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REFORMING INVESTOR-STATE DISPUTE SETTLEMENT: LEGAL TRENDS AND CHALLENGES

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Abstract

Investor-state dispute settlement (ISDS) has attracted sustained scrutiny over the past decades. Critiques of ad hoc arbitration, including inconsistent awards, high costs, and potential constraints on regulatory sovereignty, have prompted a wave of reform initiatives. This article surveys major trends and proposals with an international perspective. It examines the ongoing UNCITRAL Working Group III process and its draft Multilateral Instrument (the "MIIR"), the European Union's push for a permanent Multilateral Investment Court (MIC), the North American experience under the USMCA, and Nigeria's recent investment treaty reforms. Each approach is assessed in terms of coherence, efficacy, state sovereignty, investor protection, and access to justice. The analysis draws on treaty texts, institutional developments, arbitral cases, and scholarly commentary. It finds that reforms seek to balance investor rights with public policy and sovereignty interests, but they also risk fragmentation and complexity. The conclusion argues that while reforms promise greater transparency, consistency, and legitimacy, their success will depend on wide adoption and careful design to avoid new unintended costs.

Keywords: investor–state dispute settlement, arbitration, multilateral investment court, investor protection

INTRODUCTION

Investor-State Dispute Settlement (ISDS) mechanisms have become an indicator of international investment agreements (IIAs), enabling foreign investors to initiate arbitration proceedings against host states for alleged breaches of treaty obligations. As of 2023, over 3,300 IIAs exist globally, with more than 1,300 known ISDS cases filed across 120 countries (UNCTAD, 2024).

Designed to protect foreign investors against unfair treatment by host states, ISDS allows investors to bring claims directly against governments before international tribunals. Initially created to encourage foreign direct investment (FDI), ISDS has increasingly become controversial. Critics argue that it disproportionately favors investors, limits state sovereignty, lacks transparency, and is often unpredictable in its outcomes.

The investor-state arbitration regime centered on the ICSID Convention (the "Washington Convention") and myriad bilateral investment treaties (BITs) and trade deals has evolved from a tool for foreign direct investment to a source of controversy. From the late 20th century onward, thousands of claims have been filed against states, resulting in some multi-billion-dollar awards (e.g., in *Yukos v. Russia* and various high-profile cases) (Brauch, 2014). Critics argue that ISDS can undermine state sovereignty by chilling legitimate regulations and lacking consistent legal principles. Even the U.N. notes that there is no clear evidence that investment treaties increase foreign investment. Moreover, tribunals do not necessarily depoliticize disputes; many governments now believe that alternative mechanisms (domestic courts, mediation, investor obligations) can better address investment issues. Against this backdrop, major jurisdictions have launched reforms. In 2017, UNCITRAL's Working Group III ("WGIII") was given a broad mandate to explore ISDS improvements. The European Union has proposed a permanent Multilateral Investment Court (MIC) to replace investor-selected arbitrators (Du, 2022).

This essay critically examines the ongoing legal trends and challenges in the reform of the ISDS system. It explores the historical background of ISDS, the nature of the criticisms, the reform initiatives led by key international bodies, emerging trends in bilateral investment treaty (BIT) renegotiations, and the practical and political obstacles to meaningful reform. Ultimately, the essay aims to shed light on how the ISDS mechanism can evolve into a fairer, more transparent, and balanced system for resolving investment disputes in the 21st century.

BACKGROUND AND EVOLUTION OF ISDS

The Investor-State Dispute Settlement (ISDS) system emerged as a response to the rising need for legal assurance and protection of foreign direct investment (FDI), particularly

during the post-colonial era of the mid-20th century (Qumba, 2021). It was initially conceptualized within the framework of Bilateral Investment Treaties (BITs), agreements signed between two countries to protect and promote investment by nationals or companies of one state in the territory of the other. These treaties typically include clauses on fair and equitable treatment, protection from expropriation without compensation, and access to neutral arbitration forums in case of disputes.

