# Using a Multilevel Governance Framework for the Reform of the International Investment Law Architecture

Thesis submitted by

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DECLARATION

I, KATHLEEN MPOFU, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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'*And whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God the Father through him…and being confident of this, that He who began a good work in you will carry it on to completion…'* (Colossians 3:17 and Philippians 1:6)

There are a number of people who contributed to making this thesis possible and I would not have been able to reach this milestone without them.

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To all those who encouraged me and called me Doc even before completion, your words kept me going and kept me focused on the goal.

DEDICATION

This thesis is dedicated to the little girl who had big dreams, and all the people along the way that believed in me. We made it!!!!!

# ABSTRACT

International investment law has come under significant scrutiny over the last few years under what has been termed as a legitimacy crisis, with various stakeholders expressing concerns regarding its operation. These concerns cover both the substantive and procedural aspects of international investment law. In response to these concerns, states have, at varying levels of governance, taken steps to reform the international investment law system with some states focusing on procedural reforms and others focusing on substantive reforms. This thesis considers the effectiveness of the reform process taking place in the international investment law system and finds that the piecemeal and fragmented approach that has been adopted by states may not be able to address the wide range of concerns raised by stakeholders. The achievement of effective reform requires a holistic approach that not only focuses on systemic change in redesigning investment treaties but also on national reforms. This approach has largely been absent in the reform process. The question that arises is how to develop a system of international investment law, that can effectively regulate the relationships and tensions that arise in the use of FDI, that incorporates the needs of all stakeholders and allows the different levels of governance to effectively participate in the system.

This thesis explores alternative methods of reform that go beyond the small mandate of the Working Group III reforms currently being discussed and that can adequately address broader concerns that arise within the international investment law system that affect the needs of other stakeholders beyond the needs of investors.

In order to do this, the thesis made use of the multilevel governance framework to effectively organise and incorporate the different stakeholders and different levels of governance into the international investment law system. The principles that apply in the multilevel governance framework are useful in shifting the reform discussions from the narrow focus currently present in the reform effort, to exploring a wider range of issues and concerns faced by a wider range of stakeholders and proposing inclusive solutions that share and balance power between the different levels of governance.

To rebalance the rights and protections granted in IIAs and incorporate the different levels of governance into the international investment law framework, the thesis clarifies the right to regulate by embedding it as a principle of customary international law, applicable regardless of its incorporation in the treaty. To allow for broader public interest considerations such as sustainable development to be incorporated into IIAs, the thesis proposes the use of framework

clauses (which operate much like framework agreements) in the text of the IIA which will establish the broader commitments of the parties and leave the setting of specific targets to national legislation. In so doing, regulatory power can be shared between the different levels of governance using the multilevel governance principles, allowing states to enact meaningful regulatory measures within the scope of the right to regulate.

To incorporate the national level of governance in the dispute settlement process, the thesis recommends the incorporation of the exhaustion of local remedies rule and sets out how the competence to settle disputes can be shared between the national and international level in a manner that limits contestation and enhances co-operation. This is coupled with the creation of a multilateral investment court at the international level of governance that does away with the use of arbitration as a mode of dispute settlement, has a more court like structure, with increased rights of access and participation for third parties who can actively participate in the dispute settlement process and have their rights vindicated by the court.

In this way, the recommendations in the thesis allow for the regulation of the different relationships that arise in the use of foreign direct investment and creates an international investment law system where the achievement of investment objectives and economic growth need not come at the expense of other equally important public international law considerations.

ABBREVIATIONS

| | |
|---|---|
| AfCFTA - | African Continental Free Trade Agreement |
| BIT - | bilateral investment agreement |
| CERDS- | Charter for Economic Rights and Duties of States |
| CIFA- | Co-operation Investment Facilitation Agreement |
| CIL- | customary international law |
| CPTPP- | Comprehensive and Progressive Agreement for the Trans-Pacific Partnership |
| CSR- | corporate social responsibility |
| ECOWAS- | Economic Community of West African States |
| EU- | European Union |
| FDI- | foreign direct investment |
| FET- | fair and equitable treatment |
| FTC- | Free Trade Commission |
| ICJ- | International Court of Justice |
| ICSID- | International Centre for the Settlement of Investment Disputes |
| ILC- | International Law Commission |
| IIA- | international investment agreement |
| ISDS- | investor-state dispute settlement |
| ISP- | Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development |
| MIC- | multilateral investment court |
| MFN- | most favoured nation |
| MNC- | multinational corporation |
| NAFTA- | North Atlantic Free Trade Agreement |
| NGO- | non- governmental organization |
| NT- | national treatment |
| OECD- | Organisation for Economic Co-operation and Development |
| OIC- | Organisation for Islamic Co-operation |
| PAIC- | Pan-African Investment Code |
| REC- | regional economic community |
| SADC- | Southern African Development Community |

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|---|---|
| TTIP- | Trans-Atlantic Trade and Investment Partnership Agreement |
| UNCITRAL- | United Nations Commission on International Trade Law |
| UNCTAD- | United Nations Conference on Trade and Development |
| UN- | United Nations |
| VCLT- | Vienna Convention on the Law of Treaties |
| WTO- | World Trade Organisation |

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# CHAPTER 1: INTRODUCTION AND OVERVIEW OF THE STUDY

## 1.1 INTRODUCTION

Foreign direct investment (FDI) is a major component of the world economy with cross border investment flows exceeding US$1, 3 trillion annually.[1] It is trite that FDI plays a major role in the development of national economies.[2] The nature of cross border investment is such that there are several interested parties involved in making, regulating, and sustaining investment. The investor, whose primary objective is to receive returns on their investments and protect their property interests while operating in a foreign land; the host state whose interests entail job creation, human and environmental protection, and sustainable development; the home state that seeks to ensure that its nationals are adequately protected abroad and the local communities and citizens of the host state where investment activity takes place who want to enjoy the benefits of investment activity and be protected from negative investment activity. In some cases, the interests of these parties may conflict with each other resulting in disputes arising between them.[3]

Traditionally, investors feared that host states, in developing their domestic policies, would deprive them of their property or benefits arising out of their investments, with the investors lacking effective redress for their concerns.[4] Governments failed to allay investors' fears that the country's investment environment would not be arbitrarily changed after the investors had established themselves in the country and incurred substantial start- up costs.[5] This, coupled with the threat of real or perceived corruption in domestic courts in many countries, made investors lose confidence in the national courts.[6]

As a means to address this, a complex network of arrangements and understandings have been developed to govern the relationship between host states and investors at bilateral and regional levels owing to the absence of a multilateral treaty on investment.[7] This has been done through

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[1] UNCTAD World Investment Report 2019 1 available at *https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2460 (*accessed on 2 May 2020).

[2] Gary B. Born *International Arbitration: Law and Practice* (3rd ed) (2012) 411.

[3] Jose E. Alvarez and Karl P. Sauvant (eds) *The Evolving International Investment Regime* (2011) xv.

[4] Ibid.

[5] Kyla Tienhara 'Regulatory Theory: Foundations and Applications' in Peter Drahos (ed) *Investor State Dispute Settlement* (2017) 677.

[6] Tienhara (n 5) 678.

[7] In 1995, the Organisation for Economic Co-operation and Development (OECD) announced the state of negotiations for on a Multilateral Treaty on Investment (MAI). While there was convergence on some issues, there was a lot of disagreements by states on substantially important issues related to definition of investment,

the conclusion of international investment agreements (IIAs), which include bilateral investment treaties (BITs) and investment chapters in the regional trade agreements (RTAs.)[8] The mechanisms contained in most of these investment agreements provide rights to foreign investors to seek redress and make claims against host governments for damages arising out of the host governments' breaches of investment related obligations.[9] They generally provide for substantive legal standards protecting foreign investments and specialised dispute resolution mechanisms- in particular third party international investment arbitration while imposing no obligations on the investor.[10] An investor state dispute settlement (ISDS) system was therefore borne out of these IIAs. The ISDS mechanism largely resembles the international commercial arbitration system but deals with a specialised category of disputes, involving the application of substantive international law protections contained in IIAs to the regulatory actions and measures taken by governments that implicate international and domestic policies.[11]

Investment arbitration is not carried out by a single omnipotent body or court but by ad hoc tribunals. Thus, it has no single institutional core and is comprised of a relatively decentralised system of rules and norms.[12] Most investment arbitration disputes are carried out by the International Centre for the Settlement of Investment Disputes (ICSID)[13]. Other bodies, which hear investment arbitration cases although at a differing degree include the International Chamber of Commerce, International Court of Arbitration (ICC),[14] the London Court of International Arbitration (LCIA),[15] Permanent Court of Arbitration (PCA)[16] and ad hoc

exceptions to national and most-favoured-nation treatment, intellectual property, cultural exception, performance requirements, labour and environmental issues, regulatory takings, and settlement of disputes. The failure to agree on these issues, coupled with opposition to the MAI y non-governmental organisations, loss of support from the business community and negative outcomes of political cost benefit analysis led to the termination of negotiations on the establishment of the MAI. As such, no multi-lateral agreement on investments exists today. See UNCTAD Series in Issues of International Investment Agreements: Lessons from the MAI.

[8] Roberto Echandi 'Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* Katia Yannaca Smalls (ed) (2010) 3.

[9] Katia- Yannaca Smalls *Arbitration under International Investment Agreements: A guide to the Key Issues* xxi.

[10] Born (n 2) 412.

[11] Born (n 2) 412.

[12] Beth Simmons, 'Bargaining over BIT's, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 *World Politics* 12 at14.

[13] *https://icsid.worldbank.org/* (accessed 17 August 2020).

[14] *https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/* (accessed 17 August 2020).

[15] *https://www.lcia.org/* (accessed 17 August 2020).

[16] *https://pca-cpa.org/en/home/* (accessed 17 August 2020).

arbitrations under United Nationals Commission on International Trade Law (UNCITRAL) Arbitration Rules.[17]

In addition to the general characteristics of arbitration, which include party autonomy, final and binding awards and relatively easy and convenient enforcement through the use of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention)[18] and the Convention on The Settlement of Investment Disputes Between States and Nationals of Other States ( known as the ICSID Convention),[19] investment arbitration has a distinctive set of characteristics

The characteristics of investor state arbitration are[20]:

i. Through its dispute settlement provisions, the applicable IIA makes provision for the use of investment arbitration with states providing advance consent to the settlement of disputes via arbitration thereby forming the basis for the international arbitral tribunals' jurisdiction in presiding over a given case.[21]
ii. Parties are usually an investor from one of the contracting parties, being the home state on the one hand and a sovereign state, being the host country on the other hand.
iii. The arbitral tribunal is usually made up of three arbitrators or a sole arbitrator chosen by the parties in accordance with the procedure provided in the applicable arbitration rules, by party agreement or through the use of an appointing authority.
iv. It is common in the arbitration sphere, for individuals to sit as arbitrators in some cases, and in other cases represent parties in the arbitration as counsel.[22] This is a practice that is commonly known as double- hatting.[23]
v. Although adjudication is done by the selected tribunal using its own procedural norms, claims and defences in investor state arbitration are found in the substantive provisions of the particular IIA and/or customary international law. As such,

[17] UNCITRAL arbitration Rules *https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration* (accessed 17 August 2020).
[18] U.N. Doc. E/CONF.26/8/Rev.1 (1958).
[19] 575 UNTS 159.
[20] Born (n 2) 417.
[21] This has been described by Jan Paulsson as arbitration without privity, whereby the claimant need not have a contractual relationship with the defendant and where the defendant would not be capable to institute proceedings against the claimant or institute counterclaims. Jan Paulsson 'Arbitration Without Privity' (1995) 10 *ICSID Review - Foreign Investment Law Journal* 232–57.
[22] Joshua Tayar 'Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting' *McGill Journal of Dispute Resolution* 2019 Vol 5 107.
[23] Ibid.

investor state arbitration usually involves issues of treaty interpretation and international law.

vi. Investor state arbitration is usually one sided with only investors being able to make claims against the host state with the host state being able to make counterclaims against the investor in limited circumstances.[24]

vii. Although investor state arbitration was subject to the principle of confidentiality as one of the main characteristics of arbitration, there has been a move to increase transparency in investment arbitrations in comparison to international commercial arbitration. This is due to the fact that the involvement of the State in investment disputes often involves matters of public concern and public policy, which affect a significantly broader range of actors than those involved in the dispute.[25] As such, there has been a concerted effort to improve transparency and reduce confidentiality in investment arbitration so as to increase public involvement and incorporate broader policy considerations.[26]

viii. The decision of the arbitral tribunal is final and there is no appeal mechanism for the substantive review of these decisions. It has become a trite principle of international arbitration that national courts or other tribunals do not have the power to test the correctness or lack thereof of decisions of an arbitral tribunal.[27] The substantive findings of the tribunal are generally unimpeachable at law.[28]

## 1.2 BACKGROUND TO THE STUDY

While there may be some differences in the substantive protections provided in the BITs, most BITs share six core provisions: protection from expropriation or nationalization; standards of

[24] See for example *Limited Liability Company AMTO v Ukraine* SCC Case No. 080/2005 Final Award March 26, 2008, where the tribunal held that it did not have the jurisdiction to adjudicate the states counterclaim as the applicable IIA did not make provision for the same.
[25] Eugenia Levine 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation' (2011) 29 *Berkeley Journal of International Law* 201.
[26] Ibid. UNCITRAL has made significant strides in the area of transparency with the UNCITRAL Rules on Transparency in Treaty-Based Investor State Arbitration (Transparency Rules) and the Mauritius Convention on Transparency. The Transparency Rules comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. The Mauritius Convention on Transparency is an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the Transparency Rules. With the application of the Convention and the Transparency Rules, transparency in international investment arbitration has been increased.
[27] Irene M. Ten Cate 'International Arbitration and the Ends of Appellate Review' *International Law and Politics* 44 (2012) 1123.
[28] Ibid.

protection; full protection and security; and fair and equitable treatment (FET); repatriation and investment of earnings; observation of contractual obligations; and dispute resolution.[29] The dispute resolution mechanisms centres on the foreign investors from the home state being able to bring claims against the host state to be settled through ISDS.[30]

With the nature of ISDS as summarised above, there has been growing dissatisfaction from both developed and developing countries alike. The criticisms against ISDS include the following:

- The lack of investor obligations in investment treaties, has resulted in the provisions of investment being interpreted in a manner that has been perceived to limit the policy regulation space of developing countries as they attempt to implement policies and regulations that on the one hand may negatively affect investment, but are necessary to promote and protect the (sustainable) development needs of developing countries.[31] Further, tribunals do not take into account the international and national commitments of states as they relate to issues such as environmental protections, fair labour standards and in general, the human rights obligations of the country concerned when settling disputes.[32] Even though IIAs do not in themselves directly limit the legislative or regulatory powers of States, the foreign investors' rights to bring cases directly against host states has allowed unprecedented challenges to government actions.[33] This may cause governments to tread more cautiously thereby insufficiently regulating matters that are in the public interest as they may be against the interest of the foreign investors.[34] As such, governments might refrain from imposing regulatory measures in the public interest due to the threat of investment arbitration and the high damages it entails.[35]
- Countries aim to attract foreign investment for national development, yet when investments materialise, they sometimes result in disputes over land acquisition,

[29] 'Africa and bilateral investment treaties: To 'BIT' or not?' available at *https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23* (accessed 15 April 2020*)*.
[30] Born (n2) 3416.
[31] A/CN.9/WG.III/WP.176. 'Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa'
[32] Ernst-Ulrich Petersmann, 'Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice' (2007) 10 *Journal of Economic Law* 529 535.
[33] Kinda Mohamadieh 'Challenges of Investment Treaties on Policy Areas of Concern to Developing Countries' *www.southcentre.int* (accessed 22 June 2020).
[34] A/CN.9/WG.III/WP.176 'Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa'.
[35] Ibid.

environmental impacts or labour relations.[36] Most investment treaties focus on protecting investments but say little or nothing about the quality of those investments and neither do they place obligations on the investors.[37] As a result, investments that have been attracted by host states have not had a significant impact on the development of the host states. Mobilising investment and ensuring that it contributes to the sustainable development of the host state has become a priority for all countries especially developing countries.[38] There is therefore a need to shift from the old generation BITs and adopt a new form generation of BITs that makes room for the achievement of sustainable development goals.

- Due to their ad hoc nature, there has been mounting criticism against ISDS tribunals for lack of consistency, coherence and predictability of decisions, which has led to similar cases being decided differently.[39]
- Since there is no appeal mechanism, ISDS has been criticised for not providing a remedy to address incorrect decisions by arbitral tribunals.
- Given the double-hatting of arbitrators/legal representatives, there is a perception of bias and a perceived or alleged lack of guarantees for independence and impartiality amongst arbitrators.
- Mostly arbitrators are appointed from developed nations; accordingly, there has been criticism of lack of diversity in the appointment of arbitrators. [40] This has been largely true for African countries and other developing countries. Although Sub-Saharan

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[36] IIED briefing raising the bar on responsible investment: what role for investment treaties?
[37] Ibid.
[38] UNCTAD Investment Policy Framework for Sustainable Development 2015, 10.
[39] Julian Arato, Yas Banifatemi, Chester Brown et al Working Group No 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues (2019) Academic Forum Concept Paper on Issues of ISDS Reform available at *https://www.cids.ch/academic-forum-concept-papers.* See also for example the cases dealing with the interpretation of the exceptions clause in Article XI of the United States – Argentina BIT and the "necessity" defence under customary international law: CMS Gas Transmission Company v Argentine Republic (ICSID Case No ARB/01/8, Award of 12 May 2005), paras. 304-394; LG&E Energy Corp v Argentine Republic (ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006), para. 226; and Continental Casualty Corporation v Argentine Republic (ICSID Case No ARB03/9, Award of 5 September 2008), paras. 304-305. See also the inconsistent outcomes in CME Czech Republic BV v Czech Republic (UNCITRAL, Partial Award of 13 September 2001, and UNCITRAL, Final Award of 14 March 2003), and Ronald Lauder v Czech Republic (UNCITRAL, Final Award of 3 September 2001), two differently composed arbitral tribunals reached divergent positions on whether the conduct of the Czech Republic amounted to a breach of obligations under the Netherlands – Czech Republic BIT (in the case of CME), and under the United States – Czech Republic BIT (in the case of Lauder).
[40] See in general for a discussion on issue conflict The ICCA Reports No. 3 'ASIL-ICCA Task Force Report on Issue Conflicts in Investor State arbitration' (2016) available at *https://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.* See also Andrea K. Bjorklund, Susan Franck, Chiara Giorgetti et al 'The Diversity Deficit ISDS' Academic Forum Working Group 5 Paper (2019) available at *https://www.cids.ch/academic-forum-concept-papers.* (accessed 15 April 2020).

Africa contributes 15 percent of all ICSID cases by State Party involved, the region only accounts for 2 percent of arbitrators, conciliators and ad hoc Committee members appointed in ICSID cases.[41] Western Europe contributes 8 percent of all ICSID cases by State Party involved but account for 48 percent of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases.[42] North America (Canada, Mexico and U.S.) contributes 4 percent of all ICSID cases by State Party involved but account for 20 percent of arbitrators, conciliators and ad hoc committee members appointed in ICSID cases.[43] This then shows that African countries and other developing countries have been disproportionately affected by the lack of diversity in the ISDS system.

The lack of diversity may not necessarily be of concern to the parties who appoint arbitrators in accordance with their own needs and this may explain the perpetuation of lack of diversity. However, it does have an impact on how other stakeholders view the dispute settlement system and this may negatively impact the sociological legitimacy attributed to the system.[44] The lack of diversity may perpetuate perceptions of cognitive biases by adjudicators who may be perceived by other stakeholders as deciding cases with limited cultural understanding of various contexts thereby leading to greater perceptions of lack of fairness.[45]

- Investment arbitrations have become increasingly lengthy and expensive, with parties incurring high costs in legal fees and fees paid to the administering institution for the administration of the dispute.[46] High costs and lengthy duration of arbitral proceedings may in some instances impede the ability of host states and investors from making use

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[41] The ICSID Caseload – Statistics (Issue 2019 – 2) available at *https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics*
[42] The ICSID Caseload – Statistics (Issue 2019 – 2)
[43] The ICSID Caseload – Statistics (Issue 2019 – 2)
[44] Sociological legitimacy refers to the acceptance of a system by its users and stakeholders. See chapter 3 section 3.3(b) for a full discussion on sociological legitimacy.
[45] Andrea K. Bjorklund, Susan Franck, Chi 1ara Giorgetti et al 'The Diversity Deficit ISDS' Academic Forum Working Group 5 Paper (2019) 19 available at *https://www.cids.ch/academic-forum-concept-papers*. (accessed 15 April 2020).
[46] A 2017 study found that average party costs were USD 6,019,000 for the claimant and USD 4,855,000 for the respondent, while average tribunal costs were USD 933,000 (with average ICSID costs at USD 920,000 and average UNCITRAL costs higher at USD 1,089,000). Another 2017 study shows that the average cost for an ICSID annulment applicant is USD 1.36 million and USD 1.45 million for a respondent. See Catherine Titi, Julien Chaisse, Marko Jovanovic et al 'Excessive Costs & Insufficient Recoverability of Cost Awards' Academic Forum on ISDS available at *s* (2019) 5 available at *https://www.cids.ch/academic-forum-concept-paper (*accessed 15 April 2020).

of investment arbitration.[47] This is particularly true for respondent states from developing countries who would find it not only difficult to spend significant amounts of money to defend what they view are legitimate public policy measures but to also justify spending large amounts of money that could be used for the benefit of their people [48] There is a direct link between the length of the proceedings and the costs incurred as the longer the proceedings, the higher the costs of the arbitration will be. Costs incurred in arbitration proceedings are divided between party costs which are fees and expenses of legal counsel, experts and witnesses and tribunal costs which are fees and expenses of arbitrators and arbitral institutions, including secretariat services for ad hoc arbitrations. A 2017 study found that average party costs were USD 6,019,000 for the claimant and USD 4,855,000 for the respondent, while average tribunal costs were USD 933,000 (with average ICSID costs at USD 920,000 and average UNCITRAL costs higher at USD 1,089,000). [49]

As a result of these concerns, various stakeholders of the system are engaging with the question of whether IIAs and ISDS in their present form are appropriate standards for economic governance and if not, how they should be reformed.[50] Achieving a balance between the interests of the host state and the interests of the foreign investor has become an important aspect in the reform agenda of international investment law.

There have been different approaches that have been adopted by states to achieve reform of international investment law and balance the needs of the host state, the investor, and local communities. Regarding the substantive aspects, there is no global international body that has

[47] Catherine Titi, Julien Chaisse, Marko Jovanovic et al 'Excessive Costs & Insufficient Recoverability of Cost Awards' Academic Forum on ISDS available at (2019) 5 available at *https://www.cids.ch/academic-forum-concept-paper* (accessed 15 April 2020).
[48] Ibid.
[49] Catherine Titi, Julien Chaisse, Marko Jovanovic et al 'Excessive Costs & Insufficient Recoverability of Cost Awards' Academic Forum on ISDS (2019) 5 available at *https://www.cids.ch/academic-forum-concept-paper* (accessed 15 April 2020).
[50] For example, there is the multi-stakeholder process taking place under the auspices of UNCITRAL focusing on the discussions for procedural reforms. States at bilateral level are also incorporating provisions in their IIAs to reform the procedural aspects of international investment law for example, coming with new model BITs, for example India, USA and the Netherlands; the EU agreements with Vietnam providing for a multilateral investment court, Brazil's Co-operation and Facilitation Agreements providing for state-state mechanism and others still doing away with recourse to investment arbitration altogether for example the United States-Mexico-Canada Agreement (USMCA). There are also states such as Bolivia, Ecuador and Venezuela that have withdrawn from the ICSID Convention On the substantive front, states have been attempting to reform their IIAs by providing clarity to investor protections such as in the EU CETA agreement, while others have been incorporating investor obligations in their treaties such as the AfCFTA Investment Protocol while other states are doing away with investment treaties and opting for domestic regulation such as South Africa.

undertaken the mandate to reform the substantive aspects of international investment law. States have begun to take steps at a national, bilateral, and regional level to reform the substantive aspects of their IIAs in an attempt to re-balance IIAs through the incorporation of investor obligations and to incorporate sustainable development provisions. Critical areas that have been focused on by states when undertaking substantive reform are aimed at protecting the states policy space to allow states to regulate in the public interest yet this right to regulate is devoid of content thereby leaving tribunals at the loss in respect of safeguarding what can be termed as a customary international right of states. There have also been attempts to incorporate binding investor obligations to balance the rights and obligations provided for in IIAs, however due to the difficulties that are associated with the negotiation and agreement of investor obligations, these have only been incorporated in a limited number of IIAs thereby limiting their impact and creating parallel systems of investment regulation.[51]

Incorporating an express right to regulate in IIAs has become a common way in which states can make provision for the protection of their regulatory space. While most IIAs concluded prior to the Argentinian crisis rarely contained any treaty exceptions regarding the right to regulate, some IIAs concluded thereafter have sought to incorporate the right to regulate in various ways. Some IIAs have sought to recognise the right to regulate in express language in the preambles of the IIA, some have sought to provide greater guidance on the standards of investment protection as they apply to regulatory measures, and through the use of public order carve outs or general exceptions including for the protection of human, animal or plant life or health, for the conservation of exhaustible natural resources to varying degrees.[52]

In order to rebalance IIAs and place some form of responsibility on the investor to allow for the achievement of responsible investment and sustainable development, states have, at varying degrees, also begun to incorporate provisions on investor responsibility. For example, the often-cited Nigeria -Morocco BIT was the first IIA with a clause creating binding legal obligations for investors. Article 18(2) of the Nigeria- Morocco BIT provides that '[i]nvestors and investments shall uphold human rights in the host state.'[53] Articles 18(3) and 18(4) further

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[51] UNCTAD Reform Package for the International Investment Regime 22-23.

[52] Noam Zamir and Paul Barker, 'The Trans-Pacific Partnership Agreement and States' Right to Regulate under International Investment Law' (2016) 45 *Denver Journal of International Law and Policy* 205, 206. See also Recent Trends in IIAs and ISDS- IIA Issue Note 1, UNCTAD (Feb 2015) and United Nations Conference on Trade & Development, World Investment Report 2017: Investment and the Digital Economy 119 (2017).

[53] Nigeria Morocco BIT 2016 accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016-* .

make provision for the obligation of investors to act in accordance with core labour standards, and the obligation not to circumvent international environmental, labour and human rights obligations of the host and home state.[54]

At a regional level, some states have also incorporated investor obligations within their investment legislation. For example, the Supplementary Act on Investment of the Economic Community of West African States 2009 provides that investors should uphold human rights standards in the area of their investments and to refrain from operating in a manner that undermines human rights obligations, labour standards and environmental and social obligations.[55] The Pan African Investment Code (PAIC) contains similar obligations on investors to uphold human rights in carrying out their investment activity.[56] The SADC Finance and Investment Protocol (SADC FIP) also contains a clause on corporate social responsibility of investors.[57]

These developments have culminated in the AfCFTA Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA Investment Protocol)[58] that also provides for the incorporation of investor obligations. Chapter 5 of the AfCFTA Investment Protocol makes provision for investor obligations and in particular provides for issues related to business ethics, human rights, and labour standards,[59] environmental protection,[60] indigenous peoples and local communities,[61] socio-political obligations,[62] anti-corruption,[63] corporate social responsibility,[64] and corporate governance.[65] To the extent that

[54] Articles 18(3) and 18(4) of the Nigeria- Morocco BIT.

[55] Article 14(2) of the ECOWAS Supplementary Act on Investment 2008 accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments-2008-*

[56] Chapter 4 of the PAIC on Investor Obligations accessible *at https://au.int/en/documents/20161231/pan-african-investment-code-paic*

[57] Article 10 of the SADC Finance and Investment Protocol 2006 accessible at *https://www.sadc.int/document/protocol-finance-and-investment-2006* and Article 8 of the Agreement Amending Annex 1 (Co-operation in Investment) of the Protocol on Finance and Investment 2016 accessible at *https://www.sadc.int/document/agreement-amending-annex-1-cooperation-investment-protocol-finance-investment-english-2016*

[58] Accessible at Electronic Database of Investment Treaties *https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550 (accessed 6 December 2023).*

[59] Article 33 of the AfCFTA Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA Investment Protocol)

[60] Article 34 of the AfCFTA Investment Protocol.

[61] Article 35 of the AfCFTA Investment Protocol.

[62] Article 36 of the AfCFTA Investment Protocol.

[63] Article 37 of the AfCFTA Investment Protocol.

[64] Article 38 of the AfCFTA Investment Protocol.

[65] Article 39 of the AfCFTA Investment Protocol.

the Investment Protocol limits investor protection and incorporates more onerous obligations for African investors, non-African investors will have an advantage over African investors. African IIAs with third countries stand at 479 IIAs in force and these by and large remain unchanged. This creates a more favourable regime for non- African investors. [66] This may limit the effectiveness of these provisions as it may create a scenario where African investors may restructure their operations by changing their countries of incorporation so as to enjoy the benefits of parallel investment treaties that still favour foreign investors.[67]

In addition to this, these developments are limited to intra Africa IIAs and have not spread to IIAs being concluded with and by other economies. Intra-Africa investment only accounts for a small portion of the world -wide investment flows. A large portion of investment activity is still being governed by older generation IIAs that make little room for investor obligations. Even where IIAs have made recommendations for the inclusion of investor responsibility, this has usually been in non-binding language not resulting in enforceable obligations. These African developments have had little sway on the global investment law landscape. This limited uptake may be attributed to the complexities and difficulties that have traditionally been experienced by other failed attempts at developing binding obligations for investment.[68] As noted by Mbori, '[t]his view encapsulates benign Africanisation since in a highly economically globalised world here intra Africa FDI remains low, African states legislating on their own conception would have little impact on enhancing radical economic, social and environmental justice for the majority of the African poor.'[69]

Like Mbori,[70] this thesis does not seek to argue that African investors must also benefit from first generation IIAs that have already been criticised as being unjust and inadequate. This thesis seeks to find ways in which the principles and premises that underpin the African developments can find their way into a wider range of IIAs to re-balance IIAs in a manner that

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[66] Ndanga Kamau 'Investment Law and Treaty Reform in Africa: Fragments and Fragmentation | Afronomicslaw' (2020) 1 *African Journal of Internatioal Economic Law* 200–31.
[67] Chapter 3: The AfCFTA Investment Protocol: Reshaping the African Investment Regulatory Landscape for Sustainable Development at 93.
[68] For example, an attempt towards such a binding treaty for human rights obligations for multinational corporations was the Draft UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. However, this, failed in the UN Commission on Human Rights in 2004. Further, proposals
[69] Harrison Otieno Mbori 'Benign and Radical Africanization in International Investment Law and Investor-State Dispute Settlement in Africa' (2023) 24 *The Journal of World Investment & Trade* 632–58 at 643.
[70] Mbori, supra n 69.

may lead to the application of investor obligations across the board and not just in a handful of instances limited to intra-Africa investment. This would promote the effectiveness of these developments and limit the instances where foreign investors can benefit from loopholes created by the existence of parallel substantive protections and obligations between newer generation and older generation IIAs.

States have also taken varying steps to address the procedural concerns that have arisen with the use of ISDS. For example, states such as Bolivia and Venezuela have withdrawn from the ICSID Convention.[71] South Africa has opted for non-renewal of old generation BITs and enacted national legislation to govern inter alia investment disputes by doing away with recourse to investment arbitration.[72] Other states have taken less drastic measures and revised their model agreements such as India[73], while some have made provision for the establishment of permanent mechanisms to deal with investment disputes for example EU -Canada Comprehensive Economic Trade Agreement (EU-CETA)[74] which makes provision for a standing investment court to deal with investment disputes.[75] Others still, have dispensed with the use of investment arbitration such as the newly established United States-Mexico- Canada Agreement (USMCA)[76], which has made provision for the phasing out of investment arbitration between Canada and the United States of America in favour of national courts of each state party and the restriction of the use of investment arbitration between Mexico and the United States of America.[77]

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[71] 'Denunciation of the ICSID Convention and BIT's: Impact on Investor Claims' UNCTAD IIA Issues Note 2 Dec 2019. See also Venezuela's Withdrawal from ICSID: What it does and Does Not Achieve available at *https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/* (accessed 2 May 2020). In 2009 Ecuador withdrew from ICSID has since renewed its membership by depositing an instrument of ratification of the ICSID Convention on the 4th of August 2021.See *https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention#:~:text=Ecuador%20becomes%20the%20156th%20Contracting,for%20foreign%20investment%20dispute%20settlement.*(accessed 12 July 2024)

[72] Protection of Investments Act 22 of 2015 accessible at *https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000*

[73] Model Text for the Indian Bilateral Investment Treaty 2016 accessible at *https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Model-Text-for-the-Indian-Bilateral-Investment-Treaty.pdf*

[74] Accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016-*

[75] The EU-CETA agreement proposes the establishment of a standing investment court to deal with investor state disputes. The SADC FIP makes recourse to domestic remedies.

[76] Accessible at *https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between*

[77] Robert Landicho, Andrea Cohen 'What's in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA, (Nearly) Everything.' *http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-*

Accordingly, the international community is currently attempting to find an international solution to address the concerns identified above and to avoid an impending fragmentation of the regulation of international investment law. Specifically, UNCITRAL has entrusted Working Group III with the mandate to investigate the existence of challenges and the necessity of investor- state dispute settlement reform.[78] Working Group III's primary focus is on the procedural aspects of ISDS in treaty-based investment disputes. UNCITRAL has published working papers and called upon states to make submissions with their views on ISDS Reform.[79] The proposals tabled before the Working Group III are as follows[80]:

- Improvement of the current investor-State arbitration system. This proposal comes from countries such as Bahrain,[81] Kazakhstan,[82] and Mali;[83]
- Addition of an appellate mechanism to the current investment arbitration regime. This proposal is driven by countries such as China[84] and Morocco;[85]
- Introduction of a multilateral investment court (MIC) with or without a built-in appellate mechanism, and the European Union is a champion of this proposal;

*name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/?doing_wp_cron=1597865750.0823369026184082031250* (accessed 19 August 2020).

[78] United Nations Commission on International Trade Law Fifty-first session New York, 25 June–13 July 2018 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) A/CN.9/930/Rev.1.

[79] See in general the UNCITRAL Working Group III website for a collection of all the documents published by the Working Group and the various state submissions *https://uncitral.un.org/en/working_groups/3/investor-state.*

[80] *https://uncitral.un.org/en/working_groups/3/investor-state* (accessed 30 July 2020).

[81] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 Possible reform of Investor-State dispute settlement (ISDS) 'Submission from the Government of Bahrain' A/CN.9/WG.III/WP.180.

[82] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session New York, 30 March–3 April 2020 Possible reform of investor-State dispute settlement (ISDS) 'Submission from the Government of Kazakhstan' A/CN.9/WG.III/WP.187.

[83] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session 'Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Mali' A/CN.9/WG.III/WP.181.

[84] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 Possible reform of investor-State dispute settlement (ISDS)' Submission from the Government of China' A/CN.9/WG.III/WP.177.

[85] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session 'Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Morocco' A/CN.9/WG.III/WP.161

- No ISDS at all, with two sub-scenarios, namely (i) recourse to domestic courts only, and (ii) State-to-State arbitration. This proposal is led by South Africa[86] and Brazil.[87] Many the countries that have made submissions to the Working Group III process have advocated for a reform option that combines both substantive and procedural reform,[88] dispute prevention,[89] and the formation of an advisory centre.[90]

From the global participation of countries in the work of Working Group III, the participation of African countries has been minimal. It is not immediately clear why African countries have not actively participated in the Working Group III process. This is generally unsurprising as African countries, whether as individuals or as part of their regional economic communities have had limited participation and influence in global matters.[91] Handy *et al* note that the African Union has generally been an inward-looking organisation with individual African countries lacking the political will, financial or human resources capacity to meaningfully participate in global governance institutions.[92] Despite their lack of participation at the international level, there is evidence of engagements at the regional level to suggest that African countries are also dissatisfied with the current investment regime. This is evidenced by the developing trend, which has been adopted by African countries to exclude recourse to investment arbitration in recent amendments made at regional level. For example:

- In the 2016 East African Community Model Investment Treaty[93] (EAC Model Investment Treaty), a preference for 'no ISDS' is acknowledged explicitly.

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86 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session 'Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa' A/CN.9/WG.III/WP.176

87 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 Possible reform of investor-State dispute settlement (ISDS) 'Submission from the Government of Brazil' A/CN.9/WG.III/WP.171

88 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session New York, 1–5 April 2019 Possible reform of investor-State dispute settlement (ISDS) 'Submission from the Government of Thailand' A/CN.9/WG.III/WP.162.

89United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 Possible reform of investor-State dispute settlement (ISDS) 'Submission from the Government of Brazil' A/CN.9/WG.III/WP.171

90 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session Vienna, 5-9 October 2020 Possible reform of Investor-State dispute settlement (ISDS) 'Submission from the Government of Turkey' A/CN.9/WG.III/WP.197

91 Adams Oloo, 'The Place of Africa in the international community: Prospects and Obstacles' (2016) 3 *Open Access Library Journal* 1.

92 Paul -Simon Handy and Felicite Djilo, 'Is Africa ready for meaningful participation in the G20?'(2023) ISS Today https://issafrica.org/iss-today/is-africa-ready-for-meaningful-particpation-in-the-g20 (accesses 2August 2023).

93 East Arican Community Model Investment Treaty 2016 accessible at *https://edit.wti.org/document/show/062e9278-4383-4ff9-97b4-*

- SADC Model BIT[94] provides for arbitration as an ISDS mechanism but expressly states in a special note to article 29 on investor state dispute settlement that the drafting committee was of the view that the preferred option was to have no provision for investor state arbitration.
- The 2006 SADC FIP amended its dispute settlement provisions to make use of national courts and tribunals as opposed to arbitration.
- Regional and continental initiatives have resorted to a reformist agenda that focuses on providing recourse to arbitration administered by African arbitration centres.
- ISDS is absent from some recent BITs involving African States. For example, there is no provision for ISDS in the Brazil–Ethiopia BIT (2018)[95], the Brazil–Malawi BIT (2015)[96], the Brazil– Mozambique BIT (2015)[97] and the Angola–Brazil BIT (2015)[98]. Although advocated for by Brazil, the acceptance of the use of State-to State dispute settlement mechanisms in all four agreements suggests that African countries are receptive to the move away from investment arbitration.

ICSID, being the institution that administers the most investment disputes has also embarked on a process to amend its rules and regulations to attempt to address the concerns that have been raised in relation to the ISDS system. The goals of this reform process are to modernise, simplify and streamline the rules applicable to the resolution of investment disputes, while also relying on information technology to reduce the environmental impact of ICSID proceedings.[99] The process draws lessons from previous ICSID proceedings, extensive consultations with ICSID Member states and the public as well as other interested stakeholders. The ICSID Secretariat published their new rules, which came into effect on the 1st of July 2022. [100]

*a8bbff3eb21c#:~:text=The%20main%20objective%20of%20this,for%20local%20value%20addition%2C%20synergies*

[94] SADC Model BIT 2012 accessible at *https://edit.wti.org/document/show/904957c4-fcdd-49e9-ac81-3e7f1c090feb*

[95] Accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3816/brazil---ethiopia-bit-2018-*

[96] Accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3663/brazil---malawi-bit-2015-*

[97] Accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3664/brazil---mozambique-bit-2015-*

[98] Accessible at *https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3666/angola---brazil-bit-2015-*

[99] *www.icsid.worldbank.org*.

[100] Ibid.

From the above it is clear that there is a need to reform the current ISDS system, however given the fragmented approach adopted by states and international organisations, these reforms may not be able to effectively address the concerns that have been raised against the system.

## 1.3 PROBLEM STATEMENT

Traditional international investment law has viewed the relationship between the state and investor as the only relationship that needs regulating. In that regulation, IIAs took a unidirectional view of the relationship, being that of a vulnerable foreign investor who needed protection from the whims of the all-powerful state. However, with passing time, it has become apparent that the relationships involved in the use of FDI are much more complex and require greater attention to detail in their regulation. In addition to the relationship between the host state and the investor (which relationship goes both ways); there is the relationship between the foreign investor and the local communities where investment takes place; the relationship between the host state and the local communities as states still owe various duties to their citizens even when they regulate investment activities; the relationship between the foreign investor and the environment where controls need to be put in place to ensure that investment activity is not harmful to the environment; and the relationship between investment and development where regulation is required so that investment activity can positively contribute to the development of the host state. In regulating all these relationships there are different actors, across different levels of governance, applying a myriad of national and international rules and laws often in competition with one another.

In managing these relationships, the state predominantly exercises regulatory power to enact legislation to govern these relationships and judicial power to resolve disputes that may arise. However, there have been concerns that the international investment law system unduly limits the regulatory and judicial power of states and by extension the state's ability to govern all these relationships effectively.

As a result of the inability of the traditional investment law system to adequately cater to these different relationships, tensions have arisen between the rights enjoyed and obligations owed by the parties to one another. The question that arises is how to develop a system of international investment law, that can effectively regulate the relationships and tensions that arise in the use of FDI, that incorporates the needs of all stakeholders and allows the different levels of governance to effectively participate in the system.

As highlighted in section 1.2. above, there are a number of reform options that have been undertaken by various stakeholders in a bid to address the concerns that have arisen in the international investment law system. Even though different concerns have been identified by different stakeholders, the key to a successful reform effort is in ensuring that the international investment law system is able to govern the different relationships that arise in the use of FDI thereby addressing the concerns of all stakeholders. Reform of the international investment law system requires a holistic approach that not only focuses on systemic change in redesigning investment treaties but also on national reforms.[101] There has to be a review of multiple bodies of law starting from the local to the global level.[102] When determining the interplay between the substantive and the procedural elements of the international investment law system, UNECA notes that, '[b]oth institutional arrangements and legal substance matter. Carefully designed substantive provisions guaranteed by accessible, speedy and reliable dispute settlement mechanisms can manage [negative] perceptions of investment without endangering [state's] policy space.'[103]

This approach to reform is absent in the current reform agenda as there has been a piecemeal and fragmented approach to reform. The reform processes have each focused on select concerns, identified by one group of affected stakeholders, and left other concerns unattended to. This fragmented and piecemeal approach is illustrated hereunder.

In general, there has been a separation of the discussions on substantive and procedural reforms. While UNCITRAL Working Group III has been mandated to address procedural concerns, there is no equivalent body taking on the reform of the substantive aspects. This is so despite the inter-connectedness of the substantive and procedural aspects. Some of the aspects necessary for effective procedural reform need to be coupled with substantive reform. Likewise, in order to ensure that the substantive reforms are given effect to, they have to be coupled with effective procedural reform. By only focusing on one or the other, the reform effort is only dealing with half of the problem, and this may undermine the effectiveness of the

[101] Lorenzo Cotula, 'Rethinking Investment Law from the Ground Up: Extractivism, Human Rights and International Investment Law' Investment Treaty News (2023) https://www.iisd.org/itn/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula/ (accessed 11 October 2023).

[102] Lorenzo Cotula 'Rethinking Investment Law from the Ground Up: Extractivism, Human Rights and International Investment Law'

[103] United Nations Economic Commission for Africa 'The AfCFTA Investment Protocol: Reshaping the African Investment Regulatory Landscape for Sustainable Development' *Towards a Common Investment Area in the African Continental Free Trade Area: Levelling the Playing Field for Intra-African Investment* (2021) at 40 available at: https://hdl.handle.net/10855/46741.

reform effort. In this regard, there needs to be consideration of the substantive rules that provide rights and duties to stakeholders, the procedural mechanisms that are used to enforce these rights and duties, and the roles that will be played by the different levels of governance in the creation and enforcement of substantive rules

In attending to the substantive rules, there is a need to set out and clarify the rules that are applicable in determining the rights enjoyed by each of the parties and the duties owed to the other parties within the different relationships that arise in the context of international investment law. While attempting to introduce the state's right to regulate into international investment law as a means by which the state's right and the duties that are owed by the state to all parties can be balanced with its obligations to investors, there has been little clarity as to the scope of application of the right to regulate. As such there is confusion in a number of arbitral cases as well as in the literature as to the operation of the right to regulate.

In some instances, the right to regulate has been applied to exclude liability for certain regulatory measures that have been enacted in the public interest. [104] In other instances, arbitral tribunals have rejected the application of the right to regulate and found that compensation ought to be paid regardless of the public interest motivations behind the regulation.[105] It is therefore unclear to what extent the right to regulate allows the state to enact legislation for the protection of its citizens, the environment and the achievement of national developmental goals without incurring liability where that regulation may affect foreign investors. Providing clarity on the right to regulate will set the basis for the manner in which the state engages with and provides for each of the relationships that are affected by investment regulation. It will set the bounds of what the state can do when regulating for the protection of is citizens, for the protection of the environment and for the achievement of sustainable development and set out the limitations that apply to the conduct of the state that goes beyond regulations and unduly negatively impacts foreign investors. The clarification of the right to regulate will also enable

[104] *Philip Morris Brands Sa`rl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/, Award (8 July 2016); *Marfin Investment Group Holdings SA, Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award (26 July 2018); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Award (5 November 2021); *Bank Melli Iran and Bank Saderat Iran v Bahrain*, PCA Case No 2017-25, Award (9 November 2021).

[105] *Starrett Housing Corporation v Islamic Republic of Iran*, 4 IRAN-US CTR 122 (1983), Interlocutory Award (Award No.ITL 32-24-1) 19 December 1983; *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA*, 6 IRAN-US CTR219, Award (Award No.141-7-2) 29 June 1984; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, ad hoc award of 27 October 1989, ILR, vol. 95, 1990, 209, para 57; *Compa~nia´ de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (21 November 2000) para 7.5.17*; Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para 120.

the assignment of regulatory power across the different levels of governance as states will be able to, within the set parameters, freely enact rules and laws, across all levels of governance to regulate their relationships with each of the stakeholders in the international investment law system. By so doing, it will be possible to incorporate the rights and duties of all stakeholders into the substantive aspects of international investment law.

With the incorporation of substantive provisions that clarify the rights and duties of the stakeholders in the international investment law system, there must be a means in which these rights and duties can be effectively enforced. The Working Group III process focuses on a small portion of procedural issues being concerns related to time and costs of proceedings, the independence and impartiality of arbitrators and consistency, coherence and correctness of decisions.[106] The focus of Working Group III has been criticised as failing to focus on issues that would have real and meaningful impact on the reform process.[107] The reform process has to some extent left out some important procedural issues from the focus of the discussion. There seems to be a presumption in favour of the retention of arbitration as the mode of dispute settlement with no further discussions on the same.[108] The focus is on either reforming the current investor state arbitration system or the introduction of a permanent court that still retains arbitration as the dispute settlement mode (described as institutionalised arbitration).

There has been little to no engagement with the question as to whether arbitration is a suitable mode for the settlement of disputes that arise in the context of international investment law. The nature of arbitration is such that it is not compatible with the systemic changes necessary to address the concerns that have been raised against the system and give effect to the enforcement of the substantive changes. For example, arbitration is based on party agreement and as only the state and foreign investors have a mechanism for providing their consent to arbitration, the dispute settlement system, regardless of the reform effected would be incapable of providing effective redress to third parties.[109] Failing to provide access to an equivalent

[106] UNCITRAL Working Group III 34th Session Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat A/CN.9/WG.III/WP.142 (2017) 6 para 20.
[107] James Thuo Gathii & Harrison Otieno Mbori 'Reform and Retrenchment in International Investment Law: Introduction to a Special Issue' (2023) 24 *The Journal of World Investment & Trade* 535–63; J Benton Heath 'The Anti-Reformist Stance in Investment Law' (2023) 24 *The Journal of World Investment & Trade* 564–600; Caroline Lichuma 'International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?' (2023) 24 *The Journal of World Investment & Trade* 718–43.
[108] Gus Van Harten & Anil Yilmaz Vastardis 'Special Issue: Critiques of Investment Arbitration Reform' (2023) 24 *Journal of World Investment & Trade* 363–71.
[109] Emmanuel T Laryea 'Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration' (2018) 59 *Boston College. Law School. Boston College Law Review* 2845.

international mechanism by which third parties can seek redress for violations of their rights arising from negative investment activity has left many local communities that have been affected by investment activity with no means to vindicate their rights.[110] In these situations local communities (often unsuccessfully) resort to alternative mechanisms in attempts to have their rights vindicated.[111] For example, in *Kiobel v. Royal Dutch Petroleum Co* a group of Nigerians unsuccessfully attempted to sue Shell in the courts of the United States under the Alien Tort Statute after failing to obtain redress in their national courts for harm they suffered caused by the conduct of Shell in Nigeria. [112] The court held that there was a presumption within the Alien Tort Statute against the extra -territorial application of the statue and that in the absence of evidence of a sufficiently strong link between the matter and the territory of the United States, the Alien Tort Statute would be inapplicable to the matter.[113] Since the statute was presumed to be applicable the court did not proceed to deal with the merits of the matter.

The principle of party autonomy, where parties are able to choose the applicable rules and procedures, hinders the implementation of the necessary procedural reforms as parties can simply opt out of these procedures by consent or refuse to opt in.[114] Without interrogating this fundamental assumption that entirely shapes and sets out the contours and the design of the dispute settlement mechanism, there is the risk that the necessary reform elements may be excluded by virtue of the operation of arbitration.

Secondly, the focus on procedural reform is largely aimed at the needs and interests of foreign investors and to some extent, states. There has been the exclusion of the needs and interest of local and indigenous communities of the host state from the reform discussions.[115] This is so despite the fact that local communities where investment takes place are also affected by

[110] Ibid.

[111] See also *Bowoto v. Chevron Corp* United States District Court for the Northern District of California, United States Case number 09-1564.1 and *Wiwa v. Shell Petroleum Development Co* 96 Civ. 8386 (KMW) (HBP), 01 Civ. 1909 (KMW) (HBP), 02 Civ. 7618 (KMW) (HBP) March 18, 2009.

[112] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

[113] *Kiobel v Royal Dutch Petroleum* para III -IV.

[114] For example, the United Nations Convention on Transparency in Treaty-Based Investor State Arbitration (Mauritius Convention on Transparency) was implemented as a means to improve transparency in arbitral proceedings. However, there has been limited uptake of the transparency provisions with only twenty-three countries are signatory to the Transparency Convention, and it has come into force for only nine of the twenty-three countries.[114]

[115] While it may be presumed that states advance the interests of its citizens, the current tensions that have arisen between investors and local communities in the context of international investment law is illustrative of the fact that states do not always advance or act in the interests of their usually more vulnerable citizens. In this regard Perrone notes that an examination of the situation of local communities shows that states may favour large scale investment projects for financial gain, to maintain a good investment reputation or to avoid costly arbitration. See Nicolás M Perrone ‘Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities’ (2023) 24 *Journal of World Investment & Trade* 436–60 at 438.

investment regulation and investment activity, with the local communities bearing the brunt of negative investor conduct.

