scattered in various sources into one complex document was reached. With the one centralized instrument investors gained more confidence in the treaty protection of their investment. Nonetheless, when ACIA entered into force, it did not abolish the coverage of the previously existing investment treaties and free trade agreements, which opened doors to the possibility of forum shopping and left investors confused about the promised investment protection of ACIA.

On multilateral level, ASEAN Member States have concluded two mega agreements: RCEP and CPTPP. Both agreements bare great potential to broaden the trade and investment flow of the region. However, it could be confusing for foreign investors to which agreement to turn to as both RCEP and CPTPP mostly consist of same contracting parties. Nonetheless, ASEAN's Member States continue to exercise broad discretionary power in multilateral agreements.

CHAPTER 5

European Union Policy on Foreign Direct Investment

Introduction

The European Union Policy for Investment addresses the issue of sustainable and inclusive development through the lens of private sector-led development. The policy looks at all forms of investment involving all types of firms and recognizes the role of competition in relation to the principle of non-discrimination and national treatment. The Member States (MS) have different private sector development and economic sustainability and efficiency, thus policy could be non-prescriptive, as it is impossible to find an approach that suits all the countries within the European Union (EU; the Union).

The sustainability element can be observed in newly enacted regulations of the Union. Namely, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union[325] and Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088[326]. Firstly, Regulation on screening of foreign direct investment establishes a mechanism for cooperation between the Commission and Member States that allows them to share information and expertise in the area of investment screening. The regulation did not create EU-wide screening process, nor it includes obligations for Member States to enact the screening processes. It states that nothing in this Regulation shall limit the right of each Member State to decide whether or not to screen a particular foreign direct investment within the framework of this Regulation.[327] The regulation enables communications between the Member States and the Commission; allows the Commission to present opinions when an FDI poses a threat to public order; introduces main requirements for national screening mechanisms of the Member States; and endorses international cooperation. Secondly, Regulation on facilitating sustainable investment introduces EU-wide framework for determining business activities and investments whether

[325] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21 March 2019.
[326] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22 June 2020.
[327] Article 1(3) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

it is considered environmentally sustainable.[328] The Regulation incorporates detailed definitions of sustainability, protection of water and marine resources, circular economy, protection of biodiversity and ecosystems. Further if enacts disclosure obligations for businesses in order to determine whether the source of the investment is environmentally sustainable. Therefore, establishing elaborate framework for endorsing green and sustainable investment is timely introduced set of rules in the era of climate change.

Moreover, the importance of foreign investment and its policy is directly linked to the fact that the European Union is the biggest provider and destination of foreign direct Investment in the world, measured by stocks and flows.[329] Needless to say, the statistical data is candidly related to the number countries with higher Gross Domestic Product (GDP) in the European Union. Accordingly, the investment creates enormous economic growth and numerous new jobs both at home and abroad.

In order to understand the European Union policy on foreign investment, we should examine the origin of the notion and its regulatory scope. EU's policy on foreign investment can be observed from its internal regulation of intra-EU investment flows. Its internal regime presents the foundations for explaining the Union's policy towards foreign investment. As a general rule, the international investment law has main purpose of protection the foreign investor's assets in the host states. As for the EU, the main agenda for regulating foreign investment was to ensure free movement of capitals within Member States and provide non-discriminatory treatment for European investors.[330] The foundations of the common market such as free movement of capital and freedom of establishment aim to create a flexible regime for European investors so they could invest freely in the destinations of their choice within the Union. Most importantly, the Union ensured that the process would be discrimination free and all the parties would get the same treatment. The relevance of such objective intensified when the establishment of the internal market took place which resulted in formation of common rules that covered foreign investment regime as well.

Before the Lisbon Treaty entered into force in 2009, the treaty-making competence for foreign direct investment was shared between the Member States and the European Union. Before the Lisbon Treaty, foreign direct investment was neither explicitly part of the

[328] Article 1 of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.
[329] The FDI inflow data by countries, the World Bank (Jan. 17, 2021, 22:11), https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=EU&name_desc=false.
[330] ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW 17, Oxford University Press (2012).

Common Commercial Policy nor considered implicitly part of it by the European Court of Justice.[331] However, as part of the free movement of capital provisions in Articles 56(1)[332] and 57(2)[333] of the Treaty on the European Communities (TEC), the Council had a treaty-making competence for admission and establishment of Foreign Investment.[334] Foreign investments were seen as a subcategory of capital movements.[335] Article 56-60 TEC granted the European Council competence to adopt legislation in the internal market and alongside with an external competence to conclude international agreements with third countries through 'an express conferment by the Treaty' mentioned in the European Agreement of Road Transport case.[336] Therefore, the competence to conclude international agreements were implied. Nonetheless, it did not mean that the competences were all exclusive, the competence for establishment and admission of foreign investment was still shared. The protection of foreign investment was fully within the competence of the Member States. As a result of this mixture of competences, the EU concluded several Free Trade Agreements with third states just establishing and permitting admission of foreign investment on one hand. Even prior to that European Community pioneered in investment related norms in multinational agreements in framework of WTO, such as Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS)[337]. And on the other hand, the Member States concluded number of BITs that only covered the protection of foreign investment.

[331] Opinion 1/94, WTO Agreement [1994] ECR I-5267; Opinion 2/92 OECD-National Treatment Instrument [1995] ECR I-521.
[332] Article 56(1) TEC reads: 'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.
[333] Pursuant to Article 57(2) TEC, the Council can 'adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets'.
[334] PHILLIP THEODOR STEGMANN, RESPONSIBILITY OF THE EU AND THE MEMBER STATES UNDER EU INTERNATIONAL INVESTMENT PROTECTION AGREEMENTS: BETWEEN TRADITIONAL RULES, PROCEDURALISATION AND FEDERALIZATION, 18, The Springer publishing, European Yearbook of International Economic Law (2019).
[335] Christoph Herrmann & Judith Crämer, *Foreign Direct Investment - A "Coincidental" Competence of the EU*, 43 Hitotsubashi Journal Law and Politics, 85, 87-90, (2015).
[336] Case 22/70 Commission v Council (European Agreement on Road Transport) [1971] ECR 263, para 16. It stated that 'an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions ' if it was necessary to achieve certain objectives'. See also, Phillip Stegmann.
[337] PHILLIP THEODOR STEGMANN, RESPONSIBILITY OF THE EU AND THE MEMBER STATES UNDER EU INTERNATIONAL INVESTMENT PROTECTION AGREEMENTS: BETWEEN TRADITIONAL RULES, PROCEDURALISATION AND FEDERALIZATION, 19, The Springer publishing, European Yearbook of International Economic Law (2019).

Furthermore, one of the important aspect of international investment law, precisely interference with investor's property from the state, was not a part of EU's investment regulation. This can be explained by the principle of superiority of the European Union law over national laws and the general outcome which suggests that national law should be compatible with the EU law. Thus even if the European Union did not specifically regulate state's intervention with investor's property, intervening with investor's protected property and infringing the fundaments of the Union law was not an option for the Member States.

Thus this mixed competence saga needed a solution in order to keep the legal autonomy intact and avoid the confusion of the investors. Nonetheless, the situation required more precise legal framework.

European Union's investment stand has changed several times after the 2000s due to the various political and legal developments. Firstly, the Enlargement of 2004 when ten states joined the European Union. Studies on the economics of the 2004 Enlargement[338] of the EU have shown that this prospect of accession has been paramount in mobilizing foreign investments, as western firms responded to the opportunities offered by the opening of the new markets by changing the geographical organization of their production thus initiating a broader process of restructuring for the European industry. As a result, these movements became part of a deeper integration process, reflecting the significant linkages that developed on the ground, which in turn facilitated sizeable technology transfers to the companies of Central and Eastern Europe. But the extent of integration with the local economies has been low, and this was related to the volumes of foreign investment. The countries were seeing foreign investment as a market-capture type and a spatial reorganization of the production system.

The final major step in FDI policy occurred in 2009 when the Treaty of Lisbon came into force. It changed the perspective of future developments entirely by giving the Union full competence over foreign direct investments. The Lisbon Treaty shifted the competence over foreign direct investment from Member States to the Union by including it in Common Commercial Policy. Shifting investment regulations to the EU's exclusive competence was influenced by the objectives of the EU external relations that is to open the third country markets to the EU nationals as it would improve the competitiveness of European entities in

[338] Brendon et al (1999); Kaminski (2001); Clausing & Dorobantu (2005); Monastiriotis & Agiomirgianakis, (2009).

international trade and investment sectors[339]. External relation would cover not only investment related regulation, but every aspect of the international trade and commerce. When the European Union got the competence over foreign direct investment, it started concluding Free Trade Agreements and Investment Protection Agreements which had advanced FDI regulation and introduced new policy as well. These new generation investment agreements had a big impact on the third countries' foreign investment regime as well, including South East Asian countries.

5.1. The Treaty of Lisbon and the Member States'-Bilateral Investment Treaties: the conflict and its regulation

In 1957 with the establishment of the European Union (previously European Economic Community/European Community) a Common Commercial Policy (CCP)[340] was created to govern the EU's trade relations with non-EU countries. The purpose of European Economic Community (EEC) Treaty was to establish common market between the Member States of the Community in order to give possibility to people, goods, capital and services to move freely. The creation of a common commercial policy was a logical consequence of the formation of a customs union among the Member States. The European Union's trade policy therefore establishes common rules including, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instruments. In framework of common market, a twelve-year transitional period was introduced. For the sake of cohesion, liberalization at internal level had to be in tune with that at external level and the Community therefore has had sole competence for common commercial policy since the transitional period ended.[341]

Before getting into Lisbon Treaty and how it changed EU's competence, we should take a brief look at the competences of the Union overall. European Union is a regional and multinational organization which was established by the Member States through the transferring some of their competences to the organization. Based on those competences EU solely can make decisions in certain areas as politics, economics and more.

The competences of the EU are divided into three categories:

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[339] Commission Communication, Global Europe: Competing in the World 567, Brussels 4.10.2006, COM (2006).

[340] The Common Commercial Policy presents regulations to govern EU's trade relation with non-EU countries. Now it includes, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instrument.

[341] The Common Commercial policy, para 2, EUR-Lex (Jan. 18, 2021, 00:54), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aa20000.

- the EU has exclusive competence[342], meaning that only the EU can act upon those areas;
- competences are shared between the EU and the member states.[343] It is when the member states can act only if the EU has chosen not to. If the competence is shared between EU and MS, then the decision making process takes upon negotiations. But usually, the EU states fundamental principles that should be followed by MS;
- the EU has competence to coordinate, supplement or support the actions of the member states[344] – in these areas, the EU may not adopt legally binding acts that require the member states to harmonize their laws and regulations.

The biggest change to the FDI policy of the EU was brought by the Treaty of Lisbon[345] in 2009, which gave the EU power, within the framework of the CCP, to make investment agreements on behalf of the Member States. In terms of new competences, the Lisbon Treaty explicitly mentions foreign direct investment as forming part of the EU common commercial policy[346] and it confirms that CCP is an area of exclusive EU competence.[347] This includes the power to regulate the protection of foreign investment. Such formal declaration reaffirms existing case-law of the Court of Justice of the European Union (CJEU)[348] and means that the Union alone is able to legislate and conclude international agreements in this field of international investment. After the establishment of the "principle of parallelism" elaborated in the European Laying-Up Fund for Inland Waterway Vessels Case and the CJEU's following Opinion 1/76, the question regarding implicit competence of the European Union was lessened. Precisely, CJEU stated that the European Commission disposes of the complementary internal competence in that specific domain "for the purpose of attaining a

[342] Article 3 of Treaty on the Functioning of the European Union.
[343] *Ibid*, Article 4.
[344] *Ibid*, Article 6.
[345] The Lisbon Treaty is the latest amendment of the EU founding Treaties, entered into force in 2009. It resulted in amendments of the (current) Treaty on European Union (TEU) [OJ C 326.26.10.2012 p. 13] and Treaty on Functioning of the European Union (TFEU) [OJ C 326.26.10.2012 p. 47].
[346] See articles 206 and 207(1) Treaty on Functioning of the European Union.
[347] Art 188A of Treaty of Lisbon states: "By establishing a customs union in accordance with Articles 23 to 27, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers".
[348] See especially Opinion 1/76 'Draft Agreement establishing a European laying-up fund for inland waterway vessels' [ECLI:EU:C: 1977:63]; Opinion 1/94 'Competence of the Community to conclude international agreements concerning services and the protection of intellectual property'; Opinion 2/00 [ECLI:EU:C: 2001:664].

specific objective"; and that the Community's participation is necessary for the realization of that objective.[349]

In other words, Opinion 1/76 confirmed the ruling of the Kramer Case[350] in the point that the simple existence of the internal competence suffices to establish an analogue external competence provided its necessity. Therefore, a possibility of implicitly conferred powers derived from other Treaty provisions or secondary legislation consequently appears to be as much essential as the taking into account of external ones.

5.2. Bilateral Investment Treaties

Before Lisbon Treaty entered into force, competence over foreign investment was highly fragmented due to various implied powers the European Union possessed in certain sectors. The previous analysis shows that in the field of investment as a whole not all relevant aspects have been included into the EU's exclusive competence. By excluding portfolio investments, one important component usually contained in investment agreements falls outside the CCP's scope. The European Union misses an admissible piece in its investment issue which interferes it to conclude all-included agreements as wholesome as conventional Bilateral Investment Treaties usually conducted by the Member States. And reason to that would be the EU's decision to settle questions related to FDI, excluding portfolio investment.

Following the upper mentioned, in order to negotiate future BITs with its all aspects related to investment, the EU must cooperate with the Member States, calling for future of somewhat mixed agreements. On the other hand, since the delegated authority over foreign direct investment has been given to the EU, the Member States will not be able to conclude BITs on their own. Consequently, instead of forming a clear situation and centralization of authority, the predicament of a once again shared competence is established, with neither side being able to conclude a conventional and competitive agreement over investment without the cooperation of the other.

Whether one is in favor of a broad interpretation of the new FDI competence as suggested above or a rather narrow one: in either case various competences provided for in the BITs conducted by Member States with third countries now fall under the exclusive

[349] CJEU Opinion 1/76, part 3 and part 4, EUR-Lex (Jan. 18, 2021, 00:54), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61976CV0001&from=EN.

[350] Kramer Case, on the same principle of parallelism, CJEU stated: "flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions, by the Community institutions".

mandate of the European Union which indeed raises the question about the fate of these BITs. It is thus relevant to shed light on the question whether the Member States will be in the legitimate position to fulfil their obligations under their BITs or if they, by doing so, would contravene their responsibilities towards the EU. The following paragraphs shall thus provide a brief survey on the questions of the future legal validity of the existing BITs and, more importantly, what obligations the individual Member State have with regards to the EU and their international partners.

Over the last 50 years, the Member States concluded a large number of such bilateral agreements (see Figure 1). There are two types of BITs: treaties between Member States and third countries and; intra-EU agreements. From all above, one question arises: What to do with Member States' Bilateral Investment Treaties?

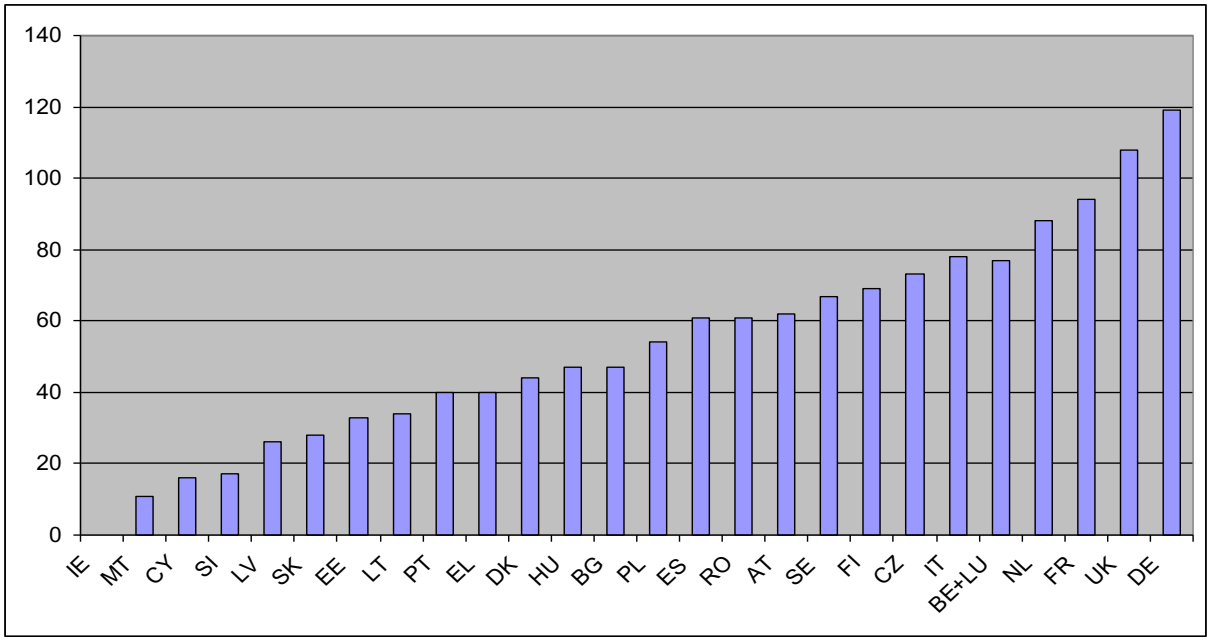

Figure 1. Overview of the number of Bilateral Investment Treaties concluded by Member States

Source: COM(2010)343 final[351]

One of the remedies can be found in Article 351 Treaty on the Functioning of the European Union (TFEU) (Ex Article 307 TEC) which states:

> *"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more*

[351] European Communication, Towards a comprehensive European international investment policy 343, (2010), European Commission (Jan. 18, 2021, 00:54), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF.

Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

This article can be used as an analogy to justify the validity of existing BITs. In this regard, the principle *pacta sund servanda* comes as a core of this remedy. The principle represents obligation by contract shall be respected and parties shall not invoke provisions of their domestic law as premise for failure of performance.[352] Particularly, the basic intention of Article 351 TFEU is to demonstrate a clear division that exists between agreements entered into before and those concluded after the European Union assumed competence in a specific domain from the Member State, leaving the first act intact in essence, whereas the latter would contravene Union law.

Favoring the analogy of Article 351 TFEU, one, however, has to take into account the subsequent paragraph alike. The paragraph further states that:

"To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established."

Without question, this provision commits the Member State to abolish any noncompliance that might arise between their existing BITs and prospective EU provisions regulating the same subject matter, therefore incorporating the duty of loyal cooperation.

By virtue of the general principles of international law as well as by analogy of Article 351 TFEU the BITs will remain in force for the time being and will thus not contravene existing EU law. The CJEU established that the purpose of Article 351 TFEU is to ensure that EU law does not interfere in Member States' duties under treaties with third countries.[353] The Member States ought to fulfil their treaty obligation as promised.[354] However, this situation applies only as long as the BITs in question comply with parallel EU provisions. Consequently, the Member States are obliged to remove any inconsistency that may spring from their proper BITs.[355]

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[352] See also: Eilmansberger, Bilateral Investment Treaties and EU Law, 397; Ceyssens, Towards a Common Foreign Policy in Investment? 287.

[353] CSONGOR ISTVAN NAGY, EXTRA-EU BITS AND EU LAW: IMMUNITY, 'DEFENSE OF SUPERIOR ORDERS', TREATY SHOPPING AND UNILATERALISM, IN INVESTMENT ARBITRATION AND NATIONAL INTEREST 138-139, Csongor Istvan Nagy ed., (2018).

[354] *Ibid.*

[355] George-Dian Balan, The Common Commercial Policy under the Lisbon Treaty, 7, (Jean Monnet Seminar" Advanced Issues of European Law") (2008).

5.3. Extra-EU Bilateral Investment Treaties

The next remedy is the Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and third countries[356] (hereinafter the Regulation) addresses the steps that should be taken about existing bilateral investment agreements. The Regulation was brought by the Commission and was enacted by the Council and the Parliament on 20th December 2012. After 20 days of enacting, the Regulation came into force. The Regulation puts an end to controversies and debates regarding the legal effect of BITs between EU Member States and non-EU countries ("extra-EU BITs"). The main uncertainty surrounding extra-EU BITs originates from Article 207 of the Treaty on the Functioning of the European Union, which referred foreign direct investments to the exclusive competence of the EU.

The Regulation pursues a smooth transition towards the new EU investment policy in two ways.[357] Firstly, it provides for legal certainty for European and foreign investors benefiting from investment protection offered in Member States' bilateral investment agreements concluded with other parts of the world previous to the Lisbon Treaty. It clarifies the legal status of those agreements under EU laws and confirms that they may be maintained in force until they are replaced by an EU investment agreement. Secondly, the Regulation also establishes a mechanism for empowering Member States – under certain conditions – to negotiate bilateral investment agreements with countries not immediately scheduled for EU-wide investment negotiations. This is designed to expand the scope of investment protection currently available to European investors.

Regulation states that the bilateral agreements signed before 1st December 2009 can be maintained in force, or enter into force, in accordance with the Regulation. Nonetheless, a few obligations are engaged for the Member States: to take necessary measures to eliminate the BIT's incompatibilities with the Union law; to amend or conclude BITs in accordance with Union law and to cooperate with the negotiations or the conclusion by the Union of a BIT with third countries.

This means existing BITs will remain in force until replaced by the EU's investment agreements. The Commission will be responsible in facilitating the replacement procedures

[356] Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and third countries. OJ L 351, 20.12.2012, p. 40-46.
[357] *Ibid.*

of existing agreements. When such agreement will be signed, the Member States are obligated to withdraw their authorization of respective existing BITs.

In order to pursue the Regulation, the Member States are obliged to notify the Commission about their BITs with third countries entered into force before 1 December 2009 or before entering the European Union, whichever is later. The Commission will further assess the notified BITs "by evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment treaties with third countries, with a view to the progressive replacement of the bilateral investment agreements".[358] If the Commission establishes that such obstacles exists, the Commission and the Member State concerned shall confer in order to elaborate measures to resolve the matter. Sixty days after the end of the consultations, the Commission "may indicate the appropriate measures to be taken by the Member State".[359]

For amendments and negotiations of new extra-EU BITs, as a general rule, the Member States should get the Commission's authorization to open formal negotiations with third countries. The Commission may require the Member State to supplement or remove from such negotiations and from the prospective bilateral investment agreement any clauses necessary to ensure consistency with the Union's investment policy or compatibility with Union law. The time limit for taking the decision is ninety days from the notification or from the receipt of additional information, if such is requested by the Commission. The Commission shall not grant authorization to open formal negotiations, if it concludes that such negotiations would:

- be in conflict with the EU law except for incompatibilities arising from the allocation of competences between the EU and Member States;
- be superfluous, because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU;
- be inconsistent with the EU's principles and objectives for external action (Chapter 1 of Title V of the Treaty on European Union); or
- constitute a serious obstacle to the negotiation or conclusion of BITs with third countries by the EU.

[358] Article 5 of Regulation 1219/2012.
[359] *Ibid*, Article 6.

Before signing, the final version, the BIT must be approved by the Commission based on the above four criteria and the Commission's requirement communicated with the authorization to open formal negotiations. The ninety days' time limit is also applicable for rendering the decision on authorization to sign and conclude the BIT.

5.4. Intra-EU Bilateral Investment Treaties

As for the intra-EU bilateral investment treaties, the main problem was that they were incompatible with the fundamental principles of the EU. More precisely, conflicts arose from restrictions on the free movement of capitals and protections granted for investment in BITs. According to the European Commission, those provisions of the bilateral investment treaties were causing discrimination among Member States which were not parties in those treaties. According to the Court of Justice of the European Union case-law, discrimination based on nationality, as declared by the EU Treaties[360] and confirmed by the case-law of the CJEU,[361] is incompatible with EU law. Thus the Union came up with the general regulation for all bilateral investment agreements of the Member States. The Commission was also concerned that the jurisdiction of arbitral tribunals to resolve investment disputes would undermine the CJEU's power to issue preliminary rulings on the relevant questions of EU law according to Article 267 TFEU.

Intra-EU bilateral investment agreements faced more problems than the agreements with third countries. The European Commission has made a bold commitment to prove that intra-EU BITs are infringing Union law. The arguments that were presented by the Commission are as follows:[362]

- The principle of *lex posterior*, which requires Member States to take actions against conflict between EU law and earlier treaties in their domestic law;
- The principle of supremacy of EU law, which means that EU law prevails over treaties concluded between EU Member States;
- Availability of equivalent investment protection under EU law;
- The principle of non-discrimination under Article 8 TFEU, which prohibits any discrimination on the grounds of nationality;
- The violation of State aid rules under EU law;

[360] See especially Article 18(1) TFEU and in the context of the so called four economic freedoms, Part Three Title 1 TFEU.
[361] See for instance Case C-467/98 Commission v Denmark [ECLI:EU:C: 2002:625].
[362] Lucian Ilie, *What is the Future of Intra-EU BITs?*, (2018), Kluwer Arbitration Blog (Jan. 18, 2021, 01:03), http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/.

- And lastly, the exclusive jurisdiction of the CJEU on interpreting EU law and that an arbitral tribunal is not competent to seek preliminary ruling from the CJEU.

In response to the arguments of the Commission, the Member States presented the problems arising from termination of their bilateral investment agreements. Firstly, European Union investors would lose their right to benefit from the advantages of international investment arbitration for disputes arising out of their investment in a European Union Member State. The only available solution would be national courts. Thus the investors would not have complete confidence in their investments in Member States. Secondly, a number of intra-EU BITs stipulate a *sunset clause*, which allows protected investors to enjoy substantive and procedural protection under the BIT upon its termination for a specified period of time. And lastly, Union law has no equivalent substantive protection to intra-EU BITs since the latter generally provide a broader scope of protections, as pointed out by Advocate General Wathelet in the *Achmea v. Slovakia* preliminary ruling.[363]

Nonetheless, in 2018 this issue was settled with the CJEU's decision on Achmea case. The CJEU held that an arbitration clause in an intra-EU bilateral investment treaty is non-compliant with EU law because it endangered the stability of the EU's judicial architecture and encroached on EU court's privilege to interpret EU law.

Achmea v. Slovak Republic

Achmea, a Dutch health insurance company, invested in Slovakian health insurance market when it was privatized in 2004. It acquired shares in Slovakian health insurance company Union zdravotna poistovna (UZP).[364] However, in 2007 Slovak Republic enacted a law that partially reversed the liberalization of the private health insurance market. More specifically, Slovak Republic prohibited the distribution of profits that are generated by private health insurance activities.[365] Thus threatened Achmea's stake in Slovak health company with indirect expropriation. Subsequently, in October 2008 Achmea brought arbitration proceedings against the Slovak Republic at Frankfurt, the chosen seat for the arbitration. Thus German law was the applicable law.

[363] Opinion of AG Melchior Wathelet in case C-284/16 Slovak Republic v. Achmea BV [ECLI:EU:C:2017:699], para 205. In the view of the arbitral tribunal, investment protections under Intra-EU BITs were neither covered nor applied in the same scope as under EU law. Furthermore, European Union law did not grant access to investment arbitration or an equivalent provision that would allow a EU investor to bring a claim against EU Member State.

[364] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2-13-12. UNCTAD Investment Dispute Settlement Navigator.

[365] CJEU C-284/16, Achmea v. Slovak Republic, Judgement ECLI:EU:C:2018:158, 6 March 2018, para 8.

During the period when arbitration was in process, Constitutional Court of Slovak Republic held a judgement that the prohibition of distribution of profits was incompatible with the Slovak constitution.[366] Consequently, in 2011 Slovak republic allowed the distribution of the profits that were subject to the arbitration proceedings.

When the Achmea v. The Slovak Republic[367] case was brought up to the UNCITRAL ad hoc arbitration tribunal, the tribunal rejected Slovakia's jurisdictional objection that the Netherlands-Slovak Republic BIT, on which its jurisdiction was alleged, was no longer applicable due to Slovakia's accession to the EU. In its final 2012 award, the ad-hoc arbitral tribunal found that Slovakia had violated the BIT and therefore ordered to pay approximately EUR 22.1 millions of damages to Achmea.[368]

Subsequently, Slovakia challenged the arbitral award on the basis of jurisdiction in the German court which was the seat of the arbitration. Slovakia argued that the arbitral tribunal lacked jurisdiction to hear the claims because the arbitration clause embedded in Article 8 of the BIT was incompatible with EU law, more specifically articles 18, 267 and 344 of the Treaty on the Functioning of the European Union. In these proceedings, the Higher Regional Court of Frankfurt[369] rejected Slovakia's arguments, finding that the BIT was not incompatible with the aforementioned provisions of the TFEU. The German Federal Court of Justice[370], hearing the case on appeal, referred questions on the compatibility with EU law of the BIT's arbitration clause to the CJEU for a preliminary ruling, thereby offering its view that the arbitration clause was not contrary to the provisions of the TFEU.

In 6 March 2018, the Court of Justice of the European Union ruled[371] that the arbitration clause included in the Article 8 of the 1991 Netherlands-Slovakia BIT has a conflicting effect on the autonomy of EU law and the principle of mutual trust between Member States. Therefore, it is incompatible with EU law. Furthermore, CJEU found that such BITs endangered the stability of the EU's judicial architecture and encroached on EU court's privilege to interpret EU law.[372] With this judgment, the CJEU decided not to follow Advocate General Wathelet's opinion from 19 September. In this opinion, the Advocate

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[366] *Ibid.*
[367] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).
[368] Achmea B.V. v. Slovak Republic, Case C-284/16, ECLI:EU:C:2018:158, 6 March 2018, para 12.
[369] Oberlandesgericht Frankfurt, decision of 18 December 2014 – Case 26 Sch. 3/13.
[370] Bundesgerichtshof, decision of 3 March 2016 – Case I ZB 2/15.
[371] Achmea B.V. v. Slovak Republic, Case C-284/16, ECLI:EU:C:2018:158, 6 March 2018.
[372] CSONGOR ISTVAN NAGY, EXTRA-EU BITS AND EU LAW: IMMUNITY, 'DEFENSE OF SUPERIOR ORDERS', TREATY SHOPPING AND UNILATERALISM, IN INVESTMENT ARBITRATION AND NATIONAL INTEREST 137, Csongor Istvan Nagy ed., (2018).

General proposed to the CJEU to rule that EU law did not preclude the application of an investor-state dispute settlement mechanism established by means of a BIT between two EU Members States.

As pointing out the primacy of EU law, the CJEU recalls the principle of autonomy of the EU legal system, which is stated in Article 344 TFEU.[373] The Court also sets forth that the EU law is characterized by the fact that it stems from independent source of law: the EU Treaties and its primacy over the law of Member States. Furthermore, the CJEU found that the arbitral tribunal constituted under the BIT must rule on the basis of the law in force of the contracting state involved in the dispute as well as other international agreements between the contracting parties, which includes EU law.[374] In the context of resolving an investment dispute under the BIT, the arbitral tribunal may be called on to interpret or even apply EU law, particularly the provisions concerning freedom of establishment and free movement of capital. The CJEU then considers whether an arbitral tribunal such as the one constituted under Article 8 of the Netherlands-Slovakia BIT can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU.[375] It answers this question in the negative, establishing that the arbitral tribunal concerned is not part of the judicial system of either the Netherlands or Slovakia. The exceptional nature of its jurisdiction is one of the principal reasons for the existence of the BIT's arbitration clause. Consequently, the arbitral tribunal has no power to make a reference to the CJEU for a preliminary ruling.

CJEU's decision over Achmea case brought huge pessimism[376] and the future of intra-EU BITs remained uncertain, unless the EU will move forwards with its new investment court. In what will most certainly be regarded as a landmark decision, the CJEU set the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. Although not binding upon investment treaty tribunals, the CJEU's ruling is likely to have far-reaching consequences for investor-state disputes under the 196 intra-EU BITs currently in force and may be the first step towards more profound changes affecting intra-EU investment treaty arbitration as we know it today.[377]

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[373] CJEU C-284/16, ECLI:EU:C:2018:158, Achmea v. Slovak Republic, 6 March 2018, para 17.
[374] *Ibid*, para 21.
[375] *Ibid*, para 22.
[376] CSONGOR ISTVAN NAGY, EXTRA-EU BITS AND EU LAW: IMMUNITY, 'DEFENSE OF SUPERIOR ORDERS', TREATY SHOPPING AND UNILATERALISM, IN INVESTMENT ARBITRATION AND NATIONAL INTEREST 137, Csongor Istvan Nagy ed., (2018).
[377] Clement Fouchard & Marc Krestin, *The Judgement of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, (2018), Kluwer Arbitration Blog (Jan. 18, 2021, 01:06),

As a result of Achmea case, in May 2020, Member States of the European Union signed an Agreement for the termination of intra-EU BITs and its sunset clauses.[378] In total 23 Member States signed the agreement, excluding Austria, Finland and Sweden. The agreement entered into force in August 2020. Bilateral investment treaties will cease to exist when new BITs will come to force in previous ones' place. However, Member States and EU itself are still signatories to the Energy Charter Treaty, hence bringing claims under ECT is still an option.

5.5. Other novelties of the approach of the European Union towards Foreign Direct Investment

With shifted foreign direct investment competences, the European Union introduced novelty provisions regarding investor-state dispute settlement mechanism that sheds light on the future of intra-EU and extra-EU bilateral investment treaties and does not conflict with the autonomy of the EU law.

5.5.1. Investment Court System: Multilateral Investment Court

The EU has recently made clear that it is determined to move away from its previous system of investor-state dispute settlement mechanism, as its ad hoc nature does not sufficiently guarantee impartiality and predictability. That is why, after a long and thorough debate with all relevant stakeholders, the European Union replaced Investor-State Dispute Settlement (ISDS) mechanism in all its international investment agreement negotiations with a permanent Investment Court System (ICS).[379] The Commission says that the Investment Court System in the European Union trade and investment agreements already addresses all the main shortcomings identified in the old ISDS system. The proposal for the new court system includes major improvements such as:[380]

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;

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http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/.

[378] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, The European Union (Jan. 18, 2021, 01:06), https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:22020A0529(01)&from=EN.

[379] European Commission, A Multilateral Investment Court (2017), The European Commission (Jan. 18, 2021, 01:06), http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

[380] The main elements of the reform can be found in the communications that Union made since the negotiations of CETA. The European Commission (Jan. 18, 2021, 01:06), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364.

- judgments would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

Investment Court System was firstly implemented in Comprehensive Economic and Trade Agreement (CETA) between Canada and the Union. The compatibility of ICS in CETA with the Union law was challenged when the Belgium High Court requested opinion from the CJEU whether CETA would affect the autonomy of the EU's legal order. Belgium's request raised questions regarding CETA's compatibility with European Union legislation. Specifically compatibility with the autonomy of EU's legal order;[381] general principle of equal treatment;[382] and the right to access the independent tribunal.[383] CJEU's Opinion 1/17 confirmed that the Investment Court System that is implemented in EU and Canada agreement was in line with the European Union law including EU Treaty, TFEU and EU Charter of Fundamental Rights.[384]

On right to access the independent tribunal, Belgium raised a question regarding the possibility of Canadian investors to bring claim against the EU, but EU investors cannot.[385] According to CETA, only parties to the agreement can bring a claim ICS. Such right is not presented to other EU investors that are investing within the European Union. Therefore, Belgium asked if such decision is compatible with equal treatment and principle of non-discrimination stated in the Articles 20 and 21 of Charter of Fundamental Rights of the European Union that prohibits discrimination on grounds of nationality.[386] CJEU found that Article 21(2) of the Charter is inapplicable to an eventual difference in treatment between

[381] Opinion 1/17 of the Court of Justice of the European Union, ECLI:EU:C:2019:341, paras 46-50.
[382] *Ibid*, paras 51-55.
[383] *Ibid*, paras 56-69.
[384] Opinion 1/17 of the Court of Justice of the European Union, ECLI:EU:C:2019:341.
[385] *Ibid*, para 51.
[386] *Ibid*, para 52.

member state nationals and non-member state nationals.[387] However, Article 20 of the Charter is applicable to all situations.[388] Therefore, CJEU held that the situation with Canadian investors is not the same as that of EU Member State investors investing in another Member State. European Union investors that invested in Canada can submit their claim to the ICS. However other EU Member States' investors that invested within EU cannot bring such claim.