Historically, before the rise of ISDS, foreign investors had limited recourse if a host state violated their investment rights. Disputes were often settled through diplomatic protection, where the investor's home state would intervene on their behalf (Carlsson & Dautaj, 2020). However, this system was not only inconsistent but also susceptible to political pressures and, in some cases, even led to gunboat diplomacy, where economic disputes risked escalating into military conflicts, especially in the Global South.

The breakthrough came with the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966, under the auspices of the World Bank (ICSID, 2024). The ICSID The convention was designed to provide an independent, depoliticized forum for resolving disputes between foreign investors and sovereign states. It was revolutionary in allowing private investors to bring claims directly against states, bypassing traditional diplomatic channels. Parallel to ICSID, other rules such as the UNCITRAL Arbitration Rules (established in 1976) allowed for ad hoc arbitration processes, broadening the dispute resolution options available to investors.

From the late 1980s onwards, the world saw a rapid proliferation of BITs. By the mid-1990s, countries were signing hundreds of these agreements annually. According to the United Nations Conference on Trade and Development (UNCTAD), there were only about 400 BITs in existence in 1989 (Nel, 2015). By 2015, that number had ballooned to over 3,300 agreements, reflecting a global investment boom and a growing faith in ISDS as a means of investor protection (Wendt, 2022). Alongside this growth in treaties came a corresponding rise in ISDS cases. According to UNCTAD's World Investment Report 2023, more than 1,200 publicly known ISDS cases had been filed globally as of December 2022. However, this figure is likely an underestimation, as not all arbitration proceedings are made public (Wittmeier, 2023). The ICSID caseload alone had crossed the 800-case mark, with most disputes involving energy, infrastructure, and natural resource sectors areas that are both high-value and politically sensitive.

A notable trend is the increasing number of claims brought against developing and emerging economies. For instance, countries like Argentina, Venezuela, Egypt, and India have faced numerous claims following regulatory changes, nationalizations, or crises. Between 1987

and 2020, more than 70% of all ISDS cases were initiated against developing countries (Wittmeier, 2023). This raised serious concerns about a potential regulatory chill, where governments might refrain from implementing policies (especially in areas like public health or environmental protection) for fear of costly arbitration claims.

Moreover, some of the awards granted by tribunals have been staggering. For example, in the Yukos v. Russia case, the tribunal awarded former shareholders of Yukos Oil over $50 billion USD, the largest amount ever awarded in ISDS history (Brauch, 2014). These outcomes have amplified fears that the system may disproportionately benefit multinational corporations at the expense of public interest and state sovereignty.

The backlash against ISDS began gaining momentum in the 2010s. Civil society organizations, legal scholars, and even some governments began questioning whether the ISDS system was fair, transparent, and sustainable (Pelc, 2017). Critics argued that it created a parallel system of justice, lacked accountability, and often empowered wealthy investors to override legitimate state regulation. In response, reform debates intensified globally, particularly in multilateral forums such as the United Nations Commission on International Trade Law (UNCITRAL) and the ICSID Secretariat, where discussions continue to this day.

The historical trajectory of ISDS reflects its evolution from a niche legal innovation to a central and controversial feature of the international investment regime. While its original purpose was to foster investor confidence and economic development, the growing complexity, costs, and perceived imbalances have made its reform not only desirable but necessary. The current wave of reforms seeks to recalibrate this balance by enhancing transparency, legitimacy, and fairness in a system that now influences billions of dollars in global economic activity.

REFORM INITIATIVES AND LEGAL TRENDS

The UNCITRAL Working Group III Reform Process

In 2017, following sustained calls for change, the U.N. Commission on International Trade Law (UNCITRAL) authorized Working Group III to consider ISDS reform. Its 34th session in 2017 confirmed a broad mandate to address the manifold problems of ISDS (World Bank, 2015). Early findings cast doubt on ISDS's benefits: studies (including by the OECD) found no clear evidence that investment treaties spur more FDI, and UNCITRAL's secretariat has observed that states are exploring "better alternatives for promoting foreign investment." In sum, WGIII was charged with exploring everything from treaty design to institutional overhaul, rather than narrow procedural tweaks.