The needs of local communities were excluded in traditional international investment law and the reform efforts taking place under Working Group III are perpetuating this exclusion. In this regard, Cotula notes that 'international law – is not only the story of judges and diplomats and lawyers in tailored suits handling complex litigation. It is also the story of women and men who feel the impacts of rules and proceedings in their lives yet are often excluded from decision making...'[116] As such, the needs of local communities ought to be effectively incorporated in international investment law. The idea that non-state actors can participate in international law has begun to appear in the policies and practices of some international organisations and in international law. For example, in environmental law, the United Nations Environment Programme allows for major groups and accredited stakeholders to participate in all public meetings of the committee of permanent representatives and allows them the opportunity to provide written and oral input to all the deliberations of the United Nations Environment Assembly and its subsidiary organs.[117]

Within the context of the WTO, stakeholder participation is starting to appear in the several member-led informal discussions and dialogues especially in the Trade and Environmental Sustainability Structured Discusses and the Informal Dialogue on Plastics, Pollution and Environmentally Sustainable Plastics Trade. [118] Although these are informal initiatives, Pauwelyn notes that they are laboratories to test the presence and the role of external stakeholders in a WTO context and indicate a willingness and recognition of the role that stakeholders can play in the WTO.[119] As such it is not only possible for the interests of local and indigenous communities to be represented in international investment law, but there is room for their direct participation in various aspects of the international investment law system.

The omission of local communities is problematic for two reasons: firstly, it ignores the fact that local communities also have rights even in the context of international investment law and

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[116] Lorenzo Cotula 'Investment Disputes from below: Whose Rights Matter?', *International Institute for Environment and Development*, available at: https://www.iied.org/fr/investment-disputes-below-whose-rights-matter.
[117] United Nations Environment Programme Stakeholder Engagement Policy https://www.unep.org/civil-society-engagement/policies/stakeholder-engagement-policy#:~:text=Representatives%20of%20Major%20Groups%20and%20Stakeholders%20accredited%20to%20the%20United,organs%2C%20including%20to%20working%20groups. (accessed 18 January 2024)
[118] Joost Pauwelyn 'Taking Stakeholder Engagement in International Policymaking Seriously: Is the WTO Finally Opening Up?' (2023) 26 *Journal of International Economic Law* 51–65 at 52.
[119] Ibid.

secondly, it overlooks the fact that local communities are at the centre of investments, and they directly or indirectly trigger investment disputes.[120] The needs and concerns of local communities can have an impact on investment usually through community action. Community action refers to the wide range of measures taken by communities to articulate their perspectives, advance their interest or realise their rights.[121] While investors cannot use IIAs to directly challenge the actions of communities, some disputes between the investor and the state may be rooted or in some way involve local communities and their conduct.[122] For example an investor-state dispute can arise where states take action or inaction in response to community concerns, which state actions negatively impact the investor triggering the investor's arbitration claim. For example, in the case of *Bear Creek Mining Corporation v the Republic of Peru*[123] where a foreign investor sought to develop the Santa Ana silver mine in Peru. The local community was against the development of the mine and opposed the same on the basis that the mining activity would affect their land and cultural identity. In opposition to the mining development social unrest and violence broke out. In an attempt to control the same, the government of Peru issued decrees that had the effect of stopping the mining development. As a result of this the foreign investor initiated arbitral proceedings against the government. [124]

Where these disputes arise where local or indigenous communities are implicated or affected, there are two points of interest that can be drawn from arbitral jurisprudence that illustrate the disenfranchisement of local and indigenous communities. Firstly, tribunals can refuse to recognise international human rights treaties and legal instruments that provide for the rights of indigenous communities as being relevant to the determination of the dispute, thereby essentially placing more importance on the rights of investors over any rights held by indigenous peoples or local communities.[125] For example in *South American Silver Ltd v Bolivia*, the Respondent state attempted to argue that international laws relating to indigenous peoples' rights were applicable in the dispute as the dispute directly related to the protection of

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120 'Access to Justice for Local Communities in Investor-State Arbitration' (*Afronomicslaw.org*) <https://www.afronomicslaw.org/2019/12/06/access-to-justice-for-local-communities-in-investor-state-arbitration> (accessed 15 January 2022).

121 Cotula L and Schroder M (2017) Community Perspectives in investor-state arbitration IIED London 9.

122 Supra 13.

123 *Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/2

124 See also *South American Silver Ltd v Bolivia*, PCA Case No 2013-15, UNCITRAL, Award (22 November 2018) where disputes between indigenous communities and the foreign investor arose as a result of the negative impacts of investment activity on indigenous land. These disputes resulted in violence and social unrest prompting the government to nationalise the investment project which ultimately giving rise to an arbitration claim being initiated by the investor against Boliva.

125 Ksenia Polonskaya 'Indigenous Peoples in International Investment Law: Time for a New Dispute Resolution Procedure' (2023) 24 *The Journal of World Investment & Trade* 691–717 at 708.

indigenous people and their rights. However, the tribunal rejected this line of reasoning opting for a narrow interpretation of the applicable international law and finding that international laws relating to the rights of indigenous peoples were not contemplated by the parties as being applicable to the dispute.[126]

Secondly, they can deny the participation of local and indigenous peoples in the dispute resolution process thereby rendering any measures put in place in the context of arbitration for the participation of affected third parties ineffective in protecting their rights. In *Glamis Gold v United States of America* although the tribunal accepted amicus curiae submissions by the indigenous Quechan peoples who brought in arguments related to the rights of indigenous peoples in the context of investment activities, the tribunal held that it had no obligation 'to address their submission at any point in the arbitration'[127], and proceeded to issue an award that did not pay attention to any of the issues raised by the amicus curiae.

When considering the current reform efforts, despite the criticism that the international investment law system privileges foreign investors,[128] there is little being done to address these concerns as they relate to the rights of indigenous peoples and local communities, to their detriment.

Finally, the reform process is taking place with little to no consideration of the role of the national level in the settlement of disputes nor is due regard being had to the reform processes that are already taking place at other levels of governance (save for the focus of a permanent investment court currently being pursued by the EU). This serves to further tensions that have arisen regarding host state sovereignty as the international level and in particular international dispute settlement has been criticised for infringing on the sovereignty of states.[129] This process promotes competition and contestation between the different levels of governance and leads to fragmentation of the system.

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[126] *South America Silver Ltd v Bolivia* para 215-216.
[127] *Glamis Gold Ltd v USA*, UNCITRAL, Award (8 June 2009) para 14.
[128] Anil Yilmaz Vastardis 'Investment Treaty Arbitration: A justice bubble for the privileged' in Thomas Schultz & Federico Ortino (eds) *The Oxford Handbook of International Arbitration* (2020) 0 available at: https://doi.org/10.1093/law/9780198796190.003.0026.
[129] Georgios Dimitropoulos 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform' (2020) 21 *Journal of World Investment & Trade* 71–103; Taylor St John *Three Conceptions of Sovereignty in Investment Law* in Christopher Smith, ed. Sovereignty in a Global Perspective (Proceedings of the British Academy, Oxford University Press) (2021), available at: https://papers.ssrn.com/abstract=3909685 (accessed 11 October 2023).

To this end there is a gap in the reform effort in that it is failing to address a broad range of critical issues, incorporate the needs of a wide range of stakeholders and bring together the different levels of governance for the effective regulation of international investment law. This gap gives credence to criticisms that the reform process is aimed at reforming the process to the benefit of a select few stakeholders including foreign investors and developed country host states, by entrenching the already existing system and its inadequacies.

There is a need to address the concerns raised against the reform effort by bringing together the needs of all stakeholders and bridging the divide between the different levels of governance and between individual states. There is also a need to bring together reform of the substantive and procedural aspects so that a clear goal for the reform agenda is established that can be fulfilled in a complementary manner by both the substantive rules and the dispute settlement procedures. As international investment law affects stakeholders and activities across all levels of governance, there is a need to incorporate the different levels of governance in the reform effort and identify how the different levels can contribute to the reform effort so that there is coherence in the policy and reform activities that are being undertaken at all levels. This incorporation of all levels of governance and all stakeholders will limit conflict and contestation between the different levels of governance and create an environment where all levels of governance can work together for the achievement of a common goal. Finally, by bringing all these elements together, we will be able to design an international dispute settlement mechanism that is capable of effectively resolving disputes while at the same time promoting the goals of a much broader reform agenda.

## 1.4 OBJECTIVES AND RESEARCH QUESTIONS

The question that this study seeks to address is how holistic reform of the international investment law system can be achieved in a manner that addresses the wide range of substantive and procedural concerns that have been raised against the system in a manner that incorporates all stakeholders and all levels of governance. In answering this question, the goal of this study is to illustrate how the different levels of governance (being the sub-national, national, regional and international levels) can be incorporated into and work together in the architecture of international investment law to achieve equitable reform that addresses the procedural and substantive concerns that have been raised against the system while at the same time maintaining its traditional goals of investor protection. In order to achieve this, the thesis will focus on the following objectives:

a. Explore how the doctrine of multilevel governance can be used as a framework:
   i. For reforming both the substantive and procedural aspects of international investment law thereby responding to the criticisms levelled against the system made by states.
   ii. setting out the roles that can be played by the different levels of governance so as to achieve a coherent and holistic reform of the international investment law system that considers the needs and interests of all stakeholders.

This thesis will achieve these objectives by answering the following questions:

a. What are the concerns raised by the current international investment law regime?
b. What are the proposals tabled before the Working Group III, and what are their shortcomings in addressing concerns from states?
c. How does the multilevel governance framework operate?
d. What are the characteristics of multilevel governance that make it suitable for the reform of the international investment law system?
e. How will the substantive aspects of international investment law be reformed through the use of the multilevel governance framework?
f. How will the procedural aspects be reformed through the use of the multilevel governance framework?

## 1.5 THEORETICAL FRAMEWORK

In order for systemic reform of international investment law to be successful, it is important to develop and assess proposals for reform on the basis of a normative and conceptual framework that is globally consented to.[130] International investment law has often been described as an incidence of global regulatory governance[131] and the success of the reform effort is dependent

[130] Stephan W Schill Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, International Centre for Trade and Sustainable Development and World Economic Forum, 2015 1–19 at 1 available at: www.E15initiative.org/ (accessed 11 October 2022).

[131] Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (NYU School of Law 2009) Public Law Research Paper No. 09-46 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980> (accessed 4 July 2022). Investment Treaty Arbitration as a Species of Global Administrative Law' (Institute for International Law and Justice) 123 <https://www.iilj.org/publications/investment-treaty-arbitration-species-global-administrative-law/> (accessed 4 July 2022).

on the effective interplay of the different levels of governance. The framework that will be used to address the concerns raised against international investment law must be embedded with principles and values that will be able to co-ordinate the functioning and authority of these different levels of governance. It is on this basis that the multilevel governance framework will be used in this thesis.

Multilevel governance can be defined as,

> '[A]n arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors -private and public- at different levels of territorial aggregation in more or less continuous negotiation/deliberation/ implementation, and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.'[132]

The concept of multi-level governance refers to the complex, multifaceted and contingent interaction of public and private institutions as networks, each operating at different levels of governance.[133] According to the multilevel governance theory, states are no longer considered as being the sole and central actors in decision making. The decision-making process has been transferred in multiple directions between actors operating at multiple levels.[134] The concept of multilevel governance comprises of numerous state and non-state actors, all acting at different levels such as the subnational (local), the national and the global levels.[135] Multilevel governance is composed of various principles that can be used to integrate legal processes into international investment law that can bring together the different levels of governance as well as the reform efforts taking place at different levels, address the concerns raised against the system and enhance sustainable development.

The five-story house theory as used in multilevel governance provides that each of the different levels of governance are not seen as individual levels but must all work together in concert for the achievement of a common objective.[136] By seeing the different levels of governance in international investment law as part of one system, we will be able to approach the reform of the system in a holistic manner, establishing linkages among the different levels of governance, and limiting contestation for competence over various aspects of the system. The five-story

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[132] Malebakeng Agnes Forere, 'The relationship of WTO law and regional trade agreements in dispute settlement: From fragmentation to coherence (2015) 11.
[133] Christoph U. Schmid, 'Multi-level constitutionalism and constitutional conflicts: Interconnecting the national, European and international economic constitutions in the banana dispute' Doctoral thesis 181.
[134] Moeko Saito-Jensen, 'Multilateral Governance Theory' in Theories and Methods for the Study of Multilevel Environmental Governance *Centre for International Forestry Research* (2015).
[135] Ibid.
[136] Thomas Cottier, 'Towards a five-story house theory' *The Prospects of 21st Century Constitutionalism* 299.

house theory ensures the different levels of governance work together in a complimentary manner to achieve reform.

Legitimacy is an important aspect of any international law system, and the international investment law system has been suffering from what has been termed as a legitimacy crisis.[137] The multilevel governance framework works to incorporate systems, accountability and transparency into the international investment law system thereby ensuring that the major legitimacy concerns that have arisen against the regime are addressed.

The principle of subsidiarity, which advocates that decisions be taken as close as possible to the people affected by the decision, assists in allocating competence between the different levels of governance.[138] Within the multilevel governance framework, each level has a specific role to play in the achievement of a common objective and the principle of subsidiarity assists in determining what role is played by each level. In conjunction with the principle of subsidiarity, the principle of supremacy ensures that policy and regulation making is coherent across all levels and ensures that the lower levels of governance do not engage in conduct that would be in violation of the obligations undertaken at the international level. [139]

The principle of stakeholder participation is used to ensure that the needs of stakeholders are considered in the reform agenda and that they are able to participate in the international investment laws system in a meaningful manner, not just in the formulation of policies and procedures but also active participation in the dispute settlement process.

It is these principles of multilevel governance that will be used throughout this thesis to make recommendations on how the architecture of international investment law can be reformed so as to achieve the goal and objectives pursued by this thesis. The system of international investment brings together different actors that is, citizens, investors and various civil society organisations and non-governmental organisations operating at the local level, host state governments at national level and the dispute resolution methods of ISDS at international level. Furthermore, with the various aspects of reform taking place at the different levels of

[137] Susan D Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521–625.
[138] Yishai Blank, 'Federalism, subsidiarity and the role of local governments in an age of global multilevel governance'37 *Fordham Urb.L. J* 509 533.
[139] Anne Peters 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *ICL Journal* 170–98.

governance, there is a need for harmony and cooperation between the different levels so as to achieve the goal of a sustainable and economically beneficial investment regime.

## 1.6 LITERATURE REVIEW

There is an extensive body of literature that proposes methods to address the concerns that have arisen against the international investment law system. As shall be illustrated hereunder, most of the literature has adopted the same narrow focus that has been adopted by Working Group III and focus on proposing solutions to address the limited procedural concerns as identified by Working Group III. There is limited literature available on how broader concerns that go beyond those identified by Working Group III can be resolved in the reform process so as to achieve meaningful reform.

The most common developments that have taken place regarding substantive reform in IIAs relate to the incorporation of an express right to regulate, incorporating investor obligations and incorporating sustainable development provisions. Titi defines the right to regulate as denoting the 'legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'. [140] Titi finds that in the absence of an explicit right to regulate, tribunals have been reluctant to uphold the states right to regulate when it competes against entrenched IIA provisions when deciding disputes.[141] As such, Titi is of the view that including an express right to regulate is an effective way in which the state regulatory space can be protected and allow states to enact policies that are necessary for the protection of the public interest and the achievement of sustainable development goals.[142] This view is also adopted by other scholars who hold that the right to regulate is an effective way in which public interest regulation can be adopted into international investment law.[143]

While there seems to be consensus on the fact that a right to regulate is necessary for the protection of a state's policy space, Kriebaum notes that, '[A]s case law illustrates, one of the challenging issues of the last 20 years has been to differentiate between the bona fide exercise

[140] Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 33.
[141] Catharine Titi *The Right to Regulate in International Investment Law (Revisited)* (2022) at 17, available at: https://papers.ssrn.com/abstract=4058447 (accessed 2 November 2023).
[142] Ibid.
[143] Adeleke Fola *International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement* (2018) at ch 2; Talkmore Chidede *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* (PhD, University of the Western Cape, 2019) at 146.

of the right to regulate and compensable expropriations.'[144] In light of this, Kriebaum looks at the methods that have been adopted by arbitral tribunals when considering the effect of the states right to regulate and the protection of measures taken in pursuit of sustainable development and she finds that recent investment awards offer elaborate criteria on how to deal with such regulatory measures, the FET standard and the question of expropriations.[145] In a similar vein, Bulut undertakes an assessment of the police powers doctrine in international investment jurisprudence.[146] In his analysis, Bulut sets out the conflicting jurisprudence that exists in international investment arbitration, with some tribunals recognising and upholding the non-compensatory effect of the police powers doctrine[147] and other tribunals rejecting the same.[148] Bulut then proceeds to make a proposal on the ways in which investment arbitration tribunals can address the question of bona fide regulatory takings for which payment of compensation is not due and regulatory takings which would be a violation of international law and require the payment of compensation.[149] Bulut's recommendations are limited to the extent that they provide for the application of the right to regulate in the tradition areas of public order and security, the environment and public health.[150] This constitutes a very narrow approach to the right to regulate. While these areas are of importance and significance, they do not account for the areas in which the state, in a modern and globalised society may need to make regulation for the protection of broader public interests and its citizens such as human rights and sustainable development. Regulation in these areas has often been problematic in the context

[144] Ursula Kriebaum *International Investment Law and Sustainable Development* (2022) at 25, available at: https://papers.ssrn.com/abstract=4298374 (accessed 4 August 2023).
[145] Ibid at 38.
[146] Omer Erkut Bulut 'Drawing the Boundaries of Police Powers Doctrine: A balanced framework for investors and states' (2022) 13 *Journal of International Dispute Settlement* 583–607.
[147] *Philip Morris Brands Sa`rl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/, Award (8 July 2016); *Marfin Investment Group Holdings SA, Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award (26 July 2018); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Award (5 November 2021); *Bank Melli Iran and Bank Saderat Iran v Bahrain*, PCA Case No 2017-25, Award (9 November 2021).
[148] *Starrett Housing Corporation v Islamic Republic of Iran*, 4 IRAN-US CTR 122 (1983), Interlocutory Award (Award No.ITL 32-24-1) 19 December 1983; *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA*, 6 IRAN-US CTR219, Award (Award No.141-7-2) 29 June 1984; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, ad hoc award of 27 October 1989, ILR, vol. 95, 1990, 209, para 57; *Compa~nia´ de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (21 November 2000) para 7.5.17*; Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para 120. These are examples of cases which have upheld the sole effects doctrine which while acknowledging the existence of the states right to regulate, reject the notion that such regulation should be free of compensation for affected parties.
[149] Bulut, supra n 146.
[150] Ibid at 599–600.

of international investment law which has led to calls from various stakeholders for greater protection to be provided to rights and interests of stakeholders beyond investors.[151]

While there have been some steps taken by arbitral tribunals on the effect of a right to regulate, the conflicting arbitral jurisprudence illustrates that development of criteria in an ad hoc manner through the use of arbitral tribunals is not an ideal way to settle the issue, largely due to the non-binding nature of arbitral awards, which gives the tribunals the freedom to apply or not apply previously developed criteria. As noted by the tribunal in *Saluka Investments B.V v Czech Republic* the question on the effect of the right to regulate ought to be regulated in international law to draw an easily distinguishable line regarding the effect of the right to regulate.[152] As such, the author is of the view that there is a need to clarify the application of the right to regulate both in international law and treaty law so that dispute resolution bodies do not have a wide range of powers in determining whether and how to apply the right to regulate.

There has also been an extensive amount of literature that assesses the inclusion of sustainable development provisions in IIAs. Gazzini identifies the features of BITs that incorporate environmental, health, safety, human rights and labour standards.[153] He further highlights the role of preambles, interpretive statements, dedicated sustainable provisions, the protection of policy space and exceptions in advancing the achievement of sustainable development in international law.[154] Levashova identifies recent trends in incorporating sustainable development clauses in the model BITs of Canada and the United States of America and concludes that while there is an increase in the incorporation of sustainable development provisions, this incorporation remains inconsistent and reflects a lack of consensus on the question of sustainable development and international investment law.[155] McLaughlin assesses

[151] Giuseppe Puma, *Human Rights and Investment Law: Attempts at Harmonization through a Difficult Dialogue between Arbitrators and Human Rights Tribunals,* in: Maurizio Arcari and Louis Balmond (eds.), Judicial Dialogue in the International Legal Order (Editoriale Scientifica, )2014, 193; Roberta Greco, 'The Impact of the Human Right to Water on Investment Disputes', (2015) 109 *Rivista di diritto internazionale* 444.
[152] *Saluka Investments B.V v Czech Republic* at para 263 where the tribunal held that '[t]he international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered . . . as falling within the police or regulatory power of states and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.'
[153] Tarcisio Gazzini 'Bilateral Investment Treaties and Sustainable Development' 15 *Journal of World Investment & Trade*.
[154] Ibid.
[155] Yulia Levashova 'Role of Sustainable Development in Bilateral Investment Treaties: Recent Trends and Developments' (2011) 1 *Journal of Sustainable Finance and Investment*.

the trend of the Association of South- East Asian Nations (ASEAN) in incorporating sustainable development provisions in ASEAN IIAs and finds that while there is an increase in newer generation BITs incorporation of sustainable development provisions, there is still a lot of work that needs to be done in addressing the sustainable development gap in IIAs.[156] In a similar vein, Chi identifies core provisions that have been used by states to incorporate sustainable provisions in IIAs and assesses their effectiveness in bringing about sustainable development.[157]

A common thread that can be gleaned from this scholarship is that there are generally eight categories of sustainable development provisions being incorporated into IIAs, which are general sustainable development provisions, anti-corruption provisions, environmental and public health provisions, labour rights and human rights, transparency of investment laws, transparency of arbitral processes, national security, and corporate social responsibility.[158] This scholarship also sets out that while older generation BITS contained very little sustainable development language, newer generation BITs, are increasingly starting to contain more sustainable development language with a large portion of the provisions relating to the protection and promotion of the environment, labour rights and public health. This literature is of importance as it helps us to gain an understanding of the relationship between sustainable development and international investment law and the steps that have been taken by states at the international level in order to incorporate sustainable development into their IIAs. The literature also shows that while there may be an increase in the use of sustainable development language, the provisions that are incorporated into IIAs are largely focused on the duty to respect with limited incorporation of positive obligations to facilitate the achievement of sustainable development.

There is little literature that addresses how sustainable development can be more effectively incorporated in international investment law in a meaningful way that culminates in the enactment of widespread, binding obligations regarding the achievement of sustainable development. There is a need to come up with a method for the recognition of sustainable development in investment treaties in a manner that overcomes the complexities traditionally associated with the incorporation of non-investment obligations in foreign investment. Further,

[156] Mark McLaughlin 'Mapping Sustainable Development in Investment Treaties: An Analysis of ASEAN Sates'Practice' (2022) 17 *Asian Journal of WTO & International Health Law and Policy* 115–40.
[157] Manjiao Chi Sustainable development provisions in investment treaties: An empirical exploration of the sustainable development provisions in BITs of Asia-Pacific LDCs and LLDCs, ARTNeT, 2018 1–78.
[158] McLaughlin, supra n 156 at 127.

we see that despite developments in newer generation IIAs, states still face significant difficulties in channelling investment for sustainable development, and in regulating the relationship between foreign investment and sustainable development so that investment can lead to the achievement of sustainable development.

Segger and Kitonka note that there are different options that are available for states to address the sustainable development aspect of international investment law.[159] In the first instance, states can adopt international measures within trade and investment agreements to address the most significant challenges.[160] Additionally, states can adopt diverse measures to address the sustainable development gap and adopt measures to mitigate the impact of trade and investment flows.[161] It is noted that a large body of literature is aimed at the first option, that is, focusing on international agreements and the steps that can be taken by states at the international level. Very little attention has been paid to the role of the national and other levels of governance in fostering sustainable development. This is so despite the fact that reforming international investment law for sustainable development requires holistic reform and not just the reform of investment treaties.[162] Newcombe undertakes an assessment of IIAs against the International Law Association 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development to determine whether IIAs are an impediment to sustainable development.[163] Newcombe finds that IIAs were never intended to be comprehensive sustainable development treaties and that the suitability of investment within any state remains within the State.[164] In this regard, Newcombe notes that,

> '[e[ach state has primary responsibility for establishing the regulatory and sustainability parameters for investment activities within its territory. States retain the capacity to determine what activities may be carried out and how they should be carried out, subject to their international commitments, including those in international environmental agreements and IIAs…. This approach arguably reflects the subsidiarity principle by acknowledging that it is more appropriate that the balancing of social, economic and environmental impacts of any specific investment project be made at a local level.'[165]

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[159] Marie-Claire Cordonier Segger 'International Trade, Investment and Sustainability' in Marie-Claire Cordonier Segger (ed) *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties* (2021) 0 available at: https://doi.org/10.1093/oso/9780198831341.003.0002; Naufal Hamis Kitonka 'Balance between Investment Protection and Sustainable Development under Tanzania-Canada BITs: Need for Progressive Domestic Investment Law' (2023) 4 *Journal of Law and Legal Reform* 79–108.
[160] Cordonier Segger, supra n 159 at 12; Kitonka, supra n 159 at 80.
[161] Cordonier Segger, supra n 159 at 12; Kitonka, supra n 159 at 80.
[162] Kitonka, supra n 159 at 96.
[163] Andrew Newcombe 'Sustainable Development and Investment Treaty Law' (2007) 8 *Journal of World Investment & Trade* at 360.
[164] Newcombe, supra n 163.
[165] Ibid at 64.

Petersmann also notes that the 'sustainable development agenda, due to globalisation, can no longer be secured by any state without international law and the multilevel governance of global public goods.'[166] Kitonka further states that the practical significance of sustainable development provisions in IIAs not only relies on the treaty provisions themselves but also depends on the national laws and policies that are in place in order to give effect to sustainable development.[167] This creates the impression that the incorporation of sustainable development goals is not only in the purview of international investment law, but is a concerted effort between the international level of governance and other levels of governance. As such, there also needs to be focus on how the other levels of governance can participate in the promotion and advancement of sustainable development in international investment law. What role exists for states and other levels of governance to contribute to and support the promotion and protection of sustainable development within transnational investment activities? What interactions can be developed between the different levels of governance to achieve holistic reform of international investment law for the achievement of sustainable development? How can multilevel governance of international investment law contribute to the achievement of sustainable development? These are questions that are currently not addressed in the existing literature which this thesis seeks to answer. Answering these questions is even more important in light of the trend in international investment law that is moving towards the domestication of international investment law. [168]

Individual countries have been the drivers of various options for the reform of the procedural aspects of international investment law, each based on their own needs and perspectives.[169] The European Union favours the formation of a multilateral investment court;[170] China, the use of

[166] Ernst-Ulrich Petersmann Transforming Trade, Investment and Environmental Law for Sustainable Development, European University Institute Department of Law, 2022, 2022/02, Law Working Paper 1–18.
[167] Kitonka, supra n 159 at 96.
[168] Pasha L Hsieh 'New Investment Rulemaking in Asia: Between Regionalism and Domestication' (2023) 22 *World Trade Review* 173–92; Julien Chaisse 'Home Rules: How Domestic Laws Are Flipping the FDI Script', *FDI Intelligence*, available at: https://www.fdiintelligence.com/content/opinion/opinion-home-rules-how-domestic-laws-are-flipping-the-fdi-script-82746; Julien Chaisse & Georgios Dimitropoulos (eds) *World Trade Review Special Issue 1: Domestic Investment Laws and International Economic Law in the Liberal International Order ,* (2023) vol 22 available at: https://www.cambridge.org/core/journals/world-trade-review/article/wtr-volume-22-issue-1-cover-and-front-matter/F0B53DFB47D6801F6EFB4C87E68104AC.
[169] See generally Working Group III documents on submissions from Governments available at *https://uncitral.un.org/en/working_groups/3/investor-state* (accessed April 2020).
[170] A/CN.9/WG.III/WP.159/Add.1 Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States available at *https://uncitral.un.org/en/working_groups/3/investor-state.* See also State of the Union 2017: A Multilateral Investment Court available at *http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf* (accessed in February 2020).

an appellate body mechanism;[171] and Brazil has spearheaded the move to dispute prevention and the use of state-to-state mechanisms. Several African countries have adopted a cautious approach to ISDS with majority of countries maintaining the traditional methods of ISDS for the resolution of investments disputes.[172] South Africa and Tanzania have adopted some drastic measures in the implementation of legislation that limits or prohibits recourse to international arbitration for the resolution of investment disputes.[173] Furthermore, participation of African countries in creating policies on ISDS reform and taking part in various fora that have been established to tackle this issue has been very low if not non-existent.[174]

There has been a study conducted by the Academic Forum composed of seven working groups that have prepared a series of "concept papers", which analyse how the issues or concerns with ISDS that have emerged in the Working Group III sessions may be addressed under a number of possible reform scenarios.[175] This project has been led by Gabrielle Kaufmann-Kohler, Michele Potestà, and George Bermann.[176] Each paper examines whether and if so, how and to what extent each of the concerns will be addressed under the four reform options identified above, being improvement of the current investor-State arbitration system; addition of an appellate mechanism to the current investment arbitration regime; introduction of a MIC with or without an built-in appeal or no ISDS at all, with two sub-scenarios, namely (i) recourse to domestic courts only, and (ii) State-to-State arbitration.[177] The Academic Forum concept papers are a useful resource in that they show how the concerns will be addressed by each option and the number of concerns that will be addressed by each reform option.[178] However,

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[171] A/CN.9/WG.III/WP.177 Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of China available at https*://uncitral.un.org/en/working_groups/3/investor-state*. (accessed in February 2020).

[172] Athina Fouchard Papaefstratiou, Capucine du Pac de Marsoulies, Martin Tavaut, and Clément Fouchard, 'The Africanisation of Rulemaking in International Investment Arbitration', Kluwer Arbitration Blog, August 17, 2018, http://arbitrationblog.kluwerarbitration.com/2018/08/17/africanisation-rule-makinginternational-investment-arbitration/.

[173] South Africa, which implemented the Promotion and Protection of Investment Act 22 of 2015 (PPIA) which has done away with the traditional model for the protection of investments and focused more of the policy objectives of the State. Tanzania has amended its Public Private Partnership Amendment Act 9 of 2018 and the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 to prohibit investors from resorting to international dispute settlement mechanisms or any foreign court or tribunal for the resolution of disputes relating to the public private partnerships and extraction of natural resources.

[174] Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration United Nations Economic Commission for Africa; see also Crispas Nyombi 'Chapter 5 Towards a New International Economic Order: Proposal for a Pan-African Investment Court' in Emelia Onyema (ed) *Rethinking the Role of African National Courts in Arbitration* (2018).

[175] *https://www.cids.ch/academic-forum-concept-papers* (accessed 10 February 2020).

[176] *https://www.cids.ch/academic-forum-concept-papers* (accessed 10 February 2020).

[177] Gabrielle Kaufmann-Kohler & Michele Potestà 'Academic Forum on ISDS Concept Paper Project: Matching Concerns and Solutions Introduction' 3.

[178] *Ibid.*

as the Academic Forum concept papers were developed in the context of the Working Group III process, they are limited to exploring the extent to which the different reform options can be used to address the limited procedural concerns that have been identified by Working Group III. Like the Working Group III process, these contributions do not engage with how and to what extent the proposed reform options can address the broader concerns that have been raised by other stakeholders. They do not approach the reform process from the point of view of the necessary holistic change that this thesis and other scholars propose as being necessary for the reform of international investment law. As such these contributions do not provide insight into how reform that addresses the needs of a wider range of stakeholders beyond the needs of foreign investors and states can be achieved.

There has been a lot of literature that has developed around the formation of a MIC and an appeals mechanism. For example, Kauffman Kohler and Potesta advocate for the use of the Mauritius Transparency Convention as a basis for the formation of a MIC;[179] Ronnelid provides an analysis of ISDS reform in the context of the EU and assess the compatibility of a MIC with EU Law;[180] Feldman analyses the suitability of an appeal mechanism[181] and Calamita assesses the challenges of establishing a multilateral investment tribunal at ICSID.[182] The main takeaway from these contributions is that the institutionalisation of the dispute settlement procedures would go a long way in addressing the concerns that have arisen against ISDS. In operationalising the MIC, Reinsch and Bungenberg have undertaken a study to set out what the MIC with or without an appellate mechanism would look like and set about the framework for the establishment of the same proposing features such as a plenary body, a secretariat, full time permanent judges and a code of conduct for judges.[183] There seems to be large consensus on the benefits of institutionalisation of dispute settlement and a move away from ad hoc dispute settlement procedures, which consensus is shared by the author. However, there are some concerns that have been identified with the proposals for institutionalisation of investment

[179] Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?
Analysis and roadmap (2016) *CIDS Geneva Centre for International Dispute Settlement*.
[180] Love Rönnelid 'Research Report: An Evaluation of the Proposed Multilateral Investment Court System' (2018)
[181] Mark Feldman 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 *ICSID Review,* 528.
[182] N. Jansen Calamita, 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID' (2017) V32 *ICSID Review* 611.
[183] Marc Bungenberg & August Reinisch *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (2020) available at: https://library.oapen.org/handle/20.500.12657/23089.

dispute settlement procedures as highlighted above. The above proposals seem to rally around the institutionalisation of arbitration as a dispute settlement system. The proposals by Kauffman Kohler et al and Bungenberg et al incorporate the Mauritius Convention and Transparency Rules in Arbitration and the EU ICS makes use of existing ICSID and UNCITRAL arbitration rules for its procedure. This signals that arbitration would be retained as the means of dispute settlement. Bungenberg et all further elaborate on this by noting that state consent to the MIC would be given in the applicable IIA and the MIC treaty whereas the investor would be deemed to have given consent through the initiation of a claim (as is the current procedure in investment treaty arbitration).[184] To this end the question that must be asked is whether the proposed MIC is not simply a retention of the existing system albeit with permanent judges without addressing the main issues that arise with the use of arbitration, to settle disputes that have a public dimension. Ketcheson notes that while there may be benefits to the establishment of a permanent investment court, if such a court is not well designed, it may do more harm than good.[185] As a result, prior to implementing the design of the dispute settlement mechanism, there is a need to engage with the question as to whether arbitration is a suitable mechanism for the settlement of investment disputes and whether arbitration will be able to provide access to an adequate dispute settlement mechanism for all affected parties to vindicate their rights. Furthermore, the design of the dispute settlement system must be compatible with the incorporation of the national level of governance as the national level of governance ought to be incorporated into the international investment law system.

When looking at the use of arbitration as a dispute settlement mechanism, Kinnear and Le Cannu advocate for the continued use of the ICSID system as the reform process of the ICSID rules sufficiently addresses the legitimacy concerns regarding the use of arbitration to resolve investment disputes.[186] Wahab agrees with this notion as he views that ICSID and Africa have a symbiotic relationship, which when coupled with the ICSID reform process, ICSID's guidance notes and the self -contained and special features that ICSID has to offer, there will be a boost in the favouritism of ICSID for the settlement of ISDS disputes and the strengthening of the ICSID-Africa connection.[187] The ICSID reform process was concluded in 2022 which

[184] Ibid at 5.
[185] Ketcheson 'Investment Arbitration: Learning from Experience' in Steffen Hindelang and Markus Krajewski *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* Oxford Scholarship Online 2016 22.
[186] Meg Kinnear and Paul Jean, Le Cannu, 'Concluding Remarks: ICSID and African States Leading International Investment Law Reform' (2020) *ICSID Review* 1.
[187] Prof Dr Mohamed S Abdel Wahab, 'ICSID's Relevance for Africa: A Symbiotic Bond Beyond Time' 34 (2019) *ICSID Review* 519 540.

resulted in the coming into force of the amended ICSID Rules and Regulations on the 1st of July 2022.[188] This reform of the ICSID Rules may provide useful insights regarding the changes that need to be made to the ISDS system. Having been the most widely used institution for the administration of investment disputes, their reformed rules require some scrutiny to assess whether and to what extent the reforms they undertake can address the concerns with the current ISDS system.

Given the nature of arbitration and the nature of investor state dispute settlement, the use of institutionalised arbitration or reformed arbitration raises the question as to whether arbitration is an appropriate dispute settlement procedure to settle investment disputes. The existing literature on the establishment of the MIC or reformed arbitration does not address this question.

Harten et al note that while the initiatives being proposed for reform may provide potential avenues for addressing some of the concerns with the system, they incorrectly lend a 'veneer of legitimacy 'to maintaining arbitration as the preferred mode of dispute settlement by focusing the discourse of reform on the apparent assumption that investment arbitration is legitimate and desirable'.[189] Garcie and Guven acknowledge that while institutionalisation in the form of an MIC may have some positive effects, it falls short on the question of participation and note that a heightened level of participation that goes beyond amicus curiae participation is required.[190] Perrone agrees with this conceptualisation and notes that the participation of local communities ought to be more than just a procedural issue and argues that investment arbitration is not suitable as a forum to resolve local claims.[191]

This is more so in the context of the development of substantive provisions that provide for investor obligations. As noted by Xiang and Maïnkade the existing framework of international arbitration does not protect the enforceability of investor obligations and would have 'marginal effect because the issue of investor compliance with treaties will only come in a small number of cases where the investor brings a claim, and the state brings a counterclaim raising the investor's human rights obligations. In any case, even if the counterclaim is successful, victims will not be directly entitled to any relief.'[192] Because of the nature of arbitration requiring prior

[188] *https://icsid.worldbank.org/resources/rules-amendments* (accessed 17 July 2024).
[189] Van Harten & Vastardis, supra n 108 at 364–5.
[190] Frank J Garcia & Brooke S Guven 'Designing a Multilateral Investment Court for Procedural Justice' (2023) 24 *Journal of World Investment & Trade* 461–86.
[191] Perrone, supra n 115.
[192] Mao Jun Xiang & Belengar Francis Mainkade 'The human rights-based approach to sustainable development: Lessons from recent African investment treaty practice' (2023) 9 *Heliyon* 1–16 at 12.

agreement, the use of reformed arbitration or the MIC (that still makes use of arbitration with permanent judges) limits the ability of states and other third parties to initiate claims against the investor as there is generally no arbitration agreement to that effect. This limits the positive effect of substantive changes aimed at rebalancing investment treaties as there is no equal mechanism that can be used by states and third parties in international investment law to enforce these obligations. The lack of direct enforcement mechanisms for host states and local communities in IIAs limits the impact of the human rights -based approach to the reform of international investment law as adopted in newer generation IIAs. While some IIAs incorporate the use of home state courts to provide redress to affected third parties, there are a number of practical considerations such as different legal systems, financial and language barriers that may limit the effectiveness of this approach. In order to address this, Garcia and Guven advocate for the incorporation of the exhaustion of local remedies and Perrone argues that the only way forward is to embed local values and organisations into investment projects themselves.[193]

With regard to the dispute settlement process as a whole, in the literature on the reform of ISDS, many authors have not taken into account the national perspective and the relationship between the resolution of international investment disputes and the national law systems. In this regard, Schill notes that ousting domestic courts entirely from the dispute settlement process risks creating a parallel justice system and poses a challenge to the principle of democratic equality and that the disenfranchisement of domestic courts should be avoided.[194] Alvarez notes that in response to the sovereignty concerns in international investment law, there has been a move by states to re-assert their sovereignty through different means, mainly through their national laws or amendments to their treaties.[195] As such, Dimitropoulos, opines that the discussion of reform of the procedural aspects must therefore be informed by the domestic systems of governance in order to 'better conceptualise the ways in which international law principles are implemented alongside and through the use of domestic legal instruments and policies.'[196] This is important because the success of the international system relies heavily on the national system and where

[193] Garcia & Guven, supra n 190; Perrone, supra n 115.
[194] Schill, supra n 130 at 7.
[195] José E Alvarez 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in The Late Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 0 at 26 available at: https://doi.org/10.1093/acprof:oso/9780199691661.003.0003.
[196] Dimitropoulos, supra n 129 at 75. For a general discussion on the importance of domestic measures see also Gus Van Harten, Jane Kelsey & David Schneiderman 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' (2019) *All Papers*.

the international court does not have the buy-in of the national system, the decisions of the international court can be rendered ineffectual.[197]

Despite the acknowledgement by various stakeholders of the need for holistic reform that brings together actions across the different levels of governance in a complementary manner, this has not been reflected in the current reform agenda or in the existing literature.

The reform of the various aspects of international investment law is taking place in a fragmented manner, at different levels of governance with little to no regard of how these reform efforts will interact with and complement each other to achieve integrated and holistic reform. While advocating for the inclusion of other levels of governance in the reform effort, the existing literature does not set out how this inclusion can be achieved and how the different levels of governance will interact with each other. It is therefore necessary to identify ways in which the other levels of governance can be effectively incorporated into the architecture of investment dispute settlement.

This thesis seeks to make a contribution that shows how holistic reform of international investment law can be undertaken that considers both the substantive and procedural aspects as well as the incorporation of other levels of governance into the reform effort. This thesis goes beyond the recommendations made in the above literature by focusing on the modalities of how the national and other levels of governance can be practically incorporated into the reform of international investment law. It sets out the processes that can be introduced at the sub- national, national and international levels to advance the achievement of sustainable development that will work together with the sustainable development provisions already being incorporated in IIAs and fill in the gaps where these provisions have not been incorporated or taken effect. It will also practically set out the roles of the different levels of governance and how they will interact with each other to enhance coherence across the different levels and limit contestation thereby achieving holistic reform that addresses the concerns raised not only with the current system, but the current reform efforts as well.

It is important for governments to have policies that not only attract FDI but can harness the advantages of FDI by enhancing its contribution to sustainable development through the establishment of linkages between the national and international level that can complement each other and can bridge any gaps that exist so as to strengthen governance capacity to

[197] See for example Gwen P. Barnes 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal.*

improve environmental and social conditions while at the same time promoting and protecting foreign investment.[198] This will be achieved by making use of a multilevel governance framework to show how the different levels of governance can come together to achieve reform of international investment law that addresses the concerns that have been identified, enhances the achievement of sustainable development and enhances coherence among the different levels of governance while at the same time retaining protection of foreign investment.

## 1.7 RESEARCH METHODOLOGY

The research necessary for this thesis will be primarily done through desktop and textual research. Reliance will be placed on primary and secondary sources of law. Primary sources consulted include but are not limited to treaties, IIAs, conventions and arbitral awards and cases. Secondary sources relied upon will include but not limited to scholarly articles, books and working papers. The research will focus on analysing the existing literature and sources in a bid to identify the gaps that exist in the current international investment law system and reform efforts and develop the model of reform that will effectively and adequately address these issues.

The Working Group III process is important to discussions on reform of international investment law. However, as the main aim of the study is to achieve holistic reform that takes into account a wide range of considerations, the study will also canvass issues that are developing outside of and parallel to the Working Group III process, as well as some issues that are beyond the scope of Working Group III. This is necessary to be able to consider aspects such as substantive reform and sustainable development which are currently not being addressed by Working Group III as well as to consider reform efforts that are taking place outside of the Working Group III procedure for example at a regional and national level.

The concerns raised against international investment law are global and affect both developing and developed countries. While the recommendations made herein are designed to apply across the board, a large portion of the concerns may disproportionately affect developing countries and vulnerable communities. As such, the concerns against the international investment law system and reform efforts are viewed through this lens and the recommendations made are

[198] Alex Berger & Sebastian Gsell How Can an International Framework for Investment Facilitation Contribute to Sustainable Development? German Development Institute, 2019, 15/2019 1–4 at 1.

geared at ensuring their compatibility with the needs of developing countries and vulnerable communities.

When making recommendations for the reform of international investment law an anti-reformist stance is taken. As noted by Heath,

> 'international investment law conversations are reformist in that they aim to improve, ameliorate, legitimate and even advance the underlying system…The debates are dominated by reformists rhetoric and techniques, which do nothing to disturb the underlying system of special rights for special people and which even seek to defend that system from challenges.'[199]

In order to address this, Heath identifies a non-reformist approach to the discussions on reform that is not limited by the structure of the existing system, conceived in terms of what should be. [200] The non-reformist approach advocates for radical reform that shrinks the system doing harm, shifts power or focus to those most affected and relies on modes of economic, political and social organisation that contradict prevailing arrangements and gestures at new possibilities.[201] This thesis attempts to provide a non-reformist approach to the reform of international investment law that seeks to go beyond the current reform efforts and propose ways in which the 'radical' reform necessary for international investment law can be achieved.

The recommendations made in this thesis will be of particular interest and importance to policy makers and treaty negotiators across all levels of governance and have implications for a wide range of stakeholders across the international investment law system beyond states and foreign investors.

## 1.8 CHAPTER BREAK-DOWN

Chapter 1 (the present chapter) provides a background and sets the context of the research. It identifies the problem to be addressed, sets out the objectives of the research and the research questions to be answered. It highlights the theory that will sustain this study, sets out the research methodology and shows the relevance of the research. Lastly, it provides an overview of the contents of the coming chapters.

Chapter 2 provides a brief history on the development of international investment law. It sets out the procedural and substantive concerns that have arisen in international investment law that have necessitated the need for reform. Thereafter, the chapter sets out the different reform

[199] Heath, supra n 107 at 565,589.
[200] Ibid at 590.
[201] Ibid.

efforts and provides an assessment of how and why the reform efforts will have limited effectiveness in addressing the concerns raised against the international investment law system.

Chapter 3 introduces the multilevel governance framework that will be used to achieve reform. In particular, it shows how international investment law and in particular ISDS, is an incidence of global administrative law, making it compatible for use with the multilevel governance framework. It also sets out the principles of multilevel governance that will be used in proceeding chapters to achieve reform.

Chapter 4, using the tools illustrated in Chapter 3, assesses how the substantive aspects of international investment law can be reformed using the multilevel governance framework. It will illustrate the changes that need to be made to the substantive provisions of IIAs to bring them in line with the tenets of multilevel governance theory thereby addressing the substantive concerns that have been identified. The chapter also sets out how the national level of governance can be incorporated into the reform of substantive law and work together with the international level to achieve meaningful reform.

Chapter 5 seeks to determine how the competence to settle investment disputes should be allocated between the national and international levels of governance. It uses the multilevel governance principles identified in chapter 3 to allocate the competence to resolve investor state disputes between the national and international levels of governance. It sets out the specific roles of the national and international levels of governance and discusses how the two levels can work together for the resolution of investment disputes.

Chapter 6 identifies the mechanism for dispute settlement that should be adopted at the international level. It advocates for the use of a MIC and proposes features that can be incorporated into the design of the MIC so that it does not perpetuate the same issues that have arisen with the current system.

Chapter 7 draws conclusions for the thesis. It sets out the main findings that have been made in previous chapters and identifies the implications of the research and recommendations. It identifies areas of future research, the limitations of the study and provides a conclusion to the research.

# CHAPTER 2: CHALLENGES FACING THE INTERNATIONAL INVESTMENT LAW SYSTEM

## 2.1. INTRODUCTION

The aim of this chapter is to contextualise and elaborate on the problem identified in chapter 1, which is the lack of an inclusive and coherent approach to the reform of international investment law that addresses a wide range of concerns that have been identified as plaguing the system. Despite the extended use and proliferation of IIAs, with over 3000 concluded IIAs, international investment law has come under scrutiny in the past few years. This scrutiny has arisen with regard to both the substantive and the procedural aspects of international investment law, with the system being described as undergoing a legitimacy crisis. This has led to calls for the reform of the international investment law system. In response to the need for reform, states have started to take steps across the various levels of governance to address these concerns. These steps range from reforming the substantive provisions in IIAs by incorporating an express right to regulate for states, including sustainable development provisions, incorporating investor obligations and modifying and clarifying existing investor protections. States have also started taking steps to reform the dispute settlement provisions by completely or partially removing recourse to ISDS, reform of the existing system of international arbitration or the creation of a permanent investment court with or without an appeals mechanism. Running concurrently with these efforts are discussions taking place under the auspices of UNCITRAL Working Group III, where states and other stakeholders are discussing possible options for the reform of ISDS.

All the efforts for reform are seemingly taking place independently of each other. In order to effectively replace the current system, a more coordinated approach is required that will not result in a fragmented international investment law system. The chapter intends to illustrate how the current approach to reform undermines the possibility of achieving coherent and holistic systemic reform that can replace the traditional ISDS system in a manner that effectively addresses the concerns of stakeholders. To do this, the following sections will contextualise the discussion by providing a brief history of the development of international investment law in section 2.2. This is important as some of the concerns that have arisen with regard to the current international investment law framework can be attributed to the inherent deficiencies that existed prior to its formation and are now manifesting themselves in various forms. The section will not attempt a thorough historical analysis of the investment regime (as that is beyond the scope of this thesis) but rather attempts to set out key historical aspects of the regime that are of importance to the subject matter of the thesis. Section 2.3 will set out the concerns that have been identified by Working Group III as being the focus of the international reform efforts. Section 2.4 will provide an overview of the reform options that are currently being advanced before Working Group III and other fora. Section 2.5 will set out and illustrate the challenges facing the reform effort and show how and why, the reform effort in its present state may be ineffectual at achieving reform. Section 2.6 will highlight the consequences that arise from the deficiencies in the reform effort. Finally, section 2.7 concludes by giving a brief overview of the salient issues raised in the chapter and pave way for the recommendations that will follow in the proceeding chapters to address the problems identified in this chapter.

## 2.2. HISTORICAL BACKGROUND

While the exact point of the development of international investment law is still not fully clear, some scholars believe that it began prior to the 17th century[202] and that a complete study of its development is a complicated exercise[203] which is beyond the scope of this thesis. Of importance for this thesis, is that prior to the development of the current international investment law framework, there were no concrete rules that applied to foreign investments. The substantive rules of international investment were therefore governed by customary international law (CIL) and the rules on diplomatic protection. Despite the fact that developed countries advocated for the use of CIL, it did not address issues of importance to investors such as the right to make money transfers and it was vague and subject to various interpretations.[204] As a result, there were significant disagreements between developed and developing countries as to the scope and content of protection of foreign investments. For one, developed countries, who were essentially capital exporting states advocated for the minimum standards of protection provided in CIL. These standards (especially with regard to the contentious issue of expropriation) provide that the taking of property of aliens is improper under international law if it is not for a public purpose, if it is discriminatory and if it is without the provision of just

[202] Sarah M Alshahrani 'What Should We Know About the Origins of International Investment Law?' (2020) 48 *International Journal of Legal Information* 122–31 at 123.
[203] K Miles, 'Origins of international investment law' in K. Miles (ed) *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013) 19.
[204] Jeswald W Salacuse 'The Emerging Global Regime for Investment' (2010) 51 *Harvard International Law Journal* 427–74 at 437.

compensation. [205] This CIL standard did not expand on what constituted just compensation and as such diverging views developed between states. Developed (capital exporting) states advocated for the use of the Hull formula. The Hull formula provides that compensation must be prompt- paid as soon as the expropriation is made without any undue delay, adequate- being an amount equal to the total value of the expropriated investment and effective in that it must be freely transferrable and in exchangeable currency.[206]

This formulation was however rejected by developing (capital importing) states. With the process of decolonisation, developing countries asserted that they played no part in the development of western international law and believed that this body of law could be used by developed countries to maintain their poverty.[207] These newly independent states rejected the concept of minimum standards of protection in international law and asserted that any measures taken by a state as a legitimate exercise of its national sovereignty could not be limited or qualified in the absence of the agreement of the sovereign state.[208] They further held that their sovereign right to restructure their political and economic orders within their respective countries was a major aspect of the decolonisation process, a process which would undoubtedly be diminished by compliance with the CIL doctrine of state responsibility. [209] They advocated for the Calvo doctrine, which gained prominence in Latin American states. This doctrine was based on the following premises: equality, sovereignty and independence and that with states being equal, sovereign and independent they have the right to expect non-interference from other states and that aliens have to abide by the local laws of the State where the investment is made without invoking diplomatic protection.[210] The Calvo doctrine resulted in the creation of the Calvo clause which provided for the use of local remedies for the settlement of investment disputes and by so doing, excluded the application of the customary international law minimum standard of protection as well as the Hull formula, unless this formed a part of the domestic law of the host state. [211]

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[205] AO Adede, 'International Law and Property of Aliens: The Old Order Changeth' (1977) 19 *Malaya Law Review* 175, 175.
[206] Suzy H 'Nikièma Performance Requirements in Investment Treaties, International Institute for Sustainable Development' (IISD), 2014 9.
[207] Salacuse, supra n 204 at 438.
[208] Samuel KB Asante 'International Law and Foreign Investment: A Reappraisal' (1988) 37 *The International and Comparative Law Quarterly* 588–628 at 594.
[209] Ibid.
[210] Manuel R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' 33 *Marquette Law Review* 16, 206.
[211] Ibid. See also Amos S Hershey, 'The Calvo and Drago Doctrines' (1907) 1 *American Journal of International Law* 26.