Further Investment Court System got implemented in new generation investment agreements of the EU with Mexico, Singapore and Vietnam. But due to its bilateral nature, ICS only applies to the specific parties to each agreement. Therefore, new agreements have clauses to transition to Multilateral Investment Court system when the latter comes to force.[389] MIC's negotiations started in 2017 under the auspices of the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).[390] For the time being EU only has observer status in negotiations.

The overall objective for creating a multilateral investment court is to set up a permanent body to settle investment disputes. This multilateral investment court would adjudicate disputes under future and existing investment treaties. For the EU, the MIC would eventually replace the bilateral investment court systems included in EU trade and investment agreements. The initiative is part of the EU's new approach to investment dispute resolution, moving away from the traditional arbitration mechanism towards a court system. It aims at responding to some of the legitimate public concerns raised in the context of the traditional investor-to-state dispute settlement, by bringing key features of domestic and international courts to investment arbitration.

At the time, multilateral investment court's negotiations completed the identification of the concerns regarding the ISDS and assessing the desirability of reforms for identified concerns. The last step would be to recommend actions and reform options which are under negotiation phase. Currently Working Group III focusing on issues regarding appellate mechanism and enforcement; selection and appointment of ISDS tribunal members; and code of conduct for adjudicators in ISDS.[391]

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[387] *Ibid*, paras 168-170. Previously the Court held the same position in judgement of 4th June 2009, Vatsouras and Koupatantze, C-22/08 and C-23/08; EU:C:2009:344, Para 52.
[388] Article 20 of Charter of Fundamental Rights of the EU stipulates that everyone is equal before the law.
[389] Article 8.29 of CETA.
[390] UNCITRAL Working Group III, Possible reform of investor-state dispute settlement: Appellate and multilateral court mechanisms, Note by Secretariat, 2020. UNCITRAL (Nov. 21, 2020, 23:09), https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/113/57/PDF/V1911357.pdf?OpenElement.
[391] *Ibid.*

5.5.2. New generation investment agreements of the European Union

Since Lisbon Treaty entered into force, the European Union initiated negotiations of broad spectrum new generation free trade agreements and investment protection agreements. As of August 2020, there are several free trade agreements and investment protection agreements including Comprehensive Economic and Trade Agreement (CETA), EU-Singapore Free Trade Agreement (EUSFTA), EU-Japan Economic Partnership Agreement and EU-Vietnam Free Trade Agreement.

Comprehensive Economic and Trade Agreement is a new trade agreement between the EU and Canada. On 21 September 2017 CETA entered into force provisionally.[392] It will only enter into force fully and definitively when all EU Member States will ratify the Agreement. As such, most of the agreement now applies. National parliaments in EU countries – and in some cases regional ones too – will then need to approve CETA before it can take full effect. As mentioned in previous subchapter, CETA has a significant effect on future new generation agreements. Investment court system which is implemented in Comprehensive Economic and Trade Agreement was in harmony with the laws of the European Union and did not pose a threat to the autonomy of EU's legal order. Therefore, ICS was implemented to new generation agreements as well.

Claims in CETA can be brought under rules of ICSID, UNCITRAL or any other arbitration rules that parties agree to.[393] In addition, ICSID secretariat shall act as Secretariat for the Tribunal, therefore facilitating in hearing disputes. The tribunals in CETA are ad hoc tribunals that are constituted on semi-permanent basis as the members of the tribunal rosters. CETA Tribunal consists of 15 members, 5 from Canada, 5 from EU and 5 from third countries that are appointed for five years and renewable once.[394] The tribunal shall hear cases in division of three tribunal members. Members of the Tribunal are paid a retainer fee that will ensure their independence and impartiality. And lastly, CETA established an appellate mechanism to review rendered awards. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on application or interpretation errors; errors in appreciation of facts and domestic laws; and grounds set out in Article 52(1) of the ICSID Convention.[395]

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[392] EU-Canada Trade Agreement, The European Commission (Jan. 18, 2021, 01:11), http://ec.europa.eu/trade/policy/in-focus/ceta/.
[393] Article 8.23 of CETA.
[394] *Ibid*, Article 8.27.
[395] *Ibid*, Article 8.28.

Initially, European Union started Free Trade Agreement and Investment Protection Agreement negotiations with Association of South East Asian Nations itself. However, the process was suspended and therefore negotiations with individual ASEAN Member States started to take place. In March 2017, ASEAN and EU restarted the negotiation processes by creating a joint working group for region-to-region agreement initiatives. So far there are two agreements with Singapore and Vietnam; and negotiations with other ASEAN Member States are continuing.

When negotiations for EU-Singapore Free Trade Agreement was going on, an issue regarding the Union's competence to conclude such agreement came into light. The question was whether signing EUSFTA is solely EU's competence or is it shared between the Union and the Member States. The question rose from inclusion of foreign direct investment clauses in the EUSFTA. In order to remove all uncertainties, the Commission requested the Court of Justice of the European Union for an opinion. CJEU in its Opinion 2/15 held that EU-Singapore Free Trade Agreement cannot be concluded by the European Union alone.[396] According to the CJEU, investor state dispute settlement clauses of the agreement fully belong to the Member States as ISDS regime removes dispute from MS's jurisdiction and it cannot be established without MS's consent.[397] Therefore, it falls within shared competence of the Union and the Member States. Subsequently, EUSFTA will now require ratification from Member States. This opinion consequently affected all the investment protection agreements with ASEAN member states thus they all would need a ratification before entering into force.[398] Same situation applies to the EU-Vietnam Free Trade Agreement that entered into force in 1 August 2020 and Investment Protection Agreement would need the ratification by the Member States of the European Union. And lastly in February 2019, the EU–Japan Economic Partnership Agreement (JEEPA)[399] came into force. Given that the JEEPA does not cover investment protection or investor-state dispute settlement, additional Investment Protection Agreement is under negotiation. In the proposed agreement, the European Union has also included a reformed Investment Court System proposal and has stated that "it is clear that there can be no return to the old-style ISDS".

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[396] Opinion 2/15 of the Court of Justice of the European Union, ECLI:EU:C:2017:376.
[397] *Ibid*, para 292.
[398] See BALASZ HORVATHY, OPINION 2/15 OF THE EUROPEAN COURT OF JUSTICE AND THE NEW PRINCIPLES OF COMPETENCE ALLOCATION IN EXTERNAL RELATIONS – A SOLID FOOTING FOR THE FUTURE? IN INVESTMENT ARBITRATION AND NATIONAL INTEREST 121-136, Csongor Istvan Nagy ed., Council on International Law and Politics, Indianapolis (2018).
[399] EU-Japan Trade Agreement news, The European Commission (Jan. 18, 2021, 01:11), http://europa.eu/rapid/press-release_IP-18-6749_en.htm.

It is safe to say that the European Union is rapidly concluding new generation free trade agreements and investment protection agreements. By doing so the Union is also shedding light to problems concerning competences in investment regulation. However, the question regarding investor state dispute settlement remains vague. Even if the foreign direct investment is the EU's exclusive competence, the major part of investment protection, the ISDS being Member States' competence could cause uncertainties among investors.

5.5.3. EUSIPA and EUVIPA

This subchapter will examine EU-Singapore and EU-Vietnam Free Trade Agreements and Investment Protection Agreements. We will primarily focus on the chapters of Investment Protection Agreements regarding investment protection and investor-state dispute settlement mechanism. Especially, the subchapter will examine the novelties of new generation free trade agreements; similarities and differences of European Union – Singapore Investment Protection Agreement (EUSIPA) and European Union – Vietnam Investment Protection Agreement (EUVIPA).

Preambles of the EU-Singapore Investment Protection Agreement explicitly promotes state's right to regulate by reaffirming each party's right to adopt and enforce measures to pursue legitimate policy objectives.[400] Such explicit expression represents that new generation free trade agreements are moving away from traditional pro-investor investment agreements and towards an agreement that promotes not only investment protection but respects the host state's right to regulate. Most of the host state's discontent regarding investor-state dispute settlement were coming from the belief that arbitral tribunals favor foreign investor regardless of that fact that investment itself is made in a public interest sector of the host state. Thus expressly formulated state's right to regulate clause in EUSIPA preamble manifests the importance of state's right to regulate to the parties. On contrary, EU-Vietnam Investment Protection Agreement did not include such express clause for state's right to regulate.

Further, in both EUSIPA and EUVIPA, we can notice the great number of explanatory footnotes and clarifications of terminologies and definitions. For example, EUSIPA clarifies what right will constitute the intellectual property rights[401]; denial of justice[402] and a whole

[400] Preamble para 6, EUSIPA.
[401] *Ibid,* Article 1.2, Footnote 1.
[402] *Ibid,* Article 2.4, Footnote 2.

annexed dedicated for clarification on what constitutes expropriation.[403] Main agenda of these footnotes and explanatory notes are to avoid potential disputes regarding the interpretation of treaty clauses. Other novelty that is introduced in order to avoid disputes rooted in interpretations is establishment of joint committees for interpretation of the agreement text. According to the Article 4.4.C of EUVIPA and Article 4.4.F of EUSIPA, joint committee of the parties shall adopt interpretations of the provisions of the agreement, which shall be binding on the parties and all other institutions of the agreement.[404] Such provisions also aimed to remove the excessive interpretive powers of the arbitrators in investment tribunals. Subsequently, the uncertainty falls on the disputing parties can be drastically decreased with committees on interpretation.[405]

Moreover, both of the agreements include extensive definitions of main terminologies of international investment law. Therefore, agreements avoided the traditional approach of investment treaties that used to give very broad definitions of principles of international investment law, which subsequently gave more interpretational power to the arbitrators. For example, the broadly defined by the arbitrators, principle of fair and equitable treatment is elaborately defined in the new generation agreements. EUSIPA and EUVIPA both give definition of fair and equitable treatment by listing the components of what kind of breaches would constitute the breach of the principle. EUSIPA's list of components include denial of justice, a fundamental breach of due process, arbitrary conduct of parties and abuse of power or bad faith.[406] EUVIPA on the other hand includes the same list with addition of targeted discrimination on the basis manifestly wrong grounds such as gender, race or religious belief.[407] However, none of the agreements give explanation or clarification whether the list is exhaustive or not. This gives potential opportunity for arbitrators to add other components to what would entail a breach of fair and equitable treatment.[408] More importantly in both agreements, fair and equitable treatment incorporated legitimate expectation of investors. Legitimate expectation of the covered investor is a notion created in the investment tribunals that the arbitrators used to justify awards of compensation for foreign investors.[409]

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[403] *Ibid,* Annex 1 and 3.
[404] Other institutions include the tribunal, the appeal tribunal and the arbitration panels.
[405] Siraj Shaik Aziz, The Investment Protection Chapter of the EU-Singapore Free Trade Agreement: A Model for the Post-Brexit UK IIAs, 10 Journal of East Asia and International Law, Issue 1, 16, 7-21, 2017.
[406] Article 2.4. Standard of treatment. EUSIPA
[407] *Ibid,* Article 2.5. Treatment of investment.
[408] Gus Van Harten, The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA, 1 University of Bologna Law Review, 156, 2016.
[409] *Ibid.*

According to the EUSIPA and EUVIPA, it is in tribunal's discretion to take into account, while determining breach of FET, whether a party made a specific or unambiguous representations in order to promote investment that created legitimate expectations of a covered investor.[410] Inclusion of legitimate expectations in to the fair and equitable treatment makes the understanding of the principle quite expansive and brings novelty to the traditional characteristics of the fair and equitable treatment principle. Nonetheless, it is uncertain whether such expansive approach will bring positive reinforcement to the international investment law. As the agreements are relatively new, it is inevitable that new arbitration cases will reveal its flaws if there is any.

Both EUSIPA and EUVIPA introduced the unprecedented binding Code of Conduct for arbitrators, mediators and members of the tribunals.[411] The code of conduct describes ethical and procedural duties of the arbitrators. Even the former arbitrators, mediators and members of the tribunal are not exempt of the obligations imposed by the code. It states that all former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived any advantage from the decision or ruling of the arbitration panel.[412] Same provision is incorporated in EU-Vietnam Investment Protection Agreement.[413]

Arbitrators in both agreements shall possess qualifications required in their respective countries for appointment of the highest judicial offices or be jurists of recognized competence.[414] Members of the tribunal shall have expertise in public international law; desirably in international investment law, international trade law and resolution of disputes arising under international investment and trade agreements.[415]

Dispute settlement mechanism between investors and the state in the European Union new generation agreements follows the example of CETA and establishes a two-tier tribunal that includes a tribunal of first instance and an appeal tribunal.[416] In EUSIPA a tribunal of first instance includes six members, two of which are nominated by the EU, two by Singapore and another two members, that are not nationals of any EU Member States and

[410] Article 2.4, para 3. Standard of treatment. EUSIPA and Article 2.5, para 4. Treatment of investment. EUVIPA. Furthermore, specific or unambiguous representation mentioned in the paragraph includes the representation made in order to convince the investor to continue with, not to liquidate or to make subsequent investments.
[411] Annexes 8 and 11 of EUVIPA and Annexes 7 and 11 of EUSIPA.
[412] Paragraph 15, Annex 11 Code of Conduct for Arbitrators and mediators, EUSIPA.
[413] Paragraph 15, Annex 8 Code of Conduct for Arbitrators and mediators, EUVIPA.
[414] Article 3.9.4 and 3.10.4 of EUSIPA, and Articles 3.38.4 and 3.39.7 of EUVIPA.
[415] *Ibid.*
[416] Chapter 3 in both EUSIPA and EUVIPA. See Subchapter 5.5.1 of this Dissertation.

Singapore, will be nominated jointly by the parties.[417] Members of the tribunal shall be appointed for eight-year term with a possibility to extend the appointment term.[418] In order to ensure their availability, a monthly retainer fee will be paid.[419] On the other hand, EUVIPA's tribunal is slightly different than EU-Singapore's tribunal. It has nine members: three from the European Union, three from Vietnam and three from third countries and are appointed for a period of four years, renewable once.[420] Appeal tribunal in EUSIPA is constituted under Article 3.10, has six members appointed in the same procedure as members of the tribunal of first instance that are appointed for an eight-year term as well. For EUVIPA, it is constituted under Article 3.39 and has 6 members that are appointed for term of four years, renewable once.[421] If the appeal is well founded, the appeal tribunal shall modify or reverse the legal findings and conclusions in the whole award or in parts of it.[422]

Another novelty that is expressly mentioned in both agreements is umbrella clause. Umbrella clause enables investors to invoke treaty based protection on a contractual breach. Article 2.4.6 of EU-Singapore Investment Protection Agreement states that a party shall not frustrate or undermine contractual written obligations towards a covered investor of the other Party, either directly or indirectly. Further it explains that contractual written obligation means a written agreement of the Party with a covered investor that creates an exchange or rights and obligations binding both parties.[423] The umbrella clause in new generation agreements only cover those contracts that is concluded after the agreements entered into force. Same provision is included in the EUVIPA; it states that a Party which entered into written agreement with the investor of the other Party shall not breach that agreement through the exercise of government authority.[424] Therefore, new generation investment protection agreements of the European Union explicitly expands the cover of the treaty protection to contracts between the party and investors of another party.

Novelties of EUSIPA and EUVIPA effectively influences the tendency of future bilateral investment agreements in Southeast Asia. Such novelties included not only protection for the foreign investor but expressly stated host state's right to regulate. Further novelties included newly formulated fair and equitable treatment principle, instruments to

[417] Article 3.9.2 EUSIPA.
[418] *Ibid,* Article 3.9.5.
[419] *Ibid,* Article 3.9.12.
[420] Article 3.38.5 EUVIPA.
[421] *Ibid,* Article 3.39.5.
[422] Article 3.19.3 EUSIPA and Article 3.54.3 EUVIPA.
[423] Article 2.4.6 of EUSIPA.
[424] Article 2.4.6 of EUVIPA.

lessen the arbitrators' interpretative powers and two-tier investor-state dispute settlement mechanism with tribunal of first instance and appeal body.

Conclusion

Prior to the Lisbon Treaty entered into force on 1 December 2009, individual Member States were encouraged to enter into Bilateral Investment Treaties while the EU was securing the liberalization of foreign investments and focused on negotiating free trade agreements. The Lisbon Treaty abandoned such dualism and devolved the competences in relation to foreign direct investments, including the negotiation and conclusion of BITs with non-EU states, to the EU. What was missing in the Lisbon Treaty and became an issue in practice, were transitional provisions clarifying the status of existing extra-EU BITs. Furthermore, CJEU's opinion 2/15 made it clear that investor state dispute settlement clauses fall within the Member States' competence. Thus being an important part of investment protection realm, it could cause uncertainties among the investors.

Furthermore, the future of Intra-EU bilateral investment treaties became apparent after the opinion of the CJEU on Achmea v. Slovak Republic case came out. Since the Court decided that investment arbitration clauses in intra-EU BITs were infringing the Union's law and had discriminatory character, ergo it contradicts to the nature of the Union. Consequently, 23 Member States of the EU signed Agreement on Termination of the Bilateral Investment Agreements in May 2020.