The Multilateral Instrument (MIIR). Over 2019–2024, WGIII developed a framework convention plus optional protocols, known as the Multilateral Instrument on ISDS Reform (MIIR). A first draft of the MIIR was published in 2024. In this model, states can opt-in by signing the convention and selecting which reforms to apply to which treaties. The draft envisages six initial protocols, divided into two groups (Kittelmann & Lemoine, 2024):

- **Protocol A (Code of Conduct for Arbitrators):** A model code (building on existing ethics rules) to govern arbitrators' impartiality and conflicts. (Parties can already agree to a code by consent, but codifying it helps transparency.)
- **Protocol B (Model Mediation Provisions):** Template clauses encouraging mediation or good offices as a pre-arbitration or parallel option.
- **Protocol C (Procedural and Cross-Cutting Measures):** Draft provisions on issues like third-party funding disclosure, early dismissal of frivolous claims, consolidation of related cases, and transparency in proceedings.
- **Protocol X (Advisory Centre):** A statute for a new multilateral advisory centre on investment law to provide legal assistance to developing states (analogous to ICSID's own facilitation). This aims to level the playing field by helping hosts manage complex claims.
- **Protocol Y (Standing Dispute Settlement Mechanism):** A proposed permanent tribunal or administrative body (first instance) to hear treaty claims.
- **Protocol Z (Appeals Mechanism):** A proposed appellate body above tribunals to review awards for legal errors, increasing consistency.

Protocols X, Y, and Z involve institutional creation and funding and are thus far-reaching reforms. In contrast, Protocols A–C impose no new bodies, only procedural standards. WGIII's draft (Article 2) even acknowledges that X–Z may require the creation of an institution and financial commitment.

States will apply the chosen protocols via notifications: each State specifies which protocols it accepts and to which of its treaties they apply. Once all parties to a treaty adopt a protocol, the treaty is effectively amended to include that protocol's rules (World Bank, 2015). This mechanism is modelled on the OECD's multilateral tax instrument (BEPS MLI). Crucially, reservations (e.g. applying to some treaties only) are allowed, but MFN escalation is banned to prevent unwanted spillovers.

The MIIR aims to reduce fragmentation by letting groups of states harmonize their treaties in parallel. In theory, a state could opt into, say, Protocol C and modify dozens of BITs at once. If major capitals join, the system will gain coherence: for example, all affected treaties

will include the same dismissal or consolidation rules (Kittelmann & Lemoine, 2024). However, voluntary opt-ins risk cherry-picking. Some feared that capital exporters might adopt only investor-friendly protocols (like binding ICSID jurisdiction), while others adopt only state-favoring ones (like stricter local-exhaustion rules).

The MIIR is explicitly opt-in. No state is forced to join the convention or take on protocols it dislikes. Thus, sovereignty concerns are somewhat allayed as each government decides its mix of reforms. For example, a state could accept Protocol A on arbitrator ethics (widely popular) but reject Protocol Z on appeals (which it might see as costly). However, once joined, states are bound by the instrument's amendment mechanisms (World Bank, 2015). A government that signs a protocol and lists a treaty cannot unilaterally back out of that protocol's modifications for that treaty. Moreover, some critics note that the complex matching of treaty parties' notifications could create uncertainties: if one party forgets to notify, the treaty change may not activate. On balance, WGIII's approach tries to respect sovereignty by requiring consent for each reform, but it also relies on multilateral coordination, a delicate balance.

The envisioned reforms have mixed implications for investors. Protocols A–C generally strengthen procedural fairness (better arbitrator integrity, optional mediation) and predictability (through consolidation and funding transparency), which could benefit both investors and states by reducing spurious claims and ensuring impartial adjudicators. The appeals (Protocol Z), if adopted, would arguably enhance the rule of law by correcting clear legal mistakes. However, they could also prolong disputes and increase costs, potentially deterring smaller claims. Importantly, WGIII's MIIR would not create new substantive rights for investors; it only adjusts how existing treaties operate. Indeed, Article 2 of the EU's MIC proposal similarly emphasized it would only apply where an investment treaty already explicitly allows an investor to bring a dispute.