Despite many attempts, the inability between developed and developing countries to agree on the scope and content of the substantive protections of the international investment regime led to failures at the adoption of a multilateral treaty governing foreign investments. The Harvard Draft of 1929 failed due to disagreements between developed and developing countries on the notions of equal treatments and minimum standards of protection.[212] Attempts were also made through the Havana Charter of 1948 which contained provisions that sought to balance the interest of the host state and those of foreign investors.[213] The adoption of the Havana Charter was unsuccessful as it received significant opposition from business and industry which led to important capital exporting states such as the United States and others not ratifying the agreement.[214] Thereafter, the Abs Shawcross Draft of 1959 was taken up by the Organisation of European Economic Co-operation (now the Organisation for Economic Co-operation and Development OECD) which developed it into the OECD Draft Convention on the Protection of Foreign Property of 1962. [215] This Convention was never adopted as it faced opposition from less developed South European states[216] and governments in more developed states realised that they could get greater investment protection standards in BITs.[217] The Multilateral Agreement on Investment also failed due in part to political opposition generated by NGO's who critiqued the lack of participation of developing countries in the negotiations, the one sided nature of the agreement, the lack of accountability of multinational corporations for their conduct and largely because Congress in the United States did not want to transfer powers to such a body.[218] The failure at multilateral level led to the development of agreements at bilateral level.

While IIAs have grown in prominence and have become the most important tools in international investment law, they actually did not address the tensions or concerns that led to their development. Concluding and sustaining international treaties requires the existence of a

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[212] Ahmad Ghouri, 'Interaction and Conflict of Treaties in Investment Arbitration International' *Kluwer Arbitration Law Library* (2015) 32 2015 18.

[213] United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4.

[214] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-1-b&chapter=10&clang=_en The conditions for the entry into force of the Havana Charter, set forth in its article 103, were not fulfilled within the prescribed time-limit. No instrument of acceptance was deposited with the Secretary-General.

[215] Peter Muchlinski T 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *The International Lawyer* 1033–53 at 1035.

[216] Ibid.

[217] Taylor St John, 'The Creation of Investor–State Arbitration' in Thomas Schultz & Federico Ortino(ed) *The Oxford Handbook of International Arbitration,* Oxford Handbooks (2020).

[218] Muchlinski, supra n 215 at 1049.

bargain between parties in which both parties benefit.[219] Where an IIA is concluded between two developed states, each of whose nationals may expect to invest in the other state, based on the principle of reciprocity and mutual protection, one state promises to protect the investors of the other state in return for the protection of its own investors.[220]

However, in the context of an IIA between a developed and developing country, the promise of mutual reciprocity did not apply as the likelihood of the developing country having investors with the capacity to invest in the developed country was highly unlikely considering the economic state of most developing states. The question therefore arises as to why developed countries entered into IIAs.

According to Salacuse,[221] the grand bargain between developed and developing countries was the promise of protection of capital in return for the future prospect of more capital. As such, developing countries largely entered into IIAs in hopes that it would lead to them receiving greater FDI. Guzman notes that developing states faced a "prisoners dilemma" in which it was optimal for developing states as a whole to reject the Hull formula on the one hand, and on the other, that the individual developing country was better off signing BITS so as to gain an advantage in the competition to attract foreign investors.[222] Alvarez on the other hand, notes that this description of international investment law, as being an instance of 'law of the empire' comparable to 19th century capitulation agreements meant to favour developed countries is not accurate within the context of present international investment law.[223] Alvarez notes that, in present international investment law, FDI flows are not unidirectional but flow equally between states. For example, USA, Brazil, Russia, China and South Africa, who are considered to be developed countries, are leading recipients and exporters of capital.[224] He further notes that developed countries, share the same 'love-hate relationship when it comes to foreign investment' as with many other countries.[225]

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219 Salacuse, supra n 204 at 440.
220 Asante, supra n 208 at 440.
221 Salacuse, supra n 204 at 441.
222 Asha Kaushal 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime Note' (2009) 50 *Harvard International Law Journal* 491–534 at 502.
223 Jose E. Alvarez, 'Contemporary International Law: An 'Empire of the Law' or 'Law of the Empire'' (2009) 24 *American University International Law Review* 811 827.
224 Ibid 832.
225 Ibid.

This illustrates that the concerns that have arisen regarding the 'grand bargain' of international investment law are no longer just limited to developing countries, but are equally affecting developed countries as well.

In addition to the lack of effective substantive rules, there was also no effective forum for the resolution of investment disputes. Investors did not trust the local courts due to concerns regarding perceived or actual bias, inefficiency of local courts, corruption and state immunity.[226] Investors could not make use of the courts in their home states as these courts would not have the jurisdiction to hear the matter and in the event that they did, the host state would likely be able to raise the defence of sovereign immunity.[227] Investors had to rely on diplomatic protection from their home states to receive any redress for any allegedly wrongful act committed by the host state. Diplomatic protection refers to an action taken by a state against another state in respect of an injury to the person or property of its national caused by an international wrongful act attributable to the latter state.[228]

Under diplomatic protection, the home state espouses the claim of its national and pursues it in its own name.[229] Relying on diplomatic protection, the home state could take a variety of measures including negotiation, mediation, consular actions, reprisals, severance of diplomatic relations, economic pressure and the threat of the use of force.[230] The process of diplomatic protection was more political than legal and there were numerous limitations that applied to its use.[231] In order to be applicable, the investor must have been a national of the state seeking to invoke diplomatic protection,[232] must have exhausted local remedies,[233]and even if these requirements were met, the invocation of diplomatic protection was at the discretion of the home state government who could choose whether or not to espouse the claim and also choose the appropriate method of compensation which decision was often directed by the political and

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[226] History and Limitations of the Traditional System of Resolving Investment Disputes' in Borzu Sabahi, Noah Rubins et all Investor State Arbitration 2nd ed (2019) 13 15.
[227] Ibid 22.
[228] Article 1 United Nations Draft Articles on Diplomatic Protection 2006 available at https: www.refworld.org/docid/525417fc4.html
[229] Christoph Schereuer, 'Investment Protection and International Relations' in A Reinisch & U. Kreibaum (eds) *The Law of International Relations* Liber Amicorum Hanspeter Neuhold 2007 345.
[230] Ahmad Gouri *Interaction and Conflict of Treaties in Investment Arbitration,* (2015) 14.
[231] Salacuse, supra n 204 at 439.
[232] This requirement caused some difficulty in respect of juristic persons that had subsidiaries or parent companies registered in other states.
[233] A process which could be time consuming and costly.

other needs of the home state and not necessarily the effective redress for the injured investor.[234]

This led to the development of a unique dispute settlement mechanism in the form of ISDS. ISDS allows foreign investors to unilaterally invoke a rule- based dispute settlement process through which independent tribunals are given the power to authoritatively decide the investor's dispute with a host state.[235]

The failure to agree at a multilateral level on the protections to be afforded to foreign property, the inadequacy of the dispute settlement mechanisms available, changes in the historical context, decline in official development assistance and restructuring that was required by international financial institutions contributed to the development and use of IIAs and of the current international investment law system.[236] Despite developing countries willingness to enter into and sign IIAs, imperialism was a contributing factor in shaping the current international investment law system. We therefore see that IIAs did not actually address the tensions that existed prior to the international investment law system but rather, capital exporting states took advantage of the 'prisoners dilemma' and imposed their views on investment protection on capital importing states in the form of binding international obligations for the host state[237]. The investment disputes that have been determined by tribunals have revealed the tensions in the architecture of IIAs including the discord between preserving sovereignty and attracting investments as well as concerns over the scope of treaty obligations.[238] These tensions can be traced back to initial tensions that caused the failure of multilateral treaty negotiations that resulted in the formation of IIAs. [239] In this vein, Abott *et al* note that the problems that have been revealed in the investment regime seem to be the unintended consequences of broader economic trends.[240] ISDS problems can be viewed as the

[234] Won-Mog Choi, 'The Present and Future of the Investor-State Dispute Settlement Paradigm' (2007) *Journal of International Economic Law* 10 725 726; Francis J Nicholson, 'The Protection of Foreign Property Under Customary International Law' *Boston College Industrial And Commercial Law Review* 26.
[235] Jason Yackee 'Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations' (2019) 59 *American Journal of Legal History* 71–110 at 71.
[236] Kaushal, supra n 222 at 502.
[237] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule takers or Rule makers: A new look at African bilateral investment treaty practice' NCCR Trade Working Papers No.7 June 2016 1illustrates how most provisions in IIAs originated from capital exporting states with capital importing states having very little say and negotiating power to frame the content of the IIAs they signed.
[238] Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' 495
[239] Ibid.
[240] Roderick Abott, Frederik Erixon and Martina Francesca Ferracane, 'Demystifying Investor-State Dispute Settlement' ECIPE Occasional Paper 5/2014 6.

inevitable outcomes from the widely different situations that existed in different countries in respect of the laws of contract and property rights.[241] These tensions were acknowledged in the case of *Banco Nacional de Cuba v Sabbatino*[242] where the court held that,

> '[t]he disagreement as to the relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting states and between the social ideologies of those countries that favour state control of a considerable portion of the means of production and those that adhere to free enterprise.'[243]

These tensions still ring true today and how they have played out within the current international investment framework will be illustrated below.

## 2.3. CONCERNS IDENTIFIED WITH INTERNATIONAL INVESTMENT LAW BY WORKING GROUP III

One of the most prominent global initiatives to address the need for reform of the international investment law system has been undertaken by Working Group III. The discussions under Working Group III began in 2017 with plans to have concluded its reform process by 2025. Working Group III was established with the broad mandate to work on the possible reform of ISDS.[244] In fulfilment of its mandate, Working Group III would proceed to i) first identify and consider concerns regarding ISDS; ii) second, consider whether reform was desirable in light of any identified concerns; iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[245] Pursuant to its mandate, Working Group III called on interested parties and stakeholders to make submissions in relation to the work of Working Group III covering issues related to the procedure to be followed by Working Group III as well as issues to be discussed.

In fulfilment of the first leg of its mandate, Working Group III identified the following concerns regarding ISDS.

### *2.3.1. Lack of consistency, coherence, predictability, and correctness of arbitral decisions by tribunals*

[241] Ibid.
[242] 376 US 398 (1963) @ 428.
[243] *Banco Nacional de Cuba v Sabbatino* @ 428.
[244] Official Records of the General Assembly. Seventy-second session, Supplement No.17 (A/72/17) para 263 and 264.
[245] Ibid.

Although IIAs have made significant strides in providing investor protections within the investment system, they have not brought much clarity to the scope and content of these protections for the purposes of their application in resolving investment disputes. Despite the fact that most IIAs, contain similar provisions for the protection of investment, the scope and content of these provisions have been decided differently by different tribunals. One of the core characteristics of the international investment law system is the existence of over 3000 IIAs,[246] which co-exist and create legally binding norms on a mostly bilateral basis.[247] In addition to this, the investment regime is not organised around a single multilateral treaty or central organisation like the WTO or the UN.[248] It is decentralised and is composed of a multitude of bilateral, regional and multilateral treaties, customary international law, domestic laws, contracts and insurance schemes as well as a diversity of arbitral institutions and domestic courts and investment agencies all without a central authority.[249] This has bred inconsistencies within the system through inconsistent interpretations of the substantive provisions that are provided for in the IIAs . The occurrence of inconsistent decision making has dominated the discourse regarding the legitimacy crisis of the international investment law system.[250] The inconsistency in arbitral decisions has occurred in three ways. [251] Inconsistency arises when similar cases are decided differently. For example, in cases involving similar facts, related parties, and similar investment rights. This occurred in the cases of *CME Czech Republic B.V. v the Czech Republic*[252] where the arbitration was instituted by the investor itself (CME) under the Netherlands-Czech BIT and *Ronald S. Lauder v the Czech Republic*[253] where the arbitration was instituted by CME's shareholder (Lauder) under the USA-Czech BIT.

[246] See UNCTAD Investment Policy Navigator https://investmentpolicy.unctad.org/international-investment-agreements (accessed 19 February 2021).
[247] Jaemin Lee, 'Mending the wound or pulling it apart? New proposals for international investment courts and fragmentation of international investment law' (2018) 39 N*orth Western Journal of International Law and Business* (2018) 21.
[248] Joost Pauwelyn, At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29 *ICSID Rev. Foreign Inv. L. J.* 378.
[249] *Ibid.*
[250] See generally, Katharina Diel-Gligor, 'Problem analysis: Inconsistency in ICSID investment jurisprudence', in Towards Consistency in International Investment Jurisprudence; Charles N. Bower & Jeremy K. Sharpe, 'Multiple and conflicting international arbitral awards' (2003) 4 *J. World Inv & Trade* 211.
[251] Susan D Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' 108.
[252] UNCITRAL Partial Award 13 September 2001, Final Award 14 March 2003.
[253] UNCITRAL Final Award 13 September 2001.

Second, inconsistencies can occur in cases involving similar commercial situations and similar investment rights. This occurred in the matters of *SGS Société Generale de Surveillance S.A v Islamic Republic of Pakistan (SGS v Pakistan)*[254] and *SGS v Republic of the Philippines*[255].

Thirdly, inconsistencies can arise in cases involving different parties, different commercial situations and the same investment rights.[256] This occurred prominently in the NAFTA arbitrations with regard to the meaning of fair and equitable treatment as provided for in Article 1105 of NAFTA. The debate with regard to the application of this fair and equitable treatment provision has been in relation to whether this provision provides a guarantee of minimum treatment under international law or whether it is an "additive" stand alone right with independent meaning.[257] See for example the decisions of the court in *S.D Myers Inc. v Canada,* [258]*Pope & Talbot Inc. v Canada,* [259]*Mondev v United States of America,*[260] and *Glamis Gold v United States of America.* [261]

The above scenarios illustrate the manner in which the substantive provisions contained in IIAs have been inconsistently interpreted by arbitral tribunals. While this thesis does not undergo an analysis of all the differently decided cases (as that is beyond the scope of this thesis), the above cases have been used to illustrate how arbitral tribunals have interpreted the substantive provisions contained in IIAs differently and how these inconsistent interpretations have a negative impact on the investment regime. In commenting on the impact of conflicting decisions with respect to the CMS and Lauder arbitrations, Jeremy Carver noted that the result, 'brings the law into disrepute, it brings arbitration into disrepute-the whole thing is highly regrettable.'[262] Inconsistency creates uncertainty and damages the legitimate expectations that are held by host states and investors.[263] Investors may structure their investments around the protections offered by IIAs but if the content and scope of these protections is difficult to

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[254] *SGS Société Générale de Surveillance S.A v Islamic Republic of Pakistan* (SGS v Pakistan) ICSID Case No. ARB/01/13.
[255] *SGS Societe Generale de Surveillance S.A v Republic of the Philippines* (SGS v Philippines) ICSID Case No.ARB/02/06 Jan 29, 2004.
[256] For example, see the NAFTA cases with regard to the meaning of the fair and equitable treatment standard.
[257] Ibid at 1575 see also Andrew P. Tuck 'The "fair and equitable" treatment standard pursuant to the investment provisions of the U.S Free Trade Agreements with Peru, Colombia and Panama' (2010) 17 *Law and Business Review of the Americas* 16 385.
[258] *S.D. Myers Inc. v Canada*, Merits, 8 ICSID Report 4, (13 November 2000).
[259] IIC 192 (2000) (OUP reference).
[260] *Mondev v United States of America* ICSD Case No. ARB (AF)/ 99/2.
[261] *Glamis Gold v United States of America*, UNCITRAL Final Award May 14, 2009.
[262] Franck (n58) at 1559.
[263] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', supra n 251.

ascertain or is shrouded in uncertainty, it makes it difficult for investors to be sure of the extent of the protections that they may receive. Likewise, host states' activities may be determined by the need to ensure that in enacting policy measures they do not violate their treaty obligations. However, if they are unable to determine the extent of their treaty obligations with sufficient certainty, then it becomes difficult for them to know which regulatory measures to enact and which would constitute a violation of their treaty obligations, opening them up to the possibility of paying large awards in compensation. The concern of consistency in decision making is grounded in the rule of law imperative that like cases be treated alike. For example, in the context of the International Court of Justice, Sir Hersch Lauterpacht noted that,

> '[t]he Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice…'[264]

Despite setting out to create clarity and predictability within the international investment law system,[265] IIAs created open-ended investment protections that were subject to wide interpretations by arbitral tribunals. The lack of guidance within the treaty itself by failing to provide definitive definitions of key terms and the lack of binding precedent in arbitral decision making has left much room for the development of inconsistent decision making by tribunals.

An extension of the concern related to inconsistency is that of multiple or parallel proceedings. Multiple proceedings occur when the same or similar parties, pursue dispute settlement in various fora either simultaneously or successively, seeking to maximise their chances of a positive outcome.[266] The problem of multiple proceedings was raised by various countries in their submissions before Working Group III including South Africa, who noted that many indirect claims are associated with abusive processes such as forum shopping.[267] The UNCITRAL Commission has also identified the importance of dealing with the issue of multiple and concurrent proceedings.[268] In April 2015, the UNCITRAL Secretariat noted that,

[264] Hersh Lauterpacht *The Development of International Law by the International Court* (1982) 14.
[265] Fox (n 51) 231.
[266] Julia Richter 'The two problem pillars of multiple proceedings in investment arbitration: why the abuse of process doctrine is a necessary remedy and requires focus in UNCITRAL'S ISDS reform' (2023) 14 *Journal of International Dispute Settlement* 407–24 at 408.
[267] UNCITRAL A/CN.9/WGIII/W. P 170 9 August 2019 para 9.
[268] UNCITRAL, 48th session, Concurrent Proceedings in Investment Arbitration – Note by the Secretariat, UN Doc. A/CN.9/848 (17 Apr. 2015), para. 11.

> 'The facts leading to investor state disputes may give rise to investment treaty arbitration as well as other proceedings between the same or closely related parties regarding those facts before other fora. As the rights of investors may be protected under different types of instruments, some investors tend to initiate proceedings in different forums to ensure that their rights are taken into account or to maximise their chances of success, an effect that was not foreseen by states when concluding investment treaties.'

Working Group III also noted that the current ISDS system lacks adequate mechanisms to address concerns arising from multiple proceedings,[269] and that reforms are required to address these concerns.[270]

The problem of multiple proceedings as it arises in investor state arbitration was aptly laid out by Gaillard when he noted that,

> '…The arbitrations were brought against our clients, a State and two state owned companies for the benefit of the same interests. Shareholders at different levels of a chain of companies initiated two adjudicative investment arbitrations against the state under separate investment treaties. The locally incorporated company sought the same relief as its shareholders in two duplicative commercial arbitrations in different fora seeking to multiply their chances of obtaining recovery. These related parties dragged our clients through a series of four full blown proceedings before four different tribunals each with two-week hearings involving essentially the same facts and witnesses.'[271]

This was the case in the CME and Lauder arbitrations above. In both matters Czech Republic attempted to raise the issue of *lis pendens* and *res judicata* in the context of the parallel proceedings initiated by CME. In the CME matter, the tribunal applied the triple identity test requiring the same parties, the same cause of action and the same subject matter to come to the conclusion that,

> 'The parties in the [*Lauder*] Arbitration differ from the parties in this arbitration. Mr. Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd Group is the Claimant. The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical... Because the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated.'[272]

The tribunal in Lauder held that,

> 'The Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action... [N]o possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e., that the Czech Republic breached or did not breach the Treaty and is or is not liable for damages towards Mr. Lauder.'[273]

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269 UNCITRAL Working Group III A/CN9. /WGIII/WP.193 22 January 2020 para 17.
270 UNCITRAL Working Group III A/CN.9/WGIII/WP 1044 para 53.
271 Emmanuel Gaillard 'Abuse of Process in International Arbitration' (2017) 32 *ICSID Review* 1–21 at 1.
272 *CME v Czech Republic* para 432–33, at 182.
273 *Lauder v Czech Republic* para 77 at 51.

In applying the triple identity test in this strict manner, the tribunals failed to consider that the Dutch holding company CME, was actually owned by the American shareholder Mr. Lauder. The tribunal also failed to consider that while the violations alleged arose from different BITs, the provisions in those BITS were identical and sought to protect the same interest.[274] So while the parties and underlying BITs may have been different in form, but in substance, they were the same. [275]

This occurrence arises in investment arbitration because the nature of investment arbitration allows for investors and shareholders to bring separate claims against a state arising from essentially the same conduct seeking the same or similar relief. Instead of a single claim brought by or on behalf of the company, claims can be brought by different shareholders for reflective loss, along with a claim by the company for its direct injury thereby leading to multiple recovery.[276] Investor state arbitration tribunals have found that shareholders are entitled to recover reflective or indirect loss arising from harm done to its company in addition to the right of the company to recover its own loss.[277] Several investment treaty tribunals have adopted a formalistic application of the triple identity test to stress dissimilarities between disputes and parties in order to avoid co-ordination of disputes arising from a restrictive view of the tribunals own mandate to resolve a dispute between two parties without regard to what other fora may decide.[278]

Multiple proceedings have a detrimental effect on the dispute settlement system as a whole and the parties in general in that:[279]

- It leads to unfairness and is prejudicial to the Respondent because the Respondent state has to defend multiple proceedings based on the same measure and the same economic damages.
- It increases the likelihood of multiple recovery or double jeopardy where two or more separate tribunals find in favour of similar claimants in similar matters.

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[274] Pedro J Martinez-Fraga & Harout Jack Samra 'The Role of Precedent in Defining Res Judicata in Investor–State Arbitration' (2012) *International Law* at 435.
[275] Ibid.
[276] Richter, supra n 266 at 410.
[277] David Gaukrodger 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice' (2014) 2014/03 *OECD Working Papers on International Investment* 1–75 at 8.
[278] Michal Swarabowicz* 'Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System' (2017) 8 *Journal of International Dispute Settlement* 280–302 at 281.
[279] UNCITRAL Working Group III Secretariat Note 2014, Gaillard, supra n 271 at 6; John David Branson 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration' (2021) 38 *Journal of International Arbitration* 187–214 at 200.

- It increases the risk of inconsistent decisions where two or more tribunals come to different conclusions in similar matters.
- It increases the costs and duration of proceedings.
- Promotes abusive practices such as forum shopping.
- Undermines the efficient administration of justice.

In this regard, scholars have noted that there is a need for a sensible and uniform approach in dealing with the issue of multiple proceedings.[280]

The perceived lack of consistency has at least in part been attributed to the fact that each tribunal which is constituted to determine a claim brought under ISDS procedures is typically composed to decide one particular dispute, rather than multiple disputes, and there are no formal rules to co-ordinate the different proceedings that have been instituted before different arbitrators. This undoubtedly has had a negative effect on the reliability, effectiveness and predictability of the ISDS system and has ultimately affected the credibility of the system.[281]

The combination of the proliferation of different IIAs, the lack of an institutional core or central authority, the ad hoc final nature of the dispute settlement procedure and the interplay between private and public interest implications of investment arbitration have exacerbated any real or perceived concerns with regard to the consistency, predictability and correctness of the dispute settlement process which has necessitated the need to re-evaluate the dispute settlement procedure to counter these concerns.

### *2.3.2. Arbitrators and decision makers*

The two main issues of concern here relate to the perceived or alleged lack of guarantees for independence and impartiality amongst arbitrators and the lack of diversity in the appointment of arbitrators.[282]

Independence and impartiality are the cornerstone of any adjudicatory mechanism, whether domestic or international, that is based on the idea of the rule of law. Independence and impartiality are recognized widely as principles of national law, human rights law, and the law

[280] Aman Prasad *Res Judicata- A Boon or A Bane for International Investment Tribunals?* (2020) at 11, available at: https://papers.ssrn.com/abstract=3585482 (accessed 19 September 2023); Martinez-Fraga & Samra, supra n 265 at 435.
[281] Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (2017) *CIDS Supplemental Report*.
13.
[282] Maria Nicole Cleis*, The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches and Improvement Suggestions* (2017) 189; J Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 *ICSID Review* 339.

governing international adjudication, and therefore constitute part of the general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[283]

Due to the nature of investment arbitration, in that adjudicators are appointed by the parties, there have been concerns raised that this creates the impression of the likelihood of bias in decision making. As arbitrations can only be initiated by investors, critics are of the opinion that arbitrators would have a vested interest in perpetuating the regime and as they rely on investors for future work or appointment, arbitrators would be ultimately inclined to cater to the investor's interests.[284] This is coupled by the fact that, the system of party appointment allows parties to select arbitrators who, as a result of their views, previous decisions and affiliations are more sympathetic to their cause, thereby increasing the likelihood of bias and partiality.[285] Also problematic is that within the system and at any given time, arbitration practitioners often play the dual role of arbitrator and counsel in different proceedings. This raises the possibility of a conflict of interest that has become known as issue conflict.[286] All these factors, create an environment especially among other non-participant stakeholders of the investment regime that the arbitrators may be unable to uphold the principles of impartiality and independence that are fundamental for the proper functioning and credibility of any adjudicatory mechanism.

Linked to the criticisms regarding the arbitrators in investment arbitration is the additional criticism of the lack of diversity in the arbitrators who often hear investment disputes. The lack of diversity among adjudicators is particularly notable in international investment law, where only two of the twenty-five most influential arbitrators are women, twenty-two are from either North America or Europe and of the other three one is from New Zealand, one from Chile but made his home in London, and the third is from Costa Rica.[287] Investment arbitration is dominated by arbitrators from Western states.  As of 1 August 2018, only 35 per cent of 695 individual arbitrators who have sat in at least one investment case were from non-Western states (as non-Western is defined by the United Nations).[288] Half of non-Western arbitrators

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[283] Report of the Special Rapporteur Param Cumaraswamy, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc E/CN.4/1995/39, para 34.
[284] Kaufman Kohler and Potesta (n 142) 12.
[285] Julian Arato, Yas Banifatemi, Chester Brown et al (n 141).
[286] See in general for a discussion on issue conflict The ICCA Reports No. 3 'ASIL-ICCA Task Force Report on Issue Conflicts in Investor State Arbitration' (2016) available at *https://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.*
[287] Andrea K. Bjorklund, Susan Franck, Chiara Giorgetti et al 'The Diversity Deficit ISDS' Academic Forum Working Group 5 Paper (2019) available at *https://www.cids.ch/academic-forum-concept-papers.* (accessed 15 April 2020).
[288] Ibid at 4

are from Latin America and the Caribbean and only 2 per cent of arbitrators and conciliators have been from Sub-Saharan Africa.[289]

The investment regime has been criticized extensively for its neo-colonial basis and perpetuation of the values of the Global North to the exclusion of others.[290] If the norms applied by decision making bodies are perceived as being one sided and being informed by a dominant culture, and the primary interpreters and decision makers of those norms are from that same dominant culture, there exists the likelihood of feelings of exclusion being felt by those who are not part of the dominant group.[291]

There has been a great deal of concern that tribunals are biased against developing states, and these perceptions remain and are exacerbated by the extent to which arbitrators are perceived as outsiders.[292] While there is currently little empirical evidence to suggest that majority of arbitrators lack independence and impartiality, the maxim set out by Lord Chief Justice Hewart in *R v Sussex Justices ex parte McCarthy*[293] finds application here, '[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.'[294] As such, the slightest apprehension of bias is sufficient to call into question the impartiality and independence of an adjudicatory body.

### *2.3.3. Costs and duration*

In the current debate about ISDS reform, the length of ISDS proceedings, alongside their costs, has been raised as a growing concern among the members of UNCITRAL Working Group III, which discussed the topic of cost and duration at its thirty-fourth session.[295] The Working Group was of the view that,

> '[i]t was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors. Highlighting the resource-intensive nature of the proceedings, it was mentioned that the very inclusion of ISDS provisions in investment treaties could have financial implications for respondent States.'[296]

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[289] Ibid. 4
[290] Kidane, 'The Culture of Investment Arbitration' 34 (2019) *ICSID Review.*
[291] Ibid 8.
[292] Ibid 7.
[293] ([1924) 1 KB 256, [1923] All ER Rep 233).
[294] *R v Sussex Justices ex parte McCarthy* 259.
[295] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1.
[296] Ibid para 37.

Additionally, there was consensus among Working Group III that there is a connection between the duration of proceedings and the costs, in that the longer the proceedings the higher the costs will be.[297]

Costs incurred in arbitration proceedings are divided between party costs which are fees and expenses of legal counsel, experts and witnesses and tribunal costs which are fees and expenses of arbitrators and arbitral institutions, including secretariat services for ad hoc arbitrations. A 2017 study found that average party costs were USD 6,019,000 for the claimant and USD 4,855,000 for the respondent, while average tribunal costs were USD 933,000 (with average ICSID costs at USD 920,000 and average UNCITRAL costs higher at USD 1,089,000). [298] Another 2017 study shows that the average cost for an ICSID annulment applicant is USD 1.36 million and USD 1.45 million for a respondent.[299] These figures show that investment arbitration is a remedy that involves significantly high costs especially in comparison to domestic remedies and other alternative forms of dispute resolution.

For the claimant-investor incurring these costs may be perfectly rational, particularly if the investment is a large one and the investor perceives that no other effective remedy is available. For the respondent State, however, these costs will normally be higher than if the dispute had been processed through its national courts only.[300] As a consequence a lot of governments especially those in least developed and developing countries would find it not only difficult to spend significant amounts of money to defend what they view are legitimate public policy measures but to also justify spending large amounts of money that could be used for the benefit of their people .[301]

## 2.4 OVERVIEW OF THE REFORM EFFORTS

Roberts has identified three reform positions that currently exist within the discussions surrounding the reform of international investment law.[302] The first position,[303] described as incrementalism, advocates that investor-state arbitration, despite its flaws is still the best

[297] Ibid para 38.
[298] Catherine Titi, Julien Chaisse, Marko Jovanovic et al 'Excessive Costs & Insufficient Recoverability of Cost Awards' Academic Forum on ISDS available at s (2019) 5 available at *https://www.cids.ch/academic-forum-concept-paper* (accessed 15 April 2020).
[299] Ibid.
[300] Ibid.
[301] Kauffman-Kohler and Potesta (n 142) 13.
[302] Anthea Roberts 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 *The American Journal of International Law* 410–32 at 410.
[303] Whose position is advocated by countries such as Chile, Japan and Russia.

method for the resolution of investment disputes.[304] Incrementalists advocate for retaining investor- state arbitration while adopting reforms to the system that would address the specific concerns that have been raised.[305] The second position[306] is that of the systemic reformers, who accept that investor-state disputes should be settled at the international level, but view arbitration as a completely flawed system that is incapable of addressing the needs of investor-state disputes.[307] Systemic reformers advocate for a complete removal of arbitration and replacing it with a standing MIC with or without an appellate mechanism.[308] The third position is reflected by the paradigm shifters[309] who reject the notion that investor- state disputes should be settled at international level regardless of whether this is before an arbitral tribunal or an international court.[310] Paradigm shifters advocate for a variety of mechanisms usually recourse to domestic courts, the use of ombudsmen or state-state mechanisms.[311]

### *2.4.1. Reform taking place under Working Group III*

Having identified concerns regarding ISDS and finding that it is desirable to achieve reform of the international investment law system, the discussions under Working Group III are now in the third phase being the consideration of possible reform options and determining the text of the proposed reform options.

Following suggestions for the establishment of an appellate mechanism, Working Group III at its 38th session undertook preliminary considerations of the main elements of a possible appellate mechanism with the goal of clarifying, defining and elaborating on the option without prejudice to any delegations final position.[312] Following this, at its 40th session, Working Group III continued deliberations on the appellate mechanism and subsequently requested the UNCITRAL Secretariat to undertake further preparatory work on the possible provisions of the appellate mechanism.[313] Pursuant to this, the UNCITRAL Secretariat has prepared a Note containing provisions addressing the main elements of the functioning and establishment of a

[304] Roberts, supra n 302 at 410.
[305] Ibid.
[306] Whose position is advocated for by countries such as the EU, Canada and Mauritius.
[307] Roberts, supra n 302 at 410.
[308] Ibid.
[309] Whose position has been advocated for by countries such as South Africa and Brazil.
[310] Roberts, supra n 302 at 410.
[311] Ibid.
[312] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019) A/CN.9/1004/ Add1 para 16-51.
[313] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021) A/CN.9/1050 para 113.

possible appellate mechanism.[314] The draft provisions as contained in the Note cover issues such as the scope of appeal, grounds of appeal, standards of review, timeline and conditions for bringing an appeal, the suspensive effect of an appeal, decisions that the appellate tribunal can make, duration of appellate proceedings, post-decision remedies, early dismissal and security for costs.[315] The Note also includes an introductory discussion on the possible options for the establishment of the appellate mechanism, including an ad hoc mechanism, permanent plurilateral or multilateral appellate body which can either take the form of a stand-alone appellate body complimenting the current investor state arbitration regime or as a second-tier mechanism to be used in conjunction with the multilateral investment court.[316]

With regard to the MIC, Working Group III has mandated the Secretariat to prepare draft provisions on the selection and appointment of adjudicators within the MIC and on related topics on the establishment and functioning of the MIC.[317] The Note contains draft provisions on the establishment of the tribunal, jurisdiction, governance structure, tribunal members and selective representation, the selection of candidates, terms of office, conditions of service, assignment of cases, means of establishment of the MIC and applicable law and treaty interpretation.[318] The UNCITRAL Secretariat together with ICSID has also prepared Draft of Code of Conduct for adjudicators in the context of the MIC and for arbitrators, in the context of reformed investor state arbitration.[319]

As evidenced from the above, the UNCITRAL Secretariat is preparing possible drafts and notes on all the reform options. All these notes are still under various stages of discussion before Working Group III, with little leeway having been made as to which reform option will be selected.

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[314] Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism Note by the Secretariat
[315] Ibid.
[316] Ibid.
[317] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021) A/CN.9/1050 para 17-55. See also United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Forty-second session New York, 14–18 February 2022 Possible reform of investor-State dispute settlement (ISDS) Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters Note by the Secretariat
[318] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Forty-second session New York, 14–18 February 2022 Possible reform of investor-State dispute settlement (ISDS) Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters Note by the Secretariat.
[319] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Forty-third session Vienna, 5–16 September 2022 Possible reform of investor-State dispute settlement (ISDS) Draft Code of Conduct Note by the Secretariat A/CN.9/WG.III/WP.216.

Stemming from the discussions that are taking place at Working Group III, scholars, academics and practitioners have started to develop designs of the different reform options, putting forward proposals that the reform options could take. For example, Kauffman-Kohler and Potesta have proposed the use of the Mauritius Convention as the starting point for the development of the MIC.[320] Bungenburg and Reinisch have provided an extensive discussion on the institutionalisation of ISDS through the use of a MIC with or without an appellate mechanism.[321] They have set out the options for the institutionalisation of ISDS and have also developed a draft statute for the MIC based on their findings. It is important to note that these proposals for the creation of a MIC, still retain the use of arbitration as the mode of dispute settlement.[322]

### *2.4.2. Reformed investor state arbitration*

Various administering institutions and inter-governmental organisations have taken an active role in reforming the investment arbitration landscape to address the concerns that have been raised. The most significant changes that have been made to the system include implementing measures to improve the transparency of the dispute settlement process, introducing measures in institutional rules to improve the efficiency of arbitral proceedings thereby reducing the length of proceedings as well as the costs of proceedings and making provision for the participation of other stakeholders in the dispute settlement process.

#### *a. Transparency*

While transparency was generally not provided for in institutional rules and in IIAs, the growing concerns that have been raised regarding transparency has led to a shift in the way issues related to the transparency of international investment arbitration have been viewed.[323]

To this end, both UNCITRAL and ICSID have implemented measures that are aimed at advancing transparency in international arbitration proceedings.

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320 Michele Potesta & Gabrielle Kaufmann-Kohler *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap* (2016), available at: https://papers.ssrn.com/abstract=3455511 (accessed 11 October 2023).

321 Marc Bungenberg & August Reinisch *from Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (2020).

322 Van Harten & Vastardis, supra n 108.

323 Sebastian Puerta & Tim Samples 'Investment Law's Transparency Gap' (2022) Forthcoming *Cornell International Law Journal*.

In July 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor- State Arbitration (Transparency Rules) which provide for extensive rules on transparency in investor state arbitration. The Transparency Rules reverse the presumptions of confidentiality and privacy in favour of a presumption of openness. The Transparency Rules recognise the public nature of investor- state arbitration and create a disclosure regime that allows for public access to documents,[324] open hearings[325] and civil society participation.[326] The Transparency Rules apply automatically to treaties concluded after 1 April 2014 that refer to the use of the UNCITRAL Arbitration Rules unless the parties expressly exclude the Transparency Rules from applying.[327] To supplement the Transparency Rules so that they can be easily applied to treaties concluded prior to April 2014, without requiring an amendment to every single IIA, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Transparency Convention) allows states to accede to and ratify the Convention and by so doing the Transparency Rules will be deemed to be applicable to disputes arising out of treaties concluded prior to 1 April 2014.[328] The Transparency Rules and Transparency Convention make significant changes that are aimed at fostering and increasing the transparency of international investment arbitrations.

ICSID has also had a positive approach to transparency as ICSID has a good history of making their case load and some decisions in cases public.[329] Many the cases that appear on investment arbitration databases are matters that were heard under the ICSID Rules.[330].

From the above, the reforms made to the institutional rules of UNCITRAL and ICSID reflect greater provisions for transparency that allow for increased availability of information and documentation, and greater participation by third parties and the public in the form of opening oral hearings to the public.

These institutional trends have also been adopted by states who have also begun to make provision for greater transparency in their IIAs. This trend can be seen in NAFTA wherein the parties have made provision for the public release of documentation and awards and the

[324] Article 2 and 3 of the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration.
[325] Article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.
[326] Article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor -State Arbitration.
[327] Article 1(1) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.
[328] Article 2 of the United Nations Convention-on Transparency in Treaty-based Investor-State Arbitration
[329] Barstow Daniel Magraw & Manel Niranjali Amerasinghe 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 *ILSA Journal of International & Comparative Law* 337–60 at 341.
[330] See for example UNCTAD Investment Policy Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement and ITA law database https://www.italaw.com/ In this regard, Rule 63 of the ICSID Arbitration Rules makes provision for the publication of awards.

opening of hearings to the public.[331] Canadian,[332] United States[333] and Indian[334] model agreements follow the trend adopted by NAFTA and all make provision for greater transparency by providing for the publication of documents, awards and allowing amicus curiae submissions.[335] This practice has also been adopted by other states and there is a growing trend among states to make provisions that allow for greater transparency. Examples of these are the United Mexican States- Panama BIT,[336] USA-Uruguay BIT,[337] Czech Iran-BIT[338], Australia-Uruguay BIT,[339] and Canada- Serbia BIT,[340] which all make reference to increased standards of transparency which include a combination of publication of documents submitted to the tribunal, making provision for the submission of amicus briefs, making the oral hearings open to the public and publication of the award.[341] The COMESA Investment Agreement also has provisions that improve on the transparency of proceedings in that it makes provision for open hearings and publication of case documents.[342]

*b. Concerns related to time and costs of proceedings.*

Complaints regarding time and costs of proceedings are related because the longer the proceedings take, the more costly they are likely to be.[343] One of the reasons arbitrations was traditionally considered as an attractive method of dispute settlement was because it was

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331 Article 1127 and 1137 of NAFTA and the NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' para A(2)(b). These provisions also appear in the United States-Mexico-Canada Agreement Chapter 14 Article 14.D.8 which makes provision for the applicable transparency rules.
332 Canada Model Investment Treaty (2004) 2004 arts 38(1) (open hearings), 38(3) (publication of documents), 38(4) (publication of award), art 39 (amicus submissions).
333 United States Model Investment Treaty (2004) art 29(1).
334 Model Text for the Indian Bilateral Investment Treaty (2015), art. 14.8(i)–(iii).
335 Esmé Shirlow & David D Caron *The Multiple Forms of Transparency in International Investment Arbitration: Their Implications, and Their Limits* (2019) at 9, available at: https://papers.ssrn.com/abstract=3470946 (accessed 29 June 2022).
336 Agreement between the United Mexican States and the Republic of Panama for the Promotion and Reciprocal Protection of Investments (2005), art 20(4) which makes provision for the public release of documents.
337 Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (2005), art 29(2) ('The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements...').
338 Agreement on Reciprocal Promotion and Protection of Investments, Czech- Iran, art 11.7 which makes provision for the application of the UNCITRAL Transparency Rules.
339 Agreement on the Promotion and Protection of Investments, between Australia and Uruguay, art. 14.19, Apr. 5, 2019, which refers to the application of the UNCITRAL Transparency Rules
340 Article 12 and 31 which provide for publication of materials and publicity of the hearing and publication of the award.
341 This is not an exhaustive list of all IIAs that contain transparency provisions but has been used to illustrate the trend in the uptake of IIAs to include transparency provisions.
342 Article 4 of the Investment Agreement for the COMESA Common Investment Area.
343 Jean Kalicki 'Controlling Time and Costs in Arbitration: A Progress Report (Part 1 of 2)', *Kluwer Arbitration Blog*, 21 November 2011, at 1 available at: http://arbitrationblog.kluwerarbitration.com/2011/11/21/controlling-time-and-costs-in-arbitration-a-progress-report-part-1-of-2/(accessed 17 June 2022).

viewed as less costly and much faster than court litigation. However, the costs incurred by parties in investor-state arbitration and length of proceedings have risen quite significantly.[344] There are a number of factors that may affect the cost and length of proceedings including the complexity of the factual and legal issues that are in dispute, the disputing parties conduct and the conduct of the arbitrators.[345] In response to the concerns raised regarding increasing costs and duration of proceedings, arbitral institutions have taken a pro-active approach in implementing changes to their rules so that proceedings are carried out in an efficient and cost-effective manner.

ICSID has undertaken an amendment to its rules, which amendments came into effect on the 1st of July 2022. The amendments undertaken by ICSID seek to address the concerns that have been raised with regard to the issue of time and costs in international arbitration.[346] The amendments made include electronic filing of documents,[347] case management conferences,[348]objections for claims that are manifestly without legal merit,[349] preliminary objections on jurisdiction and competence of the tribunal,[350] and provisions for expedited arbitration.[351] The methods are also presently under discussion by Working Group III as measures that can be implemented for the reduction of time and costs of proceedings.[352] As ICSID is a self -contained mechanism, only arbitrations that are carried out in accordance with the ICSID Arbitration Rules would benefit from these changes.

The UNCITRAL Arbitration Rules also make provision for expedited arbitration which makes use of a sole arbitrator,[353] shorter time frames and shorter deadline for issuing the award.[354] This is however, the only significant measure that has been incorporated into the UNCITRAL Arbitration Rules for the purposes of saving time and costs.

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[344] See discussion in Chapter 2 on costs and length of proceedings.
[345] José Manuel Álvarez Zárate et al ‘Duration of Investor-State Dispute Settlement Proceedings’ (2020) 21 *The Journal of World Investment & Trade* 300–35 at 305.
[346] Maria José Alarcon ‘Interview with Meg Kinnear Secretary General of ICSID’, available at: http://arbitrationblog.kluwerarbitration.com/2022/03/22/interview-with-meg-kinnear-secretary-general-of-icsid/.
[347] Rule 4 of ICSID Arbitration Rules 2022.
[348] Rule 31 of ICSID Arbitration Rules 2022.
[349] Rule 41 of ICSID Arbitration Rules 2022.
[350] Rule 43 of ICSID Arbitration Rules 2022.
[351] Chapter XII of ICSID Arbitration Rules 2022.
[352] UNCITRAL Working Group III Investor State Dispute Settlement Reform forty-third session Possible reform of investor-State dispute settlement (ISDS) Draft provisions on procedural reform Note by the Secretariat A/CN.9/WG.III/WP.219.
[353] Article 8 of UNCITRAL Expedited Arbitration Rules.
[354] Article 16 of UNCITRAL Expedited Arbitration Rules.

### c. *Amicus curiae submissions*

In a view of making the arbitration proceedings more accessible and to give interested parties who are not parties to the dispute the opportunity to make representations, the new ICSID rules make provision for non-disputing parties to make submissions on issues of fact or law that form the subject matter of the dispute.[355] This will allow local communities and other interested parties such as NGO's the opportunity to make representations on any issues that might impact them. Rule 67 of the ICSID Rules 2022, makes provision for non-disputing interested parties to make an application before the tribunal for permission to be allowed to make submissions. In determining whether to grant the application, the tribunal is guided by a list of factors relating to the relevance of the information sought to be provided.[356] Once the application is granted, the rules also make provision for the delivery of the relevant documents of the arbitration to the non-disputing party to allow them to make their submissions.[357]

### d. *Non- disputing treaty party submissions*

Rule 68 of the ICSID Rules 2022, also makes provision for non-disputing treaty parties (NDTP) to make submission on the interpretation of the treaty during the dispute. This amounts to a codification of the CIL rule that recognises that states can unilaterally express their views on a question of the interpretation of the treaty and such expression can amount to evidence of a common intention between the treaty parties regarding the meaning of a particular provision.[358] While the rule was already provided for in CIL, there was very little uptake of the use of NDTP submissions in practice save for in the context of NAFTA disputes and Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) 2004[359] disputes. A study by Mehranvar and Johnson shows that NAFTA cases and CAFTA-DR cases show the highest instances of NDTP submissions than cases brought under any other IIA.[360] One of the reasons that has been advanced for this occurrence is the express provision for NDTP submissions that are utilised

[355] Rule 67 of the ICSID Rules 2022.
[356] Rule 67(2) of the ICSID Rules 2022.
[357] Rule 67(6) of the ICSID Rules 2022.
[358] Ladan Mehranvar & Lise Johnson 'Missing Masters: Causes, Consequences and Corrections for States' Disengagement from the Investment Treaty System' (2022) 13 *Journal of International Dispute Settlement* 264–308 at 274.
[359] Accessible at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5056/cafta---dr-2004-
[360] Ibid 277–278. While there are a limited number of known cases brought under CAFTA-DR, in seven out of the seven known cases, home states have made use of the NDTP submissions.

in both NAFTA and CAFTA-DR. [361] Both NAFTA and CAFTA-DR make provision for other treaty parties to be served with the notice of the claim and other pleadings.[362] This allows for home states, who would not ordinarily be a party to the dispute to make submissions on the way treaty provisions should be interpreted. It also ensures that the NDTP have knowledge of the dispute and the issues of interpretation that may arise and with this knowledge they are able to invoke their rights to file submissions on issues of interpretation of treaty provisions. It is argued that the inclusion of an express rule on NDTP submissions in the ICSID Rules may have a similar effect. Numerous scholars and commentators have recognised the use of NDTP submissions as a viable means of ensuring that treaty parties are able to clarify their understanding of treaty provisions.[363] This is beneficial to the interpretation process as it would allow the home state- which has a substantial interest in the interpretation of treaty provisions[364] an opportunity to have a say regarding how a particular treaty provision should be interpreted in line with what the parties intention- a role which is already contemplated in light of the fact that treaty parties are viewed as 'masters of their treaties.'

*2.4.3 Attempts at substantive reform.*

There has been an increasing trend by states to amend the substantive provisions of their IIAs by including express provisions on the right to regulate, incorporating obligations for investors, including sustainable development provisions in IIAs so as to re-balance their IIAs and bring in elements of sustainable development to the international investment law system.

While most IIAs concluded prior to the Argentinian crisis rarely contained any treaty exceptions regarding the right to regulate, some IIAs concluded thereafter have sought to incorporate the right to regulate in various ways. Some IIAs have sought to recognise the right to regulate in express language in the preambles of the IIA, some have sought to provide greater guidance on the standards of investment protection as they apply to regulatory measures, and

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[361] Ibid 278.
[362] See Articles1127 and 1128 of NAFTA and Articles 10.20(2) and 10.21(1)(2) of CAFTA-DR.
[363] Geoffrey Gertz and Taylor St. John, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (June 2015) GEG & BSG Policy Brief, 2; Lise Johnson and Merim Razbaeva, 'State Control Over Interpretation of Investment Treaties' (April 2014) CCSI Policy Paper; Lauge N Skovgaard Poulsen and Geoffrey Gertz, 'Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach' (March 2021) Briefing Paper, Global Econ & Finance Prog. and UNCITRAL, WGIII, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Interpretation of Investment by Treaty Parties' (17 January 2020) Thirty-ninth session (New York, 30 March–3 April 2020), para 6 and fn 4 <https://undocs.org/A/CN.9/WG.III/WP.191> (accessed 18 October 2022).
[364] As they too would be bound by the same interpretation should the home state find itself in the position of a host state.

through the use of public order carve outs or general exceptions including for the protection of human, animal or plant life or health, for the conservation of exhaustible natural resources to varying degrees.[365]

States have also taken steps to incorporate investor obligations and sustainable development provisions in their IIAs. This can gradually be seen in developing BIT drafting practice which seeks to incorporate obligations for investors in BITs and IIAs in general. For example, the often-cited Nigeria -Morocco BIT was the first IIA with a clause creating binding legal obligations for investors. Article 18(2) of the Nigeria- Morocco BIT provides that '[i]nvestors and investments shall uphold human rights in the host state.'[366] Articles 18(3) and 18(4) further make provision for the obligation of investors to act in accordance with core labour standards, and the obligation not to circumvent international environmental, labour and human rights obligations of the host and home state.[367]

At a regional level, some states have also incorporated investor obligations within their investment legislation. For example, the Supplementary Act on Investment of the Economic Community of West African States 2009 provides that investors should uphold human rights standards in the area of their investments and to refrain from operating in a manner that undermines human rights obligations, labour standards and environmental and social obligations.[368] The PAIC contains similar obligations on investors to uphold human rights in carrying out their investment activity.[369] SADC Finance and Investment Protocol also contains a clause on corporate social responsibility of investors.[370]

These developments have culminated in the AfCFTA Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA Investment Protocol)[371] that also provides for the incorporation of investor obligations. Chapter 5 of the AfCFTA Investment Protocol makes provision for investor obligations and in particular provides for

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[365] Noam Zamir and Paul Barker, 'The Trans-Pacific Partnership Agreement and States' Right to Regulate under International Investment Law' (2016) 45 *Denver Journal of International Law and Policy* 205, 206. See also Recent Trends in IIAs and ISDS- IIA Issue Note 1, UNCTAD (Feb 2015) and United Nations Conference on Trade & Development, World Investment Report 2017: Investment and the Digital Economy 119 (2017).
[366] Nigeria -Morocco BIT.
[367] Articles 18(3) and 18(4) of the Nigeria- Morocco BIT.
[368] Article 14(2) of the ECOWAS Supplementary Act on Investment
[369] Chapter 4 of the PAIC on Investor Obligations.
[370] Article 10 of the SADC Finance and Investment Protocol and Article 8 of the Agreement Amending Annex 1 (Co-operation in Investment) of the Protocol on Finance and Investment.
[371] Accessible at Electronic Database of Investment Treaties *https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550* (accessed 6 December 2023).

issues related to business ethics, human rights, and labour standards,[372] environmental protection,[373] indigenous peoples and local communities,[374] socio-political obligations,[375] anti-corruption,[376] corporate social responsibility,[377] and corporate governance.[378]

## 2.5 CONCERNS IDENTIFIED WITH THE REFORM EFFORTS

Despite the fact that Working Group III is at an advanced stage in their discussions for reform, the approach they have taken when considering issues related to reform of the international investment law system has been narrow and may have limited effectiveness in addressing the concerns identified with the system. The following sections seek to point out the deficiencies in the Working Group III process and the consequences of the same.