It can take decades to finally stabilize the investment policy of the Union. The reform steps taken by the EU towards new regulations on investment have shown the Union's determination. Regardless of the numerous problems, including previous agreements that the EU is dealing with, the process itself is quite successful. After long-term negotiations, the multilateral agreements of the Union are waiting for approval from Member States' Parliaments, and the proposal regarding the single judicial system is getting positive feedback from the observers. The single judicial system is striving to live up to the standards set by international tribunals', and this is evidenced by the use of approaches developed by the WTO.

Lastly, European Union's new generation free trade and investment protection agreements with third countries directly influence the investment regime of Asian countries as well. When traditional investor-state dispute settlement system is replaced by new investment court system in the new generation agreements, Asian contracting parties are accepting such novelty by default and are motivated to reform their investment regimes.

Further novelties of the new generation agreements included not only protection for the foreign investor but expressly stated host state's right to regulate. It includes newly formulated fair and equitable treatment principle, instruments to lessen the arbitrators' interpretative powers and two-tier investor-state dispute settlement mechanism with tribunal of first instance and appeal body. Therefore, introducing new international investment agreements with novelty clauses is one of the main pillars of international investment regime and prompts ASEAN Member States' to shift their foreign investment regime to new level.

CHAPTER 6

ICSID: the future of jurisdictional certainty

In this chapter, we have reviewed specific criticism towards one of the major investment treaty arbitration tribunals: International Centre for Settlement of Investment Disputes. With the increased caseload in recent years[425], International Centre for Settlement of Investment Disputes (ICSID, the Center) arbitration came under scrutiny of investors and contracting states. In the past, the Center made several amendments in the ICSID Arbitration Rule and Additional Facility Rules to meet the demands of the disputing parties.[426] Much has changed since the last modifications of the Rules in 2006. Meanwhile, thirteen new contracting states have joined the ICSID Convention, while Bolivia, Ecuador and Venezuela have left. Additionally, some countries, including Australia, no longer include investor-state dispute resolution procedures in their future bilateral trade agreements.[427] Past fifteen years was full of challenges as well as success of dealing with great number of cases and expanding the number of Contracting States. Some problems regarding the nature of the Center and its arbitrations became apparent. The majority of criticism were addressed to the lack of transparency, vagueness of the jurisdiction and inconsistent decisions of the tribunals.

Firstly, this chapter discusses lack of transparency which was criticized as most of the cases affect public interest directly or indirectly and not all of the case materials and decisions are available for the public. Transparency is important due to the fact that investment arbitration is the biggest instrument in pushing forward the development of international investment law. Investor–state arbitration can help to produce a body of international investment law that is more coherent than the judicial endorsement of investment laws that diverge from one national legal system to the next.[428] On top of that disputing parties were not satisfied with absence of possibilities for third party participation or amicus curiae brief admissions. Secondly, it covers jurisdictional issues that were pointed to the intertwined treaty claims and contractual claims. Matter derives when claimant uses umbrella clause and a contractual

[425] ICSID's case load increased starting since 1997, The ICSID Caseload Statistics, Issue 2020-1, Chart 2, 7. ICSID (Aug. 27, 2020, 12:44), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf.

[426] Latest amendment made in 2006. ICSID (Sep. 9, 2020, 21:20), https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations.

[427] Jurgen Kurtz, *Australia's Rejection of Investor-state Arbitration: Causation, Omission and Implication*, 27 ICSID Review, 65-86, 65 (2012).

[428] LEON TRAKMAN & NICK RANIERI, REGIONALISM IN INTERNATIONAL INVESTMENT LAW 275, Oxford University Press, 2013.

violation to set in motion the arbitration process, which usually is initiated by treaty-based violations. And lastly, chapter examines the inconsistency in decisions which was alarming the contracting states. ICSID arbitration tribunals gave two opposite decisions in seemingly similar cases.[429] ICSID's reasoning was that the cases are heard in ad hoc tribunals and have differing circumstances that must be examined individually. This chapter will examine upper mentioned criticisms and its grounds. Furthermore, it will analyze if there are solutions to these criticisms and what did the academia and the Center itself suggested.

6.1. Transparency of the Center

International investment arbitration resolve disputes between a state and an investor of another state who raise allegations that the host state government acted wrongfully. Quite often these disputes arise from matters affecting public interest that are related but not limited to natural resources, environmental and health regulations or disputes with significant financial impacts on the state budget hence tightly affecting the taxpayers. Investor-state dispute settlement follows similar set of rules as commercial arbitration. Usually, commercial arbitration lacks transparency and limits public participation in proceedings due to the private nature of parties' relationship. Hence investment treaty arbitration follows the tendency and provides confidentiality to the disputing parties based on the private-public nature of the relationship, as it includes a private business entity of different state.

As we mentioned earlier, international investment arbitration is the main instrument in developing the international investment law. Thus such lack of transparency has several negative impacts on international investment law and arbitration. Firstly, it weakens the legitimacy of ISDS system and the decisions delivered with it. Secondly, it eliminates the possibility of access the decision reasoning which could explain the way investment agreements perceived in practice. And lastly, lack of transparency violates the public's right for information that affects them directly or indirectly. In comparison with other tribunals, ICSID have the most openness and somewhat provided transparency by publishing the awards with the parties' consent. However, parties having a veto power over the publication can potentially create an obstacle.

[429] See 3 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION, Cambridge University Press, (2017); LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS, Cambridge University Press (2018).

Transparency became topic of a broad discussion among public since the ICSID Secretariat published a discussion paper in 2005.[430] One of the problems that paper introduced was lack of transparency in ICSID arbitration proceedings. Thus it proposed that the Center must promote the publication of arbitral awards hence promoting transparency and must encourage amicus curiae briefs being admitted to ICSID proceedings. One of the very few supporters of this proposal was International Institute for Sustainable Development (IISD). IISD mentioned that UNCTAD's cost did not increase much just because the hearings were conducted publicly.[431] And on the other side the fiercest opposition was the investors who did not wish for a third party participation in the proceedings.[432] Nevertheless, the discussion paper was flawed in couple of ways. Firstly, the Secretariat lack the authority to initiate substantial reform as it is absent from the functions of the ICSID Secretariat.[433] Secondly, there was a practical limitation because Secretariat officials were not in the office long enough to see fruition of their proposal.[434] Despite the fact that discussion paper did not have a competence to be finalized, it became the starting cog of the Center's movement towards more transparent proceedings.

Further we will discuss transparency trends and how ICSID reflected them in itself. The main transparency trends are (a) the commencement of proceedings, (b) access to documents during the proceedings, (c) open hearings, (d) amicus curiae briefs, (e) the final award and (f) exceptions to transparency for protection of confidential business information, state secrets, or other privileged or protected information. The commencement of proceedings is the notification of the public about proceedings that have been filed. Under ICSID Convention, parties must file a request for proceedings with the ICSID Secretary-General, who then registers the request.[435] Following the parties' request the Secretariat is obliged to publish the information about the registration of those requests based upon ICSID's

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[430] See International Centre for Settlement of Investment Disputes, Suggested Changes to the ICSID Rules and Regulations (ICSID Secretariat Working Paper, 2005).
[431] LEON TRAKMAN, THE ICSID AND INVESTOR-STATE ARBITRATION 282, (Leon Trakman & Nick Ranieri eds., Regionalism in International Investment Law, Oxford University Press) (2013).
[432] *Ibid.*
[433] Article 9-11, ICSID Convention.
[434] LEON TRAKMAN, THE ICSID AND INVESTOR-STATE ARBITRATION 282, (Leon Trakman & Nick Ranieri eds., Regionalism in International Investment Law, Oxford University Press) (2013). Of note, a particularly vocal supporter of reform of the ICSID, Antonio Parra, vacated his office as Deputy Secretary-General of the ICSID shortly after the Secretariat proposed the reforms.
[435] Article 36, ICSID Convention: "(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party… (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre."

Administrative and Financial Regulations.[436] The Secretariat keeps the basic information listed on their website.[437] Access to documents during the proceedings is not regulated in ICSID Convention, it neither imposes general obligation of confidentiality, nor requests publication. Therefore, parties have full autonomy regarding publishing the tribunal's decisions, orders and other documents submitted to the tribunal. In case the both parties of the proceeding consent to the publication of the proceeding records, the Secretary-General shall arrange for the publication in an appropriate form.[438] ICSID Arbitration Rule 32(2)[439] covers the possibility of including impartial third party in the proceedings and the parties would have a veto power, fixed in phrase "unless either party objects", with which they could prevent open hearings. Similar wording exists in Article 39(2) of the Additional Facility Rules.

ICSID rules and regulations continue to enable a disputing party to veto open hearings, however the new language indicates a slight trend towards openness as it seems to require one party to affirmatively object to opening the hearing in order to keep it closed. By comparison, Rule 32 in both the 1984 and 2003 versions of the ICSID Arbitration Rules required affirmative consent of the parties.[440] It stated: "The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings."

Procedural Rules' amendment of 2006 was another step forward for the Center as it allowed admission of amicus curiae briefs and participation of third parties. Amicus curiae briefs became official in ICSID with the Amendments of 2006 with a newly added Rule 37 to the ICSID rules of proceedings. However, even before 2006 the tribunal could accept amicus curiae briefs on their discretion.[441] Rule 37 states that tribunal may admit the brief

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[436] Regulation 22, ICSID Administrative and Financial Regulations.
[437] Registration and pending cases of the ICSID (Sep. 1, 2020, 13:20), https://icsid.worldbank.org/cases/pending.
[438] Regulation 22, ICSID Administrative and Financial Regulations.
[439] Arbitration Rule 32(2) reads "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."
[440] Nathalie Bernasconi-Osterwalder & Lise Johnson, *Transparency in Dispute Settlement Processes: Country best practices, International Institute of Sustainable Development* 8, 2 IISD Best Practice Series, (2011).
[441] See Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. Argentina, Order in Response to a petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (May 19, 2005), para. 16. The tribunal concluded that Article 44 of the ICSID Convention, which grants the tribunal residual power to decide procedural questions, granted it the power to admit amicus curiae briefs from suitable non-parties in appropriate cases.

of non-disputing party on that matter of the dispute[442] and has some limitations to its application: (a) parties to the dispute must be consulted prior; (b) non-disputing party submission must not disrupt the proceedings; (c) non-disputing party must have significant interest in the process, it could constitute a public[443] interest; (d) third party must bring a perspective, particular knowledge/insight that is different from disputing parties.[444] From the Center's perspective Rule 37 was a compromising step towards meeting the proposal of the Secretariat. However, there are several issues regarding the applicability of the Rule 37 and its preconditions: whether the independence of parties of the dispute is violated by the exercise of tribunal discretion, directly or indirectly; whether admitting third party briefs and testimony will lead to annulment proceedings; and lastly, whether third parties that cannot afford the direct or indirect cost of such participation in the proceedings will have prejudice. Due to ICSID's *ad hoc* nature and claims being decided case-by-case basis, these issues are hard to address and give ultimate answers.

The ICSID Rules do not require one disputing party to obtain the other's consent before publishing awards. Consent of the parties is only required when the ICSID Secretariat, not one of the disputing parties, seeks to make the award public. Additionally, following the 2006 revisions to the ICSID Rules, the ICSID Secretariat must "promptly include in its publications excerpts of the legal reasoning" supporting the award even when parties do not agree to ICISD's publication of the award itself.[445] And lastly, UNCITRAL Rules on Transparency in Treaty based Investor-state Arbitration of 2014 gives substantial authority to the tribunal to make all documents, testimony and proceedings transparent, unless the tribunal finds the information to be confidential or protected.[446] This rule applies to arbitrations that use UNCITRAL Rule of Arbitration, that were filed under treaties concluded after April 2014, unless parties agreed otherwise.[447] Same rules apply to the treaties concluded before April 2014 if parties to the dispute decide so. Thus, UNCITRAL

[442] Rule 37, ICSID Rules of Procedure for Arbitration proceedings.
[443] Not always true. Even if ICSID allows third parties under Rule 37, it does not render those proceedings "public" in the sense of being transparent. The tribunal may limit third party's participation; may accept the brief but decline a record. For example, tribunal may deny requested information on grounds that the third party has failed to justify grounds on which it should receive that information, that it is already publicly available, or that it is privileged. See, Glamis Gold Ltd. V. U.S., Award, 106, 121 (2009) and Suez v. Argentine, ICSID case No. ARB/03/19, Order to Response to a Petition for Transparency and Participation as Amicus Curiae (2005).
[444] Rule 37(2), ICSID Rules of Procedure for Arbitration proceedings.
[445] Rule 48(4) ICSID Arbitration Rules; Article 53(3) Additional Facility Rules.
[446] Article 7 UNCITRAL Rules on Transparency in Treaty based Investor-state Arbitration.
[447] *Ibid*, Article 1.

Rules on Transparency in Treaty based Investor-state Arbitration can be used as a model for other tribunals as well as ICSID.

Latest Amendment process of ICSID Arbitration Rules and Additional Facility Rules started in 2016 and the latest Working Paper 4 sets out amendments to transparency provision. Chapter X and specifically Rule 63 of Arbitration Rule amendment proposal states that the Center shall publish orders and decisions, with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.[448] In case the parties object to such publication, the ICSID Secretariat will publish it and retain the present Arbitration Rule's status quo.[449] Furthermore, Working Paper 4 is allowing the publication of documents files in the proceeding with the parties consent. However, if the party does not agree with such publication, it can refer it to the tribunal and consequently, the tribunal will determine whether publication is permitted.[450]

6.2. Jurisdictional issues

In order to examine the jurisdictional issues of the Center, we need to determine the definition of jurisdiction in ICSID proceedings sense. Firstly, jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases; power and authority of a court to hear and determine a judicial proceeding; right and power of a court to adjudicate concerning the subject matter in given case.[451] Secondly, competence is the fact that court having a lawful jurisdiction.[452] However, ICSID does not differentiate the two terminologies. Reed, Paulson and Blackaby commented on Article 41[453] of ICSID Convention and stated that the tribunal shall be the judge of its own competence meaning that the tribunal itself is to decide questions regarding its jurisdiction.[454] Principle of competence/competence supports the latter argument and functions as a ground for ordinary meaning of jurisdiction. This would support the thesis that two terminologies stand for the same meaning. However, professor Christopher Scheuer disagrees and says that jurisdiction

[448] Rule 63(1), ICSID Arbitration Rule Amendment Proposal, Working Paper 4.
[449] *Ibid.*
[450] *Ibid*, Rule 64(2).
[451] GEROLD ZEILER, JURISDICTION, COMPETENCE, AND ADMISSIBILITY OF CLAIMS IN ICSID ARBITRATION PROCEEDINGS 78 (Christina Binder et al eds., International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer, Oxford Publishing) (2009).
[452] *Ibid.*
[453] Article 41(1) of ICSID Convention reads: "The Tribunal shall be the judge of its own competence".
[454] 2 Nigel Blackaby et al, Guide to ICSID Arbitration 85, Kluwer Law International (2004). Furthermore, see Gionvanni Alemani and Others v. Argentine, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 Nov. 2014, para 259.

and competence have special meaning. He mentioned that the Convention's English text is consistent in distinguishing between the jurisdiction of the Center and the competence of the Commission or Tribunal.[455] Under the Convention's terminology the word 'jurisdiction' refers to requirements set out in Article 25, that are conditional for power of a conciliation or arbitral tribunal. And 'competence' refers to a specific tribunal and its issues such as its proper composition or *lis pendens*.[456] The idea behind this notion is that the ICSID is not an arbitral tribunal nor an international court, it is rather administrative institution which serves the arbitrators and the parties in matters concerning the administration of international arbitration proceedings.[457]

Admissibility is another issue that needs to be discussed with 'jurisdiction' and 'competence'. It is however completely different terminology that ICSID does not contain. The term is used to describe constraints on the right to file claims in cases clearly subject to arbitration.[458] As mentioned in *Water Management*[459] case: "Jurisdiction is power of the tribunal to hear the case; admissibility is whether the case itself is defective – whether it is appropriate for the tribunal to hear it". Admissibility can be identified in cases where parties failed to comply with prejudicial requirements such as meditation, exhaustion of domestic court system and so on.

Criticism on jurisdiction is originally rooted in the legal basis of the investment dispute: whether it is treaty violation or a contractual violation. Jurisdictional issues in ICSID proceedings are sometimes related to the overlap of treaty-based rights and contract-based rights. Usually, the investor will enter into a contract with the host State or a its agency, which will govern the parties' contract rights and obligation.[460] Furthermore, the host state usually has bilateral investment treaty with the investor's home state. Therefore, the treaty and contractual rights overlap, creating a very distinctive method for dispute resolution. The main difference between two rights is the legal basis. A contract claim will be based on the terms of the contract, and a treaty claim will be based on the terms of the treaty.