Some reforms may improve access. The advisory center (Protocol X) is designed to assist investors and states lacking resources, so it could help less-developed countries defend themselves or understand cases. Model mediation (Protocol B) encourages amicable solutions, potentially resolving disputes earlier without arbitration. An appellate body would give both sides a chance to review an award, arguably enhancing confidence in outcomes (World Bank, 2015). On the other hand, mandatory pre-arbitration remedies (considered in WGIII papers) or expanded waiting periods could delay access to arbitration. Critically, the WGIII draft prohibits mandatory exhaustion of local remedies in the MIIR itself such rules would have to come from treaty amendments or other protocols, so no new burdens are imposed by the convention alone.

Even as WGIII advances, skeptics note it faces political hurdles. Some capital-exporting states are wary of appeals or advisory centers due to cost, while some developing states fear

giving too much power to international bodies (World Bank, 2015). The draft MIIR is also unwieldy: its optional, multi-tiered structure is complex. Achieving consensus on the final text is difficult. Nevertheless, the MIIR represents a more systematic attempt at reform than any previous effort. It could be a landmark if enough states participate. As one observer notes, WGIII has been tasked with potentially a framework convention with protocols, underscoring that it is not yet a done deal (Kittelmann & Lemoine, 2024).

The European Union's Multilateral Investment Court

The European Union has taken a proactive approach to ISDS reform. Motivated by public backlash and by the 2018 Achmea judgment, which held that intra-EU BIT arbitration was incompatible with EU law, the EU proposed replacing ad hoc ISDS with a standing court (European Parliament, 2019). First articulated in 2015, the EU's Multilateral Investment Court (MIC) is envisioned as a permanent tribunal (first instance) plus a permanent appellate tribunal. All member and partner countries would be eligible to join, but crucially, the MIC would only hear disputes under treaties that explicitly provide for it (European Parliament, 2019). It does not create new treaty rights. In other words, a treaty must already allow investor-state claims before the MIC can apply.

Several EU agreements already include language paving the way for an MIC. For example, the EU–Canada CETA's Investment Court System (ICS) is a prototype: it established a tribunal and appeal court for EU–Canada disputes and expressly calls for a multilateral mechanism. Similarly, the EU–Vietnam FTA and others envisage a future multilateral court.

If widely adopted, an MIC could bring uniformity across many treaties. Substantive rules and procedures would be harmonized: investors and states would face the same judicial mechanism rather than a patchwork of ad hoc panels. In theory, this would promote consistent jurisprudence and reduce forum shopping. Moreover, because the MIC would be open to all interested countries, it could evolve into a global (or at least pan-regional) court (Mskhvilidze, 2023). On sovereignty, the MIC requires careful analysis. By opting into the treaty establishing the court, states would cede the right to choose arbitrators in covered disputes and accept binding jurisdiction of a supranational tribunal. However, participation is voluntary and limited: states never cede regulatory power itself, only dispute resolution authority. In fact, the EU explicitly emphasizes that the MIC should prevent disputing parties from choosing which judges rule on their case, shifting selection power from parties to states (or to a standing court leadership). Some states have been cautious: for example, the UK Parliament in 2018 noted the UK government would examine the detail carefully of the EU MIC to see if it meets UK

objectives (European Parliament, 2019). In practice, outside the EU only a few states might join a fully multilateral court; others may prefer bilateral arrangements.

Investor protections under the MIC would largely mirror those in existing treaties. The court proposal itself says it does *not* create new rights beyond what treaties provide. However, certain design choices could affect protection levels. Proponents claim that an independent judiciary, with appeals, will improve the coherence and legitimacy of awards, possibly reducing fears of bad faith or bias. Tenured judges with ethics obligations might also raise the tribunal's accountability. On the other hand, critics argue that the MIC (like any ISDS reform) may lock in substantive outcomes that favor investors. For instance, Friends of the Earth Europe (2020) warned in 2017 that the MIC would still allow corporations to *sue governments for laws and regulations that harm their profits*, preserving *unjustified privileges* at the expense of the public interest. Such critics contend that unless treaty language itself is rebalanced (e.g. adding health or environmental exceptions), a new court could continue the status quo of broad investor rights.