### *2.5.1. Lack of substantive reform, sustainable development and sustainable investment*

There is general acceptance of the link between the substantive and procedural provisions in IIAs.[379] In this regard, the government of Indonesia viewed the procedural and substantive aspects as being inherently intertwined in nature, requiring both issues to be addressed at the same time.[380] In focusing on the substantive aspects, the government of Indonesia stressed the need for balancing investor rights with investor obligations, ensuring the protection of policy space and the right to regulate.[381] This view was also held by the government of Morocco that noted the need to achieve a balance between investor right and investor obligations,[382] the government of Thailand, that recognised that the substantive and procedural aspects are intertwined and proposed the creation of model clauses to address substantive concerns, the government of Mali,[383] and the government of South Africa, who went so far as to note that as the Working Group III discussions are state led with a broad discretion to determine how to discharge its mandate, Working Group III would not be discharging its mandate if discussions

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372 Article 33 of the AfCFTA Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA Investment Protocol)

373 Article 34 of the AfCFTA Investment Protocol.

374 Article 35 of the AfCFTA Investment Protocol.

375 Article 36 of the AfCFTA Investment Protocol.

376 Article 37 of the AfCFTA Investment Protocol.

377 Article 38 of the AfCFTA Investment Protocol.

378 Article 39 of the AfCFTA Investment Protocol.

379 United Nations Economic Commission for Africa, supra n 103 at 40. See also Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) Part I A/CN.9/930/Rev.1 (2017) para 20 where Working Group III notes that 'critical questions on possible ISDS reform involved the underlying substantive rules.'

380 A/CN.9/WG III/WP 156 Submissions of the Government of Indonesia para 2.

381 A/CN.9/WG III/WP 156 Submission of the Government of Indonesia para 6.

382 A/CN.9/WG III/WP 161 Submission of the Government of Morocco para 7.

383 A/CN.9/WG III/WP 181 Submission of the Government of Mali 2.

on substantive issues were excluded from the process.[384] Some of the concerns that have been raised with the international investment law system can only be effectively addressed by taking into account the substantive law and how it can be reformed. Ratner notes that the concern with the UNCITRAL process is its failure to consider the deficiencies of the underlying substantive provisions of IIAs and goes as far as recommending the creation of a new forum that will be able to effectively deal with the interplay of substantive and procedural issues and how these issues can be addressed to balance the needs of the different stakeholders.[385] This thesis however does not advocate for the creation of a new forum to deal with substantive issues but rather explores how multilevel governance can be used to create linkages and partnerships between the different levels of governance so as to effectively address the concerns that arise with the substantive aspects of international investment law.

Linked to the question of substantive reform, is the issue of the lack of sustainable development orientation within the international investment law system. Turrini notes that foreign investment and sustainable development have an inextricable yet non-linear link, with multiple points of contact between the two.[386] It has been noted that the implementation of 2023 Agenda for Sustainable Development requires enormous global investment[387] with the private sector being required to fill this investment gap.[388] In this regard, the achievement of sustainable development is directly linked to the ability of states to attract investment and regulate that investment so that it can produce the desired sustainable development results. Sauvant notes that 'the consensus is that on balance, investment can make a contribution to development and while investment (including FDI) is not everything, everything is nothing without investment.'[389] In supporting the incorporation of sustainable development into international investment law, the government of Mali submitted that they were in favour of system where responsible sustainable investment that creates stable and decent jobs is promoted and facilitated.[390] The government of Guinea emphasised the role of investment in promoting

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[384] A/CN.9/ WG III/WP 176 Submission of the Government of South Africa para 20.
[385] Ratner 'International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows' (2020) 20 *Journal of World Investment & Trade* 7–33 at 29.
[386] Paolo Turrini 'International Investment Law: The Anarchical Society Where Development and Sustainability Are Frenemies and Participation Plays Gooseberry' *Sustainability through Participation?* (2023) 458–90 at 458 available at: https://brill.com/edcollchap-oa/book/9789004509382/BP000026.xml.
[387] UNCTAD (United Nations Conference on Trade and Development) *World investment report 2014 – investing in the SDGs: An action plan* (2014) Geneva notes that developing countries require investments of up to USD$4 trillion per year in order to achieve sustainable development goals.
[388] Berger & Gsell, supra n 198 at 2.
[389] Karl P Sauvant 'Improving the distribution of FDI benefits: The need for policy-oriented research, advice and advocacy' (2021) 4 *Journal of International Business Policy* 244–61 at 245.
[390] A/CN.9/WG III/ WP 181 Submission of the Government of Mali 2.

sustainable development and achieving related goals thereby giving rise to the need of a fair, stable and effective ISDS system.[391] In the same vein, the government of South Africa noted that 'there must be conscious recognition of the principle of sustainable development' with the reform effort locating IIAs in the wider context of sustainable development and alignment with nation and regional objectives.[392] The government of Morocco noted that the process of ISDS reform has to lead to responsible international investment and promote the achievement of sustainable development objectives.[393]

Despite the seemingly apparent consensus on the link between investment and sustainable development and the need to in some way or form inculcate the recognition of sustainable development and the achievement of its related goals into the fabric of the international investment law system, the Working Group III has largely been silent on any issues relating to sustainable development or sustainable investment. The effect of this is that the reform process under Working Group III is taking place with relevant ignorance of how the reform options being discussed would positively or negatively impact the promotion of sustainable investment and the achievement of sustainable development goals. This would be necessary so that only those reform options that have a positive impact on sustainability concerns would be adopted with those that negatively impact sustainability being discarded. This would allow for the development of an international investment law system and a dispute settlement mechanism that is compatible with a wide range of cross- cutting issues related to sustainable development and public policy as well as compatible with the protection of the interests of all affected stakeholders and not a select few. The ability of reform options to have a positive impact on sustainability would make the possible reform options acceptable to a larger number of states especially developing countries, thereby increasing the likelihood of success of the adoption of a coherent approach to reform.

While sustainability concerns do and will undoubtedly rise in the procedural aspects of international investment law (as shall be discussed below), a large reason that there is a lack of sustainable development-oriented discussion taking place is linked to the fact that Working Group III mandate has been limited to dealing with issues of procedural reform. The concerns relating to sustainable development and the substantive aspects of international investment law

[391] A/CN.9/WG III/ WP 183 Submission of the Government of Guinea para 20.
[392] A/CN.9/ WG III/WP 176 Submission of the Government of South Africa para 15 and 23.
[393]A/CN.9/ WG III/ WP 161 Submission of the Government of Morocco para 4.

will be set out hereunder to illustrate how these issues affect the international investment law system and why they need to be addressed in order to achieve meaningful reform.

*a. One sided nature of IIAs*

As the traditional goal of IIAs was the protection of foreign investment, a large number of IIAs only contain provisions for the protection of investors with no corresponding obligations and make provisions for obligations on the host state, with no corresponding rights. By only containing provisions on investor protections, the one-sided nature of BITs has resulted in investors enjoying a significant amount of protection from the host state's regulatory activities but has left host states and other stakeholders vulnerable to the activities of foreign investors. While to some extent, the decisions of arbitral tribunals have been 'blamed' for this occurrence[394], the reality is that tribunals are bound to apply the provisions of the treaty as the applicable law, and in the absence of treaty provisions that protect host states from the conduct of investors, it has been and will continue to be difficult for tribunals to enforce protections for the host states invoking obligations outside of IIAs.

In investor-state disputes, where the investor alleges a violation of the rights contained in the IIA, the IIA in question is considered the primary source of law applicable to the investment dispute.[395] As most IIAs only contain substantive investment protections for investors, host states and other stakeholders are left with little redress if they feel their rights have been violated. Investment tribunals have been confronted with disputes involving human rights and other sustainable development issues on numerous occasions. Tribunals have not looked favourably on requests by hosts states to take into account rules contained in non-investment treaties.[396] This is because arbitrators are bound to strictly apply the applicable *lex specialis* in resolving the investment dispute and in most cases, this would be the applicable IIA. As a result of this non-inclusion of substantive protection for other stakeholders, many have begun to question the legitimacy of the investment regime and its ability to promote sustainable

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[394] Eberhardt, Pia & Cecilia Olivet 'Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom' (2012) Brussels, Transnational Institute; Bottari, Mary & Lori Wallach (2005). NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005, Washington DC, Public Citizen 76-81.

[395] W. Michael Reisman, James Richard Crawford et al, 'Chapter 6: Applicable Substantive Law', *Foreign Investment Disputes: Cases, Materials and Commentary* 2nd edition, (2014) 438 91.

.[396] Giovanni Zarra 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17 *Chinese Journal of International Law* 137–85 at 141. who notes that , '[I]n addition to the above, the lack of coherence is to be considered also from the perspective of integration of values, within international investment law, which are protected by other fields of public international law (such as human rights and the protection of the environment), which often are in contrast with the protection of investors, and which have been taken into consideration only occasionally and unpredictably by investment arbitrators.'

investment goals. Some scholars have attempted to argue that the definition of international law as encompassed in Article 38 of the Statute of the International Court of Justice should be used to provide an avenue for arbitrators to apply non-investment rules in resolving international investment disputes. Article 38 of the ICJ Statute provides that a reference to international law should be understood as incorporating international treaties, customary international law and general principles of law.[397] Tribunals have been reluctant to adopt a wide meaning of the choice of law clause which refers to general international law being applicable in the dispute. In *Von Pezold v Zimbabwe*, the tribunal held that the inclusion of general principles of international law in the choice of law clause in the applicable IIA does not render the entire body of international law applicable to an investment dispute.[398]

The current wording of IIAs makes it difficult for tribunals to strike a balance between the interests of foreign investors and the public interests of states and affected communities.[399] This one-sided nature of IIAs has caused many criticisms from other stakeholders who are of the view that the current state of the investment regime does not cater for the needs and wants of other stakeholders beyond the investors.

If the text of IIAs remains vague and there is no expansion of protections for other stakeholders, the investment system will not experience sufficient change as the arbitrators or decision-making bodies will still be bound to apply the applicable *lex specialis* with little room for ensuring protections for other stakeholders. [400] To this end, there is a need for a revision of the substantive protections included in IIAs, to make provision for the inclusion of protections for other stakeholders such as host states while imposing obligations for the investors if developing countries were to reap the benefits of FDI. There have been some attempts to address the one-sided nature of IIAs by incorporating a right to regulate for states and investor obligations with relation to the environment, labour and corporate social responsibility. However, these efforts (as shall be illustrated more fully in s2.5.2) have had a limited impact. Despite the general acceptance of a right to regulate, it has been applied in an inconsistent manner with little to no direction as to the scope and content of the right. In addition to this, the incorporation of investor obligations has taken place in a piecemeal manner with some IIAs making provision

[397] Article 38 of the United Nations Statute of the International Court of Justice, 18 April 1946 and see also Vivian Kube and Ernst- Ulrich Petersmann, 'Human rights law in international investment arbitration" EUI Working Paper Law 2016/02 Department of Law 19.
[398] *Bernhard von Pezold and Others v Republic of Zimbabwe* ICSID Case No ARB/10/15 par 57.
[399] Maria Chochorelou and Carlos Espaliu Berdud 'Sustainable developments in new generation FTAs: Could arbitrators further the principle through ISDS?' (2018) *Rev. Eur. Comp. & Int'l Envtl. L*. 27 176.
[400] Ibid.

for investor obligations and others not. This creates a parallel system of investment where some investors would be subject to compliance with investor obligations and others not. As such there is a need to create an investment system with clarity on the scope, content and application of the right to regulate and investor obligations can be applied in a uniform manner.

b. *Promotion of development through greater FDI flows*

One of the reasons that developing countries entered into BITs was the promise of increased FDI flows which would, in turn, lead to greater development within the country. The perceived benefits of FDI include provision of capital, job creation, access to new and improved technologies and management practices, more developed and diversified domestic markets, stronger institutional capacity, less dependency on foreign aid and external debt to reduce poverty and infrastructural development.[401] Developing countries entered into BITs with the assumption or the hope that their more industrialised treaty partners would take an affirmative approach in encouraging investors in their countries to invest in the developing country.[402] This is because the preambles of most BITs state that the purpose of the BIT is to promote the flow of FDI and as such developing countries accept restrictions on their sovereignty in the hope that this will lead to greater FDI.[403]

Despite the promise of increased FDI flows leading to development, there are no BIT provisions that seek to advance the goal of development for the host state. [404]

BITs and IIAs in general, are concluded in a specific historic, economic and social context and respond to the existing needs and challenges.[405] The conservation of natural resources, protection of the environment, protection of human rights and social wellbeing did not feature prominently on the international policy agenda at the time the first IIAs were included and for that reason, these issues are not sufficiently contained in traditional IIAs. Today, these issues have gained significant importance in policy making in both developed and developing

[401] Fox (n 51). See also UNCTAD Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries (2003)1.
[402] Jeswald W Salacuse & Nicholas P Sullivan 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' *The Effect of Treaties on Foreign Direct Investment* (2009) available at: https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780195388534.001.0001/acprof-9780195388534-chapter-5.
[403] Eric Neumayer & Laura Spess 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1567–85.
[404] Jeswald W Salacuse & Nicholas P Sullivan 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain' *The Effect of Treaties on Foreign Direct Investment* (2009.
[405] UNCTAD Reform Package for the International Investment Law Regime 14.

countries alike including in investment policy making. With changing trends and shifts in the global landscape, more emphasis has begun to be placed on ensuring food security, protection of the environment, alleviating the effects of climate change, ensuring the protection of human rights even in business transactions, the alleviation of social challenges and poverty eradication.[406] As a result, investment policies can no longer be designed in isolation of these issues but need to not only be harmonised with but also promote the achievement of sustainable development. Sustainable development as used in this thesis refers to 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[407] It encompasses the development of three inter-related dimensions, being the economic, social and environmental.[408]

The shift in the focus from merely seeking to attract FDI has resulted in the emergence of a new generation of investment policies that pursue a broader developmental agenda while at the same time maintaining an environment that is favourable to investment.[409] This new generation of investment policies are characterised by the recognition of investment as the primary driver of economic development, a desire to pursue sustainable development through responsible investment, placing social and environmental goals on the same footing as economic growth as well as a shared recognition of the need to improve the effectiveness of policies to promote and facilitate investment.[410]

The shift in focus is evidenced by the conclusion of standards by international organisations such as the United Nations Guiding Principles on Business and Human Rights, the revised OECD Guidelines on Multinational Enterprises, the FAO/ World Bank/UNCTAD/IFID Principles on Responsible Agricultural Investment, the UNCTAD Investment Policy Framework for Sustainable Development, G20 Guiding Principles for Global Investment Policy Making and the International Institute for Sustainable development Model Agreement on Investment for Sustainable Development to mention a few. At a national level, states have also begun to adopt new generation IIAs which make provision for the achievement of sustainable development. Notable here are the US Model BIT[411] and the Nigeria Morocco BIT.

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[406] UNCTAD Investment Policy Framework for Sustainable Development 2015 UNCTAD/DIAE/PCB/2015/
[407] United Nations Brundtland Report.
[408] Emma Aisbett et al *Rethinking International Investment Governance: Principles for the 21st Century* (2018). 53
[409] UNCTAD Investment Policy Framework for Sustainable Development 2015 UNCTAD/DIAE/PCB/2015/.
[410]UNCTAD Investment Policy Framework for Sustainable Development 2015 UNCTAD/DIAE/PCB/2015/.
[411] United States Model BIT 2012 accessible at *https://edit.wti.org/document/show/f11fb55a-06b7-4aa9-9680-7bbc26704201?textBlockId=d159f655-e782-4410-ab65-e057f7ee324b&page=1*

While these developments do signal a shift to a new generation of investment policymaking, international standards are not binding on states and cannot be enforced by arbitral tribunals. The Nigeria Morocco BIT is still yet to come into force and at present no states have entered into agreement with the United States of America on the basis of the new US Model BIT.

Majority of investments to date are still covered under the traditional BIT model which do not offer significant protection for the state and other stake holders and do very little to promote sustainable development goals. There is very little evidence (especially in the context of developing countries) that an increase in FDI has enabled countries to achieve the developmental benefits associated with increased investment. [412] There is no requirement in BITs that investors should make use of local labour and more often than not investors will import highly trained foreign employees instead and locals are often left with menial labour jobs.[413] In addition to this, there are no obligations on investors to promote infrastructural development in the communities in which they operate, to protect the environment in the area in which they operate or to respect the needs and cultures of indigenous communities. There is very little protection offered to the host state and local communities to address these concerns and they are often left with no recourse in respect of the same. Furthermore, as BITs do not explicitly recognize the right of the host state to regulate in the public interest and for the achievement of national polices, many policies which are taken by host states, as a means to promote public interest objectives, which may have a negative impact on the investor, are often met with hefty claims before arbitral tribunals. This has led to the so called 'regulatory chill' that has been seen as a perceived or actual consequence of IIAs.[414]

In the face of this need for the promotion of sustainable development, there is a need to balance the interests that are protected by the IIAs. While the protection of investors from government conduct is indeed necessary for a thriving investment regime and can by and large remain unaffected, such protection of investment should not be over emphasized or expanded in a manner that is detrimental to host states and other stakeholders.[415] Host states must have the

[412] Joshua Boone 'How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies' 1 17.
[413] Ibid.
[414] See generally Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' (2010). *Evolution in Investment Treaty Law and Arbitration,* Chester Brown, Kate Miles, eds., Cambridge University Press, 2011; Janeba, Eckhard, Regulatory Chill and the Effect of Investor State Dispute Settlements (July 2019). CESifo Working Paper Series No. 6188, Available at SSRN: https://ssrn.com/abstract=2887952 or http://dx.doi.org/10.2139/ssrn.2887952
[415] Hisham Ababneh, 'A Model BIT for Development: The Example of Jordan' PhD thesis University of Pittsburgh (2017)10.

ability to act in their best interests and achieve the developmental benefits that are associated with FDI while still maintaining adequate investor protections. These two goals should not be and are not mutually exclusive.

There is little evidence to show that IIAs promote sustainable investment that leads to the enjoyment of the benefits of FDI that most states thought they would enjoy at the time of conclusion of IIAs. There is therefore a need to reform the substantive provisions as contained in IIAs so that they are able to fulfill their goals of investment protection with all stakeholders being able to enjoy the benefits associated with FDI.

### *2.5.2. Deficiencies in the efforts at substantive reform*

#### *a. Lack of clarification on the right to regulate*

In safeguarding the right to regulate, there seems to be consensus in general international law as well as in international investment law that states have a right to regulate in the public interest.[416] In this regard, Titi notes that, '[i]f the police powers doctrine is customary international law or a general principle of law, did tribunals fail to apply the applicable law? Or has the police powers failed to truly survive BIT codification and do investment treaties constitute contrary lex specialis.'[417] The contentious issue that has emerged from arbitral jurisprudence is not necessarily regarding the existence of a right to regulate, but rather the effect of a states exercise of its right to regulate. The pertinent question here is whether regulatory conduct by a state falling within its exercise of its right to regulate is non-compensable or still requires the payment of compensation. Jurisprudence from arbitral tribunals illustrates that there are conflicting views that have been adopted regarding the effect of the state exercising its regulatory powers. In this regard, some tribunals, while acknowledging the states right to regulate or the police powers doctrine, have adopted the sole effects doctrine and noted that conduct within the states regulatory conduct is still subject to the payment for compensation. In *Santa Elena v Costa Rica*, an ICSID dispute related to a direct expropriation for conservation purposes held that,

[416] Talkmore Chidede 'The Right to Regulate in Africa's International Investment Law Regime Symposium Articles' (2018) 20 *Oregon Review of International Law* 437–68; Bashayer Al-Mukhaizeem 'The Dilemma of Indirect Expropriation of Host States and the Right to Regulate in the International Investment Sphere' (2016) 4 *Legal Issues Journal* 1–24; Federica Cristani 'The Right to Regulate in International Investment Law' (2015) 6 *European Journal of Risk Regulation: EJRR* 329–31.
[417] Catharine Titi 'Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attilia Tanzi & Filippo Fontanelli (eds) *General Principles of Law and International Investment Law* (2018) at 16.

> '[e]xpropriatory environmental measures- no matter how laudable and beneficial to the society as a whole- are, in this respect similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'[418]

In *Vivendi v Argentina*, that tribunal held that there is 'extensive authority for the proposition that the state's intent or its subjective motives are at most a secondary consideration...the effected of the measure on the investor, not the state's intent is the critical factor.'[419] In *Pope & Talbot v Canada*, the tribunal held that 'a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriations.'[420] In *Azurix v Argentina* the tribunal held that there is no justification to conclude that bona fide regulation can be exempt from the payment of compensation. In particular, the tribunal when determining the effect of a bona fide regulation on payment for compensation held that, '[t]his tribunal finds the criterion insufficient and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation based on public purpose was intellectually viable…'[421] In a similar vein, the tribunal in *Tecmed v Mexico*, held that,

> 'no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole- such as environmental protection- particularly if the negative economic impact of the of such actions on the financial position of the investor is sufficient to neutralise in full the value or economic or commercial use of its investment without receiving any compensation whatsoever.'[422]

From the above jurisprudence, some arbitral tribunals have found that the legitimate exercise of a states police powers or right to regulate is not sufficient to exclude the payment of compensation and that the purpose for which the measure was taken cannot be used as a deciding factor as to whether payment for compensation is due or not.

On the other hand, especially in the context of indirect expropriation, there are tribunals that have recognised that measures taken in the exercise of a states police or regulatory powers are excluded from the payment of compensation. In *Methanex v United States*, the tribunal held that,

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[418] *Compania del Desarollo de Sanat Elana, S.A v Costa Rica* ICSID Case No. ARB/96/1 Final Award, 17 February 2000 para 72.

[419] Compania de Aguas del Aconquija S. A and Vivendi Universal S. Av Argentina ICSID Case No. ARB/97/3 award 20 August 2007 para 7.5.20.

[420] *Pope & Talbot Inc. v Canada,* Interim Award 26 June 2000 para 96.

[421] *Azurix Corp v Argentina* ICSID Case No ARB/01/12 Award 12 July 2006 para 310.

[422] *Tecmed S.A v Mexico* ICSID Case No ARB (AF)/00/2 Award 29 May 2003 para 121.

'[a]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects inter alios, a foreign investor or investment is not deemed expropriationary and compensable unless specific commitments had been given by the regulating government to the putative foreign investor contemplating investment that the government would refrain from such regulation.'[423]

In support of this view, the tribunal in *Chemtura v Canada* held that measures taken by Canada's Pest Management Regulatory Agency 'motivated by the increasing awareness of the dangers presented by lindane for human health and the environment were a valid exercise of the state's police powers and, as a result, did not constitute an expropriation.'[424]

As noted by the tribunal in *Saluka Investments B.V v Czech Republic*,

'[t]he international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered . . . as falling within the police or regulatory power of states and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.'[425]

Since these conflicting decisions, states have attempted to rectify the issue within their IIAs. For example, article 20 paragraph 8 of the COMESA Investment Agreement provides that,

'Consistent with the right of states to regulate and the customary international law principle on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives such as public health. Safety and the environment, shall not constitute an indirect expropriation under this paragraph.'

Similar measures are also adopted in the US Model BIT and the EU-Canada CETA. However, the application of these measures to the other provisions in the IIA is limited as these measures have been incorporated in the context of indirect expropriations. They would not apply generally to regulations that may impact on other protections provided in the BIT. As the right to regulate will be relevant to standards beyond expropriation, the clarification provided in IIAs should apply generally to exclude a violation of all measures in the IIA and not just one. As noted by Titi, '…the police powers doctrine is independent of the type of interference with the investment and that if it did not extend to other standards beyond expropriation then it could

[423] *Methanex Corporation v United States* UNCITRAL Final Award on Jurisdiction and Merits 3 August 2005 Part IV Chapter D para 7.
[424] *Chemtura Corporation v Canada* UNCITRAL Award 2 August 2010 para 266.
[425] *Saluka Investments B.V v Czech Republic* para 263.

be neutralised by investors' bringing claims for violations of other standards such as fair and equitable treatment.'[426]

As such, in order for the right to regulate to have the desired effect and overcome the obstacles of conflicting decisions as identified above, there is a need to clarify within the applicable IIA, the effect of the right to regulate on the payment of compensation in a manner that will, on the one hand safeguard the state's policy space while on the other hand, ensuring that the investor protections are not deemed ineffective as a result.

*b. Effectiveness of sustainable development provisions to encourage sustainable development*

According to Baltag et al, the most common sustainable development provisions being incorporated into IIAs are preambulatory, non-precluded measures and exception clauses.[427] While the increasing use of sustainable development provisions is a welcome development, the types of measures being incorporated affect the effectiveness of these provisions. For example, the incorporation of sustainable development provisions in the preamble does not create binding obligations that can be directly enforced by parties to the IIAs, but only serve as an interpretive aid when a dispute arises. Further, the use of exceptions and other clauses such as non- relaxation clauses are often narrowly interpreted by tribunals who seek to maintain consistency and conformity with the traditional goal of investor protection thereby limiting their scope of application.[428] In addition to this, most of these provisions are mainly aimed at reducing the harm of foreign investment activity but they cannot adequately harness the positive effects of FDI so as to promote investment that leads to sustainable development.[429]

Some scholars have noted that the practical effect of sustainable development provisions not only relies on their incorporation in IIAs, but also on the national law standards of the host state aimed at promoting sustainable development.[430] However, the incorporation of sustainable development provisions at the international level of governance, is not being accompanied by similar reform and incorporation at the national level so as to give effect to the efforts being

[426] Titi, 'Police Powers Doctrine and International Investment Law', supra n 417.
[427] Crina Baltag, Riddhi Joshi & Kabir Duggal 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsiblity: Too much or Too Little>' (2023) 00 *ICSID Review* 1–41 at 34.
[428] Howard Mann 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' 17 *Lewis & Clark Law Review* 521–44 at 540.
[429] Ibid at 535.
[430] Chi, supra n 157 at 62; Kitonka, supra n 159 at 96; Newcombe, supra n 163.

made at the international level.[431] For example the EU-China Comprehensive Agreement on Investment has been modelled as a sustainable development oriented IIA. However, the domestic investment law of China does not mention sustainable development, nor does it incorporate any sustainable development-oriented provisions. While it is accepted that domestic investment laws are a necessary avenue for development- oriented regulation,[432] and that there is limited incorporation of sustainable development goals in domestic investment law, there is little literature that addresses the manner in which states can translate the sustainable development provisions at the international level into benefits at the national level. As a result, states, especially developing and least developed countries will still continue having difficulty in translating sustainable development provisions in IIAs into actual sustainable development benefits at the national level. In this regard, there is a need to determine how the other levels of governance can be incorporated into international investment law and how sustainable development mechanisms can be implemented at national level that will complement and give practical effect to the sustainable development provisions at international level. The incorporation of the national level is also of importance as states are at varying levels of development with varying sustainable development needs, therefore making a one-size fits all approach at the international level impractical.

While there is increasing use of sustainable development language in IIAs, the effectiveness of these provisions in promoting sustainable development is limited by the manner in which they are drafted and the limited incorporation of the other levels of governance into the IIA and investment policy making process. There is therefore a need to consider how sustainable development provisions that promote sustainable development and harness its benefits can be incorporated into the international investment law system and across the different levels of governance.

### 2.5.3. *Deficiencies in the reform of the procedural aspects*

While Working Group III has been focused on the procedural aspects of achieving reform, they have adopted a narrow approach to the concerns that require reform and how to address these concerns. Working Group III has limited its discussions to the consideration of procedural concerns as identified above in section 2.3. However, there are a number of other procedural issues that were raised by states in their submissions to the UNCITRAL Commission that

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[431] Kehinde Folake Olaoye & Muthucumaraswamy Sornarajah 'Domestic Investment Laws, International Economic Law and Economic Development' (2023) 22 *World Trade Review* 109–32 at 130.
[432] Newcombe, supra n 163.

require attention in order to effectively address the concerns of the international investment law system. Further, in order to address these concerns, it seems Working Group III has limited itself to exploring the MIC, reformed investment arbitration and the inclusion of an appellate mechanism, without giving due regard to other reform options that may be adopted to resolve the concerns that have arisen. These other issues are discussed hereunder to illustrate how the narrow focus of Working Group III has limited the possibility of achieving effective reform.

*a. Lack of incorporation of the national level*

A number of states (mainly developing countries) proposed the introduction of national remedies and the exhaustion of local remedies rule to address some of the procedural issues that have arisen with ISDS. Indonesia has commented on the need to prevent the creation of parallel adjudication processes by making use of the exhaustion of local remedies rule.[433] Morocco has proposed the use of the exhaustion of local remedies in an attempt to limit concerns related to treaty and forum shopping.[434] Brazil has, in line with their Co-operation and Facilitation Agreements, has advocated for the promotion of national mechanisms to provide an alternative system of dispute settlement.[435] Colombia,[436] Mali[437] Guinea[438] and South Africa,[439] have also advocated for the introduction of the exhaustion of local remedies rule in order to address some of the procedural concerns.

Outside the Working Group III process, states have begun to utilise and incorporate domestic remedies into their investment law systems. The discussions under Working Group III have focused on the continued use of international mechanisms, while ignoring the potential of national mechanisms in addressing the concerns that have been raised against ISDS. The lack of focus on the domestic aspect of dispute settlement is concerning if due regard is had to the sovereignty concerns that have been raised against the regime as well as the actions that have been taken by states at different levels in order to reassert their sovereignty.[440]

In response to these sovereignty concerns, there has been a move by states to re-assert their sovereignty mainly through their national laws or amendments to their treaties.[441] This move

433 Submissions from the Government of Indonesia para 11-12, 15.
434 Submissions from the Government of Morocco para 9.
435 Submissions from the Government of Brazil 2.
436 Submission from the Government of Colombia 8.
437 Submissions from the Government of Mali 3.
438 Submissions from the Government of Guinea para 35.
439 Submissions from the Government of South Africa para 43-46.
440 The sovereignty re-assertion efforts will be discussed fully below.
441 José E Alvarez 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in The Late Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 26.

to re-assert sovereignty can be seen both at national and regional level and applies to the substantive and procedural aspects of the international investment law system.

In relation to the procedural aspects, states have also undertaken to re-assert their sovereignty by incorporating domestic remedies as a means to settle disputes. States have undertaken reviews of their IIAs against their national policies and interests. For example in 2010, the Department of Trade and Industry in South Africa conducted a review of its BITs and inter alia found that the use of investor state arbitration undermined their domestic legal systems and posed significant challenges to democratic decision making in accordance with national policies and objectives.[442] Pursuant to this, the Protection of Investment Act[443] was enacted to replace the international investment law system and provide for the regulation, protection and promotion of foreign investments. With regard to dispute settlement, s13 of the Protection of Investment Act provides for mediation and recourse to domestic courts. International arbitration can only be pursued upon agreement by the government and after exhausting local remedies.[444]

In the same vein, though not extensive as the South African approach, Tanzania has, through an amendment of various pieces of legislation governing natural resources, removed the resolution of certain disputes from the ambit of investor-state arbitration.[445] The Public Private Partnership Amendment Act 9 of 2018 in s22 prohibits the use of international arbitration for the resolution of public private partnership disputes and provides that these disputes must be settled by judicial bodies or organs established in Tanzania and subject to Tanzanian law. S11(2) of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 prohibits investors from resorting to international dispute settlement mechanisms or any foreign court or tribunal for the resolution of disputes relating to the extraction of natural resources.

In 2015, the government of Morocco established a working group to draft a new model BIT taking into account the international investment law climate, concerns regarding international

[442] Parliamentary Monitoring Group Bilateral Investment Treaties review https://pmg.org.za/committee-meeting/10836/ (accessed 6 March 2023); Jennifer Reed 'South African Revolutionizing Foreign Investment Protection System' (2014) 6 *Arbitration Law Review* 295–304.
[443] 22 of 2015.
[444] S13 of the Promotion of Investment Act.
[445] Ibrahim Amir, 'A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration', Kluwer Arbitration Blog, December 28 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzania s-attitude-towards-foreign-investors-and-international-arbitration/ (accessed 25 June 2020).

arbitration and Morocco's economic priorities and needs.[446] With regard to dispute settlement, the Moroccan Model BIT makes provision for a tiered dispute resolution settlement process. In the first instance an attempt must be made to resolve the dispute through mandatory negotiations and consultation through the Joint Committee and National Focal Points who have to resolve the dispute by exhausting the domestic administrative remedies of the host state.[447] Thereafter, the domestic courts of the host state may be approached only after the exhaustion of domestic administrative remedies provided for in Article 29.[448] Finally recourse can be had to investor-state arbitration only after the exhaustion of domestic remedies or if a decision has not been rendered by the host state courts within 30 months from filing. [449]

Following its loss in the case of *White Industries v India*,[450] India, conducted a review of its BITs, which review process culminated in the India Model BIT 2016.[451] With regard to dispute settlement, while the Model BIT retained the use of ISDS, it introduces the requirement to exhaust local remedies for a period of five years before recourse to ISDS in a bid to afford domestic courts with the opportunity to first resolve disputes. [452]

There is also a group of countries who sought to preserve their sovereignty by not entering into IIAs and making use of domestic laws and mechanisms to govern and regulate foreign investment. [453] In this regard, Brazil, that was previously inactive in the international investment law system, has entered the international arena albeit with a view of retaining its sovereignty and excluding recourse to ISDS.[454] Brazil has entered into Cooperation and Investment Facilitation Agreements (CIFA) with 13 countries including Angola, Argentina,

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[446] Arpan Banerjee & Simon Weber 'The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles?' (2021) 36 *ICSID Review - Foreign Investment Law Journal* 536–62 at 537.
[447] Article 29 of the Morocco Model BIT 2019 accessible at https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8.
[448] Article 31 of the Morocco Model BIT 2019.
[449] Article 32 of the Morocco Model BIT 2019.
[450] *White Industries Australia Ltd v The Republic of India* UNCITRAL (Australia/India BIT), Final Award, 30 November 2011 wherein the tribunal found India liable for failure to provide an effective remedy by importing a provision provided for in the Kuwait India BIT through the application of the MFN provision provided for in the Australia India BIT.
[451] Prabhash Ranjan 'India and Bilateral Investment Treaties—A Changing Landscape' (2014) 29 *ICSID Review: Foreign Investment Law Journal* 419–50 at 422.; Ranjan, Prabhash; Singh, Harsha Vardhana; James, Kevin; Singh, Ramandeep (2018) 'India's Model Bilateral Investment Treaty: Is India Too Risk Averse? Brookings India IMPACT Series No. 082018. August 2018; Pushkar Anand & Prabhash Ranjan 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 *Northwestern Journal of International Law & Business*.
[452] Article 15.1 and 15.2 of India's Model BIT 2016.
[453] Smaller countries such as Bhutan, Liechtenstein, Maldives, Fiji and Bermuda and those in the Gulf region have been reluctant to participate in the international investment regime and have signed little to no IIAs.
[454] Brazil only signed 14 BITS between 1994-1999 and none of them have entered into force see https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil?type=bits (accessed 6 March 2023).

Chile, Colombia, Ethiopia, Guyana, Malawi, Mexico, Mozambique, Paraguay, Peru, Suriname and Uruguay.[455] With regard to dispute settlement, the CIFA make provision for amicable settlement of disputes and dispute prevention measures. They provide for mandatory consultation, negotiation, joint committees and state-to -state arbitration.[456] In particular the CIFA make provision for joint committees, made up of representatives from both the host and home state to help prevent and resolve disputes in an amicable way.[457] In addition to this, a national focal point or ombudsman is created to work with the joint committee for the resolution of disputes that may arise.[458]

On the regional level, there has been a concerted effort amongst RECs to recalibrate their investment agreements to account for the concerns that have been raised against the regime.[459] With regard to the inclusion of domestic remedies, the SADC FIP amended its dispute settlement provisions to incorporate the use of national courts and tribunals prior to having recourse to international arbitration.[460] The Organisation for Islamic Cooperation (OIC) has proposed the introduction of an Investment Dispute Settlement Organ which requires investors to first exhaust local remedies until a final decision has been reached by the courts of the host

455 Cooperation and Investment Facilitation Agreements https://www.gov.br/mre/en/contact-us/press-area/press-releases/acordo-de-cooperacao-e-facilitacao-de-investimentos-brasil-guiana-13-de-dezembro-de-2019 (accessed 7 March 2023).

456 'Brazil's Innovative Approach to International Investment Law', *International Institute for Sustainable Development*, available at: https://www.iisd.org/articles/insight/brazils-innovative-approach-international-investment-law (accessed 6 March 2023); Geraldo Vidigal & Beatriz Stevens 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19 *The Journal of World Investment & Trade* 475–512 at 487.

457 See for example Article 4(4)(v) of the Cooperation and Investment Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Mozambique and Article 4(4)(v) of the Cooperation and Investment Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Angola which both provide for the establishment of joint committees whose duties shall be inter alia to 'seek consensus and resolve amicably any questions or conflicts regarding the investments of the Parties.'

458 See for example Article 5(4)(iii) of the Cooperation and Investment Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Mozambique and Article 5(4)(iii) of the Cooperation and Investment Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Angola which both provide for the establishment of Focal points and Ombudsmen to inter alia 'act directly to prevent disputes and to facilitate their resolution in coordination with the competent government authorities and in collaboration with the appropriate private entities…'

459 For example, in the 2016 the East African Community Model Investment Treaty (EAC Model Investment Treaty), a preference for 'no ISDS' is acknowledged explicitly, and the SADC Model BIT provides for arbitration as an ISDS mechanism but expressly states in a special note to article 29 on investor state dispute settlement that the drafting committee was of the view that the preferred option was to have no provision for investor state arbitration.

460 Article 27 of the SADC FIP mandates host states to ensure that investors are able to effectively access dispute resolution for a including administrative tribunals, courts and any other national mechanisms for the settlement of disputes. Article 28 of the SADC FIP makes provision for recourse to international arbitration only after local remedies have been exhausted.

state prior to resorting to international arbitration.[461] The European Commission also conducted public consultations during the TTIP negotiations whose results demonstrated significant support for the resolution of disputes in domestic courts as opposed to making use of international mechanisms.[462]

From the above, it seems that the recourse to and incorporation of national mechanisms in the investment regime has been an approach adopted in the effort at sovereignty re-assertion that has been undertaken by states. It would then appear that the discussions taking place under Working Group III are removed from these sovereignty re-assertion efforts that have been taking place at other levels of governance as there has been little engagement with the same in the Working Group III process.

The developments being made under Working Group III will be less meaningful if they do not address the sovereignty question as it relates to the procedural aspects of international investment law. The international level of governance does not operate and cannot operate in a vacuum or in isolation of the other levels of governance. As noted by Dimitropoulos, the discussion of reform of the procedural aspects must therefore be informed by the domestic systems of governance in order to 'better conceptualise the ways in which international law principles are implemented alongside and through the use of domestic legal instruments and policies.'[463] By continuing discussions at the international level that ignore the national dimension, there is a risk of perpetuating the already existing system that has proven to be, in some respects, incompatible with national policies, that creates jurisdictional competition between national courts and international tribunals, that divides national interests from investor interests and continues the fragmentation between the different levels of governance.

Furthermore, even as states are incorporating an exhaustion of local remedies rule in their IIAs, (independent of the Working Group III process), and with some scholarly writings recommending the incorporation of the exhaustion of local remedies rule, as noted by the

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[461] Kamau, supra n 66 at 225; Yusuf Kumtepe & Riccardo Loschi 'Investment Dispute Settlement Body of the Organisation of Islamic Cooperation: A Dead End for Claims under the OIC Investment Agreement?', *Kluwer Arbitration Blog*, 29 December 2019, available at: https://arbitrationblog.kluwerarbitration.com/2019/12/29/investment-dispute-settlement-body-of-the-organisation-of-islamic-cooperation-a-dead-end-for-claims-under-the-oic-investment-agreement/ (accessed 6 March 2023).

[462] European Commission Report Brussels, 13.1.2015 SWD(2015) 3 final 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf 16 (accessed 6 March 2023).

[463] Dimitropoulos, supra n 129 at 75. For a general discussion on the importance of domestic measures see also Van Harten, Kelsey & Schneiderman, supra n 196.

government of Morocco, several aspects of the international investment law system require a concerted effort by a large number of states to achieve the type of reform required to replace the current international investment law system.[464] Given the traditional formulation of international investment law, there is a need to determine the relationship between the national courts and international dispute settlement mechanism. In this regard, under the traditional formulation of ISDS, even where there was exhaustion of local remedies by the investor, by choice or mandated by the particular IIA, the investment arbitral tribunal would often re-hear the matter on the merits to determine whether the regulatory conduct of the state constituted a violation of the particular IIA. The effect of this being that any decision rendered by the national courts of the state (often the highest court) could be circumvented by the foreign investor by making use of the international investment arbitration, thereby in effect undermining the decisions of national courts. In the *Selwyn Case* it was held that,

> '[w]ithin the limits prescribed by the convention, an international tribunal created thereunder is a tribunal superior to the local courts, and it is not affected jurisdictionally by the fact that a question submitted for its decision is pending in the courts of one of the nations. Such international tribunal has power to act without reference thereto and, if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require' [465]

A discussion on the relationship between the national and international court regarding the allocation of competence between the two, setting out how a harmonious relationship can be fostered through the exhaustion of local remedies rule is currently missing in existing policy practice and in existing literature. This discussion on the allocation of competence and relationship building is important if the introduction of the exhaustion of local remedies rule is to limit contestation and competence between national and international dispute settlement mechanisms and if it is to protect and promote the sovereignty re-assertion efforts as discussed above. This thesis seeks to fill that gap by not only using the multilevel governance framework to recommend the exhaustion of local remedies rule, but also using the principles of multilevel governance to illustrate how competences whether shared or exclusive can be allocated between the national and international dispute settlement mechanisms so as to promote national sovereignty while at the same time ensuring effective protection of investors.

[464] Submissions by the Government of Morocco para 10.

[465] Selwyn Case (interlocutory award) 9 RIAA (1903) 380 https://legal.un.org/riaa/cases/vol_IX/380-385.pdf

*b. Access to justice*

Access to justice is one of the sustainable development goals[466] and is enshrined as the third pillar of the United Nations Guiding Principles on Business and Human Rights. Access to justice is a vital component of the rule of law. The former Special Rapporteur on Extreme Poverty and Human Rights has urged states to ensure the elimination of inequality in access to justice viewing this as a vital feature in the development of human centred social and economic development.[467] Despite the apparent importance of ensuring access to justice within the international investment law system, issues on the reform of ISDS to be more equitable and accessible to parties beyond the foreign investor have been largely ignored, with no designs for reform in this important area taking place.

Investor-state arbitration has been described as a dispute settlement mechanism that was conceptualised and developed as an investor protection mechanism whose system only benefits investors.[468] Some government submissions have raised the question of the legal imbalance that exists in the international investment law system, in that only foreign investors can be claimants in an investment dispute, despite the potential existing for a number of stakeholders to also suffer harm and need to seek redress at the international level for the same. [469] The government of Ecuador noted that one of the concerns with the international investment law system is that third parties who may be affected by the circumstances of a case or by the resultant arbitral award have not been given the opportunity to meaningfully participate in the dispute resolution process.[470] South Africa noted that all stakeholders who are affected by the system should have equal access to the dispute settlement process by allowing claims by investors and states and by also allowing affected third parties to bring claims against investors.[471] A number of stakeholders have also identified the current international investment arbitration mechanism as impeding access to justice. The lack of room within the international

466 Sustainable Development Goal 16 seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels https://sdgs.un.org/goals/goal16 (accessed 2 November 2023).

467 M. Sepulveda Special Rapporteur on extreme poverty and human rights 'Equality and Access to Justice in the Post-2015 Development Agenda' United Nations Human Rights Office of the High Commissioner https://www.ohchr.org/sites/default/files/Documents/Issues/Poverty/LivingPoverty/AccessJusticePost2015.pdf 2.

468 Emmanuel T Laryea 'Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845 2851.

469 Submission of the Government of Morocco 7.

470 Submissions of the Government of Ecuador 4-5.

471 Submissions of the Government of South Africa para 52-54.

investment law system to allow affected third parties to obtain a remedy arising from negative investment activity within the international investment law system has been viewed as a great concern with the system.[472] Deva and Ho describe the system as privileging foreign investors in the area of remediation and creating a justice bubble exclusively accessible by foreign investors.[473] This privileging of foreign investors arises in the fact that IIAs create special rights that are attributable to foreign investors only, creates a special, binding mechanism that foreign investors can use to enforce these rights and seek compensation against state conduct without having to exhaust domestic remedies with limited instances of intervention by affected third parties. [474] The disparity in dispute settlement is not only seen in the dispute settlement process itself, but in the manner it has been used by foreign investors as tool to silence affected third parties by challenging the decisions of domestic courts to hold foreign investors liable to local communities, stalling, ending or otherwise undermining the redress that would have been obtained by affected stakeholders in other fora.[475]

Furthermore, the barriers to participation limit the arguments submitted in investment disputes, limits how investment conflicts and concerns are viewed and recounted to tribunals and these limitations are subsequently reflected in the resultant awards that only provided a one sided dimension to often complex and multifaceted disputes.[476] In this regard Perrone notes that ISDS plays a role in the 'cultural and ontological' occupation of territories, not only by silencing local communities but also by consolidating views about modernity and development.[477] The extent of the promotion of international dispute settlement mechanisms for safeguarding the needs of foreign investors has the effect of prioritising international solutions which reinforces the common perception that domestic institutions, actors and cultures undermine democracy and human rights while international law promotes and protects democracy and human rights.[478] As noted by Perrone, '[f]oreign investment needs more than a one way adversarial

[472] Emmanuel T Laryea 'Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845 at 2847.
[473] Surya Deva & Tara Van Ho 'Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism' (2023) 24 *The Journal of World Investment & Trade* 398–436 at 400, 413.
[474] Ibid at 413.
[475] Ibid at 419; Michelle Chan & Kanika Gupta 'Impacts of the International Investment Regime on Access to Justice' at 11; Nicolas M Perrone 'Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities' (2023) 24 *Journal of World Investment & Trade* 437–60 at 447.
[476] Chan & Gupta, supra n 475 at 11.
[477] Nicolas M Perrone 'Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities' (2023) 24 *Journal of World Investment & Trade* 437–60 at 447.
[478] Anil Yilmaz Vastardis 'Investment Treaty Arbitration: A justice bubble for the privileged' in Thomas Schultz & Federico Ortino (eds) *The Oxford Handbook of International Arbitration* (2020) 623.

regime based on investor claims against national governments. Local representation must be ensured before, during and after a project…'[479] He further noted that local recognition and representation are beyond ISDS but are rather a matter of institutional design, requiring the re-thinking of a system that perpetually excludes a large number of stakeholders directly affected by it.[480]

Reform of international investment law therefore has to seriously consider the manner in which affected third parties are able to participate in the dispute settlement process. This participation should go beyond mere amicus curiae participation. Participating as amicus curiae does not give affected and interested parties a direct remedy to provide redress that may have been suffered by third parties nor does it offer any protection against violations of their rights. The participation envisioned has to be equally accessible, participatory, independent, diverse and transparent in order to effectively address the access to justice concerns that arise in the context of investor state arbitration.

*c. Continued use of arbitration as the mode for dispute settlement*

As highlighted above, the proposals for the MIC and the reformed use of ISDS retain arbitration as the mode of dispute settlement. Despite the changes that have been made regarding the use of arbitration, there are still some concerns that remain outstanding that beg the question as to whether arbitration, both institutionalised and ad hoc is a suitable mode for the settlement of disputes that arise under international investment law. As shall be illustrated hereunder, arbitration does not lend itself to the extensive nature of reforms that are necessary to address the concerns that have arisen within the system.

As a starting point, in order for an arbitral tribunal to have jurisdiction to hear a matter, there ought to be a valid agreement between the arbitrating parties. In international investment law the host state agrees to arbitration in advance in the dispute resolution clause of the applicable IIA and the foreign investor consents to the use of arbitration through the initiation of an arbitral claim.[481] There can only be two parties to an arbitration, the host state and the foreign investor,

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[479] Perrone, supra n 475 at 440.
[480] Ibid at 448.
[481] Lanco International Inc v Argentina, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at 48 where it was held that '… consent to ICSID arbitration by a State may come from a bilateral treaty. In this regard, the award in American Manufacturing & Trading, Inc. v. Republic of Zaire (SINZA Award) establishes, on the basis of the provisions of a bilateral treaty with language very similar to the bilateral treaty before us in this case, that consent for the purposes of Article 25(1) is understood to be given by the State party to the dispute in the bilateral investment treaty from the moment the State extends a generic invitation to all the investors who are nationals of the other Contracting State to submit the settlement of their possible disputes to ICSID jurisdiction. In contract, the consent of the investor who is a national of the other

and only one party, the foreign investor, can initiate arbitration proceedings. As a result of this, there can be no meaningful participation of third parties in the dispute resolution process save for in the limited context of amicus curiae submissions. This means that third parties, usually local communities and vulnerable or marginalised groups will not be able to have their rights and interests adequately protected in the course of an arbitral dispute. Further, this means that the investor obligations that are being incorporated into newer generation IIAs are ineffective as there is no equivalent mechanism within the international investment law framework that can be used by third parties to directly enforce the obligations of the foreign investor and seek protection from negative investor conduct. The use of arbitration therefore results in a binding decision that may affect a third party being made without affording the third party an equal right to participate and make presentations regarding their interest. Vastardis notes that, 'a permanent court of investment arbitration is a short-sighted solution to deficiencies in local access to justice which is likely to undermine domestic legal developments.'[482]

While it can be argued that host states can bring forward counterclaims on behalf of their citizens, this remedy is limited. Despite the rules of most arbitral institutions making provision for the use of counterclaims, there have been two key obstacles that have been identified by arbitral tribunals in accepting counterclaims made by host states.[483] These two obstacles are whether or not the agreement to arbitrate provides the tribunal with jurisdiction over the determination of counterclaims and the question as to what obligations are owed by the investor to the host state.[484]

In the case of *AMTO v Ukraine*[485], Ukraine sought to bring a counterclaim in accordance with the arbitral rules of the Stockholm Chamber of Commerce. The applicable IIA was the Energy Charter Treaty and its dispute resolution clause provided for the resolution of disputes which alleged a breach of an obligation of the host state. The tribunal held that its jurisdiction to hear a counterclaim was dependent on the contents of the dispute resolution clause in the applicable treaty. In this instance, the dispute resolution clause only extended jurisdiction to the tribunal to determine matters arising from an alleged breach of an obligation of the host state and as

Contracting State, must be given by the investor in writing, since the consent of the State is not binding on the investor.'