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[455] CHRISTOPHER SCHREUER, THE ICSID CONVENTION: A COMMENTARY, Article 41, para 49 (2001).
[456] GEROLD ZEILER, JURISDICTION, COMPETENCE, AND ADMISSIBILITY OF CLAIMS IN ICSID ARBITRATION PROCEEDINGS 78 (Christina Binder et al eds., International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer, Oxford Publishing) (2009).
[457] *Ibid*, at 79.
[458] WILLIAM PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 77, OUP Oxford (2006).
[459] Waste Management, Inc. v United Mexican States, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, Dissenting Opinion K. Highet, para 58.
[460] 3 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION 261, Cambridge University Press, (2017);

On one hand, treaty-based rights are agreed between two sovereign states in a treaty and include general, not specific rights. For example, most common treaty rights are fair and equitable treatment, most favored nation and compensation for the expropriation. Sources or applicable law in treaty-based rights are BITs, contracting state law and international law. Its aim is to avoid a perception of unfair advantage for the state, thereby giving a comfort level to investors that will encourage them to invest.[461] In a dispute arising from treaty-based rights, even if the treaty is between two states, one party will be the investor who has the rights under the treaty and the state itself, not a state agency. On the other hand, contract-based rights are included in a contract between two private entities, making their dispute a commercial arbitration. In contracts the rights of the parties are more specific and fits parties' individual relationship. Applicable law in commercial arbitration is contracting state's domestic law. In the events of the dispute, the parties would be foreign investor's subsidiary against a state agency. These two methods likely to provide two incompatible methods on dispute resolution: investment arbitration and domestic courts. The investor will try to characterize any breach as treaty breach in order to initiate an arbitration process and vice versa. Tribunals decide on cases individually based on different pertinent factors, including the treaty and contract wordings. Therefore, reviewing sources of investment treaty arbitration (BIT) and the umbrella clause of investment treaties is necessary.

6.2.1. Bilateral investment treaty as a source

Since the 1990s investment treaty arbitration became a primary mean of developing international investment law. Host and home countries could not agree on general terms of investment regulation mainly because of the investor-state dispute settlement: host countries wanted the investor to exhaust the domestic court system and then initiate arbitration, however foreign investors could not trust courts of the host country. On international level the Organization for Economic Cooperation and Development and United Nations Conference on Trade and Development tried to codify the international investment law with their model laws but members of these organizations could not come to a consensus. Thus the investment treaty arbitration became the main developer of the international investment law.

Thereafter, developing countries faced with a challenge of attracting foreign investment into their economy in order to boost it. Bilateral investment treaties or Treaties with

[461] *Ibid.*

Investment Provisions being the primary source of initiating ICSID arbitration, it requires the contracting states to conclude investment treaties in order to step towards developing their investment policy. Hence having proper legal instruments that protect foreign investor and its investment is a necessity. The main instruments that guarantee full investment protection are the specialized domestic legislation and BITs or other international investment treaties that enables foreign investors to initiate investment arbitration in case of a dispute. BITs and investor-state dispute settlement is a strategic move for developing countries and they enter such BITs on their own will with calculated risk. Trakman criticizes developing countries for their own economic disadvantage that put them in position to conclude bilateral investment treaties with limited options.[462] He further mentions that developing countries blame developed countries for their collective decisions through World Bank Group which put them in difficult situation with limited choices.[463] Some Bilateral Investment Treaties have preconditioning requirements for foreign investors to seek alternative dispute resolution methods before initiating the arbitration procedure. Alternative dispute resolution methods such as consultation, negotiation and domestic court litigation that have limited time period to render a decision. Usually the consultation period starts by a letter from the investor to the state. Letter must be addressed to the top state official instead of the head of a state entity who signed the investment contract.[464] In case the investor brings the claim to the arbitration without meeting the contractual preconditions, the award may be challenged as unenforceable. Many difficulties arise in investment arbitration due to 'fork in the road' provisions, which gives right to the parties to choose one option and automatically deny the other available options. Typically, it is a defensive clause in order to disable parallel proceedings.

6.2.2. Umbrella clause

Discussion about the umbrella clause is inevitable in examining the overlap of treaty-based and contract-based rights. Umbrella clause imposes an obligation on a contracting state to observe all obligations it has undertaken with respect to an investor from other contracting state. It extends the independent protection of the treaty to breaches of contractual or other commitment made by the host state in relation to the foreign

[462] LEON TRAKMAN, THE ICSID AND INVESTOR-STATE ARBITRATION 275, (Leon Trakman & Nick Ranieri eds., Regionalism in International Investment Law, Oxford University Press) (2013).
[463] *Ibid*, at 276.
[464] 3 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION, 257, Cambridge University Press, (2017).

investment.[465] Historical explanation to this phenomena is that in 1990s the foreign investment was regulated solely by investment contracts. In the context of umbrella clause, it is the treaty that creates a 'mirror effect'[466] of the contractual obligation into the realms of international law, rather than the contract itself.[467] In the past, tribunals tended to differentiate the two breaches, unless the conduct is 'beyond that which an ordinary party could adopt and (would) involve state interference with the operation of the contract'.[468] With umbrella clause, the contractual breach could trigger protection of the treaty. However, the question is whether umbrella clause means that if the state breaches contractual right, that are not violation of international law, an investor can initiate investment arbitration based on a treaty? According to C.L. Lim, Jean Ho and Martins Paparinskis, the answer is yes as they state that no one seems to object to any overlap between a treaty and a contract in terms of what each prescribes.[469] Does the umbrella clause make every contractual breach equal to the breach of investment treaty? This interpretation seems to be unnecessarily broad.

There are two different decisions that came out around the same time with the same Claimant, and have opposing decisions on the use of umbrella clause. First one is SGS v. Pakistan, where the tribunal has rejected the clause in the Switzerland – Pakistan BIT.[470] Article 11 of Switzerland – Pakistan BIT[471], that is used in SGS v. Pakistan case, stated that: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into". The Tribunal decided that the text of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law.[472] Furthermore, it mentioned that the wording of the Article 11 should be read as it is enhancing mutuality and balance of benefits in the inter-relation of different agreements located in differing legal instruments. And lastly, the Tribunal concluded that the Claimant did not deliver clear and

[465] LIM ET AL, INTERNATIONAL INVESTMENT LAW AND ARBITRATION, COMMENTARY, AWARDS AND OTHER MATERIALS 349, Cambridge University Press (2018).
[466] As Emmanual Gaillard named it in "Investment Treaty Arbitration and Jurisdiction over Contract Claims", 344-345, in Todd Weiler ed., International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May Publishing, 2005.
[467] LEON TRAKMAN, THE ICSID AND INVESTOR-STATE ARBITRATION 350, (Leon Trakman & Nick Ranieri eds., Regionalism in International Investment Law, Oxford University Press) (2013).
[468] Siemens A.G. v. The Argentine Republic ICSID Case No. ARB/02/8, Award, 75-76, (2007).
[469] LEON TRAKMAN, THE ICSID AND INVESTOR-STATE ARBITRATION 351, (Leon Trakman & Nick Ranieri eds., Regionalism in International Investment Law, Oxford University Press) (2013).
[470] SGS Société Générale de Surveillance v. Pakistan, ICSID Case No. ARB/01/13, 2002.
[471] Article 11 of Switzerland – Pakistan BIT.
[472] SGS Société Générale de Surveillance v. Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, para. 166, 6 Aug. 2003.

persuasive evidence that Article 11 of Switzerland – Pakistan BIT contains umbrella clause, whereas the Respondent denies that the contracting parties intention was to include this article as an umbrella clause.[473]

On the contrary, the SGS v. Philippines tribunal accepted the clause in Switzerland – Philippines BIT as an umbrella clause.[474] At first glance seemingly similar to Article 11 of Switzerland – Pakistan BIT, the Switzerland – Philippines BIT's Article X(2) reads: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investment in its territory by investors of other Contracting Party".[475] The Tribunal observed that Article X(2) is different, as it uses the word 'shall' suggesting the existence of a legal obligation, and the phrase 'any obligation' including all future obligations which the host State will assume.[476] It further observed that the bilateral investment treaty supports effective interpretation principle, promotion and reciprocal protection of investment, thus it is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investment.[477]

Therefore, investment tribunals can commence contractual analysis if the parties request so. If such request is unavailable, most international investment tribunals such as ICSID and UNCITRAL, authorizes tribunals to act on their discretion and conduct the analysis. On the broad interpretation of umbrella clause, in his dissenting opinion in Eureko v. Poland Partial award, arbitrator Jerzy Rajski's mentioned that by the wide interpretation of umbrella clauses, division between the national legal order and the international legal order is completely blurred.[478] On the other hand, UNCTAD supports the umbrella clause and it states that main purpose of umbrella clause is to redress state's violation in independent forum. Main advantage of bilateral investment treaties is the possibility to initiate the international arbitration. Thus the umbrella clause protects that right. However, the arbitrators are skeptical of such broad interpretation of UNCTAD.

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[473] *Ibid*, para. 173.
[474] SGS Société Générale de Surveillance v. Philippines, ICSID Case No. ARB/02/6, 2004.
[475] Article X(2) of Switzerland – Philippines BIT.
[476] SGS Société Générale de Surveillance v. Philippines, ICSID Case No. ARB/02/6. Decision on Objection to the Jurisdiction, para. 115, 29 Jan. 2004. See further El Paso Energy International Co. v. Argentine, ICSID Case No. ARB/03/15, Decision on Objection to Jurisdiction, para.77: "… as a result of the umbrella clause in BIT, …, the smallest obligation of a State with regard investment was protected by the BIT and could give rise to an ICSID obligation."
[477] *Ibid*, para. 116.
[478] Eureko B.V. v. Republic of Poland, UNCITRAL, Dissenting opinion, para. 11, 19 August 2005.

6.3. Inconsistent decisions

The last but not least of recent criticisms on ICSID arbitration proceeding was the inconsistency in the decisions. It was important as arbitral decisions were undoubtedly one of the sources of international investment law. And as scholars argued, arbitral decisions are material source and probably the most influential one among other sources.[479] Criticism on inconsistent decisions triggered discussions about appellate mechanism in international investment arbitration and abolishing the annulment-based system.

As of the need in consistency overall, the scholars have divided into two wings. Scholars who support the consistency idea say that it is necessary as arbitral decisions move forward the law itself by expanding the rule of law. Hence having consistent decisions is crucial for predictability, thus the coherent rule of law. Previously, international organizations such as UNCTAD and OECD tried to harmonize the international investment law, but contracting parties could not agree on the terms. And arbitral decision came as acting precedents and started filling the gaps. One of the representors of this view is Schill. Stephan Schill argues that 'investor-state arbitration performs the important function of protecting foreign investments against illegitimate government interference'. This function needs to be pursued, he states, in such a way that 'enhances the predictability of investment arbitration'.[480] When decisions are consistent with each other, it increases predictability which allows both states and investors to align their behavior with more certainty about the consequences of their actions. Thomas Schultz states that predictability is what the rule of law is all about.[481] However, further he argues that having consistent decisions in international arbitration and by that the arbitrators acting as law-makers is not a necessarily a good thing. Precise and consistent rules, forming a regime that meets the requirements of the rule of law, are not inherently preferable to vague, inconsistent rules forming a regime that does not meet the standards of regulative quality which partake of the rule of law, in its incarnation as formal legality.[482]

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[479] 1 FLORIAN GRISEL, THE SOURCES OF FOREIGN INVESTMENT LAW 223, (Douglas et al eds., 'The Foundations of International Investment Law: Bringing Theory into Practice', Oxford University Press) (2014).
[480] Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 Journal of International Dispute Settlement, 577, 606 (2012). See also STEPHAN SCHILL, ORDERING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: BILATERALISM – MULTILATERALISM – MULTILATERALIZATION 109, (1 Douglas et al eds., 'The Foundations of International Investment Law: Bringing Theory into Practice', Oxford University Press) (2014).
[481] THOMAS SCHULTZ, AGAINST CONSISTENCY IN INVESTMENT ARBITRATION 297,(1 Douglas et al eds., 'The Foundations of International Investment Law: Bringing Theory into Practice', Oxford University Press) (2014).
[482] *Ibid* at 316.

Inconsistent decisions of the ICSID can be reasoned by the fact that every case is decided on ad hoc basis with different arbitrators and every case is individual with different bilateral investment treaties chosen as a governing law. Furthermore, there are over 2000 BITs and Treaties with Investment Provisions existing[483]; thus it would be difficult to align them under consistent and coherent decisions. Great number of inconsistent decisions are somewhat inevitable. For example, as we discussed earlier the SGS v. Pakistan and SGS v. Philippines cases, seemingly similar cases but two different decisions were made on the objection of jurisdiction. And all of that because of the different wordings of the subsequent BITs.[484] Nonetheless, arbitrators face the need to interpret differently worded treaties and applying variable conceptions such as direct and indirect expropriation, as well as fair and equitable treatment to distinct cases. It is not a secret that arbitration tribunals make references to previous cases, although there is no binding precedent in investment arbitration. Therefore, another solution that scholars representing is to have an appellate mechanism.[485] WTO's appellate body is an example of working mechanism in international commercial dispute resolution. Since arbitrators recite previous cases it would be not much different to have an appellate body and have them recite cases, hence making a precedent. Consequently, appellate mechanism is in discussion and the Center has not addressed the questions regarding the inconsistency in their decision rather pointing it to the wordings of differing investment treaties.

Conclusion

With more data that appeared after hearing over 600 cases, ICSID became a target for criticism from investors and contracting states. Transparency related issues are being gradually dealt with since the Amendment of 2006. And now upcoming Amendment's Working Paper 4 presents further possibilities of making the ICSID proceedings more transparent than ever. It envisions to lessen the veto power of the disputing parties on publication of case materials. Jurisdictional criticism is related to overlap of contractual and treaty rights, and how umbrella clause plays a great role in allowing these two rights to overlap. Umbrella clause enables investors to bring arbitral proceedings on contractual

[483] UNCTAD, International Investment Treaty Navigator.
[484] See Siemens A.G. v. The Argentine Republic ICSID Case No. ARB/02/8, Award, 75-76, 17 Jan. 2007; SGS Société Générale de Surveillance v. Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, para. 166, 6 Aug. 2003.
[485] Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power*, ICSID Review, 2016, Peking University School of Transnational Law Research Paper No. 16-2.

violations. Usually, investment arbitration is initiated on treaty violations. Since the TIPs and BITs differ in their wording, decisions of the tribunals tend to be inconsistent. Tribunals explain this with their ad hoc nature, and the treaties that arbitration is brought upon is individual to each case. Some scholars support the idea of consistency in the decision, stating that it will only increase predictability and consequently the rule of law. Others disagree and state that giving the arbitrators potential legislative power will do more harm than good. And last part of scholars says that appellate mechanism of IIA is the way to put an end to this. They claim that appellate mechanism will allow tribunals to legitimate the precedent law, since arbitrators refer to previous cases nonetheless.

We will have to wait and see what will the new Amendment bring. The Proposals are not conclusive. They will be subject to another round of comments before ICSID's governing body. The ICSID Secretary-General has stated that ICSID's goal is to place the proposed amended ICSID Rules before the Administrative Council for a vote in the latter half of 2020. If then adopted, the amendments could be in place by early 2021. As a general rule any proposed amendments to the ICSID Rules must achieve a two-thirds majority approval from Administrative Council.

CHAPTER 7

Investor-State Dispute Settlement in Asia

With the increased number of international investment agreements respectively the number of investor-state dispute settlement have risen. Consequently, with the higher number of cases in investment arbitration, the criticism against ISDS mechanism became a fiercely debated topic. In relation to this, countries began taking various measure to change their policy towards foreign investment. This chapter analyzes the type of reactions that countries in Asia been exhibiting towards increased number of ISDS cases and the criticism that followed. The first part of the chapter determines the evolution of the investor-state dispute settlement and the beginning of the criticism supported by the numeric data of cases worldwide and in Asia. The second part examines the actions of the states regarding the modification of the current ISDS system. The third part reviews the currently happening movements towards the new ISDS system. And lastly, the fourth part introduces some recommendations on what changes should be introduced in the first place in the ISDS mechanism.

7.1. Introduction

Foreign investment plays a crucial role in most countries' economic and social development, for both home and host states of the investment. The benefits include development of economy through creating more employment, introducing new technologies and knowledge in many sectors as manufacturing and services; improvement of the national companies' competitive capacity and expansion of product variety and therefor the demand in the market.[486] For the home state, foreign investment can bring long term economic gain, improve the ties with other countries and expand their market respectively and get access to critical natural resources.[487]

International investment regime has two main instruments that regulate the investment regime: International Investment Agreements (IIA) and Investor-State Dispute Settlement mechanism (ISDS). Primary purpose of IIAs is to promote, liberalize and most importantly protect foreign investments and to ensure that foreign investor has the stability and security to proceed with their operations in the territory of the host state. In order to provide the

[486] See generally, Julien Chaisse, Dimopoulos.
[487] JULIEN CHAISSE ET AL, THE CHANGING PATTERNS OF INVESTMENT RULE-MAKING ISSUES AND ACTORS 13, (Julien Chaisse et al eds., Asia's Changing International Investment Regime, Springer) (2017).

foreign investors with their necessary stability and security, the host states ensure their compliance with the international and bilateral treaty standards by giving away a part of their sovereignty to regulate the activities of the foreign investor.[488] The host states agenda is to provide the requested protection and promotion for the foreign investor in exchange for the alleged economic and social benefits of foreign investment.[489]

Most international investment agreements incorporate provisions relating to the investment dispute settlement mechanism, precisely Investor-State Dispute Settlement. Now with more than 3000 active International Investment Agreements, the number of investment disputes is also on the rise. In the agreements that are in force today, the ISDS clause is included in more than 90% of Bilateral Investment Treaties (BITs) and other international treaties such as Free Trade Agreements (FTAs), Multilateral Investment Treaties.[490] Usually, investor-state dispute settlement is the most important feature of the international investment agreements. Investor-State dispute settlement enables the foreign investor to bring claims in independent international tribunal in order to avoid possible bias in host state's judicial system. Investors usually do not rely on the national courts of the host state for resolving their disputes as the respondent in the case is the host state itself. Therefore, international arbitration deemed to be more neutral and flexible in comparison to state-to-state dispute settlements.[491]

As of January 2020, the total number of known Investor-State Dispute settlement cases pursuant of international investment agreements has reached 1023.[492] The number of concluded cases has reached 674.[493] Most common ground for initiating investment arbitration is the violation of rights that are contained in investment agreements. For instance, discrimination, direct and indirect expropriation, violation of principle of fair and equitable treatment, and restriction on movement of capital. According to UNCTAD data from 1987-2017, the most common sources of initiating ISDS were indirect expropriation,

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[488] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2, Oxford University Press (2008). See Chapter 1, Evolution and Sources of international investment law.
[489] Jeswald Salacuse, *The emerging global regime for investment*, Harvard International Law Journal (2010) 51, 427.
[490] International Investment Agreements Navigator, UNCTAD Investment Policy Hub (Jan. 18, 2021, 01:23), https://investmentpolicy.unctad.org/international-investment-agreements.
[491] Marta Latek & Laura Puccio., Investor-state dispute settlement (ISDS)—State of play and prospects for reform. European Parliament Briefing (2015), The European Parliament (Jan. 18, 2021, 01:23), http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)545736.
[492] UNCTAD, Investor-State Dispute Settlement cases pass the 1000 mark: cases and outcomes in 2019. International Investment Agreements Issues Note, Issue No.2, (2020). UNCTAD Investment Policy Hub (Jan. 18, 2021, 01:23), https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf.
[493] *Ibid.*

violation of fair and equitable treatment principle, discrimination and contractual breaches that sanctioned the umbrella clause.[494] Violation of fair and equitable treatment principle and violation of minimum standard treatment were the highest in number.[495] As a general rule, these two principles impose 'due diligence' from the host state and requires their action to be consistent with investor's legitimate expectation.[496] The high number of claims based on FET principle can be reasoned by the fact that FET principle included in the most international investment agreements is not defined precisely and arbitral awards give broad, inconsistent and differing interpretations of the principle.[497] According to the ICSID's caseload data, the sectors that are more prone to investment arbitration are gas and oil mining; the areas that can be either concession or service agreements such as electricity, transportation and construction.[498] However, now the sector is shifting from traditional mining to the new service sectors including manufacturing, transport and construction.[499]

Thus with constantly increasing number of investor-state dispute settlement procedures with variety of grounds and sectors that the disputes are arising from, the need for reform and modification of the international investment law has become more relevant and crucial.