From an access standpoint, the MIC has pros and cons. On one hand, a formal court could be more accessible to some investors: it promises clear procedures and published decisions, which can help small claimants understand the process. The appeal stage, while lengthening proceedings, offers another chance to correct errors. On the other hand, higher institutional overhead and potentially longer timelines may deter smaller claims. Importantly, eligibility is still limited to parties of treaties that expressly allow ISDS; thus, many would-be claimants gain no new access. In sum, the MIC centralizes access for the subset of disputes already allowed, rather than expanding it.

The MIC remains a work in progress. The idea has broad European backing but has not attracted full global consensus. The US, for example, has never agreed to ICSID-style ISDS in treaties, and is not part of EU initiatives (Yanos, 2023). Some developing countries are suspicious of a court system they didn't help shape. Technically, the MIC proposal was discussed in UNCITRAL WGIII as well. Foot-dragging or dilution is possible; indeed, one NGO quipped that the EU's process *locks in ISDS* without fixing its underlying problems (Laryea, 2025). Overall, the EU's MIC project represents one of the boldest reform efforts: if implemented multilaterally, it could transform ISDS into a judicialized system. Whether it delivers uniformity remains to be seen; much depends on how many states join and how substantive standards are interpreted. So far, CETA and related EU agreements serve as test cases.

The USMCA's Investor–State Regime

North America's experience illustrates a contrasting approach. The United States–Mexico–Canada Agreement (USMCA), which replaced NAFTA in 2020, dramatically scaled

back ISDS. Under NAFTA, Chapter 11 had allowed broadly framed ISDS claims among all three countries (Amirfar et al., 2020). USMCA Chapter 14 retains no arbitration between the US and Canada after 2023 and sharply limits US–Mexico disputes. Key features of the USMCA ISDS framework include:

Canada declined to allow any new investor–state claims by Americans or Mexicans under USMCA. As a result, after a short transitional legacy window (ending in mid-2023), US and Canadian investors lost NAFTA-like access to each other. (They may still use CPTPP or existing BITs as alternatives). Between Mexico and the US, ISDS is available only in certain *covered sectors* when the investor has a government contract. These sectors are oil and gas, power generation, telecommunications, transportation, and infrastructure. In covered sectors, foreign investors can generally invoke the same protections as under NAFTA (including FET, expropriation, non-discrimination, etc).

Investors *not* in a covered contract are subject to a *non-privileged* regime. Such claimants may sue only for violations of national treatment, most-favoured-nation, and direct expropriation obligations; notably, the US removed fair and equitable treatment from its protected obligations in Annex 14-D. Furthermore, non-privileged claimants must *first* secure a final judicial decision (or litigate in local courts for 30 months) before arbitration, unless doing so is *obviously futile.* A strict four-year statute of limitations applies.

Investors in NAFTA-era investments (1994–2020) could submit those legacy claims under NAFTA rules for three years after USMCA's entry (until July 2023). After that window closed, all new claims must follow the stricter USMCA rules.

In practical terms, the USMCA's ISDS regime is *much more restrictive* than NAFTA. The Debevoise law firm summarizes: *Investors from Canada or the United States will no longer have access to ISDS against those countries* (Amirfar et al., 2020). Only Mexico and the US retain ISDS for new covered-sector claims; even then, broad claims are curtailed, and exhaustion is required.

The USMCA clearly prioritizes national regulatory autonomy. For example, the pact explicitly states that neither US nor Mexico consents to arbitration for certain sectors if the investor is from the other Party (e.g. US investors cannot sue Mexico under Annex 14-E if they have a covered government contract, unless they opted into Annex 14-D). More broadly, by demanding local court exhaustion and eliminating Canada–US disputes, the States reasserted the primacy of domestic institutions. USMCA text also contains detailed expropriation definitions that protect bona fide public welfare regulations from being deemed indirect expropriations. In effect, the agreement was crafted to reduce *political risk* for regulators. Notably, this was achieved by intergovernmental compromise rather than withdrawing from any international

convention; the US remains an ICSID signatory, and the treaty even preserves ICSID/UNCITRAL arbitration options under Annex 14-D (if both parties are ICSID members).