[482] Anil Yilmaz Vastardis 'Investment Treaty Arbitration: A justice bubble for the privileged' in Thomas Schultz & Federico Ortino (eds) *The Oxford Handbook of International Arbitration* (2020) 620.

[483] Yaraslau Kryvoi 'Counterclaims in Investor-State Arbitration' (2012) 21 *Minnesota Journal of International Law* 216–52 at 216.

[484] Ibid.

[485] *Limited Liability Company AMTO v Ukraine* SCC Case No. 080/2005 Final Award March 26, 2008.

such, the tribunal found that it was limited by the subject matter jurisdiction defined in the dispute resolution clause and could not determine the counterclaim raised by the host state.[486] The same reasoning was also applied in the case of *Roussalis v Romania*[487] where the tribunal found that the applicable dispute resolution clause limited the jurisdiction of the tribunal to determining claims brought by the investor alleging a breach of the host states obligations.

Even where the applicable IIA makes provision for the use of counterclaims, this is only a remedy available in certain circumstances as counterclaims can only be initiated after a foreign investor has initiated a claim, such that where there is no initial claim by a foreign investor, there can be no counter claim and thus no judicial protection.[488]

By its very nature, arbitration is based on party autonomy- which allows parties to decide not only their adjudicators but also select the preferred procedural rules.[489] According to Dursun, '…the parties do not want to deal with procedural formalities. Consequently, the parties choose arbitration as a private dispute settlement and thus, they can conduct all proceedings of arbitration by taking into account their needs and desires such as they can arrange timetable of hearings, choose anyone as an arbitrator who has relevant expertise on specific requirements of the dispute.'[490] As such, parties cannot be compelled to adopt or to opt into certain procedural rules and reform efforts where they may not want them or where they may be detrimental to their interests. For example, with respect to concerns regarding lack of adequate representation among arbitrators, as the arbitrators are party appointed, parties cannot be compelled to fulfil representation quotas or appoint arbitrators in a manner that will promote diversity as these issues may not necessarily be of concern to the parties. This shortcoming is also apparent regarding issues of transparency and time and costs. From an institutional perspective, a lot of ground has been achieved by UNCITRAL and ICSID in implementing measures that are aimed at ensuring greater transparency and reduction of time and costs in investor-state arbitration.[491] The success of these initiatives by ICSID and UNCITRAL are largely dependent on the extent to which the parties to the arbitration themselves are willing to

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[486] *AMTO v Ukraine* 118.
[487] *Spyridon Roussaliss v Romani*a, ICSID Case No Arb/06/1 Award Dec 7, 2011
[488] Tomoko Ishikawa 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 *American Journal of International Law* 33–7 at 35.
[489] 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality? *Journal of Sustainable Development Law and Policy* (The)' 224 <https://www.ajol.info/index.php/jsdlp/article/view/128033> (accessed 28 April 2023).
[490] Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent" (2012)http://www.yalova.ed.tr/Files/User Files/83 /8_Dursun.pdf (accessed 28 April 2023).
[491] See section 2.4.2 (a) above.

make use of these reforms. For example, even though the Transparency Rules and Transparency Convention came into effect in 2014, only twenty-three countries are signatory to the Transparency Convention, and it has come into force for only nine of the twenty-three countries.[492] As confidentiality and privacy are hallmarks of arbitration,[493] the limited uptake of the Transparency Rules may be due to the fact that there has been no consensus reached as to the balance that ought to be struck between confidentiality and transparency in (investment) arbitration. One the one hand, compromising on the confidentiality of the proceedings erodes one of the main attractions associated with the use of arbitration.[494] On the other hand, maintaining a level of transparency is necessary to promote the legitimacy of the system due to the public nature of investor state disputes.[495] This limits the effectiveness and applicability of the Transparency Rules in investor states disputes and the status quo regarding transparency concerns already being faced is largely maintained.

With regard to costs and length of proceedings, according to the 2011 Chartered Institute of Arbitrators Costs of International Arbitration Survey, [496] three quarters of the costs of arbitration were spent on outside counsel. Further the conduct of the parties themselves in selecting arbitrators and in carrying out the dispute resolution procedures contributed significantly to the increased delays that are experienced in arbitral proceedings.[497] It would appear that the parties themselves are largely responsible for increasing the costs and delays experienced in international arbitration.[498]

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[492]Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status (accessed 19 October 2022)
[493] Enuma U Moneke 'The Quest for Transparency In Investor-State Arbitration: Are The Transparency Rules And The Mauritius Convention Effective Instruments Of Reform?' (2020) 86 *The International Journal of Arbitration, Mediation and dispute Management* 157–86 at 157.
[494] Sonia Anwar-Ahmed Martinez ' Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Kluwer Arbitration Blog 8 April 2021 https://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/ (accessed 19 January 2024).
[495] Sonia Anwar-Ahmed Martinez ' Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Kluwer Arbitration Blog 8 April 2021 https://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/ (accessed 19 January 2024).
[496] https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf (accessed 21 June 2022).
[497] Kalicki, supra n 343.
[498] Jean Kalicki 'Controlling Time and Costs in Arbitration: A Progress Report (Part 2 of 2)', *Kluwer Arbitration Blog*, 22 November 2011, available at: http://arbitrationblog.kluwerarbitration.com/2011/11/22/controlling-time-and-costs-in-arbitration-a-progress-report-part-2-of-2/ (accessed 17 June 2022); J Risse 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings' (2013) 29 *Arbitration International* 453–66 at 453.

Further the system of arbitration does not lend itself to the promotion of coherence and consistency through the use of the most common method of ensuring consistency in decision making i.e., through the use of precedent.

Precedent (stare decisis) refers to the practice whereby lower courts are bound by decisions of higher courts on the same or similar points of law, and higher courts are also bound by their own decisions and generally only depart from them in exceptional circumstances.[499] There seems to be general consensus that arbitrators do not generate precedent in the strict sense of the word.[500] This has been attributed to the ad hoc nature of arbitration which results in a lack of continuity as arbitrators are appointed on a case by case basis, the lack of hierarchy among arbitral tribunals, the private nature of awards and the lack of structures that promote the use of precedent.[501]

Despite the fact that arbitrators and lawyers often refer to previous cases in their awards and arguments, there is no rule that binds arbitrators to follow previous decisions and as such, arbitrators are free to deviate from interpretations adopted by prior tribunals.[502] This freedom to deviate is illustrative of the lack of binding precedent and is the root cause of the inconsistency concerns as arbitrators have, where faced with similar facts, parties or rules, deviated from prior interpretations.[503] As such, it would be difficult to incorporate a rule that requires arbitrators to adopt a form of precedent so that like cases are decided the same as this would go against the very nature of the system of arbitration. [504] This occurrence is further exacerbated by the existence of parallel proceedings in investor state arbitration which is

499 Niccolò Zugliani 'A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain' (2022) 2 *The Italian review of international and comparative law* 370–289 at 377.
500 W Mark &Weidemaier 'Toward A Theory of Precedent in Arbitration' (2010) 51 *William and Mary Law Review* 1895–958 at 1899; Niccolò Zugliani 'A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain' (2022) 2 *The Italian review of international and comparative law* 370–289 at 377.
501 W Mark & Weidemaier 'Toward A Theory of Precedent in Arbitration' (2010) 51 *William and Mary Law Review* 1895–958 at 1903–4; Niccolò Zugliani 'A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain' (2022) 2 *The Italian review of international and comparative law* 370–289 at 379; Tai-Heng Cheng 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 *Fordham International Law Journal* 1014–49 at 1030.
502 See *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, para 30-32 where the tribunal held that '[a]n identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem;'
503 See Chapter 2 section 2.4(a).
504 Richard C Chen 'Precedent and dialogue in Investment Treaty Arbitration' (2019) 60 *Harvard International Law Journal* 47–94 at 53.

another feature that arises from the nature of arbitration. Parallel proceedings refer to instances where investor state arbitration proceedings are pending before two or more tribunals in which the parties are the same or related, the cases have a similar legal basis and one or more of the issues is substantially the same.[505] The use of arbitration provides for the creation of separate tribunals to hear any matter and this increases the number of forums to which a claim can be brought and it allows for multiple investor claims such that multiple corporations or their shareholders can bring separate claims in respect of the same matter or investment.[506] In this regard, arbitral tribunals have often accepted that shareholders can bring autonomous claims even when the company is capable of acquiring effective recourse thereby going against the general principles followed in national and other international legal systems.[507] As noted by Shookman, the increased proliferation of parallel proceedings and the related concerns of lack of coherence and certainty 'points to large unsolved questions of institutional design and an increasingly global legal order.'[508]

In the premises, it can be concluded that some of the concerns that have arisen regarding ISDS are as a result of the inherent features of arbitration as a dispute resolution mechanism. The safeguards that are necessary to fully address these concerns are traditionally the exception to the rule or are opt in measures in the context of arbitration. Reformed arbitration can only go so far in addressing the concerns that have arisen regarding ISDS. This makes arbitration, in general, a less suitable method for the settlement of investment disputes.

## 2.6. CONSEQUENCES OF THE DEFICIENCIES IN THE REFORM EFFORT

Some scholars have noted the possibility that the ongoing reform agenda before Working Group III has the potential to entrench the and re-legitimise the deficiencies of the current international investment law system.[509] Gatthi and Mbori note that the focus of Working Group III on the concerns identified in section 2.3 above is aimed at improving ISDS, and will result

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[505] Erik-Kubat, Parallel Proceedings in International Arbitration: A Comparative European Perspective (2014), 15.

[506] Jamie Shookman 'Too Many Forums for Investment Disputes? ICSID Illustration of Parallel Proceedings and Analysis' (2010) 27 *Journal of International Arbitration* 361–78 at 365.

[507] See for example *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 65, 73-74; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004, para. 63; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 49; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 23.

[508] Shookman, supra n 506 at 377.

[509] Gathii & Mbori, supra n 107; Heath, supra n 107; Lichuma, supra n 107; Ibironke T Odumosu-Ayanu 'Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law' (2023) 24 *The Journal of World Investment & Trade* 792–837; Polonskaya, supra n 125.

in the carrying forward of some of the unequal, unfair and unjust rules of international investment law thereby entrenching some of the fundamental challenges that are facing the system that have received little to no attention.[510] The reform effort undertaken by Working Group III has put into the backseat important issues that arise from the potential negative impacts of investments that affect local and indigenous communities.[511] Sornarajah finds that many reform efforts address the peripheries of the system in the hopes that by fixing them, the challenges of the system will be muted.[512] Gathii further notes that at best, the Working Group III reform process will yield reforms that will 'tinker with the system at the margins without fundamentally changing it'. [513] Van Harten et al note that the concerns identified and focused on by Working Group III while also important, are far from the diligent catalogue of necessary reforms that have been proposed by various stakeholders.[514] They further note that the reforms that are presently under discussion would not alleviate the most serious challenges facing the international investment law system and underscore the need for reforms that go beyond just the procedural aspects identified by Working Group III.[515]

By focusing on a limited nature of procedural reforms, the Working Group III process will only address half of the problem thereby limiting the net effect of the reform.[516] By failing to consider and engage with the wider aspects of the reform of international investment law, Working Group III missed an opportunity to collaborate with governments and interested stakeholders to achieve wholesale and systematic reform of international investment law. Duggal et al note that the UNCITRAL reform process may have the unintended consequence of exacerbating the investor focused system as opposed to changing it.[517] Sachs et al note that the approach undertaken for reform undermines the legitimacy, support for and uptake of Working Group III's reform process. [518] They further find that,

> '[d]espite the stakes, which continue to mount, the work plan casts serious doubt that Working Group III after all its time, effort and expense, will produce serious or impactful outcomes. The

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[510] Gathii & Mbori, supra n 107 at 536.
[511] Lichuma, supra n 107.
[512] Muthucumaraswamy Sornarajah, 'Disintegration and Change in the International Law on Foreign Investment' (2020) 23 JIEL 413, 418.
[513] James Thuo Gathii *Reform and Retrenchment in International Investment Law* (2021) at 20, available at: https://papers.ssrn.com/abstract=3765169 (accessed 22 September 2023).
[514] Van Harten, Kelsey & Schneiderman, supra n 196 at 3.
[515] Ibid at 14.
[516] Kabir Duggal, Nicholas J Diamond & Sarah Ayreen Mir 'Procedural versus Substantive Reforms: Is the Work of UNCITRAL Working Group III Worth the Wait?', *Kluwer Arbitration Blog*.
[517] Ibid.
[518] Lisa Sachs et al 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System', *Columbia Centre for Sustainable Investment*. https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system (accesses 10 October 2023).

> work plan reveals an unwillingness to seriously and fully deal with concerns about how ISDS may negatively impact domestic law and institutions, chill or unduly raise or shift the cost of a public interest regulation or undermine the rights of non-parties. It is, at best, a missed opportunity and at worst, a process that is all but set to lock in a system of dispute settlement that is fundamentally at odds with inclusive sustainable development. A number of stakeholders and states have consequently been disengaging from the process.' [519]

From the above that there is a need to reinforce the reform process being undertaken by Working Group III by focusing on equally important issues that have not received attention and identifying solutions for the same. In the context of achieving broad based systematic reforms that are not merely aimed at changing the system but are genuinely aimed at addressing the deficiencies of the international investment law system. By incorporating reform of other issues as identified above, there will be much broader and more holistic reform of the international investment law system.

## 2.7. CONCLUSION

The international investment law system has come under fire, leading to calls for its reform. The chapter set out to identify the challenges that have been faced by the international investment law system. The current reform efforts under Working Group III have largely been centred on addressing procedural concerns related to lack of consistency, coherence and predictability, arbitrators and decision makers and the costs and duration of arbitral proceedings. While these are undoubtedly important issues there are several other concerns that have been excluded from the reform discussions which, it has been argued, limits the effectiveness of the reform effort. There have been some steps that have been taken in an attempt to address the concerns that have been raised against the international investment law system including the work of Working Group III to address the procedural concerns identified above, the introduction of the Mauritius Convention on Transparency to improve the transparency of ISDS proceedings, incorporating rules to improve time and costs of the proceedings in the various rules of arbitral institutions and the incorporation of non-disputing party submissions. These efforts have however been limited in their possible impact because they largely focus on addressing the system of international investment law for foreign investors and leave out issues that would be necessary to improve the international investment law system for all stakeholders including local and indigenous communities.

The chapter also found that the limited focus of the reform effort would entrench the current ISDS system with the risk that the concerns raised by various stakeholders being perpetuated

[519] Ibid.

in the new system of international investment law with the reform process failing to produce serious and impactful outcomes.

The chapter identified the additional issues that need to be addressed in the reform effort including:

- The substantive aspects focusing on rebalancing the rights and obligations contained in IIAs, making room for the achievement of sustainable development and clarification of the right to regulate.
- Incorporation of the national level into the regulation and governance of international investment law in both the substantive and procedural aspects.
- Improving access to justice by ensuring that affected parties are able to access the dispute settlement mechanisms for the protection of their rights.
- Identifying the mechanism for the settlement of disputes at the international level as the nature of arbitration is incompatible with the types of systemic reform required to address the additional concerns identified above.

The chapter illustrated that while there may be consensus on the need for reform, the process of reform that has been undertaken by Working Group III and states and regional communities at varying levels has been inadequate to address the wide range of concerns that are currently plaguing the regime. The process has been described as merely trying to change the existing ISDS system as opposed to critically engaging with substantial issues. This chapter has placed into context the international investment law system, the calls for reform, the reform process as well as the deficiencies in the reform process.

This thesis seeks to fill the gap that currently exists in reform literature by exploring how these 'forgotten’ issues can be addressed, and meaningful reform incorporated into the international investment law system. The following chapters proceed to make proposals as to how these deficiencies in the reform effort can be addressed to achieve meaningful reform of the international investment law system.

## CHAPTER 3: THE THEORY OF MULTILEVEL GOVERNANCE FOR THE REFORM OF INTERNATIONAL INVESTMENT LAW

### 3.1. INTRODUCTION

The earlier chapters have outlined the need for a framework that can be used to organise the different actors and stakeholders as well as the different levels of governance as they operate within in the international investment law system. This chapter proposes the use of the multilevel governance framework to achieve this.

Over time, there has been a proliferation of a dense network of international and transnational institutions of unprecedented quantity and quality which has contributed to the creation of concepts such as those of global governance.[520] Global governance refers to the 'collective efforts to identify, understand or address worldwide problems that go beyond the capacities of individual nation states to solve problems and reflects the capacity of the international system to provide government-like services in the absence of a world government.'[521] Within global governance, international institutions exercise authority beyond the nation state and have the ability to make binding decisions on matters relating to a state's domestic jurisdiction, even where these decisions are contrary to a state's own policies and preferences.[522] These institutions can circumvent the resistance of most nation states via dispute settlement procedures and by dominating the process of knowledge interpretation.[523] International investment law and in particular the ISDS system arose as a means to regulate the relationship between the host state and the foreign investor and to provide an effective and neutral remedy for the resolution of disputes between an investor and a host state,[524] and can be identified as one such international institution. International investment law operates outside of the confines of the nation state and promotes compliance with its rules through a dispute settlement procedure and an effective enforcement mechanism. It can therefore be viewed as a system of global governance. The increase in globalisation, which has given rise to the concept of global

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[520] Michael Zürn 'Global governance as multi-level governance' in Henrik Enderlein, Sonja Walti & Michael Zurn (eds) *Handbook on Multilevel Governance* (2010) 80–99 at 735.
[521] Mingqian Li 'Rethinking and Reforming the Investor-State Dispute Settlement Mechanism in the Context of Global Governance International Economic Law' (2020) 1 *Foundation for Law and International Affairs Review* 21–39 at 21; Joachim Rennstich 'Multilevel Governance as a Global Governance Challenge: Assumptions, Methods, Shortcomings and Future Directions' (2017) at 14.
[522] Michael Zürn 'Global Governance as Multi-Level Governance' in David Levi-Faur (ed) *The Oxford Handbook of Governance* (2012) 730–44 at 732.
[523] Ibid 735.
[524] Julie Maupin, A, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 *Virginia Journal of International Law* 367, 375.

governance has led to increased interactions and tensions between the public and private sphere. Without sufficient regulation of the same, these tensions have led to criticisms against global governance systems[525] such as those that have been outlined in Chapter 2 regarding international investment law. To resolve these concerns, this thesis proposes the use of multilevel governance as the framework through which these concerns can be addressed, and the system be reformed so as to bring greater legitimacy.

To achieve this, Section 3.2 will show how ISDS is a structure of global governance in particular global administrative law and will show how the exercise of global administrative power within the ISDS framework has led to the concerns identified in Chapter 2 and the tensions between the private and public spheres and between the different levels of governance. As the effective and legitimate functioning of global governance institutions requires the interplay of the different levels of governance,[526] section 3.3 will introduce the multilevel governance framework as a mechanism which can be used to regulate and restructure the relationship between the different levels of governance within the international investment system to address the concerns identified. The principles of multilevel governance that will be referred to include the principles of stakeholder participation, subsidiarity, transparency and legitimacy. These are the principles that will be applied throughout this thesis when making recommendations for the reform of international investment law. Section 3.4 will illustrate how multilevel governance will assist in addressing the issues that have arisen regarding the international investment law system as well as provide the protections necessary for the exercise of global administrative power. Section 3.5 will conclude.

## 3.2. INTERNATIONAL INVESTMENT LAW AS GLOBAL GOVERNANCE

Global governance occurs when various public and private institutions, including state and non-state actors have undertaken to work together to solve global public issues, advance public goods and promote public interests by formulating and implementing formal and informal mechanisms.[527] Global governance does not run parallel to other levels of governance; rather, it is constituted by the interplay of the different levels of governance, whereby each level cannot operate unilaterally.[528] Within global governance, the separation between national and

[525] Ernest-Ulrich Petersmann 'International Economic Law, Public Reason, and Multilevel Governance of Interdependent Public Goods' (2011) 14 *Journal of International Economic Law* 23–76.
[526] Zürn, supra n 522 at 736.
[527] Li, supra n 521 at 23.
[528] Zürn, supra n 522 at 736.

international has been blurred and administrative functions are now carried out in complex interplays between the national and international levels of governance, with increasing regulatory and administrative functions being performed at the international level.[529] Global governance can be understood as an administrative action that is focused on creating a balance between competing interests.[530] This understanding of global governance led to the development of global administrative law. Global administrative law is a system akin to domestic judicial review that operates to keep the conduct of public authorities within the bounds of legally acceptable conduct and provides enforceable remedies to individuals that have been harmed or suffered loss as a result of unlawful state conduct.[531] Global administrative law is often organized and shaped by principles of an administrative law character namely participation, transparency, reasoned decision-making, judicial review, accountability, proportionality, and legitimate expectations .[532]

As international investment law seeks to ensure that state regulatory conduct does not negatively impact foreign investors and can impact the interests of the public, international investment law, and in particular the ISDS system has been described as a structure of global governance, in particular global administrative law.[533] This is so because when settling disputes between private actors being the foreign investors, and public actors, being the host state, arbitral tribunals exercise public authority, as they undertake a review of the sovereign acts of a state's legislature, judiciary and administration.[534] Investor-state arbitration tribunals are empowered by the applicable IIA to resolve a dispute that has arisen as a result of the (usually) regulatory conduct of the host state acting in a public capacity which has negatively affected the investor, who is subject to the exercise of the public authority of the state.[535] As such,

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529 Nico Krisch and Benedict Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1 1.
530 Benedict Kingsbury, Nico Krisch & Richard B Stewart 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61 at 17.
531 Gus Van Harten & Martin Loughlin 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121–50 at 149.
532 Krisch & Kingsbury (n 10) 2. Sebastián López Escarcena 'Investment Disputes Oltre lo Stato: On Global Administrative Law, and Fair and Equitable Treatment' (2018) 59 *Boston College Law Review* 2685–715 at 2686.
533 Benedict Kingsbury & Stephan Schill Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, NYU School of Law, 2009, No. 09-46, Public Law Research Paper 1–53 at 1 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980 (accessed 4 July 2022). Investment Treaty Arbitration as a Species of Global Administrative Law' (*Institute for International Law and Justice*) 123 <https://www.iilj.org/publications/investment-treaty-arbitration-species-global-administrative-law/> (accessed 4 July 2022).
534 Escarcena, supra n 532 at 2697.
535 Ibid 148.

investment arbitral tribunals, function as a review mechanism which assesses the balance that a government has struck in a particular situation between investor protection and other important public policy measures.[536] In performing this review function, investment arbitral tribunals interpret and apply broad similar measures which are contained in similar IIAs and by so doing they concretise, expand or narrow the meaning of the provisions contained in IIAs.[537]

The administrative function of investment arbitral tribunals is largely seen through the manner in which the fair and equitable treatment (FET) standard has been interpreted and applied. The FET standard sets out the standard of evaluation against which host state regulatory acts are measured and reviewed by investment arbitration tribunals. [538] In the case of *Indian Metals & Ferro Alloys Limited (India) v Indonesia,*[539] the tribunal held that the FET standard encompasses the following principles:[540] host states must respect the investor's legitimate expectations; host states must not act in an arbitrary or discriminatory manner; host states must act in good faith; host states must act in a transparent and consistent manner; host states must respect due process and procedural propriety; host states must act in a manner which respects the principles of proportionality.[541]

These principles utilised by arbitral tribunals to check the excesses of host states are a blend of principles which are commonly applied in domestic administrative law and settled doctrines of public international law.[542] It is on this basis that investor- state arbitration tribunals have been said to exercise a form of global administrative law. Despite the fact that tribunals resolve investor-state disputes through the use of principles of global administrative governance, the failure to embed investor-state arbitration within the theories of global governance may have contributed to the concerns that have been raised against the international investment regime.[543] Global governance in general and global administrative law in particular relies on safeguards such as accountability, transparency, consultation and participation, rationality, legality and

[536] Kingsbury & Schill, supra n 533 at 1.
[537] Ibid at 2.
[538] Ibid at 7.
[539] PCA Case No. 2015- 40
[540] Ivan Stepanov 'Fair and Equitable Treatment Standard and Legitimate Expectations' *Eli Lilly and Beyond: The Role of International Intellectual Property Treaties in Establishing Legitimate Expectations in Investor-State Dispute Settlement*1 ed (2018) 50–66 available at: https://www.jstor.org/stable/j.ctv941qkw.10.226.
[541] See also *Waste Management Inc. v United Mexican States* II Case No. ARB(AF)/ 00/3 para 98.
[542] Aniruddha Rajput 'Advent of Investment Arbitration and Evolution of International Administrative Law' (2012) 54 *Journal of the Indian Law Institute* 232–47 at 234.
[543] Benedict Kingsbury & Stephan Schill 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' NYU School of Law, 2009, No. 09-46, Public Law Research Paper 1–53 at 4.

effective review mechanisms to ensure that decisions that emanate from global administrative structures are sufficiently legitimate and acceptable by stakeholders. [544] Global governance also relies on a pluralistic, democratic and inclusive management system under which various actors manage their common affairs through a process of authority sharing.[545] The concerns that have been identified in Chapter 2 can be directly linked to the absence of these safeguards which have resulted in tensions arising between the different levels of governance within the international investment law framework.

Effective and legitimate governance depends on the interplay at different levels of governance. If more than one level exhibits authority, then there is a need to co-ordinate the functioning and authority of the different levels and one can then speak of multilevel governance.[546] If we view international investment law as a form of global regulatory governance, there is a need to determine how the different actors within the international investment regime relate to each other and put in place safeguards that will regulate their interactions. This thesis proposes the use of the multilevel governance theory to determine how the different levels of governance within the international investment regime can work together in consort to achieve the reform of international investment law.

## 3.3. MULTILEVEL GOVERNANCE FOR THE REFORM OF INTERNATIONAL INVESTMENT LAW

States are increasingly contracting out some of their powers of regulation, that is, the exercise of their governmental or public authority to international organisations.[547] The effect of such power conferrals is that both public and private entities at the national level are subject to regulations stemming from a number of different entities and organs exercising governmental power belonging to different levels of governance.[548] These entities may exercise this power at national, regional, or international level. With governance and the exercise of state power expanding into international law, constitutionalism has to expand beyond the boundaries of the

[544] Benedict Kingsbury & Stephan Schill Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law'; Sebastián López Escarcena 'Investment Disputes Oltre lo Stato: On Global Administrative Law, and Fair and Equitable Treatment' (2018) 59 *Boston College Law Review* 2685–715 at 2697.
[545] Li, supra n 521 at 22.
[546] Ibid.
[547] Antonios Tzanakopoulos, 'Judicial dialogue in multi-level governance: The impact of the Solange argument' in Ole Kristian Fauchald & Andre Nollkaemper (eds) *The Practice of International and National Courts and the (De)-Fragmentation of International Law* (2012) 189.
[548] Ibid.

nation state in order to secure overall coherence of governance.[549] The concept of multi-level governance refers to the complex, multifaceted and contingent interaction of public and private institutions as networks, each operating at different levels of governance.[550] It 'aims to capture and understand political process related to the emergence of supranational institutions…and to facilitate analysis of decentralized decision-making processes, in which sub-national level governments and civil society have come to increasingly influence.' [551] Multi-level governance can therefore be defined as,

> '[A]n arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors -private and public- at different levels of territorial aggregation in more or less continuous negotiation/deliberation/ implementation, and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.'[552]

The theory of multilevel governance can be traced to the works of Gary Marks where it was first proposed as a tool for understanding the European Union (EU) and the way it functions.[553] The theory has been expanded to illustrate and explain the most appropriate method for the interaction of the different levels of governance (including the regional and international). The theory of multilevel governance sees the different levels of governance as a single coherent framework of governance that recognises the interconnectedness of all the actors who must act in consort.[554] It may be conceptualized as an analytical tool of systems theory, which conceives the economy, politics, law and society as different systems within an overall network.[555] It adequately captures the increasing functional differentiation, specialisation and decentralisation of the multi-level systems various components which evolve in a constant learning process in which novel problems are tackled by monitoring adapting and fine tuning regulatory experiences over time.[556] In order for global governance systems to adequately respond to external pressures, there ought to be an equitable division of power, accountability of policy and decision makers and multilevel governance to prevent governments from

[549] Thomas Cottier, 'Towards a five-storey house theory' *The Prospects of 21st Century Constitutionalism* 299.
[550] Christoph U. Schmidt, 'Multi-level constitutionalism and constitutional conflicts: Interconnecting the national, European and international economic constitutions in the banana dispute' Doctoral thesis 181.
[551] Moeko Saito-Jensen, 'Theories and methods for the study of multilevel environmental governance' (2015) Center *for International Forestry Research* 2.
[552]Malebakeng Agnes Forere, 'The relationship of WTO law and regional trade agreements in dispute settlement: From fragmentation to coherence (2015) 11.
[553]Ibid at 10.
[554] Ibid at 11.
[555] Christopher U. Schmidt supra n at 181.
[556] Ibid.

ignoring the fundamental rights of citizens or the relevant interests of stakeholders.[557] This is the type of governance that this thesis proposes for the investment regime. It allows for consultation and the consideration of the needs of different stakeholders, will provide for greater legitimacy and acceptance of decisions taken within the international investment law framework, and create an environment where all levels of governance are working together for the achievement of a common goal.[558]

The multilevel governance acts analytically and normatively to reconstruct the relationship amongst the various levels. Multilevel governance operates as an analytical framework to explain how the different players from the different layers of governance affect a particular policy area.[559] It not only explains how the different layers interact with each other, but also explains the tensions and fragmentation that may exist across the different layers.[560] Normatively, multilevel governance offers a framework for bringing coherence and interaction of the different layers of governance while taking into account any differences that may exist between the different layers.[561]

The multilevel governance approach revolves around two fundamental criteria in order to achieve the goal of reconstructing the relationship between the different levels of governance. First, being institutional capacity, which refers to the technical potential of effective problem solving at supranational level. Institutional capacity relates to the manner in which the different levels of government interact with each other.[562] It entails that no actor or sub-system may act autonomously. The relationship between the actors and subsystems is co-operative and highly dependent on each other. Mechanisms such as recommendation, expertise and consultation are used to enhance co-operation between the different levels of governance.[563] Secondly, legitimacy which is the degree to which supranational governance is socially accepted and complied with by the governed and thus able to exist at all.[564] Legitimacy, refers to the manner and extent to which the different levels of governance act in accordance with accepted human rights norms and apply the principles of separation and balancing of powers, rule of law and

557 Arthur Benz *Policy Change and Innovation in Multilevel Governance* (2021) at 3 available at: https://www.elgaronline.com/display/9781788119160.xml.
558 Ibid at 3.
559 Malebakeng Agnes Forere supra n 511 at 13.
560 Ibid.
561 Ibid.
562 Ibid at 182.
563 Ibid.
564 Christopher U. Schmidt supra n 509 at 181.

democracy. These elements act in a flexible system under which the deficiencies of some elements can in some instances be compensated by the strengths of others.[565]

When making recommendations for reform of the international investment law regime, various principles that can operate within the multilevel governance framework will be utilised. These principles will inform the entire reform process and will direct the recommendations that are made in this thesis. These principles will be set out more fully hereunder.

*a. The Five Storey House Theory*

The Five Storey House theory as advocated by Cottier suggests that the five different levels of governance can be depicted as a five-storey house, with each separate level making a distinct contribution as a part of a whole.[566] While the first three levels, being the local, sub-national and national are commonplace in many systems, the forth level i.e. the regional level is derived from a framework of regional integration,[567] and the fifth level i.e. the global level which refers to the emerging structures of global integration in the fields of trade and investment regulation such as the WTO, the Bretton Woods institutions and the international investment regime.[568] It depicts the concept of a system with different layers that work together although not always simultaneously.

The five storey house concept does not normatively suggest that all the layers are of equal importance and neither does it suggest that the higher layers of regional and international law are more powerful than the lower levels.[569] The concept advocates that all layers must be considered, as a whole, as a constitutional system, with the different layers forming the different parts of the whole.[570] The different levels of governance all derive from different sources of law, reflect different circles of political identity and have their own purpose.[571] As a result, the five storey house makes the allocation of powers among the different levels possible as well as the development of a system of checks and balances among the layers. It allows for communication and interaction among the different layers of governance to define concepts which are suitable to the operation of each of the levels.[572] This is particularly

565 Ibid
566 Thomas Cottier 'Towards a Five Storey House' (2003) *Max Plank UNYB* 7 299
567 For example, the European Union and its treaties
568 Thomas Cottier, supra n 525 at 300.
569 Ibid at 301.
570 Ibid.; Malebakeng Agnes Forere supra n 511 at 10.
571 Thomas Cottier supra n 525 at 306.
572 Ibid at 301. Malebakeng Agnes Forere supra n 511 at 10.

important especially in the context of the investment regime where States have already expressed the concern with regard to the infringement of arbitral tribunals on state sovereignty.[573] In achieving this, the principle of shared sovereignty is applied within the five storey house.[574] Although the notion of shared sovereignty traditionally referred to the division of powers in federation and sub-federal entities, Cottier suggests that there is no reason why the same principles cannot be applied to international governance structures.[575] In this regard, the 'shared sovereignty entities are created by a voluntary agreement between recognised national political authorities and an external actor such as another state or a regional or international organization. Such arrangements can be limited to specific issues areas like monetary policy or the management of oil revenues.'[576] As a result, the notion of shared sovereignty is applicable in governing the relationship between the national levels and international levels to ensure a sufficient level of protection of the sovereignty of the state.

Shared sovereignty involves the engagement of external actors in some domestic authority structures of the target state(s) for an indefinite period of time.[577] Such arrangements are legitimised by the agreements signed by recognised national authorities. National actors would therefore use their legal sovereignty to enter into agreements that would compromise their Westphalian sovereignty with the goal of improving a particular policy area. Legitimacy issues would be mitigated by the fact that those empowered to exercise international legal sovereignty had agreed to the new arrangement.[578] Legitimacy would be enhanced even further if the agreement appeared to be the result of symmetrical, rather than highly unequal bargaining.[579]

Unlike the concept of sovereignty, the notion of shared sovereignty does not conceive sovereignty as a 'zero sum game that is either you have it or you do not'.[580] Therefore in order for this concept to work there has to be a move away from the traditional Westphalian state and notions of sovereignty and a shift to a more collaborative understanding of sovereignty, where

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573 Thomas Cottier supra n 525 at 305.
574 Ibid.
575 Ibid.
576 Stephen D. Krasner, 'The case of shared sovereignty," (2005) 17 *Journal of Democracy* 69-83.; Jorge Emilio Núñez, 'Shared sovereignty in a two-state context: a problem of distributive justice' PhD dissertation (2014) University of Manchester 70.
577 Stephen D. Krasner 'The hole in the whole: Sovereignty, shared sovereignty and international law' (2004) 25 *Michigan Journal of International Law* 1075 1091.
578 Ibid.
579 Ibid.
580 Thomas Cottier supra n 525 at 305.

the different layers that affect the governing of the nation state are interlocked and intertwined.[581]

### b. *Legitimacy*

The capacity of global governance systems to enforce rules and solve problems in an effective way is dependent on their acceptance as legitimate actors in the view of their stakeholders.[582] Legitimacy is the belief that a governing power has the authority to rule and that it exercises that authority in an appropriate manner.[583] Legitimacy can be viewed in both a normative and a sociological sense. In the normative sense, legitimacy asserts that an institution has the right to rule by promulgating rules and securing compliance with the rules by attaching benefits for compliance or costs for non-compliance.[584] From a sociological viewpoint, legitimacy exists where the subjects of an institution demonstrate a belief, confidence or acceptance of the right of the institution to rule and is conferred by the subjects of the global governance institution.[585] Sociological legitimacy is important for global governance institutions as international institutions can only thrive if they are legitimate and if they are perceived to be legitimate by the stakeholders.[586] In the context of international investment law, it is the stakeholders (subjects) of the investment regime that have raised concerns regarding the right to rule of the international investment law regime in its current state, thereby causing the legitimacy crisis that is currently being faced. Focus will therefore be had on measures that can be adopted to improve the sociological legitimacy of international investment law and promote its acceptance as a legitimate form of global governance.

Traditionally, the subjects of global governance regimes were states and state actors, however, research has shown that non-state actors that are affected by the governance of an institution are also subjects of global governance and as such, attempts to incorporate sociological

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[581] Ibid.

[582] Ingo Take 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 *Swiss Political Science Review* 220–48 at 221.

[583] Lisa Dellmuth et al *Citizens, Elites and the Legitimacy of Global Governance* (2022) at 3; Lisa Dellmuth & Bernd Schlipphak 'Legitimacy beliefs towards global governance institutions: a research agenda' (2020) 27 *Journal of European Public Policy* 931–43 at 933.

[584] Allen Buchanan & Robert O Keohane 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405–541 at 404; Jan Aart Scholte 'Sources of Legitimacy in Global Governance' (2019) 12 *Outlines of Global Transformations: Politics, Economics, Law,* 47–76 at 51.

[585] Buchanan & Keohane, supra n 584 at 404; Scholte, supra n 584 at 51.

[586] Jan Aart Scholte 'Towards Greater Legitimacy in Global Governance' (2011) 18 *Review of International Political Economy* 110–20 at 111; Lisa Dellmuth 'Individual Sources of Legitimacy Beliefs: Theory and Data' in Jonas Tallberg, Karin Bäckstrand & Jan Aart Scholte (eds) *Legitimacy in Global Governance: Sources, Processes, and Consequences,* (2018) at 1.

legitimacy must not just focus on state actors but consider the views of other stakeholders including but not limited to business, civil society and local communities.[587] The sources of sociological legitimacy include institutional sources which relate to the features of the institution itself, individual sources which relate to the characteristics of the subjects and societal drivers which relate to the prevailing norms in a given society.[588] As this thesis is focused on proposing a method of reforming the international investment law regime, focus will be had on the institutional sources of legitimacy as these will assist in determining the design of the reform option.

Institutional sources of legitimacy consider the input, throughput and output dimensions of the institution. Input dimensions address the question of who is entitled to make decisions and be represented in the decision -making process.[589] When determining the identity of decision makers, the participation of stakeholders is key in ensuring the legitimacy of the institution. The throughput dimension addresses the procedural aspects of the institution focusing on the level of transparency of the decision -making process and to what extent decision makers are held accountable.[590] The output dimension refers not only to the fulfilment of targeted goals, but also the extent to which a governance institution succeeds in generating acceptance by its internal and external stakeholders and by motivating them to follow its rules and decisions.[591]

When determining institutional design and putting in place mechanisms for input, throughput and output legitimacy, transparency and accountability are the two characteristics that must be incorporated throughout the design process.[592] Shirlow and Caron have alluded to three levels of transparency which are: availability which entails increase of information provided to the public, accessibility which entails ensuring that the public are able to access and understand the information provided to them and participation which entails the ability of stakeholders to participate in the decision making processes.[593] Transparency is of importance in the context of ISDS as it is necessary to ensure the participation of stakeholders in the decision- making process and ensure accountability.[594] Transparency in ISDS refers to the public availability of

[587] Scholte, supra n 584 at 52.
[588] See generally for a discussion of the different sources of legitimacy Scholte, supra n 584.
[589] Take, supra n 582 at 223. John G Oates 'The fourth face of legitimacy: Constituent power and the constitutional legitimacy of international institutions' (2017) 43 *Review of International Studies* 199–220 at 200.
[590] Take, supra n 582 at 224; Oates, supra n 589 at 200.
[591] Take, supra n 582 at 228. Oates, supra n 589 at 200.
[592] Buchanan & Keohane, supra n 584 at 426.
[593] Esmé Shirlow and David D Caron, 'The Multiple Forms of Transparency in International Investment Arbitration: Their Implications, and Their Limits' in Thomas Schultz & Federico Ortino (eds) *Oxford Handbook of International Arbitration* (2020) 3–5.
[594] Take, supra n 582 at 225.

information regarding the existence of the dispute resolution process, the production of documents and awards that are generated as a result of the proceedings and the possibilities of participation in the proceedings by non-disputing parties and the possibility of the public to attend hearings.[595]

Accountability consists of three elements being the standards that those being held accountable must meet, the giving of an account by those being held accountable and the ability of accountability holders to impose a sanction.[596] Accountability is a public procedure that aims to identify where there has been an improper exercise of power or authority and to take remedial action to address the same.[597] Accountability has been described as an important principle to for oversight and control when dealing with regimes whose authority operates outside the traditional parameters of the nation state.[598] Within multilevel governance, as actors operate outside the parameters of the nation state, systems of democratic accountability are limited. However, multilevel governance can still provide various control mechanisms that can promote pluralistic and diversified accountability relationships such as user councils, administrative courts, ombudsmen and performance reviews.[599] When determining how to incorporate accountability into global governance systems, Mulgan notes that an effective, independent judicial system is a fundamental prerequisite for effective accountability.[600]

Taking into account the various aspects of legitimacy discussed above, global governance arrangements need to build their legitimacy on multifaceted grounds giving due regard to the fact that most global governance arrangements are highly diverse in their cultural, ecological, economic and political outlooks.[601]

### c. *Stakeholder participation and stakeholder analysis*

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[595] Joanna Lam & Güneş Ünüvar ‘Transparency and participatory aspects of investor-state dispute settlement in the EU “new wave” trade agreements’ (2019) 32 *Leiden Journal of International Law* 781–800 at 783; Christina Knahr & August Reinisch ‘Transparency versus Confidentiality in International Investment Arbitration - The Biwater Gauff Compromise’ (2007) 6 *Law and Practice of International Courts and Tribunals* 97–118 at 97.
[596] Buchanan and Keohane (n 75) 426; M Bovens, ‘Analysing and Assessing Public Accountability: A Conceptual Framework’ (EUROGOV 2006) C-06–01.
[597] Carol Harlow & Richard Rawlings Promoting Accountability in Multilevel Governance: A network approach, EUROGOV, 2006, C-06–02 1–41 at 4.
[598] E Fisher ‘The European Union in the Age of Accountability’ (2004) 24 *Oxford Journal of Legal Studies* at 495.
[599] Yannis Papadopoulos ‘Accountability and Multi-level Governance: More Accountability, Less Democracy?’ (2010) 33 *West European Politics* 1030–49 at 1041.
[600] R. Mulgan *Holding Power to Account, Accountability in Modern Democracies* (2003) 75-76.
[601] Scholte, supra n 586 at 116.

As multilevel governance is premised on collaboration between the different levels of governance, it is important that all levels of governance are able to participate in the policy and decision-making process. All stakeholders must be given the opportunity to participate in the reform process. Together with openness, accountability, effectiveness and coherence, stakeholder participation is recognised as one of the five elements of good governance.[602] This makes it an ideal principle that is compatible not only with the multilevel governance framework but with the broader objectives of reforming international investment law within the system of global governance.

Stakeholder refers to any actor, institution, group or individual who will be directly affected by a project or policy decision, as well as those who have an interest in the societal decision making process and have the ability to influence its outcome either positively or negatively.[603] Participation is a process where stakeholders are involved in making decisions that affect them either passively via consultation or actively via two-way engagement.[604] Two way engagement involves expressing opinions, sharing perspectives and listening to alternative views to reach mutual understanding with some sharing of decision making power among the different stakeholders.[605] An extension of stakeholder participation is stakeholder analysis which is a tool to analyse the various actors and interests in an issue of public policy.[606] Stakeholder analysis examines the interest of stakeholders in relation to the policy to understand which stakeholders are most affected by the policy and to take steps to ensure that the views of the most affected stakeholders are considered in policy and decision making.[607]

Stakeholder participation is premised on the understanding and general acceptance of the fact that people have the right to know about and participate in decisions that could affect their quality of life.[608] Natural resources, access to public goods and the protection of the

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[602] 'Stakeholder Involvement in Decision Making: A Short Guide to Issues, Approaches and Resources', *Nuclear Energy Agency (NEA)*, at 17 available at: https://www.oecd-nea.org/jcms/pl_14894/stakeholder-involvement-in-decision-making-a-short-guide-to-issues-approaches-and-resources?details=true (accessed 20 July 2022).
[603] Marlan Hutahaean 'The Importance of Stakeholders Approach in Public Policy Making' (2017) 462–6 at 462. OECD (2017), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, OECD Publishing, Paris 19 http://dx.doi.org/10.1787/9789264252462-en (accessed 21 July 2022).
[604] Mark S Reed et al 'A theory of participation: what makes stakeholder and public engagement in environmental management work?' (2018) 26 *Restoration Ecology* S7–17 at S8.
[605] OECD (2017), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 9.
[606] Hutahaean, supra n 603 at 462.
[607] Ibid.
[608] Feldman Ira 'The Stakeholder Convergence: Enhanced Public Participation and Sustainable Business Practices' (2003) 33 *Environmental Law Reporter News & Analysis* 1496–10513 at 10496.

environment play a fundamental role in ensuring a safe, healthy and productive quality of life and as such, the general public has an interest in decision making and policies that may have an impact on the above and by extension, have an impact on their quality of life.[609] Stakeholder participation is particularly beneficial when dealing with issues that are complex, dynamic and affect a wide variety of actors.[610] This is because more participatory approaches have the capacity to bridge the gap between the divergent views and needs of different stakeholders, foster common understanding and match problems with solutions.[611]

Stakeholder participation can be initiated or led by citizens or special interest groups (bottom-up approach) or can be initiated and led by those with formal decision-making power, who wish to empower interested parties who have less decision-making power to contribute towards decision making (top-down approach).[612]There are various modes through which stakeholder engagement can be carried out and these include:[613]

- Informative modes which are aimed at providing balanced and objective information through one way communication to help stakeholders understand the context and objectives of a policy or decision taken.
- Consultative modes which obtain stakeholder input in relation to a particular problem, decision or policy through two-way communication.
- Involvement modes in which public authorities work directly with stakeholders throughout the process of implementing a policy so that their concerns and aspirations are understood and considered in the final decision.
- Collaborative modes where public authorities partner with stakeholders in each aspect of decision and policy making including the development of and identification of new solutions and.
- Empowering modes which place decision making power in the hands of the stakeholders.

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[609] Ibid.
[610] Reed et al, supra n 604 at S7.
[611] Report on good practices of stakeholder participation in implementing Article 6 of the Convention, United Nations Framework Convention on Climate Change, 2014, FCCC/SBI/2014/3 available at: https://unfccc.int/sites/default/files/resource/docs/2014/sbi/eng/03.pdf (accessed 20 July 2022).
[612] Reed et al, supra n 604 at S8.
[613] Ibid S9. See also OECD (2017), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 11; ICAT (Initiative for Climate Action Transparency) (2020). *Stakeholder Participation Guide: Supporting Stakeholder Participation in Design, Implementation and Assessment of Policies and Actions*, J.C. Durbin and S. Vincent, eds. Washington, D.C.: Climate, Community & Biodiversity Alliance and Verra; Bonn: ICAT https://climateactiontransparency.org/ icatguidance/stakeholder-participation/ 9 (accessed 21 July 2022).

There are principles which underpin effective stakeholder participation that make it conducive for use in governance issues. Stakeholder participation is inclusive, in that it gives all stakeholders the opportunity to effectively and equitably participate in the decision-making process; it is transparent and ensures that stakeholders are provided with all the information necessary to make informed decisions in an understandable and accessible manner; it is responsive in that decisions are made or changed in response to the input provided by stakeholders and feedback is given to stakeholders regarding how their input has been utilised and how their concerns have been addressed; it ensures accountability as it requires the establishment of clear governance structures and it promotes respect for procedural and substantive rights as the impact of policies on the enjoyment of rights is assessed and corrective action is taken where necessary.[614] Because of these principles, stakeholder participation can enhance policy and decision making by raising awareness and enabling better understanding of the complex issues involved for all affected parties; builds trust, collaboration, shared ownership and support for policies and actions among stakeholder groups; leads to less conflicts and easier implementation of policies and decisions; addresses stakeholder needs and concerns and helps to develop proactive measures and responses to reduce any possible negative impacts and ensures increased benefits for stakeholder; increases transparency, accountability and legitimacy of the policies or decision and ensures respect for stakeholder's rights.[615]

There is broad agreement that ensuring stakeholder participation is likely to lead to the realisation of the above mention benefits.[616] As such, there has been an increase in international declarations and agreements that recognise that stakeholder participation is a key element in ensuring protection of critically important areas for example in the area of the protection of the environment and natural resources.[617] Environmental concerns are often viewed as being

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[614] ICAT (Initiative for Climate Action Transparency) (2020). *Stakeholder Participation Guide: Supporting Stakeholder Participation in Design, Implementation and Assessment of Policies and Actions* 9.
[615] Cristina Pita, Graham J Pierce & Ioannis Theodossiou 'Stakeholders' participation in the fisheries management decision-making process: Fishers' perceptions of participation' (2010) 34 *Marine Policy* 1093–102 at 1093; 'Stakeholder Involvement in Decision Making: A Short Guide to Issues, Approaches and Resources', *Nuclear Energy Agency (NEA)*, supra n 602 at 26; Samuel D Brody 'Measuring the Effects of Stakeholder Participation on the Quality of Local Plans Based on the Principles of Collaborative Ecosystem Management': (2016) *Journal of Planning Education and Research* at 409.
[616] Mark S Reed 'Stakeholder participation for environmental management: A literature review' (2008) 141 *Biological Conservation* 2417–31 at 2418; Anne M Larson, Juan Pablo Sarmiento Barletti & Nicole Heise Vigil 'A place at the table is not enough: Accountability for Indigenous Peoples and local communities in multi-stakeholder platforms' (2022) 155 *World Development* 105907 at 105907.
[617] Carl E Bruch and Roman Czebiniak, 'Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters' (2002) 32 *Environmental Law Reporter* 10428, 10428.

complex, uncertain, multi-scale and affecting multiple actors and agencies and as such, require transparent decision making that is flexible and embraces a diversity of knowledge and values.[618] Stakeholder participation has been increasingly applied into decision-making to address environmental concerns. Agenda 21, endorsed at the United Nations Conference on Environment and Development 1992 stresses the importance of enhancing the participation of civil society in advancing sustainable development and identifies nine major groups that should be included in the stakeholder participation process. These include women, children and youth indigenous people, NGO's, local authorities, workers, businesses, farmers and the scientific communities.[619] Principle 10 of the Rio Declaration on Environment and Development provides that

> '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

Pursuant to the Rio Declaration and Agenda 21, the Organisation of American States adopted the Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development (ISP) which is an independent regional initiative for the promotion of environmental governance.[620] The ISP consists of the Policy Framework and Recommendations for Action which urge states to improve communication mechanisms to share information, to establish legal and regulatory frameworks for access to information, decision -making and justice, to implement institutional structures and procedures for expanding public participation, to advance education and training programmes and dedicate funding for public participation.[621]

The Convention on Access to Information Public Participation in Decision -Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 provides an example of how governments can collaborate with other stakeholders to jointly develop and implement

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[618] Reed, supra n 616 at 2418.
[619] Section 3 United Nations (1992) Agenda 21: United Nations Conference on Environment and Development, UN Rio De Janeiro.
[620] 2001 Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development available at http://www.oas.org/dsd/PDF_files/ispenglish.pdf (accessed 10 June 2023).
[621] Ibid.

environmental laws, institutions and practices.[622] Article 1 of the Aarhus Convention sets out its objective as follows:

> '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'[623]

In pursuance of this objective, the Aarhus Convention contains obligations on states to make provision for public participation in decisions on specific activities related to environmental matters,[624] concerning plans, programmes and policies relating to the environment,[625] and in executive regulations and generally binding normative instruments.[626]

The OECD Guidelines for Multi-national Enterprises on Responsible Business Conduct provide that MNE's should engage with relevant stakeholders so that their views and concerns are adequately represented and addressed in relation to the planning, design and implementation of projects that may have an impact on the local communities.[627]

These are just some instances where the principle of stakeholder participation has been applied for the resolution of complex issues that transcend national borders and affect a multiplicity of parties across the board. Despite the recognised benefits that are associated with stakeholder participation, care must be taken to ensure that the stakeholder participation exercise is carried out in a manner that will yield the best possible results. A failure to properly implement stakeholder participation activities can have the negative impacts of increasing stakeholder dissatisfaction with the policy or decision and exacerbate conflicts among stakeholders. This would have the spill over effects of increased distrust of the policy and create further resistance and backlash against the policy and reduce the legitimacy of the effort.[628] In order for the stakeholder participation process to be properly implemented, care must be taken to ensure that the appropriate stakeholders including marginalised groups are able to access the process and effectively participate, that they are provided with sufficient information to enable effective participation in the process, that they have clarity on the types of issues and decisions that will

[622] Bruch & Czebiniak, supra n 617 at 10429.
[623] Article 1 of the 1998 Aarhus Convention on Access to Information, Public Participation, Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (Aarhus Convention)
[624] Article 6 of the Aarhus Convention.
[625] Article 7 of the Aarhus Convention.
[626] Article 8 of the Aarhus Convention.
[627] OECD (2023) OECD *Guidelines for Multi-national Enterprises on Responsible Business Conduct*, OECD Publishing Paris Chapter II para A15.
[628] OECD (2017), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 10.

be influenced by the consultation process. the extent of their contribution, clarity on the information sought and the feedback that will be provided and the extent to which their contribution will affect the final decision taken or policy that will be implemented.[629]

There are no one-size fits all method for effective stakeholder participation and each instance where such participation is required will have to be assessed on a case-by-case basis so that the adequate level of stakeholder participation is implemented for success of the endeavour.