7.1.1. Asian perspective

Historically, Asian countries were one of the biggest recipients and the source of foreign investment flow.[500] Asian countries' participation in international investment regime escalated from 1990s as the bilateral investment treaties became favored worldwide, thus the number of BITs increased in Asian continent as well. Following this, regional integration

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[494] UNCTAD International Investment Agreements Issues Note, Special Update on Investor- State Dispute Settlement: Facts and Figures 6, (2017), UNCTAD (Jan. 18, 2021, 19:02), https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf.
In international investment law the umbrella clause implemented when contractual violation can invoke investment treaty protection in arbitral proceedings. See Chapter 8, ICSID.

[495] *Ibid*.

[496] Roberto Echandi, *The Debate on Treaty-based Investor-State Dispute Settlement*, ICSID Review, 32, 50 (2019).

[497] The main difference is rooted in two differing views on FET whether it should be interpreted within customary international law (US, Canada) or whether it should not be limited by the barriers of customary international law (EU). See generally, Rudolf Dolzer.

[498] ICSID Caseload Statistics 12, Issue 2019-1, ICSID The World Bank (Jan. 18, 2021, 19:04), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202019-1%20%28English%29_rev.pdf.

[499] According to ICSID Caseload Statistics, total of cases regarding manufacturing, transportation, construction and other services are higher than mining, gas and oil. The ICSID Caseload Statistics, Issue 2020-2, ICSID The World Bank (Jan. 18, 2021, 19:04), https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf.

[500] See generally, Foreign direct investment, net inflows (% of GDP) – East Asia & pacific, South Asia. Europe and Central Asia; Foreign Direct Investment Trends and Outlook in Asia and the Pacific 2019/2020.

in Asia intensified, therefore the multilateral agreements within the region to promote foreign investment flow started to flourish too. For example, ten Member States of the Association of South-East Asian Nations (ASEAN) have concluded comprehensive investment agreement[501] and commenced several investment and trade promotion initiatives.[502] On a bigger scale Asia-Pacific Economic Cooperation (APEC) laid the foundations of Free Trade Area initiatives of the Asia-pacific. Foreign direct investment inflows to the APEC, ASEAN and the Regional Comprehensive Economic Partnership areas (all entirely or substantially in Asia-Pacific) have gradually increased as the economies in these regions became one of the competitive global production centres, and at the same time have developed large intermediate and final demand for a wider range of products and services. Foreign direct investment, globally and particularly in Asia-Pacific, has been helping to transform the global economy. Simultaneously, the nature of FDI in Asia-Pacific has been undergoing major transformations. More FDI now occurs in service sectors than in manufacturing and primary sectors combined.[503]

In addition to the investment treaty scope, Asian countries participate in international commencement of directives that focus on promoting, facilitating and liberalizing foreign investment policy. Latest initiatives on multilateral level are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership that entered into force in December 2018 and Regional Comprehensive Economic Partnership that have been signed after 8 years of negotiation on 15 November 2020.

Regardless of number of new initiatives, until recently the Asian countries participation in international investment regime, including investor-state dispute settlement, was not major. Not long ago, Asian countries began to reform their own international investment agreement regimes and actively engage in the development of international investment law. The shift is reasoned by the fact that Asian countries and its investors became more targeted in investor-state dispute settlement procedures, both as a respondent and a claimant. For instance, according to the UNCTAD data[504], Chinese investors brought at least six claims, Singapore investors brought five and Malaysia four. As a respondent, India, Vietnam and

[501] ASEAN Comprehensive Investment Agreement in force since 29 March 2012.
[502] ASEAN Economic Community Blueprint 2025. Association of Southeast Asian Nations (Jan. 18, 2021, 19:09), https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf.
[503] BEKZOD ABDULLAEV & DOUGLAS H. BROOKS, SHAPING GLOBALIZATION: RECENT TRENDS IN ASIA-PACIFIC FOREIGN DIRECT INVESTMENT, (Julien Chaisse et al. eds., Asia's Changing International Investment Regime, Springer) (2017).
[504] Investor-State Dispute Settlement Navigator, UNCTAD, Investment Policy Hub (Jan. 18, 2021, 19:11), https://investmentpolicy.unctad.org/investment-dispute-settlement.

Indonesia have the highest number of cases with twenty-five, eight and seven cases respectively.

Nonetheless, Asian perspective on foreign investment policy and dispute resolution experiences were different than the rest of the world. The differences rooted in their population, economic development and overall legal culture when it comes to the balancing on national and international interests.[505]

7.2. Criticism towards ISDS. Defining the problems of ISDS.

International investment arbitration has been greatly acclaimed as it removed international investment from politicizing and greatly contributed to the development of international investment law and rule of law in investor-state relations.[506] However, with the increase of investment treaty arbitration, the concerns with the existing investor-state dispute settlement mechanism started to surface. The controversy towards investor-state dispute settlement has divided into two main streams. Firstly, the criticism towards the ISDS as a whole system where host countries are persuaded that arbitral tribunals are favoring investors over them and do not take into account their needs.[507] But for investors, arbitral tribunal is the only way to seek redress for the alleged violation of their treaty rights in international tribunal that is independent from the host country's jurisdiction. Secondly, the criticism is gathered around institutional forms of the arbitral tribunal. The question arose whether the current arbitral tribunal form and procedures are effective. Therefore, recent criticism towards ISDS has led to a reform initiatives of international investment law, both substantive protection of investors and procedural framework of investment arbitration.

The concerns regarding the ISDS **as a whole system** rooted from the view that arbitral tribunals favor investors over host countries. Host countries that demonstrated their negative resonance with ISDS, mentioned that arbitral tribunals do not pay enough regard for the needs of the host country. On one hand, such comment is partially based on the belief that arbitral tribunals serve to protect investors only and do not regard for the host country.[508] On the other hand, the nature of most investment arbitration in a way or another touches

[505] See Chapter 4 ASEAN, where the author has discussed about the ASEAN-Way phenomena. Generally, ASEAN countries in particular were reluctant to enter international agreements easily as they have gained their independence relatively late. Thus being overprotective of their newly gained sovereignty was a priority.
[506] Stephan Schill, *Reforming ISDS: A Constitutional Law Framework*, 20 Journal of International Economic Law, 649, 650 (2017).
[507] See for instance, Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25:4 European Journal of International Law, 1147–1168, (2014).
[508] *Ibid.*

upon the public interest of the host country, including public health, environment, infrastructure, labor standards and depending on the decisions awarded the influence covers the economic and financial situation of the host state.[509] Therefore, investment arbitration is also criticized over the fact that they hear cases regarding the public interest of the host country, whereas operating as individual tribunal. Aforementioned issue also can be explained by the hybrid nature of the investment treaty arbitration.[510] Firstly, most states require the foreign investor to have a company incorporated according to host state's law; therefore, claimants in the investment treaty arbitration are mostly corporate entities established under domestic law of the host state. Secondly, the tribunal in investment treaty arbitration refers to the domestic law of the host state in order to determine whether foreign investment in question falls under the terminology of such legislation. Lastly, investment protection standards are incorporated in international investment treaties; however, rendered award of investment arbitration is enforced through national courts of the host state. In addition, the public concern includes 'chilling effect' that international arbitration imposes on the host state's regulatory power. Such position allows foreign investors avoid the operations of domestic law and national courts through the process.[511]

The core issues regarding the **procedural concerns** addressed towards the high cost, lengthy proceedings, lack of predictability and transparency, inconsistent decisions, limited mechanisms to check the correctness of arbitral decision and the independence and impartiality of arbitrators, who can act as an arbitrator in one case and represent a disputing party in another, therefore creating a window for potential conflict of interests.

For Asian countries, these criticisms resonated as well. Non-governmental organizations have fanned the belief that Asian states fail to enact *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration.[512] In Asian continent these developments deemed to be true due to the following reasons. Firstly, many Asian countries are changing their international investment regime and with investor-state dispute settlement mechanism. These countries are reforming, renegotiating, delaying ratification or terminating their investment agreements and bilateral investment treaties. In

[509] Most of the ISDS cases concern state's regulation policy towards public interest that violates investor's treaty rights. For example, Australia's plain packaging law for tobacco, Germany's termination of nuclear power plants. See Chapter 7, ICSID.
[510] ZACHARY DOUGLAS, THE HYBRID FOUNDATIONS OF INVESTMENT TREATY ARBITRATION, 74 The British Yearbook of International Law 151, 152-155 (2003).
[511] RAHUL DONDE & JULIEN CHAISSE, THE FUTURE OF INVESTOR-STATE ARBITRATION: REVISING THE RULES? 216, (Julien Chaisse et al. eds., Asia's Changing International Investment Regime, International Law and the Global South, Springer (2017).
[512] *Ibid*.

particular, Sri Lanka has announced its intention to move away from traditional international investment agreements;[513] India, Indonesia and Australia started taking strict measures such as termination of BITs or parting away from ISDS altogether, which was the counter action to the traditional IIA and ISDS systems. These countries believe that ISDS system is biased towards the investor.[514] Secondly, due to the increased flow of investment in and out of Asia, made them eligible to act as global rule makers in the field of foreign investment.[515] And thirdly, the number of investment arbitration cases that are Asian countries are party to increasing in number.

The existence of issues in international investment regime can be observed through the following events: the denunciation of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) by Latin American countries, namely Bolivia, Ecuador and Venezuela; withdrawal of some countries form IIA systems by terminating the Bilateral Investment Treaties[516]; exclusion of investor-state dispute settlement mechanisms from new investment agreements[517]; and renegotiating the substantive content and procedural provisions of new investment agreements in pursuit of increasing the state's control over foreign investment policy.

These challenges shall be seen in a broader context where global actors build their foundations for their negotiations. For instance, notion of world investment court, which would have been denied years ago, is now firmly inscribed in the international agenda.[518] Discussions about reform of international investment law and regime is still on going as the field itself is relatively young. Its evolution and development resonated to the experience of the field added with criticism. And the most impact was shown through Investor-State Dispute Settlement mechanism.

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[513] Chamindi Malalgoda & P. Samaraweera, *The experience of Sri Lanka with International Investment Treaties*, 7 Investment Policy Brief (2016), The South Centre (Jan. 18, 2021, 19:20), https://www.southcentre.int/wp-content/uploads/2016/12/IPB7_The-Experience-of-Sri-Lanka-with-International-Investment-Treaties_EN.pdf.

[514] Whether the criticism on ISDS biased view is justified see: IBA Subcommittee on Investment Treaty Arbitration, Report on the Subcommittee's Investment Treaty Arbitration survey May 2016.

[515] Stephan Schill, Changing geography: Prospects for Asian actors as global rule-makers in international investment law, 177 Columbia FDI Perspectives (2016), Colombia Center of Sustainable Development (Jan. 18, 2021, 19:21), http://ccsi.columbia.edu/files/2013/10/No-177-Schill-FINAL.pdf.

[516] These countries include Indonesia, Czech Republic, Ecuador, Venezuela and South Africa.

[517] Australia has been the pioneer of such actions for some time now. See for instance: Amokura Kawharu & Luke Nottage, *Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu*, 18/03 Sydney Law School Research Paper (2018); Jurgen Kurtz & Luke Nottage, Investment *Treaty Arbitration 'Down Under': Policy and Politics in Australia*, 30:2 ICSID Review - Foreign Investment Law Journal, 465–480 (2015).

[518] KARL P. SAUVANT, REFORMING THE INTERNATIONAL INVESTMENT REGIME: TWO CHALLENGES, (Julien Chaisse et al. eds., Asia's Changing International Investment Regime, International Law and the Global South, Springer (2017).

Internationally and regionally, global actors of international investment law started focusing on possible reforms of the IIA and ISDS. On international level number of negotiations and amendments are in process including UNCITRAL Working Group III which initiated the process of examining the possible reform in ISDS area[519] and ICSID Amendment Proposal IV.[520] On regional level, the European Union is negotiating the possibility of Multilateral Investment Court.[521] European Union's reform for MIC is progressing under the auspices of UNCITRAL WGIII. At the moment, the EU has number of investment agreements, for instance CETA, EUSFTA, EU-Vietnam FTA, that contain renewed investment dispute settlement mechanism, the International Court System.

Negotiating reform steps range from leaving the current system behind by creating a permanent investment court and creating an appellate mechanism for arbitration, establishing entirely new instruments that will ensure transparency, predictability and consistency of decisions in investment arbitration. On individual countries level, some countries are distancing from traditional IIR by denouncing the ICSID Convention; removing ISDS mechanism altogether from their investment regime and seeking alternative solutions for institutional reform of the investment treaty arbitration; and negotiating their old BITs and renewing their bilateral and multilateral investment agreement with the option of limiting or entirely omitting the investor-state dispute settlement clause. For instance, according to the UNCTAD review of new international investment agreements, fifteen were newly concluded IIAs in 2019 and most of them have reform-oriented provisions.[522] The preservation of States' regulatory space remains the most predominant area of reform; other areas with higher reform-oriented provisions are dispute settlement and sustainable development.[523] Preservation of states' regulatory space generally focus on general or special exceptions, including limitations to treaty scope and clarification of indirect expropriation and omission of provisions that might expose the state to the arbitration (umbrella clause).[524] Such changes are triggered by the desire for more transparent, predictable and consistent arbitration with tenured judges who would not succumb to the conflict of interests.

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[519] UNCITRAL Working Group III (Jan. 18, 2021, 19:25), https://uncitral.un.org/en/working_groups/3/investor-state.
[520] See Chapter 7, ICSID.
[521] See Chapter 5, European Union Investment Regime.
[522] UNCTAD, World Investment Report 112, (2020). UNCTAD (Jan. 18, 2021, 19:26), https://unctad.org/system/files/official-document/wir2020_en.pdf.
[523] *Ibid.*
[524] *Ibid.*

7.3. Procedural developments overall and in Asia

Regardless of the criticism towards investor-state dispute settlement, some developments were observed in procedural clauses of investment treaties.

Inconsistent decisions are derived from inconsistent interpretation of treaty wording by arbitral tribunals, which is triggered by wide range of differing investment treaties with very general and broadly formulated principles. As a result, it develops broad room for interpretational discretion of arbitrators which creates uncertainty and unpredictability in investment treaty arbitration.[525] It does not come by surprise that different wording in international investment agreements gave foundation to arbitrator's discretionary power to interpret the main principles differently in over 1000 cases of investment treaty arbitration. In addition, the arbitrators' contrasting legal culture and the *ad hoc* nature of the investment arbitration have contributed to the inconsistent interpretations and decisions consequently. Until recently, investment treaty arbitration was proclaimed that it develops the international investment law and regime through interpretation of BITs and deciding investment cases, when contracting parties were not as active to develop the global investment regime. However, now it seems to have become a root of discontent for some parties.

Furthermore, there are no precedent system in international investment arbitration and cases are decided on the *ad hoc* basis with differing treaties and different arbitrators for each case. Thus consistency in treaty wording is nearly impossible to achieve. To resolve this concern, states started establishing joint interpretational committees or other institutions with sole purpose of interpreting the international investment treaty.