For investors, USMCA's protections are significantly narrowed. Many categories of claims available under NAFTA were eliminated. A non-privileged investor cannot sue for breach of FET, performance requirements, or umbrella clauses, only for discrimination or expropriation. Even in covered sectors, the investor must have a government contract and is subject to an approved list of sectors. In sum, the threshold to bring a claim is much higher. Some observers praised this as a sensible recalibration aligning remedies to risk, while others warned it could deter investment by reducing treaty assurances (Wittmeier, 2023). The evidence so far suggests only a few USMCA ISDS cases have been initiated (mostly legacy claims).

Compared to the EU's approach or UNCITRAL's multilateral proposals, the USMCA demonstrates a retreat from universal ISDS toward selective, treaty-specific dispute options. It reflects the U.S. (and Canada's) political will to confine ISDS to a narrow niche. Legally, it is coherent within NAFTA successors (with CPTPP covering some remaining gaps), but it diverges sharply from the broad ISDS regimes in many other FTAs. Importantly, like the EU MIC, USMCA does not create new investor rights, if anything, it trims them. The trade-off is clear: state sovereignty and policy flexibility were enhanced at the expense of investor protections and ease of arbitration.

Nigeria's Investment Treaty and Arbitration Reforms

As an African case study, Nigeria illustrates how a capital-importing developing country is recalibrating its investment regime. Nigeria ratified the ICSID Convention in 1965 and implemented it domestically through the ICSID (Enforcement of Awards) Act, 2004 (Mbah, 2019). Yet by the 2010s, Nigeria had faced several high-profile claims and was conscious of the fiscal and political risks of broad ISDS. Nonetheless, the Nigerian government is *not* abandoning ISDS; instead, it has moved to update its treaties.

In late 2020 Nigeria's authorities announced a review of all BITs. This culminated in November 2024 in a nine-member committee chaired by the Attorney General, with a mandate to modernize existing agreements and discard treaties that have no further relevance. The stated aims are to improve investor protection, balance national and foreign interests, and promote sustainable development. Officials emphasize that BITs remain cornerstones of FDI policy, providing legal stability, but also stress the need to align with current socio-economic realities.

New Model BITs: Drafts reportedly include provisions requiring investors to uphold environmental, labor, and human rights standards, reflecting Global Standards and CSR norms.

They also contemplate broad exceptions and state interests (in line with African Union guidance).

Dispute Settlement Safeguards: Nigerian officials (through the NIPC) indicated the review will introduce mediation and dispute mechanisms and put in place safeguards to ISDS provisions. This suggests measures like mandatory consultation, cooling-off periods, or early screening of claims may be considered. It also signals a willingness to explore alternatives to litigation.

Ombudsman/Facilitation: Though not yet formalized, Nigeria could emulate models like Brazil's Cooperation and Facilitation Agreement, which eschews ISDS in favor of an ombudsman and negotiation process (a path taken by several BRICS and African countries). Nigeria's statements on improving domestic institutions hint at such thinking.

Domestic Arbitration Law: Nigeria recently overhauled its Arbitration and Mediation Act (2023) to incorporate the UNCITRAL Model Law and make arbitration more efficient. While focused on commercial disputes, this modern law also governs any treaties that refer disputes to arbitration in Nigeria.

These reforms are driven by Nigeria's sovereignty concerns. Abuja is reclaiming discretion over its treaty commitments, dropping obsolete BITs (Nigeria has dozens with various states) and revising others. The new committee's work will produce a framework of legal protection calibrated to Nigeria's development needs. Notably, Nigeria remains a member of ICSID and has not repudiated any convention, indicating it still upholds core international obligations. But through treaty renegotiation, it is exercising sovereignty to shape investor protections.

Nigeria still values FDI protections the Attorney-General calls BITs a *cornerstone* of investment policy – but is emphasizing reciprocity and responsibilities. The emerging approach seeks balance: investors get fair treatment, but with clear obligations and limited immunities. In practice, this could mean tighter definitions of expropriation (excluding legitimate regulation, as some BITs now do) and explicit exceptions for public welfare. The Nigeria–Morocco BIT, for instance, requires investors to meet national governance standards and acknowledges legitimate regulatory lapses. By incorporating such language, Nigeria aims to preserve genuine protection (so as to attract capital) while safeguarding policy space.