*d. Subsidiarity*

Global governance is growing fast without a clear principled framework to guide the creation of global governance institutions.[630] Formal international institutions, intergovernmental networks and private authorities and a variety of domestic political actors often operate side by side, sometimes in unison and sometimes in conflict.[631] In light of the growth of global governance, there is a need for a more principled approach for allocating power between the different levels of governance.

The principle of subsidiarity governs power relations between units and sub-units in multi-level governance system[632] and has often been explored for its potential to play a role as a way to structure legal and political debates on issues relating to the allocation of authority between national and international institutions.[633] The principle of subsidiarity requires governments to delegate their powers, authority and duties to the level of governance that is closest to the citizens or to the layer that can efficiently perform them. It advocates that action should be taken at the lowest level of governance at which the particular objectives can be achieved.[634] In its totality, in terms of the principle of subsidiarity, 'a larger and greater body should not exercise functions which can be carried out efficiently by one smaller and lesser, but rather the former should support the latter and help to coordinate its activity with the activities of the

[629] 'Stakeholder Involvement in Decision Making: A Short Guide to Issues, Approaches and Resources', *Nuclear Energy Agency (NEA)*, supra n 602 at 23.; ICAT (Initiative for Climate Action Transparency) (2020). *Stakeholder Participation Guide: Supporting Stakeholder Participation in Design, Implementation and Assessment of Policies and Actions* 23.
[630] Markus Jachtenfuchs & Nico Krisch 'Subsidiarity in Global Governance' (2016) 79 *Law and Contemporary Problems* 1–26 at 1.
[631] Ibid.
[632] Malebakeng Agnes Forere supra n 511 at 23.
[633] Andreas Follesdal 'The principle of subsidiarity as a constitutional principle in international law' (2013) 2 *Global Constitutionalism* 37–62 at 38.
[634] Yishai Blank, 'Federalism, subsidiarity and the role of local governments in an age of global multilevel governance'37 *Fordham Urb.L. J* 509 533.

whole community.[635] The principle of subsidiarity is suitable for the governing of the relationship between the different layers of governance for the following reasons:[636]

First, it is receptive to the idea that there can be more than two types of recognised layers of governance and does not confer preferred status on any of the layers. The principle of subsidiarity acknowledges the strengths and weaknesses of the different layers of governance as well as the interconnectedness of the different layers and the separate role each can play in the achievement of a set goal.

Secondly, it promotes the notion of positive autonomy that it places a positive duty on the central government to assist the other levels where they are unable to perform. It recognises the strengths and weakness of each layer of governance and allows each layer to flourish in strengths while receiving assistance from other layers in areas of weakness. It is geared towards enhancing co-operation between all spheres and levels of governance. [637]

Thirdly, the principle of subsidiarity does not strictly adhere to principles of exclusive competences.[638] The main characteristics of the principle of subsidiarity are autonomy, mutual assistance and diversity/flexibility and these are key in developing a successful relationship between the different actors in international investment law.[639] These are the same premises upon which multilevel governance is based and such the principle of subsidiarity can effectively govern the relationship between the different layers in line with multilevel governance objectives.[640]

In practice, the principle of subsidiarity can therefore be used to determine which layer of governance should exercise competence over a particular issue. This assists in the allocation of power between the different layers and also addresses a situation where a conflict arises between the different levels as to who should exercise particular authority. In this regard, the primary question to always be answered is, which is the layer of governance that is closer to the problem or most suited[641] to effectively address the issue?

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[635] Domenec Mele, 'The principle of subsidiarity in organizations: A case study' (2004) IESE Working Paper 566.
[636] Yishai Blank, 'Federalism, subsidiarity and the role of local governments in an age of global multilevel governance'37 *Fordham Urb.L. J* 509.
[637] Ibid at 533.
[638] Ibid.
[639]Malebakeng Agnes Forere, supra n 511 at 25.
[640] Malebakeng Agnes Forere supra n 511 at 24.
[641] Taking into account factors such as effectiveness, capacity, knowledge.

Subsidiarity can be applied as a legal norm or as a principle. The distinction between the two lies in the manner in which subsidiarity will be applied. Legal norms or rules are applicable in an all or nothing fashion. If the requirements that are set out in the rule to determine the application of subsidiarity are met, then subsidiarity must be applied and where they are not, then subsidiarity will not be applicable.[642] On the other hand, principles are applicable in a more flexible manner. They are required to be taken into account if applicable when making a decision. Principles also have a dimension of weight and importance that is '[w]hen principles intersect ..., one who must resolve the conflict has to take into account the relative weight of each…. it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is'.[643]

Subsidiarity has been applied to govern the relationship between the different levels of government within the European Union (EU) and gained prominence in Europe in the times of the signing of the Maastricht Treaty. At the time of the formation of the EU, public suspicions on the EU were reflected during the process of national ratification of the Maastricht Treaty.[644] For example, a referendum on the Maastricht Treaty failed in Denmark, British parliamentary support was questionable and in the traditionally pro-European Community France, the referendum passed by narrow margins.[645] Public suspicions were focused on two factors being the legitimacy of the EU institutions themselves (also known as the democracy deficit) and the threat that the EU posed to the independence and survival of the independent nation state. [646] In establishing the EU, there was the need to balance, on the one hand, the integration of the European Community by extending the powers conferred upon the Community and on the other, to maintain the independence of Member States and their subnational authorities.[647] The principle of subsidiarity emerged to resolve the tensions between the EU and the Member States of the EU and was introduced as a way of addressing the opposition between centralisation and local control (decentralisation).[648]In order for integration to work, without threatening the independence of Member States and the ability of their governments to make

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642 Theodor Schilling 'Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously' 1995.
643 Ibid.
644 Paul D. Marquardt, "Subsidiarity and sovereignty in the European Union" (1994) 2 *Fordham International Law Journal* 616.
645 Ibid at 617.
646 Paul D Marquardt, supra n 600 at 617.See also Paolo G. Carozza, 'Subsidiarity as a structural principle of international human rights law' (2003) *Notre Dame Law School* 38 at 51.
647 Koen Lenaerts, 'The principle of subsidiarity and the environment in the European Union: Keeping the balance of federalism' (1993) 4 *Fordham International Law Journal*, 846 at 847.
648 Paolo G. Carozza, 'Subsidiarity as a structural principle of international human rights law" 51.

decisions, Article B of the Maastricht Treaty subjects the pursuit of all EU objectives, to the duty of respecting the principle of subsidiarity.[649]

As the EU is a voluntary union of sovereign nation states, it does not properly fit into the traditional types of federal systems and as such has been described as a sui generis system of governance.[650] There are policy areas which fall into the exclusive competence of the EU (as defined in the treaties establishing and governing the functioning of the EU), other areas which fall into the exclusive competence of member states, and still other areas, known as shared policy areas or competencies over which either the EU or the Member States can exercise decision making authority. The principle of subsidiarity therefore applies in order to determine the relationship between the EU and the Member States over the shared policy areas.[651] The principle of subsidiarity in this regard aims to increase the efficiency and legitimacy of European governance by assessing which level of governance is better suited to perform any of the tasks that fall in the ambit of shared competencies.[652] The various treaties that govern the formation and functioning of the EU, all make reference to the principle of subsidiarity to guide the EU and the Member States as to which level of governance should exercise decision making authority over a particular area of shared competence.

To this end, article 3b of the Maastricht Treaty provides as follows,

> '[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Further, Article 5(3) of the Maastricht Treaty provides that '…the European Union shall act only to the extent necessary to successfully obtain the objectives if the European Union, in cases where Member State action on the same issue is unlikely to succeed die to reasons of scale or effect'.

The phrasing of the principle of subsidiarity as highlighted above is designed to ensure the highest level of decentralisation[653] and so that decisions are taken as closely as possible to the citizens.[654] The principle of subsidiarity is therefore not used to allocate competencies to the

[649] Article B of the European Union, Treaty on European union (Consolidated version) Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C325/5 (Maastricht Treaty).
[650] Josephine van Zeben, 'Subsidiarity in European environmental law: A competence allocation approach' (2014) 38 *Harvard Environmental Law Review* 415 417.
[651] Ibid.
[652] Ibid.
[653] Ibid at 418.
[654] Paul D Marquadt, supra n 595 at 617.

various levels of governance as that is already achieved by the treaties, but rather, to determine which level of governance should exercise power in the areas which the treaties have allocated as shared competencies.[655]In this regard, the principle of subsidiarity as it is applied in the EU constitutes a judicially enforceable mechanism of self -defence that can be used by Member States against what they perceive as the risk of excessive use of non-exclusive community powers.[656]

The adoption of the principle of subsidiarity within the Maastricht Treaty seemed to be a clear indication of the EU's acceptance of an international norm that structured the distribution of competences between supranational European institutions and the Member States. Following the coming into force of the Maastricht Treaty, the most significant development in the EU regarding the acceptance of the principle of subsidiarity was the agreement on the Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, which has been annexed to the Treaty establishing a Constitution for Europe. This Protocol reaffirms the EU's decision to be bound by the principle of subsidiarity. In the preamble of the Protocol, it states that the parties wish to 'ensure that decisions are taken as closely as possible to the citizens of the Union.' Following this, Article 1 of the Protocol provides that '[e]ach institution shall ensure constant respect for the principles of subsidiarity…'

The principle of subsidiarity applies to all EU institutions and has practical significance for legislative procedures.[657] The Treaty of Lisbon,[658] has strengthened the role of both the national parliaments and the Court of Justice in monitoring compliance with the principle of subsidiarity.[659] In keeping with Article 5(3) of the Maastricht Treaty, national parliaments monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Article 6 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality. Under this ex ante mechanism, any national parliament has six weeks from the date of forwarding of a draft legislative act to send to the European Parliament, the Council

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[655] Koen Lenaerts, 'The principle of subsidiarity and the environment in the European Union: Keeping the balance of federalism' (1993) *Fordham International Law Journal* 846 849.
[656]Ibid at 851.
[657] https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=When%20applied%20in%20the%20context,central%2C%20regional%20or%20local%20level. (accessed 14 April 2021).
[658] https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=When%20applied%20in%20the%20context,central%2C%20regional%20or%20local%20level. (accessed 14 April 2021).
[659] https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=When%20applied%20in%20the%20context,central%2C%20regional%20or%20local%20level. (accessed 14 April 2021).

and Commission a reasoned opinion stating why it considers the draft not to comply with the principle of subsidiarity.[660] If reasoned opinions represent at least one third of the votes allocated to the national parliament, the draft must be reviewed ("yellow card").[661] If the Commission decides to maintain the draft legislative act then the matter is referred to Parliament and Council which takes a decision. If Parliament and Council considers that the legislative draft is not compatible with the principle of subsidiarity, it may maintain, amend or withdraw the draft ("orange card"). [662]The yellow card procedure has been used three times and the orange card procedure has never been used.

Compliance with the principle of subsidiarity may also be reviewed retrospectively by means of legal action brought before the Court of Justice of the EU. [663]Member States may bring actions for annulment before the Court against a legislative act on grounds of infringement of the principle of subsidiarity on behalf of their national parliament or a chamber thereof, in accordance with their legal system.[664]

The principle of subsidiarity has been more or less successfully used in the EU to govern the exercise of the EU's competences. In areas where the EU does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of Member States to take decision and actions. Further, it authorises the EU to take decisions only in instances where the decision can be better carried out at Union level.

The example of the application of subsidiarity in the EU can be used as a stepping stone to consider the applicability of the principle of subsidiarity within the context of international law. The question that arises here is whether subsidiarity can be applied to the international order in general and whether the idea of subsidiarity might be helpful in understanding and ordering the structure of international law and international institutions more generally.[665] The difficulty that might arise in the application of subsidiarity to international law in general arises from the very nature of international law in that international law is fragmented and unlike the EU, is not organised around a central regional government body, that the state is the central actor in

[660] Consolidated version of the Treaty on the Functioning of the European Union Protocols-Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality Document 12008E/PRO/02 (Protocol No.2)
[661] Article 7 of Protocol No. 2
[662] Article 7 of Protocol No. 2
[663] Article 8 of Protocol No. 2
[664] Ibid.
[665] Paolo G Carozza 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38–79 at 57; Paolo G Carozza 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 *American Journal of Jurisprudence* 51–67 at 55.

international law with state consent being the basis of the international legal system and that there is generally the absence of the civic dimension in international society.[666]

Despite the concern on the applicability of subsidiarity to general international law, there seems to be a basis to argue that subsidiarity can find application in specific areas of international law. In this regard, Follesdal notes that,

> 'Subsidiarity is a way to *way to structure legal and political debates* that engages both normative and empirical premises on such issues as the allocation of authority between national and international institutions. A principle of subsidiarity does indeed seem to not only explain but also provide some intellectual order to features that express the *centrality of sovereign states* in international law. This centrality includes: an understanding of the main social function of public international law as *supplementing* domestic law; the centrality of state *consent* in creating such legal obligations; the requirement that national remedies must be *exhausted* before turning to international courts and treaty bodies; the ECtHR practice of granting states a '*margin of appreciation*' when assessing whether they are in compliance with their obligations; and the often *weak* treaty sanctions.'[667]

Some scholars have had the opportunity to explore the application or applicability of subsidiarity in various subsets of international law.

In the context of international human rights law, Besson notes that,

> 'Subsidiarity is en vogue in international human rights law. From a largely implicit and mainly jurisprudential principle used in discrete guises by international human rights courts, it has become increasingly present in human rights reasoning and is about to become entrenched in the text of international human rights treaties.'[668]

Carozza notes that, 'subsidiarity fits international human rights law so well that the basic values of the principle can be regarded as already implicitly present in the structure of international human rights.'[669]

In the context of transitional justice, Reinold notes that, 'the concept of local ownership- a cognate of subsidiarity- has become increasingly popular in some fields of international relations such as transitional justice where efforts have intensified to make transitional justice responsive to realities on the ground.'[670]

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666 Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', supra n 665 at 55.
667 Follesdal, supra n 633 at 38.
668 Samantha Besson 'Subsidiarity in International Human Rights Law--What is Subsidiary about Human Rights?' (2016) 61 *The American Journal of Jurisprudence* 69–107 at 69; See also Sanele Sibanda 'Beneath it all lies the principle of subsidiarity: the principle of subsidiarity in the African and European regional human rights systems' (2007) 40 *Comparative and International Law Journal of Southern Africa* 425–48.
669 Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', supra n 665 at 40.
670 Theresa Reinold 'The promises and perils of subsidiarity in global governance: evidence from Africa' (2019) 40 *Third World Quarterly* 2092–107 at 2094.

In the context of the WTO, Howse and Nicolaidis, note that

> 'Again, inspiration can come from the EU—not in its constitutional guise, but by incorporating some of the institutional and political features associated with subsidiarity. A model of global subsidiarity can help take into account the process dynamics and the kinds of conflicts present in the WTO and assumed away by constitutionalism. Such a model can suggest functional equivalents to traditional "safeguards" for the state, while acknowledging legitimate loci of governance other than the state. A model of global subsidiarity would incorporate throughout the workings of the WTO three basic principles: institutional sensitivity, political inclusiveness, and top-down empowerment.'[671]

The emergence of subsidiarity as a principle of global governance has arisen out of the need to find an organising principle in a world where policy making increasingly rests with regional and international bodies.[672] The basic conditions for the relevance of subsidiarity in global governance include the need to allocate authority and competence in a principled way among multiple levels of governance and the need to balance the autonomy of smaller communities or states vis-à-vis the larger group of the international association of states and institutions, while at the same time recognising that states are sometimes incapable of meeting some of their needs without external help.[673]

These conditions are evident within the international investment law system. As already noted above, international investment law has emerged as a principle of global governance.[674] States that shape the international investment law system agree to scale up the rules applicable to investment regulation and the authority to adopt decisions related to foreign investment protection to the international level, thereby creating a multilevel structure of governance.[675] As a result of this, international investment law requires an organising principle for allocating authority among the different levels of governance and a criterion for choosing whether certain issues should be decided at the national or international level.[676] It is on this basis that some scholars propose that the field of international economic law in particular, is prime for the application of subsidiarity which is viewed as a viable option to settle conflicts between the

[671] Robert Howse & Kalypso Nicolaïdis 'Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large' (2016) 79 *Law and Contemporary Problems* 259–83 at 282.
[672] Jachtenfuchs & Krisch, supra n 630 at 14.
[673] Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', supra n 665 at 51.
[674] See section 3.2 above.
[675] René Urueña 'Subsidiarity and the Public--Private Distinction in Investment Treaty Arbitration' (2016) 79 *Law & Contemporary Problems* 99–121 at 103.
[676] Ibid at 99.

preferences of domestic political communities and the wider demands of the global market system.[677]

Despite the significant potential for the application of the subsidiarity in international investment law, there is still some concern over the substantive applicability of subsidiarity in international law.[678] Follesdal notes that,

> 'The principle of subsidiarity stands in need of substantive interpretation which must be guided by normative considerations. While a principle of subsidiarity may prove a helpful constitutional principle in international human rights law and other areas of international law, many crucial aspects require further attention including the standing of states.'[679]

As a result of this, Howse and Nicolaidis describe the relationship between subsidiarity and international law as an idea that makes perfect sense in practice for which it seems impossible to develop a theory. They further note that they have became 'increasingly frustrated with the dominant institutional focus implied by both the term and conceptual apparatus of subsidiarity and grew convinced of the need to free the principle from its narrow, mainstream meaning of allocation of power.' [680] This led to the suggestion to think about subsidiarity in a new way and they have opined that,

> 'A genuine spirit of subsidiarity and democratic self-determination at the global level calls for the fine-tuning of a transnational political ethics for our age of globalization. Such ethics must start by speaking to the relationship between the universal and the local, the global and the regional. It must and can incorporate other, including minority, considerations into decision making and decision shaping, including agents and values from outside one's circle; committing to returning to past outcomes on grounds not only of external change but also internal fallibility; incorporating checks and balances in the global management of economic exchange; taking seriously the need to empower, or at least to compensate, those who for one reason or another are consistent losers in the globalized world; applying the principle of mutual recognition to the greatest extent possible when dealing with cooperation problems; and finally, translating the demands of pluralism into WTO guidelines for adjudication.'[681]

This way of thinking about subsidiarity finds support among other scholars as Carozza notes that,

> 'And finally, across all of these problems, one last point is also worth underscoring: subsidiarity in the international sphere cannot work as a mere transposition of the concepts and practices of a constitutional system onto a different plane. There are

[677] Günter Walzenbach 'Subsidiarity: A Principle for Global Trade Governance?' in Günter Walzenbach & Ralf Alleweldt (eds) *Varieties of European Subsidiarity: A multi-disciplinary approach* (2021) at 172; Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', supra n 665 at 66.
[678] Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', supra n 665 at 55; Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', supra n 665 at 57.
[679] Follesdal, supra n 633 at 61.
[680] Howse & Nicolaïdis, supra n 671 at 259.
[681] Ibid at 282.

> certain structural differences that require us to rethink how subsidiarity will work in this context that might look quite new and unfamiliar.'[682]

Walzenbach notes that, 'the time is right to think about a more systematic recognition of subsidiarity in the global rulebook in order to strike a new balance between achieving globally universal rules while permitting, at the same time, greater diversity to meet specific local conditions.'[683]

This thesis takes its cues from Howse, Nicolaidis, Carozza and Walzenbach and explores the potential of subsidiarity to be used as a tool or principle and as a part of much larger framework to address concerns that have arisen in global governance and to show how new thinking about subsidiarity can be applied to resolve global governance problems in the context of international investment law.

*e. Principle of supremacy*

By applying subsidiarity to the allocation of competence between the different layers, each layer is considered as being autonomous to the extent that it can perform a particular function effectively. This however raises the question of how to resolve conflicts between norms originating from different sources. In this regard, the principle of supremacy of the higher levels of governance can be applied in the case of a conflict. The principle of supremacy has been traditionally recognized in multi -level governance systems as playing the important role of providing co-ordination and coherence. For example, the supremacy of federal law vis a vis state, provincial or cantonal law is accepted.[684] Further as the relationship between the different layers, that is between the national and international layers, is voluntarily entered into by agreement between the nation state and the international organisations,[685] the principal of *pacta sunt servunda* applies. As such, the supremacy of higher levels of governance would be derived from participation within the system by nation states and the binding nature of their consent to so participate.

In order to support the principle of supremacy to determine the applicable law when a conflict arises between the application of international law or national law, reference can be made to

[682] Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', supra n 665 at 67.
[683] Walzenbach, supra n 677 at 182.
[684] As is seen in the USA and Swiss systems.
[685] As seen through the application of shared sovereignty discussed in section 3.4.a above.

the theories of monism and dualism. Monism views public international law and national law as being a single system of law whereas dualism views international law and national law as being separate and distinct legal systems that exist alongside each other.[686] Under the monist theory, public international law would be directly applicable and enforceable in local courts without any need of incorporation into municipal law.[687] Under the dualist theory, public international law would have to be formally incorporated into the national law before it could be applied and enforced in local courts.[688] In determining which of the two theories would be applicable, especially in the context of the present discussion, an example can be drawn from the relationship between EU law and member state law. It can be argued that as citizens can directly invoke EU law in order to seek legal redress, a monist relationship exists between EU law and national law.[689] In the same vein, as the provisions of investment agreements can be directly invoked in order to seek legal redress, a monist relationship can be said to exist between national law and international investment law as contained in investment agreements. Further and for the purposes of the present discussion, the monist theory which states that international law and national law constitute a unified system of law, is in line with the multilevel governance theory which advocates for the position that the international level of governance should be considered as being a part of a unified system together with the national levels of governance. As such, the monist theory would suitably apply in this instance.

Within monist theory, a distinction is made between monism with national law supremacy and monism with international law supremacy.[690] Monism with national law supremacy takes its starting point in the national legal system and conceives international law as part of this national legal system.[691] Monism with international law supremacy, takes its starting point in international law and conceives the national system as being subordinated to and as a part of international law.[692] Kelsen, advocates for the application of monism with international law supremacy. In his argument, Kelsen finds that where two nation states A and B exist, neither can confer any rights or competence to another, however, international law is capable of

[686] G. Ferreira and A. Ferreira-Snyman, ‘The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism” (2014) 17 *PELJ* 1471.
[687] Ibid.
[688] Ibid.
[689] Davor Jancic, “Recasting monism and dualism in European Parliamentary Law: The Lisbon Treaty in Britain and France.” (2013) LSE Research online 2 http://eprints.lse.ac.uk/51484/ .
[690] Torben Spaak, Kelson on Monism and Dualism in Marko Novakovic (ed) *Basic Concepts of Public International Law: Monism and Dualism* (2013) 323.
[691] Ibid.
[692] Ibid.

conferring rights and competences on both these states.[693] The ability of international law to confer rights and competences on sovereign states, supposes the supremacy of international law.[694]

In addition to this, the principle of *pacta sunt servunda* finds application. This is a fundamental principle in international law and is the confirmation of international law as binding law.[695] It has been described as the *jus necessarium* for the success of the international legal system and ensures the preservation of the international legal order and prevents arbitrary behaviour within the system.[696] States expressly agree to be bound by the principles of international law and they must therefore be bound by that agreement. This principle was aptly enunciated in the case of *Costa v ENEL*.[697] In this case the ECJ established the supremacy of Community law over Member State law. The ECJ found that the Member States have transferred sovereign rights to a community created by them and that this process cannot be reversed by means of subsequent unilateral measures which are incompatible to the concept of the Community and that the autonomy of the Member States to act as they wish has been limited by virtue of their membership.[698]

It can be argued that the same reasoning can be applied within the scope of international investment law and national law. Member States have created a system of law to govern foreign investments and have ceded a portion of their sovereignty to supranational institutions to determine disputes arising from IIAs. As long as states have consented to be bound by the rules of the international system, these rules may take precedence over their own national laws. It is on this basis that Kelsen established the theory of monism with supremacy of international law and it is on this basis that this thesis advocates that the supremacy of international law can be applied in instances of a conflict between the application of national law and international law.

However, the above view is in itself not sufficient to legitimize the supremacy exercised by the higher of governance as is evidenced by the current backlash against the investment regime. With increased globalisation, the distinction between monist and dualist states is becoming less and less important. John Dugard observes that, '[w]hatever the jurisprudential basis for the

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[693] Ibid at 333.
[694] Ibid.
[695] I. I. Lukashuk, 'The principle of pacta sunt servunda and the nature of obligation under international law" (1989) 83 *American Journal of international Law* 513.
[696] Ibid.
[697] *Flaminio Costa v ENEL* Case 6/64, EU:c:1964:66 [1964] ECR 585, 15 July 1964.
[698] Ibid.

application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law.'[699] In the same vein, Cassesse argues that,

> 'It [international law] no longer constitutes a different legal realm from the various municipal systems but has a huge daily direct impact on these systems. It conditions their life in many areas and even contributes to shaping their internal functioning and operation. In addition, many international rules address themselves directly to individuals, without the intermediary of national legal systems: they impose obligations on them (this chiefly applies to rules on international crimes) or grant them rights (for instance the right to petition international bodies). Those obligations must be fulfilled, and the rights may be exercised, regardless of what national legal orders may provide. In short, in many respects' individuals have become international legal subjects, associated to sovereign States.'[700]

As such, the strictly monist or strictly dualist views find less and less application in our evolving legal order. This is evident within the investment regime in that despite state consent to cede authority to determine investment disputes to arbitral tribunals, and despite the binding nature of that consent, states and indeed the lower levels of governance represented by civil society groups and the citizens have demonstrated an unwillingness to be bound by the decisions of arbitral tribunals resulting in the call for the reform of investor state dispute settlement. This has been partly due to the non-participatory nature of the investor state dispute settlement process as the lower levels rarely have a say in how investment disputes should be resolved, neither are their needs and considerations taken into account. In order for the regulatory scope and enforcement mechanisms of international levels of governance to be enhanced and generally accepted, there needs to be increased participatory rights on that layer as well as a system of checks and balances.[701] This would be in line with the multilevel governance principles in that although the higher levels have supremacy where there is a conflict, that supremacy is exercised in view of the other layers and there is a mechanism of control so that supremacy is exercised accordingly.

Applying supremacy in a flexible way that still allows the national level of governance the ability to implement regulations and policy will work to allow a symbiotic relationship between

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[699] G. Ferreira and A. Ferreira Snyman 1.
[700] A. Cassese, *International Law* 2 ed (2005) 216-217.
[701] Antonio Tzanakopoulos, supra 506 at 187.

the supremacy of international law and the sovereignty of states. This is important given the interconnectedness between the national and international levels of governance. In this regard, the use of the framework agreement approach in achieving the reform of IIAs will provide flexibility to allow for policy space at the national level.

A framework agreement is a binding international treaty that establishes broad commitments for its parties and a general system of governance, while leaving more detailed rules and the achieving of specific targets either to subsequent agreements (such as protocols) or to national legislation.[702] There is no technical or legal definition of a framework agreement, but the character of an agreement as a framework agreement is established by the decision of contracting parties to delegate questions that are relevant for achieving the agreement's objectives to subsequent agreements. [703] Framework agreements are useful when dealing with issues in which the diversity of interests prohibits the conclusion of clear and strict standards[704] such as within the context of the reform of the substantive aspects of international investment law. Framework agreements would also be useful in the context of international investment law as they are, by their conception, instruments that take note of and acknowledge the value of multi-level systems.[705]

As there is no technical definition, there is no single model for framework agreements. Some agreements provide for procedural and institutional matters and leave issues of a substantive nature to further agreement, such as the Bonn Convention on the Conservation of Migratory Species of Wild Animals.[706] Other agreements provide for detailed substantive legal rules in the framework and delegate more specific issues.[707] An example of a framework agreement that makes provision for the adoption of a legal framework to be filled in by domestic regulation is the Framework Convention for the Protection of National Minorities,[708] which is the format that is proposed to provide flexibility between the supremacy of international law and national policy regulation. In this formulation, the framework agreement serves as a legally binding

[702] Nele Matz-Lück 'Framework Agreements' available at: https://0-opil-ouplaw-com.innopac.wits.ac.za/display/10.1093/law:epil/9780199231690/law-9780199231690-e703?prd=MPIL.
[703] Daniel Bodansky The Framework convention/protocol approach, World Health Organisation, 1999, WHO/NCD/TFI/99.1 available at: https://iris.who.int/handle/10665/65355 [last accessed 18 July 2024].
[704] Ibid.
[705] Matz-Lück, supra n 702.
[706]Convention on the Conservation of Migratory Species of Wild Animals accessible at *https://www.cms.int/en/convention-text.*
[707] Nele Matz-Lück 'Framework Conventions as Regulatory Tools' (2009) 1 *Goettingen Journal of International Law* 439–58 at 441.
[708] European Framework Convention for the Protection of National Minorities, 1 February 1995, 34 I.L.M. 351 accessible at *https://rm.coe.int/16800c10cf* .

guidance for national regulation that is adopted to the specific needs of the parties and allows sufficient room for each party to take into account its own peculiarities when implementing national regulations in fulfilment of the broader objectives.[709] As subsequent issues will be addressed through the development of national policies and strategies, framework agreements are inherently flexible, allowing governments the discretion to determine how to achieve the agreed objectives based on their countries capabilities. In this way, the supremacy of international law is maintained while at the same time making room for the national level to take an active role in the formulation of regulations and policy.

## 3.5. CONCLUSION

Having identified the above multilevel governance principles, these principles will be used in the coming chapters to illustrate how they can be applied in the context of international investment law to achieve the reform and re-design of the substantive and procedural aspects of international investment law. By making use of these principles in the reform effort, this thesis seeks to recommend a reform option that will address the concerns identified with the current system and meet the needs of its users and stakeholders thereby bringing about legitimacy to the system and promoting its continued use in the regulation of FDI. While the multilevel governance framework will not resolve all the problems of the investment regime and fragmentation as highlighted in Chapter 1 and Chapter 2, it will address the major concerns of legitimacy (through increased participation and protections of public law interests), assist in solving the tensions as to which level of governance i.e. the domestic or international, is the best for the resolution of investment disputes (by implementation of a mechanism of co-operation between the international dispute settlement mechanism and domestic courts) and lead to the defragmentation of international investment law (by ensuring co-operation and coherence between the different levels and in dispute settlement such that investment and non-investment treaty obligations are balanced to achieve the most beneficial result).

It is important to note from the outset that there is no entirely perfect method for the reform of international investment law. The multilevel governance theory creates a framework so that, to a large an extent as possible, the chosen method of reform is perceived as legitimate and may be acceptable by the actors and stakeholders involved thereby increasing its effectiveness

[709] Matz-Lück, supra n 707 at 449.

# CHAPTER 4: REBALANCING IIAs AND INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT LAW

## 4.1 INTRODUCTION

Chapter 2 illustrated that there is a need to reform the substantive aspects of international investment law to rebalance their extensive focus on investor protections and so that states are able to effectively harness FDI to achieve sustainable development.[710]

This chapter explores how the multilevel governance framework proposed in Chapter 3 can be used to achieve substantive reform of IIAs. In particular, section 4.2 will set out how the five - storey house theory as underpinned by the principle of subsidiarity and supremacy can be used to establish relationships between the different levels of governance to guide the reform effort. Flowing from this and using these principles, section 4.3 will focus on reforms that can be adopted at the international level of governance to achieve the desired level of the protection of state regulatory space, incorporate sustainable development provisions that result in binding obligations and rebalance IIAs through the inclusion of binding investor obligations. Section 4.4 will explore ways in which the national levels of governance can be utilised to give effect to the proposals made in section 4.3 so that host states are able to effectively harness the benefits of FDI to contribute to sustainable development without violating their obligations contained in IIAs. Section 4.5 will conclude by drawing together the proposals made in the chapter to show how, by using the multilevel governance framework, a harmonious integration between the different levels of governance can be achieved that will see the reform of the substantive aspects of international investment law in a manner that limits contestation between the different levels of governance and between the different stakeholders affected by the international investment law system. This will improve the impacts and perceptions of the international investment law system thereby having a positive impact on the sociological legitimacy of the system.

## 4.2 USING MULTILEVEL GOVERNANCE TO REFORM THE SUBSTANTIVE ASPECTS OF INVESTMENT LAW

[710] Sustainable development as used in this thesis refers to the ability to meet the needs of the present, without compromising on the ability of future generations to meet their own needs. See chapter 2 section 2.5.1.

Balancing investment protection. with sustainable development requires a holistic approach that not only focuses on systemic change in reforming IIAs, but also focuses on national reforms through a broad review of multiple bodies of law from the local to the international level of governance.[711] Where a number of actors across different levels of governance are required to act, the multilevel governance framework can be an important tool that can be used to organise the different actors across various sectors and levels to improve participation and limit contestation.

While national investment laws and IIAs have never been anticipated to exist as disconnected regimes, and even though they seemingly co-exist under the international investment law system, in the current impasse brought about by the need to promote sustainable development and balance the protection contained in IIAs, the disconnect between the goals of national regimes and international regimes becomes apparent.[712] In this regard, it must be noted that international economic structures are not a substitute for national structures.[713] International investment law and national laws governing foreign investment should strongly influence each other and co-operate in a relationship of co-dependency and interoperability.[714] If the hazards of an international law that is not interoperable with its domestic counterpart can be identified as well as the opportunities for incorporating domestic law concepts in international law, there may be increased chances of creating a more legitimate and effective regime for foreign investment.[715] Neither the international level nor the domestic level of governance can tolerate for an extended period of time, fundamental disparities with the other.[716] As noted by Ratner,

> '[s]tates can carry out or frustrate its international investment law commitments through the content of their domestic laws and states rely on domestic investment law for developing their policies and positions with respect to international investment law. The contours, depth and breadth, as well as the success of the global regime on the treatment of foreign investors in achieving its goal for all its stakeholders thus depend on the content of both sets of laws.'[717]

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[711] Lorenzo Cotula, 'Rethinking Investment Law from the Ground up: Extractivism, human rights and investment treaties' Investment Treaty News https://www.iisd.org/itn/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula/ (accessed 10 October2023).
[712] Olaoye & Sornarajah, supra n 431 at 109.
[713] Ibid at 130.
[714] Ratner, supra n 385 at 1.
[715] Ibid at 3.
[716] Ibid at 26.
[717] Ibid at 33.

The multilevel governance framework can therefore be useful in bringing together national and international laws on investment in a manner that ensures their interoperability and compatibility.

Within the multilevel governance framework, the five- storey house theory demonstrates the potential of the different levels of governance to work together for the achievement of common goals as all levels of governance work together as a whole. The five- storey house theory makes the allocation of powers among the different levels possible as well as the development of a system of checks and balances among the layers. It allows for communication and interaction among the different layers of governance to define concepts which are suitable to the operation of each of the levels.[718] By using the five- storey house theory, the different levels of governance are not viewed as hierarchical structures but the different levels are useful in helping to understand the different actors in global governance regimes and permits the defining of concepts that are suitable to the operation of all the levels and thereby design coherent legal thinking.[719] Following a process of communication and interaction rather than the mechanical precedence of higher levels over lower levels leads to greater coherence and ensures that adequate safeguards are established at the appropriate level of governance.[720]

The protection of life, liberty, property, and the pursuit of goals of human welfare and development in a non-discriminatory manner are increasingly becoming important aspects of international economic law. The five-storey house theory recognises that these guarantees and goals need not be present in a similar manner across the different levels of governance. Within the five-storey house theory, it is sufficient that these rights are effectively protected by at least one layer of governance which the other layers defer to.[721] Cottier and Hertig provide an example of how this interaction between the different layers operates in practice in the European Community in the context of the Treaty of Rome and the protection of fundamental human rights.[722] The Treaty of Rome was limited to securing market access within the European Community and did not contain extensive provisions on the protection of human rights. However, with the passage of time, it became apparent that while aimed at economic integration, the application of the Treaty of Rome could impact the enjoyment of other human

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[718] Ibid at 301. Malebakeng Agnes Forere supra n 511 at 10.
[719] Thomas Cottier & Maya Hertig 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck UNYB* 261–328 at 306.
[720] Ibid at 313.
[721] Ibid at 314.
[722] Ibid.

rights provided for national systems. As a result of this, national courts noted that they would not be willing to apply European Community law, where that law would be contrary to or conflict with fundamental guarantees as provided for in their national laws.[723] In order to preserve the supremacy of European Community law and ensure compliance with the same by national courts, the European Court of Justice recognised that despite not expressly incorporating the same into the text of European Community law, the principles on the protection of fundamental rights derived from national constitutions and international treaties are general principles of European Community law which ought to be taken into account when interpreting and applying European Community law. [724]

As such, important principles that existed within national law frameworks were incorporated into a treaty for economic integration, without necessarily transposing the whole body of human rights into the treaty. The relationship between the different levels of governance, and the different sources of constitutional and economic norms illustrates that there is a possibility for the transportation of values and norms from the national level to the international level. An example, of how regional commitments can be aligned with domestic policies can be seen in the reform of the SADC FIP. In determining the manner of calculation for compensation payable as a result of expropriation, South Africa took an active role in proposing a flexible method of calculation of compensation for expropriation that would be in line with the method of calculation employed in the South African Constitution.[725] As a result of these efforts, the final clause regarding the calculation of compensation contained in Annex 1 s5(3) of the SADC FIP 2016, is identical to the provision on calculation or compensation in s25(3) of the Constitution of South Africa.[726] This transposition of national law principles into the

[723] Ibid.
[724] Cottier & Hertig, supra n 719 at 314.
[725] T Kondo 'A Comparison with Analysis of the SADC FIP before and after Its Amendment' (2017) 20 *Potchefstroom Electronic Law Journal (PELJ)* 1–47 at 15.
[726] For the similarities between the two provisions see Annex 1 Article 5(3) of the SADC FIP provides, Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the Intended expropriation had become known earlier. However, where appropriate, the assessment .of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard to all relevant circumstances and taking account of: (a) the current and past use of the property; (b) the history of its acquisition; (c) the fair market value of the investment; (c) the purpose of the expropriation; (e) the extent of previous profit made by the foreign investor through the investment; and (f) the duration of the investment.

S25(3) of the Constitution of South Africa provides 'The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including— (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the international law framework can also be seen in the incorporation of national law principles of equity, transparency, good faith and proportionality which are cornerstones of national constitutional systems that have started making significant contributions to shaping processes occurring at the international level.[727] The outcome of viewing the different layers of governance as part of a whole is that a dialectical relationship can exist between the different levels of governance through a communicative process which can bring about rapprochement of the different levels of governance.[728]

When applied to the international investment law system, it is not necessary to transpose the entire body of human rights law, sustainable development law and environmental protection into the text of the IIA. It would be sufficient to incorporate the principles and values underpinning these systems into international investment law and give due deference to other levels of governance which may be best suited to address these issues. This kind of relationship requires the allocation of regulatory competence across the different levels of governance.[729] The principle of subsidiarity is useful for the allocation of competences and can be used to allocate regulatory authority across different levels of governance.[730] The principle of subsidiarity advocates for the notion that the decision be taken at the lowest level that is capable of performing the function. In determining which level is capable of performing the function, the principle of subsidiarity focuses on both the process i.e. the need to ensure the adequate participation of affected stakeholders and the outcome i.e. which level has the capacity to produce the desired result.[731] As a result of this dual focus, when it comes to allocation of regulatory authority, the principle of subsidiarity does not necessarily require the allocation of a policy field to a specific level of governance, but can spread these regulatory powers across different levels, taking into account the capacities and capabilities of each level to achieve the desired process and outcome.[732]

This is further made possible by the partnership principle which works closely with the principle of subsidiarity. The partnership principle describes a collective process involving public authorities at international, regional, national and local levels as well as economic and

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extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.'

[727] Cottier & Hertig, supra n 719 at 316.
[728] Ibid at 317.
[729] Ibid at 323.
[730] Ibid.
[731] Ibid.
[732] Ibid.

social partners and bodies representing civil society.[733] The partnership helps programmes to focus and co-ordinate funding, ease access to resources, provide institutional strength, capacity building and empowerment of players and promotes legitimacy, stability and sustainability of investments.[734] An example of this shared regulatory competence can be seen in the area of climate change regulation. The Paris Agreement provides a framework guiding the global effort relating to the achievement of climate goals.[735] While climate change is a global concern and indeed requires global solutions, the international level has been vested with the competence to create frameworks, common goals and standards and for the lower levels to determine how the reduction of carbon emissions can be achieved taking account the circumstances of each state. For example, the overarching goal of the Paris Agreement is to hold 'the increase in the global average temperature to well below 2°C above pre-industrial levels' and pursue efforts 'to limit the temperature increase to 1.5°C above pre-industrial levels.'[736] Having set this goal, it is left to the different states to determine how they will achieve this goal by setting and submitting their national climate action plans, known as nationally determined contributions (NDCs).[737] As such the interconnectedness of the different levels of governance, coupled with increased communication, cooperation and partnerships allows for the exercise of regulatory power in a complementary manner. A symbiotic relationship can then be developed between the different levels of governance, all exercising some form of regulatory authority, each complementing the other.

Finally, so that there is coherence in the manner in which regulatory power is carried out, the principle of supremacy of international law, dictates that the rules created at the international level of governance will guide the regulatory making power of the lower levels of governance. As such, regulations made at the lower levels of governance, must be consistent with the regulations at the international level of governance. This is important so that states are not found to be in violation of their international law obligations. As noted in Article 27 of the Vienna Convention Law of Treaties, a party cannot invoke the provisions of its national law to justify a violation of international law. As such the supremacy of international law ensures that

[733] Frank Holstein & Kai Böhme Application of the principles of partnership and multi-level governance in Cohesion Policy programming 2021-2027, Commission for Terrotorial Cohesion Policy and EU Budget, 2021 81 at 3.
[734] Ibid at 5.
[735] https://unfccc.int/process-and-meetings/the-paris-agreement (accessed on 3 November 2023).
[736] Article 2 of the Paris Agreement, Paris 12 December 2015.
[737] Article 3 of the Paris Agreement.

coherence in regulatory making is maintained regardless of which level of governance exercises regulatory making authority.

When applying these principles to the reform of the substantive aspects of international investment law, the goal will be to use the international level of governance through IIAs, to create common standards and frameworks that will be applicable to govern the rebalancing exercise of international investment law as well as the promotion of sustainable development, with more specific regulation taking place at the national level. This method of reform takes into account the fact that IIAs are not human rights or sustainable development treaties but that they should, at the very least, be human rights and sustainable development oriented so that they do not conflict with other areas of international and domestic law.

The following sections will set out the nature of reforms that ought to be undertaken at the international level to create general norms and frameworks to increase the human rights and sustainable development orientation of IIAs. Thereafter, we will see how the national level of governance can be incorporated into the investment law system to build on the framework developed at the international level so that host states can effectively implement regulations and processes necessary to protect their populations and national interests and harness the positive impacts of FDI for sustainable development without violating their IIA obligations.

## 4.3 REFORM AT THE INTERNATIONAL LEVEL

IIAs are widely deemed as being a major source of the legal norms that govern the regulation of FDI and the relationship between the host state and the investor.[738] When using the multilevel governance framework to address the concerns that have arisen with the international investment law system, it is not necessary to fully incorporate positive human rights and sustainable development obligations directly into IIAs as this has already proven difficult to achieve.

This difficulty is evidenced by the previous failed attempts at creating binding human rights obligations in the context of economic agreements. One of the early attempts arose from the Sub-Commission on the Promotion and Protection of Human Rights which developed draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

[738] Chi, supra n 157 at 1.

with Regard to Human Rights which norms remained a draft due to political opposition.[739] The debate resultantly led to the establishment of various non-binding standards establishing a corporate responsibility to respect human rights, which was adopted by the UN Human Rights Council in 2011.[740]

Another attempt was made to implement binding obligations for business entities under the auspices of the Open-ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business entities. The OEIGWG's mandate was to elaborate on an internationally binding instrument to regulate the activities of business entities in respect to their human rights obligations.[741] The working group published an Elements Paper with possible elements of a treaty on business and human rights which inter alia contained obligations on business entities and transnational corporations to respect internationally recognised human rights, to develop policies to ensure that their activities are consistent with recognised human rights standards, to implement and monitor these policies and to refrain from activities that would undermine the rule of law and the protection and promotion of human rights.[742] Again, these elements were met with opposition from states and a first draft for a treaty that was subsequently published did not contain any obligations for corporations and focused on obligations for states to regulate the conduct of transnational corporations and provide for remedies for victims of human rights violations.[743]

This thesis seeks to make use of the multilevel governance framework in attempt to overcome the hurdles experienced by previous attempts. The proposals made herein use the five-storey house principle, the principles of subsidiarity and supremacy to achieve reform of the substantive aspects of international investment law. The thesis proposes common standards, frameworks and processes that can be incorporated into IIAs that will allow host states to able

739 Krajewski (n 95) 110. See also David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Entities with regard to Human Rights' (2003) 97 *American Journal of International Law* 901-922 and Detlev F. Vagts, 'The UN Norms for Transnational Corporations'' (2003) 16 *Leiden Journal of International Law* 795-892.

740 See generally the Report of the Special Representative of the Secretary- General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework UN DOC A/HRC/ 17/31 (21 March 2011) (hereinafter United Nations Guiding Principles on Business and Human Rights)

741 Human Rights Council Resolution 26/9 (14)

742 OEIGWG on transnational corporations and other business enterprises with respect to human rights Elements for a Draft Legally Binding Instrument on transnational corporations and other business enterprises with respect to human rights HRC Res. A/ HRC/ Res/ 26/9 29 September 2017.

743 Legally Binding Instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises.

to implement more directed efforts at rebalancing IIAs and incorporating sustainable development provisions in a manner that will not amount to a violation of their IIA obligations regarding foreign investment without necessarily converting IIAs into human rights and sustainable development treaties.

*a. Development of an international framework agreement for the termination and renegotiation of older generation IIAs*

While the recommendations that are proposed by this thesis can easily be applied in the context of newly negotiated IIAs, the question as to how these reforms can be effectively incorporated into existing IIAs to provide immediate protection remains. According to UNCTAD, 68 ISDS cases were initiated in 2020 and about 65% of these were brought under BITs and TIPs signed in the 1990s or earlier with all but two of the remaining cases being based on treaties signed between 2000 and 2011.[744] To prevent the creation of parallel international investment law systems, with some IIAs making provision for human rights, investor obligations and sustainable development and others not, there is a need to re-align older generation IIAs with the recommendations made herein.

While some states have started terminating their BITs, for the purposes of ensuring the application of new investment regulations to existing investments, the impact of termination is limited by the application of sunset or survival clauses. Sunset clauses extend the application of a treaty's provisions in respect of investments already established in the host state after the treaty has been terminated.[745] Their role is to protect investments already made in the host state by preventing an overnight change in the legal regime that covers them and allowing them to enjoy the treaty's protection for an additional period of time.[746] Most survival clauses apply for periods between 5-25 years. As a result of these survival clauses, foreign investors will still be able to invoke the provisions and protections in older generation BITs thereby limiting the impact of any termination and the introduction of reforms.

[744]UNCTAD World Investment Report: Investing in Sustainability Geneva 2021 UNCTAD/WIR/2021 129-130.
[745] Catharine Titi *Most-Favoured-Nation Treatment, Survival Clauses and Reform of International Investment Law* (2015) at 434, available at: https://papers.ssrn.com/abstract=2723342 (accessed 9 October 2023).
[746] Ibid.

In order to counter this effect, the 23 Member states of the EU, following the *Achmea* decision[747] have signed a plurilateral treaty known as the Termination Agreement[748] to terminate all intra-EU BITs. The Termination Agreement provides that all intra-EU BITs concluded between the parties shall be terminated. It further provides that all sunset clauses of BITs terminated pursuant to the BIT and even the sunset clauses of those terminated prior to the Termination Agreement will be terminated and will not produce any legal effect. [749] The Termination Agreement goes even further to clarify that all arbitration clauses in BITS shall not serve as a legal basis for arbitration proceedings.[750]

It may be argued that a multilateral treaty to govern and regulate investment activity would be the ideal mechanism for the wholesale replacement of IIAs and bring about consistency in the rules that govern investment regulation. Despite this, as noted above there have been difficulties in coming to multilateral agreement, and even where these difficulties could be overcome, treaties often require years of consensus building among states if they are to be ultimately adopted.[751]

Whether the process for reforming substantive laws takes the form of renegotiation of IIAs or the creation of a multilateral treaty, it would be useful to have an international framework that can be followed by states as they pursue reform of substantive laws. This international framework would set out guidelines and principles that would guide states in achieving reform of substantive aspects of international investment law. In comparison to negotiating a multilateral treaty, it may be much easier for states to negotiate and agree on the specific principles that ought to be applied to the reform of substantive law, leaving it up to states to determine how this can be achieved.