As we mentioned earlier, ASEAN Comprehensive Investment Agreement and ASEAN-Australia New Zealand FTA have a provisions that enables parties to the dispute to establish such committee in order to interpret the treaty wording.[526] The same provisions are included in EU-Canada Comprehensive Economic Trade Agreement.[527] Another option, that stated in China-Australia Free Trade Agreement, is to suspend the arbitral procedure while treaty parties make consultations up to 90 days on the concern whether violation falls under the provisions of the free trade agreement.[528] In order to initiate such procedure, the Respondent

[525] See generally, Stephan Schill, *Reforming ISDS: A Constitutional Law Framework*, 20 Journal of International Economic Law, 647, 649-672 (2017); Gus Van Harten, *Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010*, 29:2 European Journal of International Law, 507–549 (2018).
[526] Article 40.2 of ACIA; Article 27.2 of AANZFTA. See further, David Gaukrodger, The legal framework applicable to joint interpretive agreements of investment treaties. OECD working papers on international investment (2016). OECD Publishing (Jan. 18, 2021, 19:31), http://dx.doi.org/10.1787/5jm3xgt6f29w-en.
[527] Article 8.31, the Tribunal may request CETA Joint Committee to adopt an interpretation of the Agreement.
[528] Article 9.11.5-9.11.6, China-Australia Free Trade Agreement.

state must issue 'public welfare notice' with specification why it believes that the measure falls outside of the FTA's scope. In case the treaty parties agree that the concerned measure does not fall within the scope of the free trade agreement, their decision would be binding for the arbitral tribunal.[529] And on contrary if the parties fail to come to an agreement, the matter would be decided by the tribunal. The tribunal shall not draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non- disputing Party.[530]

The next procedural component that was under criticism is *transparency*. It is one of the widely discussed topics and a serious concern in investment treaty arbitration. Transparency issues mainly focus on the publication of awards and related documents and inclusion of *amicus curiae* brief in the proceedings. Lack of predictability and transparency affects the international investment law negatively as it weakens the legitimacy of investor-state dispute settlement system and hinder the access to the arbitral award that contains information that could affect the public directly or directly. Hence it also entails violation of public's right for information. Recent developments in international investment law is aiming to eliminate transparency issues. In multilateral level, UNCITRAL Rules on Transparency in Investor-State Arbitration came into effect in 2014. These rules apply to the cases that were initiated after 1 of April 2014, or it can cover cases that were initiated before the given date as well if the parties consent to that. Transparency Rules cover issues ranging from disclosure of the initiation of arbitral proceedings, to specifying the documents to be disclosed, to requiring open hearings and publication of awards. UNCITRAL made it clear that the rules do not exclusively apply to UNCITRAL arbitration, but other arbitral institutional and *ad hoc* tribunals can apply the rules. As for the Asian states, ACIA and other ASEAN FTAs include transparency provision.

The next procedural concern is availability of the *appeal court mechanism*. In current ISDS system, there is no hierarchy like in national court systems. There is no possibility to check the errors of the arbitral tribunal and ensure coherence of interpretations in dispute resolution which results in distrust of the investment arbitration parties. Therefore, the clash is originated in existence of disputes with public and private law mixed characteristics and their settlement in arbitral tribunals that historically established as a traditional commercial arbitration. One of the serious concerns for ISDS was the fact that its decisions are inconsistent. And criticism hovered around the structure of the investment arbitration

[529] *Ibid*, Article 9.18.3.
[530] *Ibid*, Article 9.11.8.

tribunals which do not have an appeal mechanism that can check their decisions' correctness. There are two perspectives regarding appellate mechanism: multilateral investment court with its own appellate body or adding appellate bodies to existing arbitral tribunals. However, it would trigger the issue of structure of such body including idea of tenured judges.

India's new model BIT and US-Singapore FTA and IPA considers the inclusion of appeal mechanisms. Furthermore, CETA and EU-Vietnam FTA and IPA have established Investment Court System. Within existing dispute settlement bodies, World Trade Organization's Appellate Body hears only issues of law covered in first instance. Same mechanism is at work in Southern Common Market (Mercosur) where only matters of law is included in the scope of appellation. Decisions of ICSID cannot be appealed, however, it can be annulled on limited and procedural grounds included in Article 52 of the Convention.

The last development is *Investment Court System (ICS)* which is already implemented in the EU-Canada Comprehensive Economic and Trade Agreement and other European Union's new generation free trade agreements with Singapore, Vietnam.[531] In EU-Singapore Investment Protection Agreement, Investment Court System favors less conflicted approach which allows the settlement to be agreed amicably any time after arbitration proceeding have sat in motion.[532] When the parties fail to settle the dispute amicably, the claimant may request a consultation to the respondent within 30 months after the alleged violation have occurred.[533] If during the consultation parties failed to settle the dispute, the claimant may submit a notice of their intention to bring the claim to the tribunal.[534] And only after three months of such notice, the claimant may submit the claim to the Tribunal.[535] The Tribunal of first instance would consist of six members, two of EU's choosing, two of Singapore's choosing and another two that are chosen jointly by the Contracting Parties.[536] The rules of dispute settlement must be consented by the disputing parties among ICSID, ICSID Additional Facility, UNCITRAL arbitration rules or others. The ICS has a permanent Appeal Tribunal, which also consist of six members and hear appeals from provisional awards issued

[531] EU-Singapore Free Trade Agreement and Investment Protection Agreement. EU-Vietnam Free Trade Agreement and Investment Protection Agreement. Both FTAs entered into force in November 2019 and August 2020 respectively. Investment Protection Agreements need ratification by all the Member States of the European Union.
[532] Article 3.2, Chapter Three Dispute Settlement, EU-Singapore Investment Protection Agreement.
[533] *Ibid*, Article 3.3(3).
[534] *Ibid*, Article 3.5.
[535] *Ibid*, Article 3.6.
[536] *Ibid*, Article 3.9. The Committee may increase the number of members and shall be appointed for an eight-year term. However, the inaugural terms of three of the six persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to twelve years.

by the Tribunal of First Instance. Similar set of rules are applied in the EU-Vietnam Investment Protection Agreement (EUVIPA). However, in EUVIPA the disputing parties would start forming the arbitration panel within 10 days of the complaint.[537] And the members of the Appeal Tribunal shall be appointed for four years.[538] The appellate tribunal can uphold, modify or reverse awards. These new generation agreements between the European Union and ASEAN member states aimed to provide a mechanism that favors amicable settlement of disputes without jumping to the investment arbitration immediately. In the beginning of these agreements some prominent Asian commentators have expressed their strong discontent with the ICS.[539]

UNCITRAL's initiative on Multilateral Investment Court have proposal for creation an appellate mechanism that would aim to ensure procedural and substantive correctness of arbitral decisions and rectification of errors as well. At this instance, the WGIII is working on the scope of appeal and the appellate body's competence which could include not only procedural matter but substantial matters too.[540]

Other developments on procedural criticisms overall and in Asia could include *counterclaims* and *state-state dispute settlement*. Traditional belief that investment arbitration favors investor more that the host state is related to the is related to the historical establishment of investment arbitration, by capital exporting countries to protect its nationals' property abroad. Recent development suggests that counterclaims became more common than before. In the last six years thirteen counterclaims were filed out of total 28.[541] As for Asian states, only Indonesia has been successful in initiating a counterclaim in *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*.[542] Altogether there has been four counterclaims in Asia.[543]

Usually State-State dispute settlement is not used in investment related matters. However, this tendency is shifting as states can exercise greater control over the

[537] Article 3.7 EU-Vietnam Investment Protection Agreement.
[538] *Ibid*, Article 3.39.
[539] Muthucumaraswamy Sornarajah, An international investment court: Panacea or purgatory180, Columbia FDI Perspectives (2016).
[540] Possible reform of ISDS, Appellate and multilateral court mechanisms. UNCTAD Working Group III (Jan. 18, 2021, 19:33), https://undocs.org/en/A/CN.9/WG.III/WP.185.
[541] Ina Popova & Fiona Poon, *From perpetual respondent to aspiring counterclaimant? State counterclaims in the new wave of investment treaties*, 2:223 BCDR International Arbitration Review, Kluwer Law International (2015).
[542] Hesham Talaat M. Al-Warraq v The Republic of Indonesia, UNCITRAL, Award (2014).
[543] For counterclaims in Asia, see Trisha Mitra & Rahul Donde, Claims and Counterclaims under Asian Multilateral Investment Treaties, (L. Choukroune ed., Judging the State in International Trade and Investment Law: Modern Sovereignty, the Law and the Economics, Springer) (2016).

interpretation and application of disputed international investment agreement provisions.[544] In Peru v. Chile for instance, state-state arbitration was initiated to define the temporal limits of the Peru-Chile BIT. Similarly, in Ecuador v. United States, a tribunal was called on to define the scope of the Contracting Parties' obligations under the US-Ecuador BIT.[545] On Asian perspective, IIAs between Australia-Malaysia and Australia-Philippines contain state-state dispute resolution as the only dispute resolution method.

The aforementioned criticism points are addressed more to the systemic and institutional framework of investment arbitration rather that the substantial standards of it.[546] Furthermore, from host country's perspective on investor-state dispute settlement criticism concerns the impact on the future of investment arbitration, rather that the outcome of individual proceedings.[547]

7.4. Reaction overview from individual countries

The difference in approach to foreign investment also differed within the Asian continent. For instance, major economies such as China, South Korea and Hong Kong were more adapting and positively endorsing the foreign direct investment flow and countries such as Indonesia and India are responding quite negatively by terminating BITs and enforcing a selective engagement.[548]

Regarding this matter, we will examine Indonesian strategy to terminate its existing BITs and renegotiating new BITs with its economic partners.

In 2014 the government of **Indonesia** have made a decision to terminate unilaterally its all existing 67 bilateral investment treaties. The first BIT to get terminated was Indonesia-Netherlands BIT of 1994. By 2015 Indonesia have informed their intent to terminate the BITs and already have terminated 9 of them. Then Indonesian Vice President declared that

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[544] Potestà, M. 2013. State-to-state dispute settlement pursuant to bilateral investment treaties: Is there potential? In International courts and the development of international law: essays in honour of Tullio Treves, ed. Boschiero, N and others, 753–770. The Hague, The Netherlands: T.M.C. Asser Press. (Donde, Chaisse p221).

[545] Republic of Ecuador v. United States of America, PCA case No. 2012-5. Final award 29 Sep 2012.

[546] See for instance, Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioral Experiments*, 31:2 European Journal of International Law, 405–428, (2020). The authors conduct a research on the roots of public criticism against investment arbitration. One of the research questions was whether the criticisms were triggered by the nature of the substantive rights that were protected by international investment law. The result came out negative thus suggesting that without major affects in the substantial law scope, the modification of institutional designs of the adjudicative body can improve the acceptance of ISDS in opinion of the public.

[547] Stephan Schill, *Reforming ISDS: A Constitutional Law Framework*, 20 Journal of International Economic Law, 649, 654 (2017).

[548] In the world the process of terminating BITs and/or excluding ISDS started from 2008 with Latin American states such as Ecuador, Venezuela, Bolivia.

Indonesian government is preparing new bilateral investment treaties that will replace the ones that have been terminated. He mentioned that the new BITs shall be 'modern' and adjusted to the recent developments.[549]

Such bold strategy to terminate all exciting bilateral investment treaties might have been rooted in the recent investment treaty arbitrations that Indonesia have been respondent to. After losing millions of dollars' worth on the compensation payments, government of Indonesia have decided that the investor state dispute settlement and international investment agreements need grand reforms. Their officials have declared that most of their BITs were concluded several decades ago, which now does not align with the new regulations and policies within the country.[550] Especially these matters affect the public sectors including health, mineral resources and environment.

A recent case regarding the biggest coal reserves in the world has added weight to Indonesia's decision to terminate its investment treaties: *The Churchill Mining and Planet Mining v. Republic of Indonesia*.[551] Churchill UK owned mining company and its wholly owned Australian Subsidiary Planet Mining have entered into the project East Kutai Coal Project with Indonesian local company Ridlatama. EKCP had mining licenses in a territory where another local company (Nusantra) had license too and claimed the license is still valid. Local government have decided in favour of Nusantra group and revoked licenses of EKCP. After exhausting local remedies including the Supreme Court of Indonesia, Churchill began its investment arbitration in May 2012, which was followed by Planet's claim in December 2012. With the consent of all three parties, ICSID consolidated these two cases into one. However, rendering one decision would be impossible. Indonesia argued that the arbitration did not have jurisdiction to hear the claims as it did not give consent to arbitrate under UK-Indonesia bit of 1976 and Australia-Indonesia bit of 1992 respectively. But the tribunal have rejected the claim and issued two awards in jurisdiction which enabled the claimants to proceed with the damages claim. Nonetheless in the procedure of arbitral proceedings the tribunal found that the licenses presented by the claimants were forged and subsequently found the claims inadmissible.[552] The claimants have filed for annulment in March 2017 and

[549] David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?* 7(1) Asian Journal of International Law, 124-151 (2017).
[550] *Ibid*, at 126.
[551] Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB.12.14 and 12.40. Award (2016).
[552] *Ibid*, para 528.

the decision has not been rendered yet. The problem with the BITs was the fact that it did not provide any clause for the consequences of unlawful conducts by the claimant.

Indonesia's decision to terminate bilateral investment treaties was motivated by the content of BITs and its application in arbitral tribunals rather than the notion of the investment protection in substance. It is understandable that such wording of BITs and decisions of the arbitral tribunal triggered the notion that investment treaties and Investor-State Dispute Settlement mechanisms shall be changed to suit recent developments of international investment law. Furthermore, the coal mining sites were the biggest reserves of coal in the world, which is undoubtedly great importance to the Indonesian people and economy.

Reaction to Indonesia's decision were mixed. Some countries and scholars have applauded its bravery and necessity of such decisions and other said that this action would sink Indonesia's reputation as a favourable investment destination.

Despite the fact that Indonesia have terminated most of its BITs, it still is bound by the multinational agreements. These agreements include ACIA, ASEAN-Australia-New Zealand FTA. Furthermore, Indonesia remains the member of WTO and ICSID. Therefore, termination of investment treaties does not prevent foreign investors to bring claims in investment arbitration. Foreign investor's rights can be protected by the international treaties while contracting states negotiate the new bilateral investment treaties.

It's worth to note that the most BITs have a sunset clause that enables the provisions of the investment treaties to be effective even after its termination. Therefore, some counties' decision to spent aside from investment arbitration do not necessarily leave the foreign investors without protection. In addition, the sunset clause gives plenty of time to the contracting parties to enter into new IIAs and to renegotiate their BITs terms.

Indonesia followed the paths of many countries which were under satisfied with the investment treaties and stem ties arbitration. In 2013 South Africa have terminated its BITs with the Netherlands, Germany and Switzerland.

Another country that terminated most of its BITs, total of 67 by November of 2020 is **India**. India's decision was also triggered by high number of investment arbitration claims that started to hover since 2011 with *White Industries v. India* case.[553] In 2016, India

[553] PRABHASH RANJAN, INVESTMENT PROTECTION AND HOST STATE'S RIGHT TO REGULATE IN THE INDIAN MODEL BILATERAL INVESTMENT TREATY: LESSONS FOR ASIAN COUNTRIES (Julien Chaisse et al. eds., Asia's Changing International Investment Regime, International Law and the Global South, Springer (2017).

introduced its new model bilateral investment treaty.[554] Investor-state dispute settlement mechanism included in the new model BIT is quite strict. For instance, prior to initiating investment arbitration, the foreign investor must exhaust all domestic remedies in time period of five years.[555] If the dispute cannot be resolved in within the means of domestic remedies, the investor shall deliver notice of dispute to the host states which will be followed for another round of negotiation attempts for six months.[556] If after the negotiation period parties could not come to an amicable resolution of the disputes the foreign investor can initiate the arbitration process. On top of this lengthy process there are additional conditions for the investor prior to his initiation of arbitration. The conditions are: (a) no more than six years have passed since the alleged injury; (b) no more than 12 months have passed since the exhaustion of domestic remedies; (c) at least 90 days prior to submission of arbitration request, the host state must be given a notice.[557] With such difficult conditions, it is quite troublesome for the foreign investor to bring his claim to the international tribunal. Hence the balance between investor protection and host state's right to regulate is inclined in favour of the host state.

Exclusion of ISDS from their international investment agreements started with Australia when it decided to not include ISDS provision in their international investment agreements anymore.[558] Such decision was preceded by the infamous *Phillip Morris v. Australia* case, where Australia's plain packaging act was challenged by one of the biggest tobacco producers, Phillip Morris.[559] Now similar path is being taken everywhere in world. Countries are terminating its existing bilateral investment treaties but many of them renegotiating the parts of the investment arbitration system including the EU with its new generation investment agreements, and UNCTAD with its new Working Group III initiative. On more individual level, India has followed the same path and has introduced its new model BIT. In a nutshell, number of countries, both developing and developed, are taking actions to reform their foreign investment regime through IIA and ISDS within the treaties in order to provide greater balance between investors protection and host states right to regulate.

Conclusion

[554] India New Model BIT. Indian Department of Economic Affairs (jan. 18, 2021, 22:08), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.
[555] *Ibid*, Article 15.1-15.2 India New Model BIT.
[556] *Ibid*, Article 15.2-15.4.
[557] *Ibid*, Article 15.5.
[558] See generally Luke Nottage.
[559] Phillip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12.

Recently, ISDS system came under strong scrutiny. As number of investor-state dispute settlement proceedings started to rocket, the discontent of respondents, that are usually host states, grew more. Many host states came to realize that investor state dispute settlement is not favourable for them and their investment regime. Some were explaining it as the regime needed an update as most of their Bilateral Investment Treaties are several decades old. On top of that, the nature of investment arbitration came under question as well. For instance, scholars agreed that investment arbitration is a private dispute settlement mechanism with ad hoc nature where arbitrators can act as arbitrators in one case and councils in another. The claims that investment arbitration hears are the investment disputes between the foreign investor and the host state. Usually, the sectors that most investment focused on in host state are tightly related to the public interest areas such as natural resources, health, human rights, construction and other services. According to upper mentioned statement, host countries' dissatisfaction with investor-state dispute settlement system is the fact that private institutions render decisions on public interest sectors of the host state. Recent example of such intervention from international tribunal to host state's regulatory power can be examined in cases of Australia[560] and Germany[561], where arbitral tribunal contended their rights to regulate in health and environment sectors respectively. The countries which had the most investor-state disputes against them are responding strongly and unfavorably and consequently reforming their ISDS approaches in international investment agreements. To a certain extent, some of the regime's weaknesses are a legacy issue. The regime was framed at a time of significant power asymmetries between the principal capital exporting and most capital importing countries, and long involved overwhelmingly unidirectional foreign direct investment flows.[562]

In addition, host states made such decisions in belief that investment arbitration is biased towards the foreign investor. We believe that host countries belief of biased investment arbitration that favors investors are not entirely false. It is related to the BITs that govern the investment arbitration. Most of the BITs in the world was concluded in 1990s which evidently protected the capital exporting countries given the that periods' economic circumstances. As we remember, the main capital exporting countries were the developed

[560] *Ibid.*
[561] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, 2 July 2013.
[562] Julien Chaisse, Tomoko Ishikawa, Sufian Jusoh eds., Asia's Changing International Investment Regime, Springer, 2017.

north and southern states were usually capital importing host states.[563] These host states were put in a position where they had to accept BITs with strict provisions that grant greater freedom to investors over economic advantage.