Under current law, foreign investors can still arbitrate against Nigeria (e.g. through ICSID, UNCITRAL, or Nigerian seats) and enforce awards via Nigerian courts. The reforms may introduce alternative dispute routes: the mediation provisions and dispute mechanisms could encourage amicable settlements. If Nigeria institutes a requirement to exhaust local remedies, that could slow arbitration (though no public proposal has mandated this yet). It may also empower domestic courts or tribunals to handle investment cases first. For now, however, Nigeria's public focus is on making treaties clearer and fairer rather than curtailing access.

CHALLENGES TO ISDS REFORM

Although the need to reform the Investor-State Dispute Settlement (ISDS) system is widely acknowledged, translating this consensus into practical changes has been much harder than expected. There are deep-rooted legal, political, and economic reasons why efforts to overhaul ISDS have faced significant resistance. This section will explore four major challenges: diverging state interests, political will and institutional resistance, legal fragmentation, and enforcement concerns.

Diverging St ate Interests

One of the core challenges to ISDS reform is that states do not all want the same thing. This divide is particularly stark between developed and developing countries, and even among countries within those broad categories. Historically, developed countries like the United States, the United Kingdom, and EU member states have been major capital exporters, meaning their companies are more often investors than hosts. As a result, they tend to prioritize strong protections for investors, such as fair and equitable treatment (FET), full protection and security (FPS), and rights to compensation for expropriation.

On the other hand, developing countries, many of which have been respondents in ISDS cases, are increasingly concerned about maintaining their sovereign regulatory space. According to UNCTAD's 2023 data, more than 70% of ISDS cases are filed against developing and transition economies, often involving sensitive policy decisions on health, environment, or land reform (Wittmeier, 2023).

Furthermore, even among developed countries, priorities are changing. The European Union has recently adopted a more cautious stance, proposing a Multilateral Investment Court (MIC) as an alternative to the traditional ISDS model, aiming for greater consistency and transparency (Reinisch, 2017). However, countries like the United States and Japan remain sceptical of such centralized judicial bodies, arguing they may infringe on national legal systems and slow down dispute resolution.

This fragmentation in state interests makes it difficult to find a common ground, particularly when treaty negotiations or reforms require consensus or multilateral cooperation.

Political Will and Institutional Resistance

A second major hurdle is the lack of political will, especially among countries or stakeholders that benefit from the current system. For some states, especially those whose investors frequently initiate ISDS claims, the existing model works to their advantage. These countries often view reforms as a potential loss of leverage in protecting their multinational

corporations abroad (Reinisch, 2017). Additionally, the arbitration industry itself, including arbitrators, law firms, and arbitration centers, has grown into a multibillion-dollar sector. According to a 2022 report by the OECD, the average cost of an ISDS case is about $8 million per party, with some cases exceeding $30 million. These high stakes have created vested interests in maintaining the current framework. The so-called double hatting practice where individuals serve as both arbitrators and legal counsel in different cases has raised concerns about impartiality and ethics but continues due to weak regulation.

Institutional resistance is further fuelled by bureaucratic inertia. Reforming ISDS requires changing long-standing treaty texts, negotiating new ones, and often building new legal institutions from scratch all of which demand time, resources, and a high level of international cooperation that few countries are willing to prioritize amid other global challenges such as climate change, pandemics, or geopolitical instability.

Legal Fragmentation

The highly fragmented nature of international investment law makes reform incredibly complicated. As of early 2024, there are over 3,300 international investment agreements (IIAs), each with its own wording, dispute settlement clauses, and legal standards (UNCTAD, 2024). Some treaties permit full ISDS access, others restrict it to certain sectors or types of disputes, and still others prohibit it entirely.