Such an agreement can be developed under the auspices of UNCITRAL, as an extension of the work of Working Group III, with the aim of complementing the work on procedural reform. The focus of the agreement would be to reach consensus on broad issues that are necessary to reach substantive reform for example, undertakings by states to terminate or renegotiate older generation IIAs by a set date, undertakings to limit the impact of sunset clauses in existing IIAs

[747] *Slovak Republic v. Achmea B.V.* (Case C-284/16).
[748] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/INIT 2020 accessible at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29*

[749] Article 2 and 3 of the Termination Agreement.
[750] Article 4 of the Termination Agreement.
[751] Lichuma, supra n 107 at 736.

and undertakings to negotiate IIAs taking into account the need to promote sustainable investment and equal protection and participation of all affected stakeholders. These issues are discussed in more detail below.

In order to achieve targeted efforts and limit the negative impacts of older generation investment treaties, states could agree to set a timeline for the termination and/or re-negotiation of older generation IIAs. This will not only provide advance notice to foreign investors of the global effort for the reform of the substantive provisions of IIAs but set a targeted goal that states can work towards so that they initiate processes to terminate or renegotiate existing IIAs where they have not begun and where this has begun, speed up the process so that targeted goals are met. This would also work to bolster the efforts being undertaken by states at individual level and bring together the wholesale participation of a large group of countries in reforming their IIAs. The result will be that as opposed to sporadic and isolated instances of reform or termination, there will be a wholesale effort by states to re-negotiate and reform their IIAs. This will give impetus to the reform effort and narrow the likelihood of the development of a parallel international investment law system as states would be working together, within a given time frame to bridge the gap.

In order to achieve the effectiveness of the termination process, where this is the option adopted by states, states would affirm their commitment to limiting the impact of sunset or survival clauses. In this regard, states would undertake to amend their BITs to completely remove sunset clauses to facilitate the termination of treaties. This will ensure that once terminated, the treaty is not subject to a sunset clause thereby preserving the effect of termination.[752] It is possible that some states may not be desirous of completely negating the effect of sunset clauses. In this regard the agreement would provide for the amendment of sunset clauses to limit their application to a period of not more than three years from the date of termination provided that the three year period does not extend beyond the targeted termination date as mentioned above.[753] The main purpose of the undertaking would be to ensure effectiveness of the reform effort such that any reforms can be immediately applicable in governing the relationship between the different stakeholders in the international investment law system.

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[752] Titi, *Most-Favoured-Nation Treatment, Survival Clauses and Reform of International Investment Law*, supra n 745 at 438.

[753] This is less than what is currently applicable in older generation treaties but still provides a modicum of protection to investors.

Finally, states would undertake to negotiate new substantive provisions taking into account principles that will allow newer generation IIAs to take into account the needs of a wide range of stakeholders. In particular, they would undertake to make provision for the effective participation of affected stakeholders in the design of the treaty and treaty provisions, ensure the implementation of provisions that allow for the protection of and balance the interests of all stakeholders, give effect to the promotion of sustainable investment that can facilitate the achievement of sustainable development goals and the use of clearer treaty drafting language and where possible, limit the use of vague and open ended concepts without providing clarity on the manner in which they ought to be applied.

It would be ideal to have a binding agreement as described above, that will illustrate the commitment of states to the reform of the international investment law system, with binding obligations to which states could be held to account. However, given the difficulties in negotiating the binding agreement, the document could also take the less onerous and perhaps less effective form of guidelines such the UN Guiding Principles on Business and Human Rights. Regardless of the form, the goal would be to attempt to direct the reform of the substantive aspects of international investment law in a coherent manner to develop a new generation of IIAs that are capable of changing and replacing the current system.

The types of substantive provisions that can be incorporated into treaties so that substantive reform is capable of addressing the issues identified will be illustrated below

### *b. Clarity on the right to regulate*

Incorporating an express right to regulate in the text of IIAs has been seen as a way in which states can preserve their policy space and enable them to enact policy and regulatory measures to govern the different relationships that arise in the use of FDI and to achieve various national goals including the promotion and achievement of sustainable development. Despite this incorporation, the scope and content of the right to regulate remains elusive, with different tribunals and legal scholars attaching different effects and recognition to the same. Mostafa notes that some tribunals apply the police powers doctrine as CIL and others do not.[754] As illustrated in chapter 2, some scholars and tribunals have found that the right to regulate forms a part of CIL and serves to exclude liability for state regulatory conduct, while others have

[754] Ben Mostafa 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' *Australian International Law Journal* 267–96 at 272.

found that compensation ought to be payable regardless of the measure enacted by the state.[755] Titi notes that the CIL status of the police powers says very little about its concrete content and how it should be applied.[756] The scope and content of police powers and the right to regulate must be determined by its status under international law and its design and purpose will flow naturally from such a determination. This section of the thesis seeks to trace the CIL status of the police powers doctrine to establish its scope and content and set out how it should be applied in the settlement of investment disputes. This exercise is of importance because

> '[a]s the international legal system matures, grows increasingly complex, dense and fragmented …it would appear to be manifestly sensible and necessary for states to have clearly developed understandings, not only of their obligations within [the international] legal system, but also their rights, which can potentially be used as a shield against excessive encroachment upon their sovereign independence.'[757]

In determining what constitutes CIL reference is made to the definition adopted by the ICJ in the Gulf of Maine area case, where it held regarding CIL that,

> 'a body of detailed rules is not to be looked for in customary international law which in fact comprises of a limited set of norms for ensuring the co-existence and vital co-operation of members of the international community, together with a set of customary rules whose presence in opinion juris of states can be tested by induction based on the analysis of a sufficiently extensive and convincing practice.'[758]

The above case illustrates that there are two types of CIL rules. The first being a limited set of norms for ensuring the co-existence and vital co-operation of states and the second are the rules arising from opinion juris of states. The author submits, as shall be illustrated hereunder that an argument can be made that the right to regulate falls within the first category of CIL.

The right to regulate has been recognised as a basic attribute of state sovereignty.[759] Sovereignty, independence and equality of states are crucial in the functioning of the international legal order as they provide for the rights which support the existence of states and

[755] For a full discussion on this point see chapter 2 section 2.5.1(d).
[756] Titi, 'Police Powers Doctrine and International Investment Law', supra n 417 at 18.
[757] Daniel H Joyner & Marco Roscini 'Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?' (2015) 4 *Cambridge Journal of International and Comparative Law* 467–81 at 477.
[758] Case Concerning the Delimitation of the Maritime Boundary in Gulf of Maine Area (Canada v USA) Judgement ICJ Rep 1 1984 264 para 11.
[759] Muthucumaraswamy Sornarajah 'The Right to Regulate and Safeguards' *The Development Dimension of FDI: Policy and Rule-Making Persepectives* (2003) at 205; Valentina Vadi *Cultural Heritage in International Investment Law and Arbitration* (2014) at 85.

the obligations which support the peace co-existence of independent sovereign states.[760] Sovereignty is therefore one of the fundamental rights of states resulting from the very existence of the state. [761] As such, sovereignty falls into the first category of CIL, i.e., the limited norms for the governing of relations between states and is not dependent on opinion juris to be established. Sovereign states, as an inherent function of their sovereignty have the authority to enact legislation, enforce judgements and adopt regulatory policies they deem necessary or essential to promoting the social and economic welfare of citizens.[762] This is because sovereignty has been described as the competence and authority to exercise the function of a state within national borders and to regulate internal affairs freely.[763]

As the right to regulate is an exercise of sovereignty, its existence, scope and content is derived from sovereignty. While some scholars such as Zarra [764] sought to deny the CIL status of the police powers doctrine as a result of insufficient opinio juris, the right to regulate, as an extension of state sovereignty is not founded solely on opinio juris, but rather accrues to the state as part of the limited norms that exist in CIL and is a fundamental and inherent right of a state that is necessary for the functioning of the state.

The OECD Draft Convention on the Protection of Foreign Property notes that the right to regulate accrues to states by virtue of their independence and autonomy and their political and social existence all recognised by international law.[765] It would be difficult to envision a state that does not have the power or authority to make regulations and govern within its territory. Thus, when determining the nature of inherent rights of states, the ICJ in the *North Sea Continental Shelf Case*, held that '[i]n order to exercise it [the inherent right], no special legal process has to be gone through, nor have any special legal acts have to be performed. Its existence can be declared but does not need to be constituted.'[766] There is no multilateral treaty on the ability of a state to exercise regulatory power, and yet despite this absence, all states

[760] Sergio M Carbone & Lorenzo Schiano di Pepe 'States, Fundamental Rights and Duties' at para 36 available at: https://0-opil-ouplaw-com.innopac.wits.ac.za/display/10.1093/law:epil/9780199231690/law-9780199231690-e1112?prd=MPIL.
[761] Joyner & Roscini, supra n 757 at 474.
[762] Sornarajah, supra n 759 at 71.
[763] MP Ferreira-Snyman 'The evolution of state sovereignty: a historical overview' (2006) 12 *Fundamina* 1–28 at 4.
[764] Giovanni Zarra 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay' (2017) 14 *Revista de Direito Internacional*.
[765] OECD Draft Convention on Foreign Property, 12 October 1967 23-25.
[766] North Sea Continental shelf (Germany v Denmark; Germany v Netherlands) Judgement [1969] ICJ Rep 3 para 19.

exercise this right freely and without interference from other states. This supports the nature of the right to regulate as an inherent and fundamental right of states.

As the exercise of an inherent right that accrues to states by virtue of their state hood, the right to regulate need not be expressly recognised in IIAs in order to be considered as applicable in the settlement of investments disputes. This was noted by the tribunal in the case of *Philip Morris v Uruguay*, where in applying an older generation BIT, the tribunal found that the incorporation of the right to regulate in newer generation BITs has been adopted 'ex abundanti cautela' but still nonetheless reflects general principles of international law.[767] The applicability of the police powers doctrine is derived from its CIL nature and need only be invoked by the state in order to be applicable in the determination of a dispute.

Where tribunals have failed to give effect to the right to regulate, they have, therefore in effect, failed to give due regard to the applicable law and how it interplays with the rights and obligations that are contained in IIAs. The author submits that it could not have been the intention of states, when signing IIAs, to relinquish their sovereign regulatory power in favour of investment protection in such a manner that relinquishes their ability to effectively govern within their territory and carry out the functions of the state especially in areas that are of fundamental importance to the protection of the public and public interest. This finds support in early jurisprudence on the police power of states. In the case of *Chicago & Alton R. Co v Tranbarger,* the US Supreme Court held that, 'the police powers of a state cannot be abdicated nor bargained away, it is inalienable even by express grant and all contract and property rights are held subject to its fair exercise, it embraces regulations designed to promote public convenience or general welfare as well as those in the interest of the public health, morals or safety.'[768]

This view has been carried on in later arbitral jurisprudence where the right to regulate has been accepted. In *Feldman v Mexico*, the tribunal opined that 'governments must be free to act in the broader public interest…reasonable regulation cannot be achieved if any business that is adversely affected may seek compensation.'[769] The tribunal went further to find that

> '[N]ot all governments regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business is an expropriation…Governments, in their exercise of regulatory power, frequently change

[767] *Philip Morris v Uruguay* para 301.
[768] 238 US 67 (1915) 238.
[769] *Marvin Feldman v Mexico* ICSID Case No ARB/(AF)/99/1 Award 16 December 2002 para 106.

their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.'[770]

The rights contained in IIAs are therefore held and enjoyed subject to the fair exercise of police powers and the right to regulate.

Difficulties regarding the application of the right to regulate have also been based on the apparent lack of concrete content of the right with little direction on how it should be applied.[771] However, the lack of concrete form has not prevented basic legal principles from being accepted and applied as part of international law. Sovereignty has been recognised as a fundamental principle of international law and CIL even though the precise meaning of the terms has not been clearly defined.[772] The concept of sovereignty is considered as being highly adaptable and ideas and views about sovereignty may change from time to time as changing times necessitate different approaches.[773] As such, the concept of sovereignty is of a framework nature which usually relates to basic or general aspects of international law, to be completed and integrated into international law on a case by case basis.[774] That the right to regulate appears to have limited direction regarding its content and form of application can be argued to be a feature derived from its nature as an ideal based in sovereignty. Much like with the concept of sovereignty, the Saluka tribunal noted that it has been left to international law to fill in the gaps that exist in the functioning of the right to regulate, in particular to determine what constitutes a valid exercise of the right to regulate.

The question then becomes to what regulation does the right to regulate apply and how must the regulation have been applied. A wide approach to the interpretation and application of the right to regulate and the exclusion of liability for such regulation would mean that it applies to any and all regulatory conduct by a state that is enacted for the purposes of achieving public welfare.[775] However this approach has been described as being too far reaching and would most likely render investment protections ineffectual.[776] This formulation would also most likely be

[770] Ibid para 112.
[771] Titi, 'Police Powers Doctrine and International Investment Law', supra n 417 at 18.
[772] MP Ferreira-Snyman 'The evolution of state sovereignty: a historical overview' (2006) 12 *Fundamina* 1–28 at 1.
[773] MP Ferreira-Snyman 'The evolution of state sovereignty: a historical overview' (2006) 12 *Fundamina* 1–28 at 2.
[774] Carbone & Schiano di Pepe, supra n 760 at para 31.
[775] Mostafa, supra n 754 at 274.
[776] Ibid. See also *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12 at 310; *Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 para 7.5.21.

rejected by foreign investors and by extension, capital exporting states. A narrow approach would mean that the right to regulate would only apply to certain areas with various authors and definitions making reference to different areas of applicability such as crime, tax, maintenance of public order and security and public health.[777] A reference point in international law is therefore required that can pull together the different areas to which the right to regulate will apply so as to limit the application of the right to regulate to those areas that are of great importance but also takes into account the changing needs of states and communities.

When determining what issues are of significant concern to the broader community of people, in a manner that takes into account changing times and changing needs, this thesis proposes the use of the common concern to humankind approach and the concept of public goods for the purposes of determining what regulation falls within the scope of the legitimate exercise of the right to regulate. The author submits that these criteria that take into account the general needs and concerns of the global community as well as the needs of individual states and communities within those states with room to regulate on these matters across all levels of governance without unduly limiting the rights of foreign investors. Common concern to humankind refers to important shared problems and the shared responsibility for issues that reach beyond the bounds of single states.[778] These are the types of concerns that will have long lasting and adverse effects that are potentially devastating for future generations and their resolution has a strong focus on ensuring intergenerational equity.[779]

Soltau has identified the following characteristics of common concerns that are based on community interest i.e. the interests concerned extend beyond those of individual states and communities and touch on values and ethics of global significance; threats to the concern are

[777] For example, the 1961, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens refers to the execution of tax laws; a general change in the value of currency; the action of the competent authorities of the State in the maintenance of public order, health or morality; or the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State.
American Law Institute's Restatement Third of Foreign Relations Law of the United States refers to general taxation, regulation and forfeiture for crime.
Simon Baughen, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18 *Journal of Environmental Law* 207 at 211 refers to areas of tax, crime and the maintenance of public order.
Jason Gudofsky, 'Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study' (2000) 21 *Northwestern Journal of International Law and Business* 243 at 290 refers to health, safety and even morality.
[778] Lucía Satragno 'A Common Concern of Humankind Approach to Monetary Stability' *Monetary Stability as a Common Concern in International Law: Policy Cooperation and Coordination of Central Banks* (2022) vol 759–91 at 65 available at: https://brill.com/display/book/9789004508736/BP000004.xml.
[779]Chelsea Bowling, Elizabeth Pierson & Stephanie Ratté 'The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas' at 3 available at: www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf.

marked by their gravity and the potential irreversibility of their impacts and safeguarding the interest involved requires collective action and entails collective responsibility.[780] When determining the nature of common concern, both Brunnee[781] and Nolte[782] consider the principle of common concern as having its origins in international law. Examples of issues falling within the ambit of common concern today are issues relating to the environment, natural resources and climate change,[783] sustainable development[784] and human rights.[785] Public goods are those goods which are created for the benefit of the population and are available to all ('nonexcludable') and can be enjoyed repeatedly by anyone without diminishing the benefits they deliver to others ('nonrival').[786] These are goods that are primarily provided by the state for the benefit of the entire population with little to no profit accruing to the state for their provision. As such regulation to address common concerns or regarding the promotion and protection of public goods would not benefit the state directly, but rather benefit the general population.

The use of common concern of humankind and public goods takes into account the changing circumstances and needs of global and national communities and is adaptable to changing needs, as opposed to making specific references to specific areas of applicability. To this extent, common concern of humankind approach has been described as being able to influence the development of international law in the age of globalisation facing new challenges beyond the longstanding threats of international peace and security.[787]

The benefits of referring to common concern and public goods were noted by Satragno, where he stated that,

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[780] F Soltau 'Common Concern of Humankind' in CP Carlane, KR Gray & RG Tarasofsky (eds) *The Oxford Handbook of Internationla climate Change Law* (2016) 202–13 at 207–8.
[781] J Brunnee 'Common Interest: Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law' (2008) 49 *ZaoRV* 791–808.
[782] G Nolte 'The International Law Commission and Community Interests' in E Benevisti & G Nolte (eds) *Community Interests Across International Law* (2018) 101–17 at 114.
[783] See for example climate change is recognised as a common concern in the preamble of the United Nations Framework Convention on Climate Change, 9 May 1992, 31 ILM 849, 851. The 2015 Paris Agreement UNTS 1760 also recognises climate change as a common concern to humankind. The 1992 United Nations Convention on Biodiversity (CBD) UNTS vol. 1760 p. 79; 31 ILM 818 recognises the preservation of biodiversity as a common concern.
[784] Thomas Cottier 'The Principle of Common Concern of Humankind' in Thomas Cottier (ed) *The Prospects of Common Concern of Humankind in International Law* (2021) 3–92 at 16.
[785] Bowling, Pierson & Ratté, supra n 779 at 4. who note that human rights and international humanitarian law reflects the notions of common concern.
[786] Moya Chin, 'What are Public Goods?' (2021) https://www.imf.org/en/Publications/fandd/issues/2021/12/Global-Public-Goods-Chin-basics (accessed 29 November 2023).
[787] Satragno, supra n 778 at 73.

> [c]ommon concerns are global but also exist at the local and regional levels of governance and correlates with public goods appropriate at each level. Common concern aims to work as a foundation to strengthen international co-operation and also to define and legitimise unilateral domestic measures in the absence of adequate international co-operation.'[788]

The common concern and public goods approach ties in with the multilevel governance framework as the regulation of common concerns and public goods, are not restricted to the international level of governance but can also be found at the national and regional levels. In this regard, the use of common concern of humankind and public goods approach determines what types of regulation the right to regulate applies to and allows for the co-operation across different levels of governance for the regulation of these issues,[789] without the national level running the risk of facing investment treaty claims arising from this regulation. The multilevel governance framework would find application here to determine the level of governance at which the common concern is better addressed. [790] This ensures that the right to regulate is able to achieve optimal promotion and protection of public goods at the different levels of governance, in a manner that allows for the inclusion of multiple stakeholders across different levels of governance.

While the protection of state regulatory power is important, it is also important that the exercise of this regulatory power is controlled. By looking to international law, we can ascertain the principles applicable to restraining and controlling the exercise of state sovereign power. Administrative law is a mechanism that was designed to control and correct administrative or regulatory authority.[791] Administrative law creates rules and procedures for controlling the exercise of regulatory making power and is not concerned with the substance or content of resulting policy and regulation but is concerned with the process by which the regulation was made.[792] Global administrative law describes the ensemble of legal rules, based partially on international sources and partially on domestic sources dealing with administrative activity in the international field. [793] As noted in Chapter 3, international investment law and ISDS is an

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[788] Ibid at 71.
[789] The incorporation of the different levels of governance is one of the themes that guides the recommendations made in this thesis.
[790] How regulatory competence can be effectively shared between the national and international levels for the protection of common concerns and public goods is discussed hereunder in section 4.3.a and section 4.4.
[791] 'The Origins and Meaning of Administrative Law' *The Rule of Law in Public Administration* (2015) at 25 available at: https://us.sagepub.com/sites/default/files/upm-assets/72280_book_item_72280.pdf.
[792] Ibid.
[793] Benedict Kingsbury 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23–57 at 23.

incidence of global administrative law and as such can be concerned with the process through which government regulation that affects foreign investment is made.[794] When looking at the right to regulate from a global administrative law lens, the focus of dispute settlement bodies would not be on the substance of the regulation (as this has been dealt with in the above discussion on common concern and public goods approach), but rather, with ensuring that the process through which the regulation is made is not discriminatory, not arbitrary, does not violate the legitimate expectations of investors, has been enacted in good faith, in a transparent manner and with respect to the principles of necessity and proportionality.[795] When testing the exercise of the right to regulate in accordance with these principles, the enquiry seeks to ascertain whether the state, in making regulations, did not violate the investors legitimate expectations, did not act in an arbitrary or discriminatory manner, acted in good faith and in a transparent manner, to enact measures that are necessary to achieve the desired result.

In this regard these principles of global administrative law (which also form a part of international investment law) would not do away with the actual exercise of the right to regulate, but rather would set limitations on the manner in which the right to regulate should be exercised in order for regulation to constitute non-compensable legitimate regulatory action and to allow for the protection of the foreign investor from arbitrary state conduct.

In the premises, based on the above application of international law, the following can be established with regard to the right to regulate. It forms part of CIL and does not have to be incorporated into the text of the treaty to be applicable in the settlement of disputes. The determination of state regulatory conduct that would be a legitimate exercise of the right to regulate would entail a two -stage enquiry. The first stage would be to ascertain whether the regulation is made regarding a public good or a common concern of humankind. This stage of the enquiry serves to limit the exercise of the right to regulate so that it does not have far reaching consequences. As such, where the regulation is not in relation to the protection or promotion of a public good or addressing a common concern of humankind, there can be no valid exercise of the right to regulate and that would be the end of the enquiry. Where it relates to the promotion of a public good or common concern, then the second stage of the enquiry is considered. The second stage of the enquiry seeks to control the exercise of regulatory power

[794] Chapter 3 section 3.2.
[795] As noted in Chapter 3, these principles, which mirror the global administrative law principles inform the scope and content of the FET standard and as such one would still be applying the principles that are applicable in international investment law and would be compatible with the general import of international investment law.

by ensuring that the right to regulate is exercised in an administratively just manner with due regard to due process. Where the exercise of regulatory power is found to fall short of administrative law principles, there can be no legitimate exercise of the right to regulate.

The CIL nature of the right to regulate is such that it is not necessary to incorporate an express right to regulate in treaties. However, Titi notes that given the manner in which the right to regulate has been treated in the international investment law system, it would be necessary to, out of an abundance of caution, expressly recognise the right to regulate in the text of investment treaties.[796] When doing this, it is important that the clause be drafted in clear unambiguous language that leaves little room for dispute settlement bodies to interpret the right in a manner that was not contemplated by the parties. The right to regulate should therefore be incorporated in IIAs in the following ways:

First, the recognition of the state's right to regulate must be included in the preamble. Although inclusion in the preamble does not create an enforceable right, its serves as a means through which the purpose and object of the IIA can be varied from just focusing on investment protection to one of ensuring investment that balances and recognises the needs of all the stakeholders. This may serve as a guide for future dispute settlement bodies in their interpretation of the provisions of the IIAs that there are wider considerations that ought to be applied when interpreting the substantive clauses of the IIA. It further ensures that the goal of investment protection does not take precedence over other rights that are incorporated within the IIA and that other rights do not take precedence over investment obligations. Resultantly when undertaking a purposive interpretation of the IIA as provided for in Article 31 of the VCLT, the dispute settlement body will be enjoined to consider the protection of a host states policy space as part of the objectives of the IIA.

Secondly, the right to regulate must contain a 'chapeau' which is an introductory paragraph, which must be satisfied in addition to the other requirements contained in the right to regulate clause.[797] The purpose of a chapeau is to prevent abuse and misuse of the right to regulate by host states.[798] It also acts as a second check to ensure that regulatory measures are taken in good faith and to reveal any ulterior objectives of the host state that have been shrouded under

[796] Titi, 'Police Powers Doctrine and International Investment Law', supra n 417 at 15.
[797] Robert Brew, 'Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection Canterbury Law Review Student Prize 2018' (2019) 25 *Canterbury Law Review* 205, 232.
[798] Appellate Body - United States - Standards for Reformulated and Conventional Gasoline - AB-1996-1 - Report of the Appellate Body WT/DS2/AB/R 22.

the veil of public interest.[799] The chapeau will limit the possibility of abuse of the right to regulate and ensure that regulatory measures taken by the state are not meant to violate the general objectives of the treaty. Ensuring that the right to regulate is not abused is of particular importance for investors who may otherwise fear the negative impact of uncontrolled state regulatory power, an aspect which the IIA was created to guard against in the first place.

Thirdly, to fall within the clauses coverage, there should be a nexus requirement which governs the required relationship between a host state's policy measure and the objective that the host state seeks to achieve.[800] The most used nexus is the 'necessary requirement'. The definition of the word necessary would direct the appropriate test to be applied by tribunals when determining whether a measure is necessary to achieve the policy objective. In this regard some tribunals have adopted the customary law necessity test which requires that the adopted measure be the 'only way' in which the policy objective can be achieved.[801] The 'only way' nexus requires that the State must have no other lawful means of achieving the stated objective and will not have been met if there are other means for achieving the objective even if these other means are more costly or less convenient. [802] This thesis adopts the view advocated by Ismailov who argues that where a dispute settlement body considers alternatives, 'irrespective of [their] viability and reasonableness, [it] makes it impossible for a state to invoke it [the clause] successfully in practice'.[803] As such a more appropriate test would be a determination as to whether or not the state adopted the least-investment -restrictive measure that it is capable of being reasonably able to adopt.[804] The test would entail a determination as to whether a measure is necessary by reference to whether or not

> 'the reasonably available and less investment-restrictive alternative measure would contribute more or equally effectively to the state's chosen level of protection of its objective. For an alternative measure to be 'reasonably available', the formulation that it not be 'merely theoretical in nature' should be adopted. Unlike the customary 'only way' test, this would permit tribunals 'to consider only practical and possible means, and not alternative measures

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[799] Brew (n 87) 232.Robert Brew 'Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection Canterbury Law Review Student Prize 2018' (2019) 25 *Canterbury Law Review* 205–42 at 232.
[800] Ibid 207.
[801] As contained in Article 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.
[802] *Sempra Energy International v Argentina* (Rejoinder Opinion of Anne-Marie Slaughter and William Burke-White) ICSID ARB/03/02, 2 December 2005 at [47], referring to Gabakovo Nagymaros Project
[803] Otabek Ismailov "Interaction of International Investment and Trade Regimes on Interpreting Treaty "Necessity" Clauses: Convergence or Divergence?" (2017) 48 *Georgetown Journal of International Law* 505 514.
[804] Brew, supra n 799 at 227.227.

which a state would be incapable of taking, such as those which would impose an undue burden.'[805]

The least restrictive measure test is based on the idea that a right should be limited no more than is necessary to achieve a policy objective and requires regulators to pursue regulatory objectives in a manner that is least restrictive of other rights or values.[806] In applying the least restrictive measure test to the necessity analysis, the following questions can be asked; whether the measure is capable of attaining the objective; whether there are any other less restrictive means to achieve the objective and whether the less restrictive means are equally effective at achieving the objective.[807]

The least restrictive measure test has been applied by a number of jurisdictions when determining whether or not a measure is necessary. For example the least restrictive measure test was developed in German constitutional and administrative jurisprudence and its application has extended to other jurisdictions.[808] In s36 of the Constitution of the Republic of South Africa, 1996, the less restrictive means test is one of the factors that is considered in determining whether a limitation of a right in the Bill of Rights is justifiable.[809] In determining whether a right contained in the Canadian Charter on Rights and Freedoms has been reasonably limited, the Supreme Court of Canada developed the Oaks test which makes reference to the existence of less restrictive means as one of the factors to be considered in the determination.[810] Similarly, the European Court of Human Rights in the case of *Nada v Switzerland* held that in order for a measure to be regarded as necessary, the possibility of recourse to an alternative measure that would cause less damage to the right at issue whilst fulfilling the same aim must be ruled out.[811]

In WTO jurisprudence, the least inconsistent measure test applied to determine whether a measure was necessary in the context of GATT article XX exceptions, has been viewed as

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[805] Ibid.
[806] Alan O Sykes, 'The Least Restrictive Means' (2003) 70 The University of Chicago Law Review 403, 403; Stu Woolman and Michael Bishop (eds), 'Chapter 34: Limitations', *Constitutional Law of South Africa* (2nd edn, Juta & Company (Pty) Ltd 2013) 86
[807] Eva Brems & Laurens Lavrysen '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 1–30 at 4.
[808] Ibid 2.
[809] See for example the decision of the court in *S v Manamela and Another* (Director-General of Justice Intervening) (2000) (5) BCLR 491.
[810] *R. v. Oakes* [1986] 1 SC R 103, at pp. 138–40.
[811] ECHR Grand Chamber *Nada v Switzerland* 12 September 2012 para 183.

being a variation of the less restrictive means test.[812] The least restrictive measure test can therefore be viewed as an acceptable test that adequately balances two competing rights in determining whether or not a measure is necessary.

Fourth, the clause has to set out the areas to which the right to regulate would apply. As noted above, these would relate to arears that are of common concern to humankind and the provision of public goods. This is beneficial as it gives the investor an indication of the areas which would be the subject of regulation and creates some form of certainty for the investor as they undertake planning for their projects. By so doing, it is argued that the rights of investors and host states will be balanced giving sufficient protection to each of them.

In support of this approach, the tribunal in *Methanex Corp v United States of America* had to determine whether the enactment of environmental regulations in California were a violation of the minimum standard of treatment. [813] The tribunal noted that the investor was aware at the time of making the investment that the USA and the state of California were notorious for enacting regulations for protecting the environment. [814]As such where the investor entered into an investment, fully aware of and appreciating the regulatory environment that was in existence in the host state and was able to anticipate the possibility of regulation in a particular area, the investor could not claim compensation arising from such regulation.[815]

This approach will also create policy certainty, which is key for attracting FDI. One of the functions of IIAs is to enhance the stability of the investment climate and reduce political risk.[816] The question of stability, consistency and predictability of the legal and policy environment has been a recurring aspect in FET jurisprudence.[817] On the one hand, where a state ensures predictability of policy action and provides sufficient guidance on future policy action, it reduces the ambiguity and arbitrariness of policy making, creates policy certainty and a conducive environment for investment.[818] On the other hand policy uncertainty spoils the investment climate and creates reluctance amongst investors when making investments.[819] This

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[812] Sykes, supra n 806 at 408. See also United States- Section 337 of the Tariff Act of 1930 para 5.26 36th Supp GATT BISD 392-393 (1990); Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes para 74 Supp GATT BISD 200 1990.
[813] *Methanex Corporation v United States of America* Part IV Chapter D para 7-10.
[814] Ibid.
[815] Ibid.
[816] Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) IILJ Working Paper 1, 11.
[817] Ibid.
[818] 'How Does Policy Uncertainty Affect Investment?' (2018) 115–127 *Economic Survey* at 115.
[819] Kira R Fabrizio 'The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation' (2013) 29 *Journal of Law, Economics & Organization* 765–98 at 766.

is apparent in the South African context where there is growing risk aversion among international investors due to policy uncertainty.[820] In *Tecmed v Mexico*, the tribunal held that foreign investors,

> 'need to know beforehand any and all rules and regulations that will govern its investment as well as the goal of the relevant policies and administrative practices and directives to be able to plan its investment and comply with such regulations.'[821]

The above proposals aim to provide for greater policy certainty which will work to the benefit of investors while at the same time allowing host states to take any regulatory measures that they deem necessary without violating their obligations as contained in the IIA. By considering the above-mentioned issues as well as making use of clearer and more concise drafting language, a model clause providing for the right to regulate that will balance the needs of host states and investors can be drafted and be incorporated into IIAs. In this regard, IIAs will not have to account for all the possible changes that may require regulatory conduct. IIAs will simply recognise that in an everchanging world, there is a need to enact policy to regulate changing circumstances and set out the framework that individual states ought to follow when implementing these regulations. In this way, IIAs leave room for the national level of governance to act, but still exercises an oversight role over these actions so that they do not unduly deprive investors of protection.

The following sections illustrate, through the incorporation of substantive rules on sustainable development how the joint regulation of common concern and public goods can be achieved at both the international and national levels of governance.

*c. Moving IIAs towards greater sustainable development orientation*

The concept of sustainable development arose from the recognition of the numerous challenges facing the global community. According to Khan,

> '[p]overty endures and inequality grows. Discrimination and denial of rights persist. Conflict and civil strife engulf nations with renewed vengeance. Corruption corrodes societies. In many countries, women and girls are subjected to appalling violence… Broad consensus is emerging on the solution: sustainable development.'

[820] Dr Jan Venter and others, 'Policy Uncertainty: How It Affects South Africa's Growth and Development Prospects' 1 <https://commerce.nwu.ac.za/sites/commerce.nwu.ac.za/files/files/TRADE/Media/News%20Print/WTO-Trade%20Policy%20Brief%20Series_1.pdf> (accessed 29 July 2022).
[821] *Tecmed v Mexico* para 154.

The 2030 Agenda for Sustainable Development was adopted by all member states of the United Nations in 2015 and provides a shared blueprint for peace and prosperity for people and the planet to address the growing concerns at the global level.[822] At the core of the 2030 Agenda for Sustainable Development are the seventeen sustainable development goals which cover a wide range of areas affecting the global community.[823] The interests highlighted by the sustainable development goals are of a global nature and extend beyond individual citizens and states, the negative impacts of these concerns are severe and have harmful and negative impacts on the global community, and there has been recognition and understanding in enacting the sustainable development goals, that addressing these issues requires greater co-operation between states with all states being collectively responsible for the same. Cottier notes that the sustainable development goals are at the heart of common concern[824] and the incorporation of sustainable development into IIAs can be justified by its nature as a common concern to humankind.

Sustainable development has traditionally been incorporated in IIAs through declaratory and non -binding provisions which do not create any rights or any obligations.[825] As a result, the balance in applying sustainable development provisions and investor protection provisions will still tip in favour of investor protections as investor protections are the only binding and enforceable obligations contained in IIAs. To remedy this, there needs to be express provision and recognition of sustainable development in the body of the treaty as a stand-alone right. This will place the attainment of sustainable development on equal footing with investment protection as a core obligation of IIAs.

In this regard, the recognition of sustainable development needs to be direct and express but need not necessarily create positive sustainable development obligations for foreign investors. This can be achieved by using the IIAs to focus on achieving sustainable development outcomes without dictating the methods to achieve those outcomes. This is because the specific approaches to sustainable development are largely determined by individual states focusing on

[822] Sustainable Development Goals https://sdgs.un.org/goals (accessed 30 November 2023).
[823] The seventeen sustainable development goals are: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent works and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable communities; responsible consumption and production; climate action; life below water; life on land; peace, justice and string institutions and partnerships for the goals.
[824] Cottier, supra n 784 at 16.
[825] Thabo Fiona Khumalo 'Sustainable development and international economic law in Africa' (2020) 24 *Law, Democracy and Development* 133–57 at 138.

the sustainable development aspects most relevant to it.[826] This approach speaks to the five - storey house partnership described above, where the international level creates frameworks and common goals, and the national level focuses on how these goals can be achieved.

The stand-alone clause on sustainable development will recognise the importance to host states of attracting investment that is sustainable and can contribute to the achievement of sustainable development goals in the host state. The clause must recognise the inextricable link between sustainable development and foreign investment, both positive and negative. In order to harness the positive impacts of FDI and limit its negative impacts on sustainable development, the clause must make express recognition of the fact that sustainable development is best regulated at the national level, taking into account the unique needs and circumstances of the different states. The clause must therefore make provision for states to implement regulations in their domestic laws aimed at the promotion of sustainable development and the limitation of negative impacts of investment.

However, there is also a need to make sure that states do not abuse such sustainable development provisions to enact arbitrary measures that are aimed at unduly limiting the protection of investors. In this regard, it is necessary to create standards against which state measures aimed at sustainable development will be tested to be protected under the sustainable development clause. There has been a lot of progress made in the form of soft law guidelines to direct the creation of sustainable investment policy making. These guidelines can be incorporated into the text of the treaty making them binding obligations that states ought to be bound by when enacting legislation for the promotion of sustainable development. This will work as a counter measure to protect investors from arbitrary and discriminatory conduct by states and ensure that investors still have an avenue to challenge arbitrary and discriminatory measures. In addition to the requirements set out with regard to the right to regulate, this thesis proposes the incorporation of the following guidelines that are aimed at setting the standards that ought to be met by states when enacting national legislation: [827]

- States should not enact measures that are directly or indirectly aimed at protectionism in relation to cross- border investments.

[826] Ibid at 141.
[827] These clauses are adapted from the G20 Principles on Investment Policy Making accessible at https://investmentpolicy.unctad.org/news/hub/508/20160711-unctad-facilitates-g20-consensus-on-guiding-principles-for-global-investment-policymaking#:~:text=The%20G20%20Guiding%20Principles%20for,business%20conduct%2C%20and%20(IX) (accessed 10 October 2023)

- Investment policies and regulations should be open, non-discriminatory, transparent create predictable conditions for investment. Regulations must therefore be coherent with national and international law.
- Regulations should be developed in a transparent manner with the opportunity for all stakeholders including foreign investors and home state investment agencies to participate.
- Regulations must be based on sound, evidence based expert advice.
- Rule of law principles must be applied and respected in the creation of regulations.

Foreign investors will therefore be able to challenge any regulations enacted by the state for failure to comply with the criteria set out in the IIA. By creating a framework at the international level that recognises the importance of the promotion and attainment of sustainable development and setting out guidelines for the creation of implementation modes at the national level, the international level fulfils the task most suited to it, while leaving other aspects to other levels. It creates a symbiotic relationship between the national and international levels of governance where the international level can exercise oversight over the conduct of the national level but respects each states policy space and leadership to design and implement policies for the achievement of national sustainable development goals. This provides sufficient protection for the attainment of sustainable development in a manner that is compatible with the traditional goals of IIAs and does not turn IIAs into sustainable development treaties.

*d. Ensuring Investor Responsibility*

Majority of traditional IIA's contain substantive protections for investors but have no corresponding obligations. Scholars have viewed this asymmetry of the international investment regime as contributing to the legitimacy crisis in that the regime entrusts investors with significant substantive protections but imposes no duties on these powerful economic actors whose conduct has the potential to affect the interests of the host states and the local communities within which these investors operate.[828] There have therefore been calls for the rebalancing of the international investment regime so that both host states and investors have corresponding rights and obligations in relation to investment activity.

[828] Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations through Treaty-Making and Treaty-Application' (2020) *5 Business and Human Rights Journal* 105.

Investor obligations are therefore necessary in IIAs as they:

- are a means through which investor behaviour can be regulated to lead to the achievement of sustainable development goals,
- create a balance between the rights and obligations of investors and host states in IIAs,
- can be a means through which the domestic law of the home and host state can be strengthened and bolstered, and
- can improve governance.[829]

International human rights law and international investment law have often been seen as two separate *lex specialis.* Despite this, there is sufficient evidence of an overlap between the two systems that would warrant the incorporation of obligations for investors within the context of an international investment treaty. There are two hurdles that present themselves in attempting to create binding obligations for investors within the investment regime. The first is regarding the capacity of international investors to be bearers of obligations under international investment law and the second relates to the practicality and political difficulty that may be associated with negotiating and establishing binding obligations for investors within the IIA framework.

Traditionally, the human rights law was perceived as being vertical in nature i.e. human rights obligations were owed by the state as the obligation holder to individuals as the beneficiaries.[830] The term vertical denotes that the state, as the primary subject of international law that is capable of entering into treaties and being bound by the obligations imposed by them is placed on a higher playing field than individuals who operate within the state.[831] Despite the fact that traditionally states are the primary duty bearers of obligations under international human rights law, Kinley and Tadaki note that, 'it is possible to invest in [transnational corporations] sufficient legal personality to bear obligations, as much to exercise rights.'[832] In the same vein, Faturos opines that, 'it is possible for the international legal process to acknowledge that [transnational enterprises] are significant actors in the world economy and thus to recognise

829 Nathalie Bernasconi-Osterwalder, Caroline Dommen, Mintewab Abebe, Howard Mann and Joe Zhang, 'Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements' (2018) International Institute for Sustainable Development.
830 Lottie Lane 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (2018) 5 *European Journal of Comparative Law and Governance* 5–88 at 15.
831 Ibid.
832 Jernej Letnar Černič, 'Corporate Human Rights Obligations at The International Level' (2008) 16 *Willamette Journal of International Law and Dispute Resolution* 130, 152.

that they have a degree of legal capacity in international law.'[833] This is viewed as horizontal application of human rights. Under horizontal application, human rights obligations would accrue to private bodies and individuals who would be bound to abide by the duties imposed on them under applicable treaties and a breach of these duties would be directly actionable by aggrieved parties.[834] Horizontal application of human rights thus places non-state actors under direct and explicit obligations to respect, promote and fulfil human rights.[835] As such, it seems there is no impediment to imposing horizontal human rights responsibilities on investors.

The International Court of Justice in its Reparations for Injuries Advisory Opinion[836] held that subjects in international law need not be identical, neither do they need to possess similar rights and obligations. The nature and extent of the rights enjoyed, and the duties owed by a particular subject under international law will be determined by the needs of the community.[837] As such, not all duties under international human rights law would accrue to investors within the investment regimes. They would only incur duties in respect of the fundamental rights which the 'community' requires protection to guard against violation by the conduct of international investors. For example, investors can incur duties with respect to the protection and promotion of labour rights, environmental protection and the general duty to refrain from activities that may negatively impair the rights of the local communities within which they would operate. It would be possible to include these investor obligations in the text of IIAs because states do have the power to create binding norms for non-state actors through international law.[838]

Despite the lack of impediments to the creation of binding obligations for investors, as noted above, it seems that states have been reluctant to negotiate and enter into treaties for this purpose. While African countries have played a leading role in the incorporation of investor obligations in their investment treaties, this wave has not permeated to treaties with other third countries. This creates a system of investment law applicable to relations between African states, which is different from the system of investment law that would be applicable to relations with other states, in so far as investor obligations are concerned- with the system applicable between African states being more onerous on African investors.

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[833] Ibid.
[834] Lane, supra n 830 at 16.
[835] Ibid.
[836] Reparations for Injuries suffered in the Service of the United Nations Advisory Opinion 1949 I.C.J. Reports 178 (April 11, 1949) 8.
[837] Ibid.
[838] David Bilchitz, 'Corporate Obligations and a Treaty on Business and Human Rights' in Surya Deva and David Bilchitz(eds) *Building a Treaty on Business and Human Rights* (2017) 185 186.

The proposals contained in this thesis, while advocating for obligations to be placed on investors are framed in such a way that they can be more palatable to a wider group of states including capital exporting states.

The passage of time and continued use of ISDS has illustrated the deficiencies that exist within the system and has also illustrated that these deficiencies apply equally to developed and developing countries. The negotiations for the incorporation of investor obligations no longer exists in the context of capital importing states against capital exporting states as these lines have been blurred by increased globalisation. States often are finding themselves in the role of both the home state and the host state and this has led to calls for the rebalancing of investment treaties across the board not just by less developed countries. This thesis does not advocate for the immediate creation of a multilateral treaty, but rather opts for the incorporation of investor obligations into IIAs at the national, bilateral and regional level. As the development of national laws does not require broad consensus from states, domestic law obligations for foreign investors can be implemented much faster than a multilateral treaty. It can also be argued that negotiations taking place at the bilateral and regional level are more likely to yield positive results and faster negotiation and adoption of investor obligations within the text of treaties.

For example, intra- Africa IIAs have begun to incorporate investor obligations into their treaty texts.[839] These intra-Africa developments create more onerous responsibilities for African investors, in comparison to already existing IIAs with non-African countries that do not contain provisions on investor responsibility. While African countries are not generally high exporters of capital, this imbalance between African and non-African investors can create impetus for African states to undertake wholesale review of their existing IIAs with non-African countries in a bid to bring them into conformity with their intra- Africa arrangements. As noted by Mbori, the focus by African states on intra- Africa regulation without expanding it to extra- Africa regulations as well limits the positive impact that African led reforms will have.[840] Therefore, should the reform process already evident in intra Africa IIAs, be extended to extra- Africa IIAs, in a coherent and collective manner, through the development of an ‘African investment agenda’[841] coupled with mounting concerns by citizens and intergovernmental and non-

[839] See for example the Nigeria-Morocco BIT and the AfCFTA Investment Protocol.
[840] Mbori, supra n 69 at 644.
[841] This term here is used loosely to denote a cohesive effort amongst African countries to rebalance IIAs with non-African states as opposed to referring to a uniquely African template for the negotiation of IIAs.

governmental organisations, there may be sufficient pressure exerted on non- African states to consider the incorporation of provisions on investor responsibility.

A case in point for making use of bilateral processes can also be seen in EU treaty making practice. While the EU is advocating for the creation of a multilateral investment court, it has started incorporating provisions of an investment court system into its IIAs at bilateral and regional level and has already negotiated IIAs that make provision for the use of an investment court system.[842] As such the adoption of EU reform measures is not hindered by the slow pace of multilateral efforts but has already started taking shape at bilateral and regional level, which may well pave way for multilateral process. Despite the fact that EU progress has been made in the context of procedural reform, it is argued that the same principles can be applied in the reform of the substantive aspects as well.

In addition to this, different modes can be used to incorporate investor obligations into international investment law, making use of both the national and international levels of governance as well as direct and indirect incorporation of investor obligations. As a starting point, investor obligations would be incorporated into the text of IIAs through the respect, protect, promote framework. Although the UN Guiding Principles on Business and Human Rights[843] (UN Guiding Principles) have not yet culminated into a binding international treaty on human rights, they are widely used and accepted as the standard for business and human rights.[844] According to De Schutter, the UN Guiding Principles are regarded as 'the most authoritative statement of the human rights duties or responsibilities of states and corporations adopted at the UN level.'[845] On this basis they can be used to assist in incorporating investor obligations in IIAs. Under the UN Guiding Principles, business corporations (which would include investors) have a duty to respect human rights, i.e., to not engage in any behaviour that limit the enjoyment of human rights.[846] As a bare minimum, IIAs should contain provisions requiring investors to respect human rights. This obligation to respect human rights would

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[842] See for example EU-Canada Comprehensive Economic and Trade Agreement ('CETA'); EU–Singapore Investment Protection Agreement 2018 ('IPA') accessible at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018-; EU–Vietnam IPA accessible at https://edit.wti.org/document/show/062e9278-4383-4ff9-97b4-a8bbff3eb21c.
[843] Accessible at *https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf*
[844] René Wolfsteller & Yingru Li 'Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness |' (2022) 23 *Human Rights Review* 1–17 at 2.
[845] De Schutter O 'Foreword: Beyond the Guiding Principles. In: Deva S, Bilchitz D (eds.) *Human rights obligations of business: Beyond the corporate responsibility to respect?'* (2013) xvii.
[846] Principles 11-24 of the United Nations Guiding Principles on Business and Human Rights.

cover areas related to the conduct of the investor when carrying out their investment activities to respect human, cultural, labour and environmental rights of the communities within which they carry out their investments and to ensure that investors do not engage in corruption in setting up and maintaining their investments. By focusing on these areas of international law, the obligations placed on investors are limited to the extent of the sphere of influence within which the investor has direct control and is likely to be more acceptable. [847]

As seen from previous attempts, there may be reluctance to incorporate positive investor obligations in a binding international treaty. To remedy this, the State, which generally has the duty to fulfil and protect human rights can play an active role in indirectly incorporating domestic investor obligations at treaty level. The UN Guiding Principles, provide that states must protect against human rights abuses and promote the fulfilment of human rights within their territory and/or jurisdiction by third parties, including business enterprises by implementing effective policies, legislation, regulations and adjudication.'[848] Further, the UN Guiding Principles also provide that '[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.'[849] These principles set the use of domestic legislation as an important tool that can be used to promote the fulfilment of and respect for human rights obligations.[850] In order to give effect to these principles, the UN Human Rights Council adopted a draft resolution to establish an open-ended intergovernmental working group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[851] The Working Group has released a third revised draft text for a binding treaty on business and human rights. The text of the treaty deals with inter alia provisions for ensuring investor liability.

These provisions illustrate how the domestic courts of the host state can be an effective forum for ensuring liability of investors and sets out the steps that states ought to take in giving effect

[847] This is in comparison to the Draft Norms on the Responsibilities of Transnational Corporations which was largely criticised for imposing far reaching obligations for investors and requiring them to comply with obligations contained in over 30 international law instruments. (See preamble of the Draft Norms).
[848] Principle 1 of the United Nations Guiding Principles on Business and Human Rights.
[849] Principle 9 of the United Nations Guiding Principles on Business and Human Rights.
[850] Nicola Soekoe 'The Human Rights Case for Robust "in Accordance with Domestic Law" Provisions in Africa's International Investment Law – Investment Treaty News', available at: https://www.iisd.org/itn/en/2022/03/30/the-human-rights-case-for-robust-in-accordance-with-domestic-law-provisions-in-africas-international-investment-law/.
[851] See website the United Nations Human Rights Council https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (accessed 10 October2023).

to the same. For example, article 7 makes provision for access to a remedy and sets out the steps that states ought to take so that victims are able to receive effective redress. These steps include ensuring that there are effective, adequate and timely remedies that overcome the specific obstacles that women, vulnerable and marginalised people face,[852] facilitating access to information,[853] providing adequate legal assistance,[854] removing barriers and obstacles to access to courts such as high costs of filing cases[855] and ensuring enforcement of judgements rendered.[856] In addition to this, Article 8 provides for the legal liability of business entities and enjoins states to ensure that their domestic laws make provision for domestic liability for business entities carrying our operations within the state for human rights abuses.[857]

These clauses expressly recognising the state duty to protect will be coupled with stand -alone provisions that require that, through the lifetime of the investment, foreign investors must carry out their investments in accordance with domestic law provisions including domestic laws regulating business and human rights activities. The use of these provisions would create an obligation on states to provide legislation, regulations and effective remedies at the national level so that investors can be held accountable. The use of the in accordance with provisions, elevates the general obligation of investors to comply with national law to the international level, and places it on an equal footing with other obligations contained in IIAs, thereby giving a violation of national law, an international legal effect.[858]

This method of incorporation of investor obligations removes the complex process of negotiating investor obligations from the international level and leaves it to each individual state to determine the level and extent of investor obligations they want to implement, and makes the duty to implement the domestic laws by the state and the duty to comply with those domestic laws by the investor enforceable against the state and investor at both domestic and

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[852] Article 7.1 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[853] Article 7.2 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[854] Article 7.3 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[855] Article 7.4 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[856] Article 7.6 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[857] Article 8 of the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[858] Andrea K Bjorklund 'The Role of Counterclaims in Rebalancing International Investment Law' (2013) 17 *Lewis & Clark Law Review* 461–80 at 467; Thomas Obersteiner 'In Accordance with Domestic Law Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors' (2014) 31 *Journal of International Arbitration* 265–88 at 267.

international level. [859] An example of positive obligations that can be placed on investors using domestic policies and legislation can be a requirement on investors to engage in corporate social responsibility initiatives (CSR).