However, circumstances have changed. The flow of foreign investment has shifted, north started investing in the north and south in the south. The distinction between north and south being only investors and host states respectively is no longer true. Previous capital exporting states have become host countries themselves. And therefore consequently have become respondents in the investment arbitration as ISDS can be initiated only by the investor against the host state, not vice versa.

Thus the investment agreements that were concluded in the past century no longer serve its purpose. Such notion has awakened within the traditional host countries hence they have started initiating reform procedures of their existing BITs and started introducing new one that serve their investment regime purpose as well. For instance, Indonesia terminated its first BIT with the Netherlands that was concluded in 1994. Termination of BITs and renegotiation of other international investment agreements are host countries fight for its regulatory power over public interest areas including health, human rights and so on. In other words, private institution, the investment arbitration, deciding on matter of host countries public interest is what triggered such bold strategy of termination of BITs and removal of ISDS system altogether.

It is important to note that such policy shift is not only seen in developing countries, but also in developed ones too. For instance, Member States of the EU are opposed to the ISDS system, hence implementing new Investment Court System. Australian government also ceased to include ISDS provisions in their trade and investment agreements.

However, more than the substantive law field, the procedural part came under more scrutiny. It was related to the nature of the investment arbitration, but more precisely towards the lack of transparency and predictability, high costs, lengthy proceedings, inconsistent decisions and limited mechanism to check the correctness of arbitral decisions. Inconsistencies remain a problem as they weaken the notion of predictability and rule of law in arbitral proceedings. Furthermore, possible conflict of interest of arbitrators cripple the idea of independent decision making of international tribunals. And high cost, lengthy processes obstruct the access of parties to justice.

[563] See Chapter 1 of this Dissertation. North, South dichotomy was developed by the trade relationship of the USA and Latin American states.

The criticism of investor-state dispute settlement system highly resonated in Asia. Asian countries only recently became global actors to influence international investment law as the flow of foreign direct investment increased in the region and regional integration of Asian states grew stronger. For instance, ASEAN's Comprehensive Investment Agreement and APEC's initiatives on Free Trade of the Asia Pacific.

Alongside with the positive integration and increase of foreign direct investment flows, some Asian states started taking bold measures to terminate, renegotiate, reforms their international investment agreement and entirely exclude investor state dispute settlement mechanism from their treaty protection of investors. Such actions were praised by some and others were saying that these countries will effectively lose their flow of foreign investments. Counties such as Indonesia and India, that have terminated their bilateral investment agreement, started negotiating and signing new investment agreement to replace the old ones. This action does not necessarily leave the foreign investors without protection. International treaties, including Comprehensive and Progressive Agreement for Trans-Pacific Partnership, are still in force for investors to seek protection from them. Furthermore, these countries have not denounced the ICSID Convention as well.

Besides the individual countries' rather harsh actions to reforms on IIA and ISDS can be expected from the multinational organizations that are negotiating the possible reforms of the field. For instance, ICSID 4th Amendment, UNCITRAL Working Group III, European Union's new generation FTAs including CETA, EU-Singapore FTA and EU-Vietnam FTA, are foreseeing major amendments in the future.

However, the different proposals to reform international investment regime might confuse the parties of an investment treaty even more. The active parties have different ideological, political and institutional preferences that often do not harmonise with each other. As Stephan Schill stated such actions might be counterproductive in arriving at balanced, predictable and legitimate ISDS system that is accepted worldwide in developing and developed countries.[564]

[564] Stephan Schill, *Reforming ISDS: A Constitutional Law Framework*, 20 Journal of International Economic Law, 649, 652 (2017).

Conclusion

From 17th century till nowadays, international investment law has evolved a long way. Main instrument and sources of international investment law started with treaties of friendship, commerce and navigation and developed into bilateral investment treaties, multinational agreement, customary international law, domestic law and debated rule of precedent. However, in current international investment regime, with ongoing amendment negotiations and proposals, the precedent could become legitimate source of international investment law. Dispute resolution evolved from applying only domestic laws to having specific bilateral investment treaties that regulate investment matters between states. Now BITs are the most important instruments of international investment law as it incorporates the main principles of international investment law such as most favored nation, national treatment, principle of fair and equitable treatment and compensation for expropriation.

This dissertation aimed to examine the influence of international investment regime on Asian host states, and their responses to the system overall. Research has unfolded that both positive and negative reactions of host states persisted; moreover, neither manner of reaction dominated the other. Positivity represented in the ultimate support of the system without attempts to change or renounce it; and negativity represented in efforts to reform the core idea of the system that is envisioned in international investment agreements and investor-state dispute settlement mechanism. However, neither positive nor negative reactions entail ultimate total positivity or negativity.

Positive reaction entails various actions of host country's government, including amendment of legislation other instruments in order to improve economic and legal atmosphere for the foreign investor. These improvements consequently increased the foreign investment flow to the country. Generally, a foreign investor seeks full protection of investment and full consent to the investment treaty arbitration. Positive reaction of a host country was identified in Mongolia's foreign investment policy. Mongolia has amended its foreign investment law four times and each time was targeted to improve the legal atmosphere in the country towards foreign investors. Since the very first foreign investment law of Mongolia, foreign investors had preferential treatments including tax and custom incentives and flexibility towards investment. After the introduction of democratic regime in 1990 Mongolia enacted first ever Foreign Investment Law in 1993, which aimed to encourage foreign direct investment flow by defining special tax preferences and privileges only available for foreign investors; had clear distinction between foreign and domestic

investor; introduced the basic rules of investment protection; and defined 'investment' and 'business entities with foreign investment'. 1993 FIL was amended in 2002 as a result of complaints from domestic investors regarding foreign investors' exclusive tax preferences and requirements of the World Trade Organization regarding safety and stability of investments. In 2011-2012, Mongolian GDP rose dramatically as a result of increased foreign investment in mining sector and exploitation scales of natural resources skyrocketed. Thus Government of Mongolia enacted Law on Foreign Investment in Strategic Sector in 2012, main agenda of which was to keep control over Mongolia's natural resources and prevent the establishment of undesired foreign investment in strategic sectors by State-owned entities. Law on Foreign Investment in Strategic Sector allowed both foreign private and state-owned investments to be screened and admissions to be denied in the public interest. Nevertheless, SEFIL aroused some uncertainties among investors alongside with the significant drop of FDIs, which made the longevity of the law only one year.

In 2013, Mongolian Investment Law was enacted to cover all the gaps that its predecessors left. The MIL applies to both foreign and domestic investors, therefore avoids reverse discriminations of the latter, secures the former equal legal treatment and it keeps the entry screening process of State-owned investments. Unless prohibited or restricted by the applicable domestic laws, private foreign investors can freely make investments in all sectors, including production and services. Main novelties of Mongolian Investment Law were the introduction of tax stabilization certificates, which is issued by the Government of Mongolia to the investors who qualify to certain requirements of the law; inclusion of an open offer to arbitrate investment treaty related disputes in international arbitration and sanctioning of number of clauses to sustainable development of host country. In essence, MIL's investment protection clauses reflected internationally accepted standards and principles, including fair and equitable treatment, national treatment, free transfer of funds, compensation for expropriation and standing offer for arbitration.

Every amendment of investment legislation in Mongolia was driven by the will to improve the legal regime in order to increase foreign investment flow and keep existing ones in the country. Therefore, it constitutes positive response to the international investment regime as it was accepting its clauses without question. Mongolia's attempt to improve domestic investment laws in order to meet international standards and requirements of the foreign investors reflect that country is leaning towards maintaining the status quo of the international investment regime.

Further the dissertation focused on Association of Southeast Asian Nations and the European Union's investment policy that affected Asia pacific region directly. As one of the most attractive destinations for the foreign investment, Association of South East Asian Nation tried to keep its independence from strict standard treaty rules for a very long time. This over cautiousness correlated to recently gained independence for the majority of Member States. But ever changing and developing market demanded a change of the regime from relation-based regulation to the rules based one. After transitioning to rules based regulation in the region focused on two pillars: keeping the independence of the Member States and enacting international law standards, the biggest leap towards internationalization of investment rules started with the ASEAN Comprehensive Investment Agreement. However, ASEAN did not mean to change the regulative policies completely and rather decided to combine the two by making the treaty rules flexible and in favor of host state's discretionary powers. ACIA's aim to complete and consolidate the investment regulations that were scattered in various sources into one complex document was reached. With the one centralized instrument investors gained more confidence in the treaty protection of their investment. Nonetheless, when ACIA entered into force, it did not abolish the coverage of the previously existing investment treaties and free trade agreements, which opened doors to the possibility of forum shopping and left investors confused about the promised investment protection of ACIA.

Nowadays, ASEAN's future investment regime is being heavily influenced by the investment policy of the European Union. Prior to the Lisbon Treaty, Member States of the European Union were encouraged to enter into bilateral investment treaties while the EU was securing the liberalization of foreign investments and focused on negotiating free trade agreements. The Lisbon Treaty abandoned such dualism and devolved the competences in relation to foreign direct investments, including the negotiation and conclusion of BITs with non-EU states, to the EU. What was missing in the Lisbon Treaty and became an issue in practice, were transitional provisions clarifying the status of existing extra-EU BITs. Furthermore, CJEU's opinion 2/15 made it clear that investor state dispute settlement clauses fall within the Member States' competence. Thus being an important part of investment protection realm, it could cause uncertainties among the investors. Furthermore, the future of Intra-EU bilateral investment treaties became apparent after the opinion of the CJEU on Achmea v. Slovak Republic case came out. The Court decided that investment arbitration clauses in intra-EU bilateral investment treaties were infringing the Union's law and had discriminatory character, ergo it contradicts to the nature of the Union. Consequently,

twenty-three Member States of the European Union signed Agreement on Termination of the Bilateral Investment Agreements in May 2020. It can take decades to finally stabilize the investment policy of the Union. The reform steps taken by the EU towards new regulations on investment have shown the Union's determination. Regardless of the numerous problems, including previous, agreements that the EU is dealing with, the process itself is quite successful. After long-term negotiations, the multilateral agreements of the Union are waiting for approval from Member States' Parliaments, and the proposal regarding the single judicial system is getting positive feedback from the observers. The single judicial system is striving to live up to the standards set by international tribunals', and this is evidenced by the use of approaches developed by the WTO.

European Union's influence on Asia Pacific is seen in the new generation free trade and investment protection agreements of the Union. When traditional investor-state dispute settlement system is replaced by new investment court system in the new generation agreements, Asian contracting parties are accepting such novelty by default and are motivated to reform their investment regimes. Therefore, introducing new international investment agreements with novelty clauses is one of the main pillars of international investment regime and prompts ASEAN Member States' to shift their foreign investment regime to new level.

Negative reaction of host countries towards international investment regime was reflected in the criticism of investor-state dispute settlement mechanism and international investment tribunals. As number of investor-state dispute settlement proceedings started to rocket, the discontent of respondents, that are usually host states, grew more. With more data that appeared after hearing over 600 cases, ICSID became a target for criticism from investors and contracting states. Criticisms towards ISDS covered transparency, jurisdiction and inconsistency in decisions. Lack of transparency has several negative impacts on international investment law and arbitration. Firstly, it weakens the legitimacy of ISDS system and the decisions delivered with it. Secondly, it eliminates the possibility of access the decision reasoning which could explain the way investment agreements perceived in practice. And lastly, lack of transparency violates the public's right for information that affect them directly or indirectly. Often investment treaty disputes arise from matters affecting public interest that are related but not limited to natural resources, environmental and health regulations or disputes with significant financial impacts on the state budget hence tightly affecting the taxpayers. Therefore, the subject matter of the dispute is of a great importance to the people of the host state. Jurisdictional criticism was related to the use of

umbrella clause in order to bring claims in investment treaty arbitration based on the contractual violations of the host state. International organizations such as UNCITRAL was supportive of umbrella clause mentioning that the purpose of the umbrella clause is to protect the foreign investor in all possible circumstances. However, this kind of broad protection clauses were likely to put the host state in undesirable situation; therefore, intensifying discontent of host states towards the international investment regime. Inconsistent decisions of the investment treaty arbitration are reasoned by the fact that every case is based on differing investment treaties and is conducted in ad hoc nature. Some scholars supported the idea of consistency in the decision, stating that it will only increase predictability and consequently the rule of law. Others disagreed, stating that giving the arbitrators potential legislative power will do more harm than good and potential solution for inconsistent decisions would be introduction of appellate mechanism. However, appellate mechanism would require integrated dispute settlement mechanism, which is problematic to achieve with thousands of bilateral investment treaties that differ in wordings. In light of such criticisms, host states came to realize that investor state dispute settlement is not favourable for them and their investment regime.

The negativity in the sense of this dissertation entailed the attempts to reform the international investment regime by reforming the international investment agreements and opting to remove investor-state dispute settlement mechanism from the investment regulation. As number of investor-state dispute settlement proceedings started to rocket, the discontent of respondents, that are usually host states, grew bigger. Many host states came to realize that investor state dispute settlement is not favourable for them and their investment regime. Some were explaining it as the regime needed an update as most of their Bilateral Investment Treaties are several decades old. The countries which had the most investor-state disputes against them are responding strongly and unfavorably and consequently reforming their ISDS approaches in international investment agreements.

In addition, host states came to believe that investment arbitration is biased towards the foreign investor. The author believes that host countries' belief of biased investment arbitration that favors investors is not entirely false. It is related to the bilateral investment treaties that govern the investment arbitration. Most of the BITs in the world was concluded in 1990s which evidently protected the capital exporting countries given the that periods' economic circumstances. As we remember, the main capital exporting countries were the

developed north and southern states were usually capital importing host states.[565] These host states were put in a position where they had to accept the BITs with strict provisions that grant greater freedom to investors over economic advantage.

However, circumstances have changed. The flow of foreign investment has shifted, north started investing in the north and south in the south. The line dividing the north and south has blurred. The distinction between north and south being only investors and host states respectively is no longer true. Previous capital exporting states have become host countries themselves. And therefore consequently have become respondents in the investment arbitration as investor-state dispute settlement procedure can be initiated only by the investor against the host state, not vice versa.

Thus the international investment agreements that were concluded in the past century does no longer serve its purpose. Such notion has awakened within the traditional host countries hence they have started initiating reform procedures of their existing BITs and started introducing new ones that serve their investment regime purpose as well. For instance, Indonesia terminated its first BIT with the Netherlands that was concluded in 1994. Termination of BITs and renegotiation of other international investment agreements are host countries fight for its regulatory power over public interest areas including health, human rights and so on. In other words, private institution, the investment arbitration, deciding on matter of host countries public interest is what triggered such bold strategy of termination of BITs and removal of ISDS system altogether.

The negative reaction was mostly observed in south east Asian host states. The clear example was Indonesia. Indonesia has terminated over 65 BITs that were signed in past decades. Purpose was to renew the ISDS system within their investment regime. In practice, Indonesia's decision to terminate and renegotiate investment agreements were driven by the number of investment treaty arbitration proceedings that Indonesia has lost as a Respondent. The officials stated that such actions were necessary as current existing BITs were outdated and did not cohere with Indonesia's future visions on foreign investment. Generally negative reactions became more popular. For instance, denunciation of ICSID by Latin American states; Australia's exclusion of ISDS from its BITs and termination or renewal of existing BITs by Indonesia and India.

[565] See Chapter 1. North, South dichotomy was developed by the trade relationship of the USA and Latin American states.

Since 2007, the year when Bolivia denounced the ICSID Convention, international investment law been confronted by 'resistance and change'.[566] Resistance and change means abolishing the status quo of the current investment treaty regime. Therefore, renegotiating existing bilateral investment treaties and introducing new model BITs may be interpreted as attempt of the host state to have more control over their treaty obligations.

Furthermore, international organizations initiated their negotiations regarding amendment and reform processes to balance the international investment regime that is losing its popularity little by little. Most organizations, including International Centre for Settlement of Investment Disputes, United Nations Commission on International Trade Law and the European Union are proposing procedural amendments to the proceedings of investment treaty arbitration. for example, introducing system of tenured judges and appellate body for arbitral tribunals. However, in author's opinion reforming the procedural aspects first would be a better idea in the aspect of timely manner. About appellate mechanism, it seems like it will be shaped as a court in Anglo-Saxon legal regimes as international investment field do not have constituted unified substantive legal instruments. It is rather based on various investment agreements and only partially unified procedural rules that differs from tribunal to tribunal. Therefore, starting the reform with easily unifiable procedural aspects is more plausible. With ongoing negotiations by UNCITRAL, ICSID and other tribunals, only future will show whether reforms will take place and what exactly would that be.

In 1960s Broches idea that founded ICSID then was inclined towards procedure before substance. In modern world, not much has changed and consent of all the parties to establish a multilateral investment court seems like a time consuming project that might not come to life. However, this does not insinuate that it is an impossible task. The author suggests that procedural development, reform and changes would be easier to reach and have a valid result in shorter period of time. The substantive reforms can come after procedural one. Right now it is important to address the procedural concerns that were criticized harshly by parties of investment treaty arbitration, including transparency and independence of the arbitrators. It is in the country's discretion to reform their investment agreement; however, investment arbitration issues must be dealt with international organizations that represent arbitration parties.

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