Attempts to revise these treaties through bilateral renegotiation or multilateral initiatives like UNCITRAL Working Group III are slow-moving because each state must review and update its agreements case by case. Moreover, some states have terminated their BITs altogether (e.g., India, South Africa, Bolivia) in frustration, while others have started redesigning Model BITs to include more safeguards and policy exceptions. These different strategies further complicate any efforts to build a unified system or standards.

Enforcement and Legitimacy

Even if significant reforms are introduced like the establishment of a Multilateral Investment Court (MIC) there remains the problem of enforcement. One reason ISDS became popular in the first place was because arbitration awards are enforceable under the New York Convention of 1958, ratified by over 170 countries (United Nations, 1958). It is unclear whether awards from new mechanisms like the MIC would enjoy the same widespread enforceability.

Another key issue is whether major economies like the United States, China, or Russia will adopt and recognize the authority of a new investment court. As of now, the U.S. has not supported the MIC proposal, and China prefers to retain ISDS with some incremental

improvements rather than replacing it entirely. Without the participation of these powerful economies, a new system may lack legitimacy and universality, creating a two-tiered or fragmented global regime.

Furthermore, there are concerns about how investors and businesses will perceive a reformed ISDS system. If they believe that new mechanisms are overly politicized, slow, or unreliable, it might reduce their confidence in investing abroad, undermining one of the core goals of international investment agreements.

CONCLUSION

Across jurisdictions, ISDS reform reflects a common theme: reconciling investor protections with sovereign prerogatives and the public interest. UNCITRAL's WGIII is taking a *multilateral* approach, offering states a toolkit of reforms to opt into, from stronger ethics to an appeal stage. The EU's MIC embodies the *institutionalization* of ISDS, a court with appellate review aiming for predictability and legitimacy. The USMCA illustrates a *restrictive* path, drastically limiting claims to preserve regulatory freedom. Nigeria exemplifies the *nationalization* of reform: updating BITs to align with development goals while keeping arbitration as an option.

Each model has strengths and challenges. The MIIR could, if widely adopted, create legal coherence where fragmentation now reigns, but its complexity and voluntary nature risk patchwork adoption. The EU MIC promises consistency, but so far only for treaties consenting to it (and faces scepticism from non-EU actors). The USMCA sacrifices investor remedies for sovereignty, arguably making the regime predictable (no surprise suits), but at the expense of access and the perceived binding nature of treaties. Nigeria's reforms seek a middle path of domestic control, but their ultimate effect will hinge on treaty partners' acceptance of new terms.

Fundamentally, these reforms illustrate that sovereignty concerns dominate the agenda. States are reasserting the ability to regulate health, environment, and development, even as they try to reassure investors of fair play. Some solutions, like improved ethics and transparency, enjoy broad support, while others, like binding appeals or exhaustive local remedies, are contentious.

It is too early to declare winners. Many proposals remain works in progress. UNCITRAL's MIIR has yet to take effect; the EU's MIC awaits international backing; the USMCA's true impact will emerge over the years; Nigeria is still formulating its new treaty network. What is clear is that the ISDS landscape is shifting from the laissez-faire era of unconstrained arbitration to a more regulated, though still complex, dispensation. As UNCITRAL observes, this is a unique opportunity to address ISDS's problems. Whether the resulting unique solutions resolve those problems will depend on careful design and broad participation. For

now, investors and states alike must navigate an evolving mosaic: an ISDS of the future that aspires to greater coherence and fairness but still faces questions of legitimacy and consistency.

SCOPE FOR FURTHER STUDIES

Future empirical studies could assess the impact of reforms like the UNCITRAL Multilateral Instrument on ISDS Reform (MIIR) and the EU's Multilateral Investment Court (MIC) on foreign direct investment flows, particularly in developing countries. Second, comparative analyses of regional approaches, such as the USMCA's restrictive ISDS model versus Nigeria's balanced treaty revisions, could clarify their effects on investor confidence and state sovereignty. Third, research into the practical implementation of proposed mechanisms, such as appellate bodies or advisory centers, could explore their cost-effectiveness and accessibility for smaller states and investors. Finally, investigating the political dynamics of multilateral adoption, especially among major economies like the US and China, could shed light on the feasibility of achieving global consensus on ISDS reform.

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