At present, most CSR duties are phrased in non-obligatory language that makes it difficult to enforce compliance with the same. However, placing a qualified obligation on an investor to take reasonable steps within their available means to ensure that they fulfil and engage in corporate social responsibility activities places a non-onerous obligation on investors to engage in activities that promote the realisation of human rights (usually socio-economic rights) of the local communities where they carry out their investment.[860] The 'within their means' requirement has been used in some constitutions to limit the extent to which the state would be liable for the provision of socio-economic rights. For example, in the case of *Government of the Republic of South Africa and ORS v Grootboom and ORS* [861], the Constitutional Court in South Africa held that,

> '[t]he third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.'

In the same manner, obligations on investors to engage in CSR initiatives would be governed by the availability of resources necessary for the investor to engage in these activities. An investor would therefore not be deemed as having violated its obligations where it can show that they do not have the means necessary to engage in the CSR activities. In this way, we balance the need for investors to actively contribute to the promotion of human rights in the communities within which they work, while at the same time not rendering the investment non-profitable because of costly CSR expenditures. The nature and extent of the activities will be left to be determination by the investor, giving the investor complete control over the CSR activities which they engage in.

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[859] This recommendation also goes hand in hand with the right to regulate. The incorporation of a right to regulate reduces the risk of states facing investor- state disputes as a result of implementing legislation that may affect investment but is necessary to ensure the protection and promotion of human rights as this will not automatically arise to the level of a violation of the IIA.

[860] The 'within their means' requirement has been used in some constitutions to limit the extent to which the state would be liable for the provision of socio-economic rights. For example, in the case of

[861] *Government of the Republic of South Africa and ORS v Grootboom and ORS* 2001 (1) SA 46 para 46.

It is proposed that when determining investor obligations for the promotion of socio-economic rights, states must ensure that they do not implement obligations that would operate in the same way as performance requirements. The use of performance requirements is largely controversial and there is consensus that performance requirements are counterproductive and ineffective.[862] In this regard it is proposed that states must make use of the 'within their means' test as well as leave it up to the investor to determine the types of activities that they may wish to engage in when promoting socio-economic rights. Further, it is recommended that these investor obligations to promote socio economic rights should not be linked to the operation of the investment nor should they be conditions for investment related advantages. [863] They should be stand-alone obligations, enforceable through civil mechanisms.[864]

These in accordance with provisions do not only have to be applied in the context of the host states domestic laws but can also apply to the domestic laws of the home state, where these laws offer greater protection to human rights than those found in the home state.[865] Both the host and the home state would consent to the extra territorial application of the home state laws in the host state regarding business and human rights protection. More developed countries generally have more stringent laws on the protection of human rights and the environment especially regarding business activities, and through these clauses, host states, that have not developed extensive laws could benefit from the same. To prevent far reaching consequences, the parties would also be free to set out specific home state laws which they would want to apply or to set out specific laws which would be excluded from application in accordance with the needs of the host state. An example of how this can be useful is illustrated below in the context of the prevention of human trafficking and child labour.

With increased demands for products and growing markets there is a high demand for cheap labour, most of which is obtained using child labour or through human trafficking. To combat child labour and human trafficking in global value chains, more developed countries have

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[862] Ibid. As such performance requirements have been excluded from the World Trade Organization's Agreement on Trade- Related Investment Measures, are prohibited in some investment treaties or have been excluded from most investment treaties.

[863] Conducting due diligence on human rights and environmental impact assessments would not fall under these obligations to promote as these are more obligations related to the duty to respect or prevent human rights abuses.

[864] These include the use of specific performance orders and the introduction of measures that limit the investors access to court where they have not complied with extant orders against them relating to their investor obligations, which will be discussed further in Chapter 5.

[865] In this regard the clause would enjoin investors to comply with the domestic laws of the host state, as well as the domestic laws of the home state in so far as these laws regulate the relationship between business and human rights and provide more favourable protection to human rights than the laws of the host state.

implemented voluntary obligations on their companies and enterprises to conduct human rights due diligence on their businesses and on their partner businesses in their supply chain to achieve compliance with human rights standards. For example, the European Union and its member states have implemented action plans which impose voluntary or obligatory human rights due diligence requirements which must be carried out on EU the businesses and their entire global supply chain.[866] The United Kingdom implemented the Modern Slavery Act 2015. S54 of the Modern Slavery Act obliges certain commercial organisations dependent on their size to publish, in every financial year, a slavery and human trafficking statement which sets out what steps the organisation has taken to prevent human trafficking and slavery in any of its supply chains and in any of its businesses. To combat human trafficking and slavery, this section requires commercial enterprises to take active steps to make sure that their business or the businesses that they engage with in their supply chain are not engaged in any form of human trafficking or slavery. If an IIA were to impose an obligation on a UK foreign investor to comply with their home state laws when carrying out its business in the host state, the foreign investor would still be under an obligation to ensure that no human trafficking and slavery is taking place in its business and its supply chains within the host state. The conducting of human rights due diligence in this manner by a foreign investor ensures that the foreign investor (even in the absence of host state laws to that effect) proactively manages potential and actual adverse human rights impacts in the work with which they are involved, a scenario that is beneficial to the host state.

In totality, incorporating clauses in IIAs that place some responsibility on investors for ensuring the protection of human rights, whether through positive or negative obligations, will go a long way in balancing out investment treaties in that the rights enjoyed by investors, are coupled with corresponding obligations for the benefit of the communities within which they operate.

## 4.4 INCORPORATING THE NATIONAL LEVEL

Given the supremacy of international law, the framing of international obligations through the use of standards and framework provisions provides the necessary flexibility for the national level to also take part in the international investment law. In particular, it grants the national

[866] European Parliament Briefing 'Child labour: A priority for EU human rights action' 2019 https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633142/EPRS_BRI(2019)633142_EN.pdf (accessed 23 May 2023).

level freedom to regulate to meet their needs within the agreed framework and allows states to take steps at the national level to create polices and regulations to fulfil their needs.

The laws, policies and practices in host and home state countries and at the international level can instrumentally shape whether FDI ultimately contributes to sustainable development and how it impacts affected stakeholders and the planet.[867]

According to Johnson et al,

> '[g]overnments need policy space to be able to enact, implement, revise, and refine their policies, laws, and regulations in order to achieve sustainable development objectives. Unsurprisingly, these objectives, and the optimal and feasible means for meeting them, may evolve over time with changing needs and circumstances, and governments need to be able to respond to these changes. Recognizing that the roles of different government actors vary between countries, this flexibility to respond may require, for example, that: legislatures be empowered to enact or amend purposeful legislation; executive officials be able to set policies and priorities and exercise discretion where appropriate; and administrative and judicial courts be free to give meaning to laws and regulations, rule on the scope of public and private rights and obligations, and invalidate or impose penalties on illegal or otherwise wrongful conduct.'[868]

The recommendations made in section 4.3 above, provide the much-needed flexibility and protection of policy space that allows host state to take relevant measures to address sustainable development challenges and investor responsibility.

When designing and implementing investment policies, a distinction can be made between the substantive elements of a given policy and the procedural elements and measures that facilitate the implementation of and ensure compliance with the policy.[869] An important enabling aspect for an attractive regulatory investment environment is how transparent and predictable the polices are and the nature of the administrative procedures that implement them and how streamlined they are.[870] These procedural elements that contribute to the creation of a regulatory environment that can attract investment are known as investment facilitation measures. As this thesis recommends that the national level take an active role in implementing domestic regulation to govern foreign investment, investment facilitation becomes important as it ensures that the regulation enacted by the host state is implemented in a manner that will facilitate foreign investment.

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867 Alec R Johnson, Lisa Sachs & Nathan Lobel 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 *Columbia Journal of Transnational Law* 58–120 at 61.
868 Ibid at 95.
869 Hamid Mamdouh Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure, International Trade Centre, September 2021 at 7.
870 Ibid.

Investment facilitation is aimed at improving the transparency and predictability of investment frameworks, streamlining procedures and enhancing co-operation and co-ordination between stakeholders.[871] An investment facilitation framework can be a tool to add value to the regulation that governments will have implemented at the national level. [872] Investment facilitation frameworks assist by directing countries to clarify and simplify their investment regulation, promote the enhancement of their institutional governance and to guide members towards the implementation of practices that encourage sustainable international investment and safeguard national polices.[873]

As the multilevel governance framework does not only focus on vertical relationships, but horizontal relationships can also be established to allow the achievement of overlapping objectives through partnerships with different international institutions. Further, the five-storey house theory and the principle of subsidiarity allow for competence to be allocated to the institution that is best able to address a concern with other levels of governance and institutions deferring to it. In line with multilevel governance, there is no need for IIAs to make specific provision for investment facilitation as the negotiations for a plurilateral agreement on investment facilitation taking place under the WTO offer a concrete opportunity to influence the outcome of national policies and regulations and add an important component to international investment law.[874]

The WTO Investment Facilitation for Development Agreement (IFDA)[875] is an important tool that can be utilised by states so that polices and regulations that are implemented at the national level, are implemented in a manner that creates a conducive environment for the attraction and operation of sustainable development. While IFDA explicitly excludes market access, investment protection and ISDS (all of which covered by IIAs) and contains a firewall provision aimed at insulating the agreement from IIAs to prevent spill over effects,[876] by developing horizontal relationships, the multilevel governance framework allows for IFDA, and its principles and practices to be applied in the creation of national investment regulation that attracts and retains investment for development. In the Structured Discussions on the

[871] Rafael Ramos Codeço & Ana Rachel Freitas 'Multilateral Framework of Investment Facilitation at the WTO: Initiatives and Perspectives from the Global South' (2021) 43 *Contexto Internacional* 305–29 at 307.
[872] Ibid at 314.
[873] Ibid at 318.
[874] Sauvant, supra n 389 at 253.
[875] Investment Facilitation for Development Agreement 2023 (INF/IFD/W/52). Information on the agreement is available at https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm
[876] Investment Facilitation for Development in the WTO Factsheet https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (accessed 17 January 2024).

negotiation of IFDA, states have indicated that the intent of their efforts is not simply to promote investment facilitation but rather to promote investment facilitation for development.[877] In this way, IFDA is compatible with the broader recommendations of this thesis aimed at attracting sustainable investment and ensuring that investment leads to the achievement of sustainable development.

In the context of the WTO, investment facilitation means the setting up of a more efficient, transparent and investment friendly business climate by making it easier for investors to invest, conduct their day-to-day business and expand their existing investments as well as for host and home states governments to work co-operatively and in mutually beneficial ways to facilitate sustainable investment.[878] The key pillars of IFDA are on transparency of investment measures, speeding up and streamlining investment related administrative procedures, enhancing international cooperation, information sharing and the exchange of best practices and sustainable investment.[879] The aim of the agreement is to assist Members to attract more and higher quality investment that promotes sustainable development.[880] To achieve this, IFDA provides a framework that states can use to implement domestic investment regulation in a manner that attracts and retains investment. In this regard, IFDA assists in aligning domestic investment policies with global investment facilitation benchmarks. This will allow countries, when implementing the recommendations made in this section (4.4), to attract, retain and expand investment. In this way, IFDA would complement the regulatory efforts of states by creating clear and consistent benchmarks for investment facilitation so that states have a reference point to use when designing and implementing investment regulation. IFDA has the potential to make huge progress towards more streamlined, efficient and transparent domestic investment systems thereby facilitating FDI flows. [881]

By making use of the IFDA framework when enacting regulations such as those that will be discussed below, states increase the likelihood of improving the domestic investment environment and stimulating sustainable investment flows for development.

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[877] N Jansen Calamita 'Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value' (2020) 23 *Journal of International Economic Law* 973–88 at 981.
[878] Investment Facilitation for Development in the WTO Factsheet 1.
[879] Investment Facilitation for Development in the WTO Factsheet 3.
[880] Investment Facilitation for Development in the WTO Factsheet 3.
[881] Axel Berger et al Implementation of the WTO Investment Facilitation for Development Agreement: Identification of reform needs and development policy measures, German Insitute of Development and Sustainability, 2023, 7/2023, IDOS Policy Brief at 2 available at: https://www.idos-research.de/uploads/media/PB_7.2023.pdf.

*a. Implementing regulations and policies at the national level*

It is common cause that not all investments contribute to development and policy interventions are required to ensure that the benefits of investment are captured, and the harms of investment are avoided.[882] In this regard, the type of investment attracted by the state becomes of paramount importance. It is highly unlikely that foreign enterprises who are generating large amounts of profits through the use of unsustainable business practices will re-invent themselves in a significant way without some form of external coercion.[883] The challenges facing a large number of developing countries in harnessing the benefits of FDI and promoting sustainable development require major technological, organisational, institutional and social changes that are systemic, multidimensional and disruptive as opposed to small incremental advances.[884]

The use of regulation to spur sustainable development will not necessarily lead to the stifling of industry and commerce. As noted by Ashford and Hall, properly designed regulations can transform products and processes to confer greater economic and social benefits.[885] This view is based on Porter's hypothesis which argues that environmental and social regulation can induce dramatic innovation by encouraging the development of new products by existing investors but also creating conditions in which new investors with disruptive products and technologies can enter that market.[886] According to Porter's hypothesis, '[p]roperly constructed regulatory standards, which aim at outcomes and not methods will encourage companies to re-engineer their technology…and prod companies into innovating to produce less polluting or more resource efficient products that will be highly valued internationally.'[887]

It is accepted that increased regulation will not increase innovation across the board in all foreign investments – however this is the point. There needs to be a shift in thinking from just attracting any type of investment regardless of its impact or potential impact on the host state, to only allowing that type of investment that is sustainable and yields positive impacts that go beyond economic or financial benefits. The design challenge faced by most governments is how existing undesirable and unsustainable technologies and processes can be retired or

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[882] Johnson, Sachs & Lobel, supra n 867 at 62.
[883] Nicholas A Ashford & Ralph P Hall 'The Importance of Regulation-Induced Innovation for Sustainable Development' (2011) 3 *Sustainability* 270–92.
[884] Ibid at 271.
[885] Ibid at 276.
[886] Ibid at 277.
[887] Ibid.

replaced through a combination of regulation and market incentives while at the same time still encouraging the flow of investment.[888]

Policy makers and regulators play an important role in providing an effective framework to incentivise sustainable and green investment by setting strategic goals and using the multilevel governance framework to align policies and engage stakeholders.[889] Few domestic investment laws refer to sustainable development or make provision for investor responsibility. Traditionally, a balanced investment strategy has not incorporated sustainability related risks, impacts, values or returns.[890] These sustainability related risks include environmental, social and governance integration as part of the investment assessment process.[891] In this regard domestic investment laws are either promotional or facilitation oriented, or control or supervision oriented, some address investors generally with no distinction between foreign and domestic investors while other address foreign investors only.[892] Some only contain some provisions on investor protection, while others make no reference to investor protection at all, and very few make provision for investor obligations.

In order for domestic investment laws to play a significant role in the international investment law system, there needs to be a more coherent approach to the use and design of domestic investment laws. A consideration of the domestication process that has taken place under the international human rights systems shows an increasing consistency between international law treaties aimed at the protection of various human rights as well as national constitutions and domestic laws for the protection of human rights. This domestication has occurred to such an extent that individuals need not seek protection of or cite the standards of international law but can directly invoke equivalent protection within their domestic legal orders, with the international level mainly playing a supervisory role. Within the international human rights systems, a level of co-operation and complementarity has developed between the national and international levels with limited contestation and competition between the two.

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888 Ibid at 278.
889 Jessica Robinson Using Innovative Policy and Regulatory Approaches to Incentivize the Alignment of Investment Strategies with Sustainability Considerations, International Institute for Sustainable Development (IISD), 2014 34 at 4.
890 Ibid at 3.
891 Ibid.
892 Georgios Dimitropoulos 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest' (2023) 22 *World Trade Review* 90–108 at 96.

A similar domestication needs to occur in the field of international investment law.[893] In making greater use of domestic laws to govern foreign investment, states must be focused on creating coherent, transparent, and predictable laws that draw from the rules, frameworks and obligations already developed at the international level and incorporating these into their domestic law frameworks. According to Chaisse, the approach to domestic investment laws may see domestic laws suffering the same fate as IIAs, risking revisions and termination due to the same concerns.[894] In order to prevent this occurrence, domestic investment laws have to deal with cross cutting issues in investment such as sustainability, investor obligations and the protection of human rights in a more considered way than has been traditionally done in IIAs. The reforms recommended in 4.3 above, make it possible for the regulation of investment at the national level to be more responsive to the needs of a wide range of stakeholders who are affected by the investment system.

In order to achieve this, states must consider creating comprehensive domestic investment laws. As opposed to focusing only on promotion and facilitation or on control or on investor protections and obligations, the comprehensive legislation must cover all these issues and adopt a cross-cutting approach to investment regulation. Policy integration in this manner will not only foster greater coherence and transparency but is also crucial for attaining sustainable development.[895] By using a multilevel governance framework to align policies and engage stakeholders, regulations, policies and incentives are aligned across the different levels of governance and between different stakeholders. Effective governance that leads to greater policy integration depends on the interplay of the different levels of governance and requires the transnational recognition of problems, decision-making in global and national forums and the implementation of decisions across all levels.[896] Each level of governance therefore has a specific role to play in the achievement of a reformed coherent substantive investment law framework.

As the local authorities are much closer to the communities within which investments will take place, the local authorities are in a better position to engage with local communities and ascertain their needs and their input. Local authorities, due to their proximity are able to more

[893] This type of domestication would foster the implementation and effectiveness of the recommendations made in Chapter 5.
[894] Chaisse, supra n 168.
[895] Evert Meijers & Dominic Stead 'Policy integration: what does it mean and how can it be achieved? A multi-disciplinary review' at 1.
[896] Zürn, supra n 522 at 736.

accurately pinpoint the developmental needs that are required by the community and the manner in which investment activities have affected or are likely to affect the local community. Local authorities will therefore first have to engage with their constituents to receive their input and thereafter, liaise with the national level to accurately disseminate the needs of the local communities for the purposes of developing investment policy at the national level. In addition to this, as the reformed IIAs envisage obligations for investors in relation to the developmental needs of local communities, the activities that are related to the achievement of those obligations can be determined and undergone in conjunction with the investors and the local authorities. Further, local authorities are in the best position to monitor the actions of investors in relation to the fulfilment or non-fulfilment of their binding obligations and issue progress reports to the national level for the implementation of any remedies that might be available or in assisting the local communities to access remedies as will be provided for in the IIA.

The oversight of the local authority is of particular importance when it comes to preserving cultural and indigenous aspects of the community as they are well versed in this respect. Within this level, investors would have the duty to be fully aware of their obligations in terms of the applicable IIA and take all steps necessary to comply with the same. The investors will have to work in conjunction with the local authorities so that their investments align with the agreed-upon terms and to enact and implement relevant CSR policies in conjunction with the local communities and leaders.

An example of how this can be incorporated can be found in Lesotho and its decentralisation policy. Section 5, read together with the First Schedule of the Lesotho Local Government Act 1997, provides that all local authorities shall be vest with the powers to regulate and control the administration of *inter alia*, natural resources, environmental protection, and promotion of economic development through the attraction of foreign investment. In this regard, the Lesotho Local Government Act provides the legal basis for the establishment and operational functioning for local councils and facilitates the transfer of political decision -making authority to the local levels.[897] In order to give effect to this decentralisation, the Kingdom of Lesotho developed a national decentralisation policy in 2014. Having acknowledged that economic growth had not benefitted many ordinary Basotho, the decentralisation process was to be used

[897] Kingdom of Lesotho National Decentralisation Policy, Ministry of Local Government, Chieftainship and Parliamentary Affairs 2014 2-3.

as an instrument for rural development and equitable growth by re-focusing public investments to the local level while central government would focus on issues of policy and strategy. [898]

The national level will have the duty to develop the multilevel governance framework and establish partnerships between the different levels of governance for active participation of all affected stakeholders in the development of the national investment policy that will ultimately shape negotiations and the content of the newly reformed IIAs. It will have to organise strategic partnerships with the relevant regional and local authorities, urban and peri-urban authorities, economic and social partners, relevant civil society bodies including NGO's, environmental partners and bodies responsible for promoting social inclusion, gender equality and non-discrimination.[899] In so doing, the national level can be guided by the principles developed in the context of the EU Code of Conduct on Partnership which provides guidance for the development of good partnerships across the different levels of governance. The key features of the EU Code of Conduct on Partnership are[900]

- partners selected should be representative of the relevant stakeholders,
- selection procedures should be transparent and take into account the different institutional and legal frameworks of the Member States and their national and regional competences,
- partnerships should include public authorities, economic and social partners and bodies representing civil society, including environmental partners, community-based and voluntary organisations,
- specific attention should be paid to including groups that may be affected by programmes,
- partners should be involved in the preparation and implementation of the Partnership Agreement and programmes,
- the partners should be represented on the monitoring committees of programmes,
- effective partnership should be facilitated by helping the relevant partners to strengthen their institutional capacity in view of the preparation and implementation of programmes and

[898] Kingdom of Lesotho National Decentralisation Policy 10.
[899] See Article 5 of Regulation 1303/2013 of the European Union which provides for duties of member states to create a conducive environment for the establishment of multilevel governance.
[900] Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds accessible here https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjs5ga5lpazj (accessed 10 October 2023).

- the exchange of experience and mutual learning should be facilitated.

By adopting these principles, states will be able to develop effective partnerships and communication between the different levels of governance for the creation of short, medium and long terms strategies and policies for investment that touch on a wide range of issues including economic development, environmental concerns, human rights concerns and sustainable development. This will also ensure inter-departmental policy coherence to avoid policies that may conflict with obligations under IIAs.

Following this, the national level will have to undergo a review of existing BITs and assess their suitability in line with the short-, medium- and long-term policies and objectives that will have been agreed on in consultation with other levels of governance and stakeholders. Due to the powers that are possessed by the national level to enter into binding international agreements, it will be responsible for coming up with Model BITs in accordance with the new policy objectives and renegotiating existing BITs and IIAs to take into account changes that have been agreed to. This will allow for the views and needs of stakeholders to be included in the substantive content of IIAs so that there is coherence between the obligations contained in IIAs and the objectives of the state.

Throughout this entire process, the international level will play an oversight role. Through the principle of supremacy, the laws and regulations that are developed at the national level must not be in conflict with the obligations and guidelines that have been set at the international level. As noted above, within the five- storey house theory, the aim would be to promote and develop the interoperability of national and international domestic laws. This will promote policy coherence across the different levels of governance. This increased policy coherence will ensure that the laws and regulations enacted at the domestic level are not in conflict with the international obligations undertaken by states. The existence of increased policy coherence between the national and international level, may also have the effect of limiting the differences between different states, and between regional economic communities. This may ultimately have the impact of ensuring sufficient points of convergence between states and regional economic communities which may form the basis for the development of a multilateral investment treaty.

*b. Investment screening mechanisms*

Investment screening mechanisms are instruments that have the impact of restricting or prohibiting certain types of investments that can be used by a state to protect their economy from undesirable foreign investment.[901] Investment screening refers to a procedure allowing the State to assess, investigate, authorise, condition or prohibit foreign direct investments based on a range of security and public order criteria.[902] It refers to the requirements in terms of the law of the host state that requires foreign investors to submit certain documents and attain approvals prior to or concurrently with setting up their investment, along with the institutional mechanism by which such approval is granted or withheld.[903] Investment screening is not the same as regulatory approvals such as permits, but is concerned with the admission of foreign investment and assesses foreign investment against set criteria to determine if the investor should be allowed to set up their investment.[904]

The most common criteria applied for the use of investment screening is that of national security or public order. For example, countries such as the United States, Canada, Australia and the EU and its Member states have implemented regulations that mandate the screening of investments on national security and public order grounds. According to UNCTAD, there has been a steady rise in the use of investment screening mechanisms by developed countries for national security reasons particularly in the area of mergers and acquisitions.[905] The relevance of the screening system designed by a particular country will depend on the grounds and goals that are sought to be achieved.[906] Despite the recent proliferation of investment screening mechanisms on the basis of national security, the use of investment screening mechanisms is not new. In the post- World War II era, many countries screened investments on economic grounds based on whether the reviewed transaction would generate a net economic benefit for the host state.[907] While the screening for net economic benefits is now generally looked down upon, it is accepted that investment screening is a means through which the costs and benefits

[901] Pascale Lorfing Accaoui 'Screening of Foreign Direct Investmen and the States'Security Interests in Light of the OECD, UNCTAD and Other International Guidelines' in Catharine Titi (ed) *Public Actors in International Investment Law* (2021) 179–99 at 180.
[902] https://enterprise.gov.ie/en/what-we-do/trade-investment/investment-screening/#:~:text='Investment%20screening'%20refers%20to%20a,security%20and%20public%20order%20criteria. (accessed 10 September 2023).
[903] Jonathan Bonnitcha 'The Return of Investment Screening as a Policy Tool', *Investment Treaty News*, available at: https://enterprise.gov.ie/en/what-we-do/trade-investment/investment-screening/#:~:text='Investment%20screening'%20refers%20to%20a,security%20and%20public%20order%20criteria.
[904] Ibid.
[905] UNCTAD Investment Policy Monitor 'The Evolution of FDI Screening Mechanisms: Key trends and Features' 2023 Issue 25 4.
[906] Carlos Esplugues Mota 'A more targeted approach to foreign direct investment: the establishment of screening systems on national security grounds' (2018) 15 *Revista de Direito Internacional* at 447.
[907] Sarah Bauerle Danzman & Sophie Meunier 'Mapping the Characteristics of Foreign Investment Screening Mechanisms: The new PRISM dataset' (2023) 67 *International Studies Quarterly* 1–11 at 2.

of foreign investment to a host state can be managed.[908] This thesis therefore argues that investment screening mechanisms can be used and designed to screen investment on the basis of sustainable development criteria to allow states the freedom and flexibility to determine the type and quality of investment that they want to admit within their borders.

There is no unified approach to the design of investment screening mechanisms used for the protection of national security interests with differences being noted across the board regarding the scope, clarity and transparency of the different mechanisms.[909] Despite the lack of a standard or typical type of screening mechanism, there are some similarities in their legal basis, coverage and intervention powers.[910] Most investment screening mechanisms are developed through a standalone legal framework, that allows governments to intervene in cross border activities.[911] There is a need to balance the concern sought to be protected by investment screening mechanisms against the need to promote FDI so that restrictions and conditions placed on transactions do not exceed what is required. It is therefore necessary that the investment screening mechanisms are enacted in accordance with the requirements recommended above in s4.3(c) in order for them to protected in terms of the reformed IIAs.[912] As such, the creation and implementation of investment screening mechanisms must be non-discriminatory, transparent, predictable and proportionate. In addition to this, there are certain principles and guidelines that have been developed to guide policy makers in designing and implementing such mechanisms.

The OECD Guidelines For Recipient Countries Investment Policies Relating To National Security, provide for additional principles that can be employed in the creation of investment screening mechanisms.[913] These include ensuring that there is prior notification of measures sought to be enacted, that there is accountability in the process that allows foreign investors to have recourse or challenge the decision to deny or withdraw approvals, that the mechanisms are implemented on the basis of sound expert advice,[914] that there are specified time frames to

[908] Ibid at 11.
[909] UNCTAD, 'The evolution of Investment Screening Mechanisms' 8.
[910] Mikko Rajavuori & Kaisa Huhta 'Investment screening: Implications for the energy sector and energy security' (2020) 144 *Energy Policy* 111646 at 3.
[911] Ibid.
[912] This would be necessary where the IIA provides protection to the pre-establishment stage of the investment or where the screening mechanisms would apply retrospectively to already established investments.
[913] Recommendation adopted by the OECD Council on 25 May 2009.
[914] OECD Guidelines for recipient countries investment policies relating to national security.

govern the process and confidentiality of sensitive information provided by investors is protected.[915]

Investment screening mechanisms for sustainable development will be influenced by national policies, economic and developmental priorities. The starting point of any investment activity and its potential impacts, whether positive or negative is at the point of the admission of investment. To prevent negative impacts of investment that may impede the achievement of sustainable development, it would be prudent for states to have the ability to prevent the admission of investments that would likely negatively impact their developmental goals. In the context of sustainability, the investment screening mechanisms would be used to ensure the admission of sustainable investments that do not hinder or impede, whether directly or indirectly, the achievement of sustainable development goals and prevent the admission of investments that will have a negative impact. States in this regard can use investment screening mechanisms to exercise their right to determine from the outset, the type of investment they desire. This will work to limit any concerns in the long run related to investment and sustainability.

Screening mechanisms in this regard will be aimed at ensuring that investments that impede the achievement of sustainable development will not be admitted, while investments that promote sustainable development will be encouraged. The screening mechanisms could be implemented in a sector specific manner that assesses the desirability of foreign investment against sustainable development criteria. For example, in a developing country whose main focus is on the development of extractive industries in a sustainable manner, investment screening could be applied in the extractive sector. Expert reports can be relied on to determine mining methods that are most harmful to the environment in the context of that particular state and foreign investment that makes use of these most harmful methods could be rejected. Where it is possible to implement measures to counteract the harm caused by mining methods, conditional approval can be granted subject to the implementation of these counteractive measures.

Similar mechanisms can be applied in the context of other sectors, such as the manufacturing industry where for example, certain manufacturing processes are unsustainable and release excessive pollutants into the air or water. Monitoring of sectors in which processes, procedures

[915] Wolf Zwartkruis & Bas de Jong 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31 *European Business Law Review* at 466.

and outcomes can impact on sustainable development will ensure that only investment that does not negatively impact on sustainable development will be admitted into the host state.

From a design perspective investment screening mechanisms will need to be designed in a manner that promotes the seamless use of the mechanism with limited burdens and barriers. This thesis proposes the creation of a designated body that will be vest with the task of investment screening. This body will be created under the auspices of the Ministry responsible for dealing with foreign investment. The body will be made up of various stakeholders including representatives from key ministries that are impacted by investment, representatives from local government, experts in the subject matter of the identified priority areas and experts from the field of business and investment. This is to ensure that there is a level of coherence between the work of the screening body as well as the sectors that will be affected by the types of investment accepted. The body will review submissions and make recommendations to the Minister as to the possible impact of the investment on sustainable development, and the Minister will have the final decision.

Where the foreign investor is not satisfied with the decision of the Minister, a mechanism for review of the decisions of the Minister within a specified period of time will be provided. The dispute settlement procedures will be undertaken by an administrative tribunal that will be created in terms of the applicable legislation. The dispute settlement process will be flexible, with short time frames and allow for simple procedures. As a state has the freedom to choose to admit foreign investment or not, the purpose of the mechanism will not be to set aside the decision on the merits but rather, ensure that due process in making the decision was followed and that the decision was made in accordance with the principles of just administrative action. [916]

In order to promote transparency and predictability, the decisions of the Minister as well as the dispute settlement body will be published. These decisions will assist in providing an understanding of how the screening mechanism operates as well as improves on accountability of decision makers. Screening mechanisms for national security often operate outside public scrutiny with limited levels of transparency due to the classified nature of the national security concerns. [917] Within the context of sustainable development, these security concerns will not arise and as such, there are fewer impediments to achieving transparency. Further, it may be

[916] These principles include prior notification, an opportunity to view the evidence and make representations and written reasons being provided for the decision.
[917] UNCTAD Investment Policy Monitor, 'Evolution of foreign direct investment screening mechanisms' 13.

more beneficial to publicise these decisions so that investors can design their investment in a manner that is acceptable to the state thereby increasing the chances of approvals.

To further promote transparency and the accessibility of information relating to the investment screening mechanisms and procedures, information sharing with other investment promotion agencies from other countries will be encouraged. This will ensure that foreign investors have up to date information regarding the types of investment that are subject to the screening mechanisms, the processes and procedure that ought to be followed, as well as any possibilities for recourse for the investor.

The decisions that can be reached when screening investment include denial of approvals, approval and approval with conditions. In order to ensure compliance with these decisions especially where conditions have been set a monitoring mechanism can be used. As local authorities are closest to the areas where investments are made, they can be tasked with monitoring compliance with conditions set out in approval decisions. Local authorities will also be able to assess compliance, as well as assess the impact of the screening mechanisms to ascertain if they are yielding the desired results and if there are any areas that require improvement. The monitoring mechanism would entail the submission of annual reports to the review body on the compliance of investment and impacts if any that are being seen from the use of investment screening on the strategic area in question. Recommendations for review and ways to make the mechanism better based on what they have observed can also be submitted.

There are some concerns that have been raised regarding the use of investment screening mechanisms and their compliance with IIAs. Voon and Merriman note that while investment screening mechanisms usually relate to the pre-establishment phase of the investment, there is the potential for them to violate IIAs, where they apply retrospectively to already established investments or where the applicable investment treaty offers pre-establishment protection.[918] However, within the framework proposed herein, these risks are limited. This is because the expression recognition of the right to regulate coupled with the express recognition of the need for sustainable development and the need to enact measures for the same, these screening measures would be covered under scope of the IIA, where the measures are implemented in compliance with the requirements as set out in the IIA.

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[918] Tania Voon & Dean Merriman 'Is Australia's Foreign Investment Screening Policy Consistent with International Investment Law' (2022) 23 *Melbourne Journal of International Law* 1–52; Tania Voon & Dean Merriman 'Incoming: How International Investment Law Constrains Foreign Investment Screening' (2022) 24 *The Journal of World Investment & Trade* 75–114.

The use of screening mechanisms in this manner allows states to have control over the type of investments that they admit into their territories with a key focus on ensuring the promotion of sustainable investment.

## 4.6 CONCLUSION

The main concept explored in this chapter has been to determine how the multilevel governance framework can be used to achieve substantive reform of the regime. It is largely agreed that the substantive aspects of the investment regime are biased towards foreign investors as they only contain protections for foreign investors and say nothing about corresponding obligations of the foreign investor and the protection of host states and other stakeholders such as the local communities. This is so despite the investment regime having the potential to have far reaching impacts on the host state and the livelihood of its citizens. Further, there have been limitations that have been placed on states in their ability to regulate the different relationships that arise with the use of FDI. As such, there have been calls to rebalance the investment regime so that it caters for all the stakeholders of the regime and not just the investors. Having identified that there is a need to reform the substantive aspects of the regime, this chapter has made use of multilevel governance to create an environment that is conducive for the rebalancing of IIAs in a manner that retains protections for the investor but also makes provision for the host state to achieve sustainable development and protect its citizens.

Through the multilevel governance framework, the five-storey house theory, the principle of subsidiarity and the principle of supremacy was used to establish the relationships between and functions of the different levels of governance. Through this, process, an interdependent and interoperable relationship was proposed between the different levels of governance with the international level creating frameworks, standards and common objectives to be achieved within the international investment law system but leaving the modalities of how that can be achieved to the lower levels of governance. Having done so, key areas for reform of the substantive aspects of the international level were to provide clarity on the operation of and effect of the right to regulate, moving IIAs towards greater sustainability and ensuring investor responsibilities. The national level would also be able to play a role in the development of the international investment law system, by implementing national legislation to give effect to the provisions adopted at the international level thereby supporting the move to domestication of international economic law. This domestication is not in contrast to the fundamental principles of international economic law, but rather builds on the principles of international economic law to create a coherent, transparent and predictable national investment law system that addresses essential issues including control, supervision, promotion and facilitation of investment, investor protection and investor obligations and considers the inextricable link between investment and the achievement of sustainable development goals. What matters to investors, is not so much the stringency of the goals but the stability, clarity and coherence of policy goals and actions across the different levels within which they operate.[919] As noted by Dimitropoulos, using domestic law to achieve the goals of international economic law does not pose a challenge to international economic law- it is economic law come true.[920]

The recommendations made above work to create, within the substantive provisions of international investment law, a system that caters to the needs of all stakeholders  and allows the state to effectively regulate for the management of the various relationships that arise in the use of FDI in a manner that does not undermine the traditional aims of international investment law but seeks to ensure investment protection while at the same time meeting the needs of other stakeholders and promoting sustainability.

Further, the recommendations made herein, a compatible with the recommendations that will follow with respect to the reform of the procedural aspects of the international investment law system.

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[919] Jan Corfee-Morlot et al Towards a Green Investment Policy Framework: The Case of Low-Carbon, Climate-Resilient Infrastructure, OECD, 12 November 2012 at 29 available at: https://www.oecd-ilibrary.org/environment/towards-a-green-investment-policy-framework_5k8zth7s6s6d-en (accessed 18 September 2023).

[920] Dimitropoulos, supra n 892 at 108.

## CHAPTER 5: INCORPORATING THE NATIONAL LEVEL OF GOVERNANCE INTO THE DISPUTE SETTLEMENT PROCEDURES

### 5.1 INTRODUCTION

As identified in Chapter 2, there needs to be effective incorporation of the national level of governance in the dispute settlement process to align sovereignty reassertion efforts with the international reform agenda. These procedural aspects of international investment law make provision for investor-state dispute settlement (ISDS) procedures that will be applicable in the event of a dispute arising from an alleged violation of the IIA. The most unique feature of IIAs is that they provide investors with the right to, and the means to, initiate arbitration proceedings before a privately constituted tribunal under the auspices of ICSID or as an ad hoc matter making use of UNCITRAL Arbitration Rules, seeking redress for the violation of the applicable IIA by the host state.[921]

The agreement to arbitrate contained in most IIAs allows the investor to bypass the use of national courts and have direct access to international arbitration without having to exhaust local remedies.[922] This is because the ISDS system was designed to replace the use of national courts as investors often viewed national courts as being incapable of settling investor state disputes.[923] While investment arbitration has gained prominence and has been widely used for the resolution of investment disputes, states, practitioners and scholars have identified some concerns that exist within the system which has led to calls for the reform of the procedural aspects of the regime.[924] Discussions on the reform of the procedural aspects of the investment regime have been ongoing in various fora, with a wide range of reform options having been proposed by various stakeholders.[925] Reform options that have been proposed include the

[921] Stephen E Blythe 'The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties' (2013) 47 *The International Lawyer* 273–90 at 276. Michael Faure & Wanli Ma 'Investor-State Arbitration: Economic and Empirical Perspectives' (2020) 41 *Michigan Journal of International Law* 1–62 at 14.
[922] Stephen M Schwebel & J Gillis Wetter 'Arbitration and the Exhaustion of Local Remedies' (1966) 60 *The American Journal of International Law* 484–501 at 484.
[923] Gary Clyde Hufbauer 'Chapter 11: Investor State Dispute Settlement' in Cathleen Cimino-Isaacs & Jeffrey J Schott (eds) *Trans-Pacific Partnership: An Assessment* (2016) 197–212 at 204.
[924] Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer Law International BV 2010). See also the discussion in Chapter 2 of this thesis which addresses the need for reform of the international investment law regime.
[925] The main discussions have been taking place under the auspices of UNCITRAL Working Group III https://uncitral.un.org/en/working_groups/3/investor-state ICSID has also been undergoing a reform of its rules and has recently adopted a new set of Arbitration Rules which are to come into effect on the 1st of July 2022. https://icsid.worldbank.org/resources/rules-amendments

formation of a standing multilateral investment court (MIC), an appellate mechanism, recourse to domestic courts and recalibration of the current investor state arbitration system.[926]

As can be seen from the reform options, there are some reform options that are proposed to take place at the international level (the MIC, the appellate mechanism and recalibration of international arbitration) and other reform options that have been proposed to take place at the national level of governance (the use of domestic mechanisms such as national courts). It will therefore be necessary to determine the jurisdiction of each level of governance. This chapter makes proposals on the incorporation of the national level of governance into the settlement of investment disputes and how the national and international levels can work together in a symbiotic manner to reduce the sovereignty tensions that currently exist while at the same time promoting and protecting investments.

The multilevel governance framework makes use of the principle of subsidiarity to ascertain the allocation of competence between the various levels of governance. The principle of subsidiarity requires decisions to be taken at the level of governance that is closest to the citizens and that can effectively take the decision.[927] Institutional subsidiarity is a form of subsidiarity that can be used to identify and empower an institutional actor to perform a certain function.[928] It requires that a superordinate institution, body or community refrain from taking any action in matters which a more particular, subordinate institution can appropriately dispose of.[929]

An instance of institutional subsidiarity which will be useful for the present analysis is that of jurisdictional subsidiarity which is concerned with the apportionment of responsibility and power to adjudicating fora. [930] In its simplest formation, much like the general principle of subsidiarity, jurisdictional subsidiarity dictates that matters are to be referred to a higher court only if an effective remedy is not available in the lower court.[931] Jurisdictional subsidiarity

[926] See for a general discussion on the reform options UNCITRAL Working Group III Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat A/CN.9/WG.III/WP.166 https://uncitral.un.org/en/reformoptions (accessed 6 March 2023); Roberts, supra n 302.; Chiara Giorgetti et al ‘Reforming International Investment Arbitration: an Introduction’ (2020) 18 *The Law & Practice of International Courts and Tribunals* 303–13.
[927] Robert K Vischer, ‘Subsidiarity as a Principle of Governance: Beyond Devolution’ 35 Indiana Law Review 40, 106.
[928] Lourens du Plessis, ‘Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication’ (2006) 17 *Stellenbosch Law Review* 207, 209; Jaap de Visser, ‘Institutional Subsidiarity in The South African Constitution’ (2010) *Stellenbosch Law Review* 26, 91.
[929] du Plessis, supra n 928 at 209.
[930] Ibid 211.
[931] Ibid.

seeks to strike a balance between state autonomy and international supervision.[932] As such, the international institution shall not appropriate to itself those functions that the institution nearest to the people can perform more effectively and positively. [933] This is because ideally, the people who should participate in the deliberative process which involves the delivery of public goods or has implications on public functions should be those people that have a significant interest in the delivery of the good or performance of the function. [934] If too many people with insignificant interests are included, the democratic process becomes over inclusive, irrelevant information can be considered and democratic control is diluted.[935] These criticisms have arisen within the context of international investment law. Some critics are of the view that the use of ISDS has removed decision making power from the local communities.[936] Koskenniemi notes that,

> '[t]he main issue is really not about whether to decide in favour of the investor interests or countervailing values. It is instead, whether to protect the autonomous power of the domestic local communities or to let the conditions of local lives be decided in the (disembedded) process of economic globalization.'[937]

Further, some critics note that while independent arbitrators may have the expertise in international law matters, they do not have sufficient knowledge of or expertise in the broader social, economic, or environmental issues surrounding the public policy measures that are often the subject of investor-state disputes and as such, are not able to properly assess the merits or lack thereof of a particular challenge.[938]

Under the principle of subsidiarity, the international organ will have the duty to act when the relevant national institution proves incapable of providing minimum safeguards or lacks the impartiality to offer adequate protection.[939] When applied effectively, institutional subsidiarity has a proscriptive effect in that it will bar the action of a higher level of governance into a

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[932] Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation, and International Adjudication within a Cooperative Conception of Human Rights' (2017) 15 *International Journal of Constitutional Law* 393, 402.
[933] Ibid 403.
[934] Ibid.
[935] de Visser (n 23) 93.
[936] Towards a More Diligent and Sustainable System of Investment Protection, ClientEarth, March 2019 at 15 available at: https://www.clientearth.org/media/aeykzgen/towards-a-more-diligent-and-sustainable-system-of-investment-protection-ce-en.pdf (20 May 2022).
[937] Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18 The Journal of World Investment & Trade 343, 343.
[938] Marc Bungenberg and others, *Second Thoughts: Investor State Arbitration between Developed Democraci.es* (Armand de Mestral ed, MQUP 2017) 12 <https://www.jstor.org/stable/10.2307/j.ctt1w6tdcv> (accessed 12 May 2022).
[939] Vila, supra n 932 at 403; Melanie Murcott & Werner van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' *Constitutional Court Review* 43–67 at 46.

particular functional area; or it will have a prescriptive effect in that it will prescribe that a higher level of governance carry out the act where a lower level of governance is required to act but is unable to.[940] Institutional subsidiarity can also have a creative effect in that the application of the principle may require the higher and lower levels of governance to act together to create new structures where a lacuna may be found to exist.[941] By so doing, the principle of institutional subsidiarity reduces the likelihood that the lower levels of government remain in a state of perpetual inability to perform a function that they ought to be able to perform.

In allocating judicial competence to a particular forum, the principle of subsidiarity takes a holistic approach to ascertain whether the lower level of governance is able to perform a particular function and if not, seeks to establish what the role of the higher level of governance should be in fulfilling that function.[942] Both the national and international levels of governance must be required to take on the duties and roles that will allow both levels of governance to exercise their adjudicative powers fully and effectively.

The following sections will therefore propose the means by which the national level of governance can be incorporated into the international settlement of disputes, thereby filling the gap which currently exists and ensures that the reform options that are undertaken at the international level are compatible with the sovereignty re-assertion efforts that have been taking place at other levels of governance. Following the present introduction, section 5.2 will discuss how the national level of governance can be incorporated into the international investment law system. In order to achieve this, section 5.2.1 will show how, through the use of the principle of subsidiarity, the national level can practically be incorporated into the dispute settlement process through the exhaustion of local remedies rule. Section 5.2.2 will explore how areas of shared and exclusive competences can be established between the national and international levels of governance and make recommendations on how each level ought to engage with the interpretation and application of investor protections. Section 5.2.3 will set out the benefits of incorporating the exhaustion of local remedies rule in the international investment regime. Finally, the chapter concludes by providing the findings of the chapter, setting out the recommendations made therein and setting the basis for the following chapter (section 5.3).

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[940] Jaap de Visser 'Institutional Subsidiarity in The South African Constitution' (2010) *Stell LR* 90–115 at 94.
[941] Ibid 93.
[942] Jachtenfuchs & Krisch, supra n 630 at 1.

## 5.2. INCORPORATING THE NATIONAL LEVEL INTO THE DISPUTE SETTLEMENT PROCESS

Both international remedies and national remedies have their pros and cons and there is no consensus among the users of ISDS as to which is the level that ought to be used for the settlement of investment disputes.[943] Within the multilevel governance framework, the question is not which level must be chosen over the other. Rather, the focus is on ensuring how both levels, can work together in concert to provide a mechanism for the settlement of disputes. The strengths that are associated with the use of either national remedies or international remedies can be used to offset and counter the weaknesses and deficiencies that are associated with the other. The following sections set out how the national and international levels of governance can work together to create a system for the settlement of investment disputes.

There already exists a mechanism in international law that allows for the shared competence for the settlement of disputes between national and international level. As shall be illustrated hereunder, the exhaustion of local remedies rule is an accepted principle of international law and has been applied in other systems of international law.[944] The exhaustion of local remedies rule is an effective means of power sharing between local courts and international mechanisms and is an important tool that can be used to implement the principle of subsidiarity in practice.[945] While the traditional reason for excluding recourse to domestic remedies has been inefficiencies in the domestic court system, this thesis argues that the exhaustion of local remedies rule does provide for exceptions where recourse can be had directly to international remedies where the domestic remedies are not available. These exceptions can be tailored so that they consider the situations that may arise or are of concern in the context of investor-state disputes.

### *5.2.1. Exhaustion of local remedies and international law*

The exhaustion of local remedies rule has been considered as one of the longest standing and most basic principles in international law.[946] The CIL rule of exhaustion of local remedies aims

[943] This accounts for the different reform options that are being explored and proposed.
[944] Tamás Kende 'Distant Cousins: The Exhaustion of Local Remedies in Customary International Law and in the European Human Rights Contexts' (2020) 2 *ELTE Law Journal* 127–42 at 128.
[945] Ibid 136. See also *Akdivar and others v Turkey,* Application No.21893/93,16 September 1996, in Reports, 1996-IV, para. 65.
[946] Douglas Wong 'From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration' (2017) 35 *Singapore Law Review* 114–45 at 114.

at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international remedies.[947] This principle was confirmed in the *ICJ Interhandel* case, where the court held that the exhaustion of local remedies rule is a well-established principle of CIL that gives the State where the violation occurred an opportunity to redress the violation by its own means, within the framework of its domestic legal system.[948] The exhaustion of local remedies rule acknowledges that recourse to international dispute settlement mechanisms should complement national mechanisms and should only be pursued where national mechanisms fail to provide effective protection.[949] This is in line with the principle of subsidiarity outlined above which advocates for a complementary relationship between national and international levels of governance.

The exhaustion of local remedies rule is a procedural rule that is not concerned with the merits of the disputes, but rather, conditions the admissibility of a claim on the exhaustion of local remedies.[950] Where the exhaustion of local remedies rule applies, the claim before the international tribunal will not be admissible until local remedies have been pursued, save for certain exceptions that will be illustrated hereunder.

The exhaustion of local remedies rule is widely applied in various *lex specialis* under international law. For example, in the human rights system, the International Covenant on Civil and Political Rights makes provision for the exhaustion of local remedies except where the local remedies prove to be unreasonably prolonged.[951] The European Convention on Human Rights provides for the exhaustion of local remedies according to generally recognised rules of international law.[952] The American Convention on Human Rights also makes provision for the exhaustion of local remedies save for instances where the claimant would have been denied access to local remedies, where there is lack of due process and where there is unwarranted delay in finalisation of the matter.[953] The African Charter on Human and Peoples Rights

[947] Martin Dietrich Brauch ‘Exhaustion of Local Remedies in International Investment Law’ 33 at 1.
[948] *Interhandel, Switzerland v. United States*, Preliminary Objections, Judgement ICJ GL No 34, [1959] ICJ Rep 6, IC GJ 171 (ICJ 1959).
[949] Amos O Enabulele ‘Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice’ (2012) 56 *Journal of African Law* 268–95 at 269.
[950] Nsongurua J Udombana ‘So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples’ Rights’ (2003) 97 *The American Journal of International Law* 1–37 at 2.
[951] Article 41(c) of the United Nations General Assembly International Covenant on Civil and Political Rights 1996, United Nations Treaty Series vol 999 171.
[952] Article 35(1) of the Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 1950, ETS 5.
[953] Article 46 of the Organisation of American States American Convention on Human Rights Pact of San Jose, Costa Rica 1969.

provides for the exhaustion of local remedies rule unless it is clear that the local remedies would be unduly prolonged.[954] The exhaustion of local remedies in international human rights law, applies not only to foreign nationals seeking redress against state conduct but also to nationals who may seek redress against their own governments.

The exhaustion of local remedies rule also finds application in the settlement of maritime disputes.[955] Article 295 of the United Nations Convention on the Law of the Sea (UNCLOS) makes provision for the exhaustion of local remedies rule. Much like the rule under international human rights law, there are certain limitations that have been applied to the exhaustion of local remedies rule in the practice of ITLOS tribunals to ensure its suitability for the circumstances that arise in maritime disputes. For example, the rule does not apply in matters relating to prompt release cases that have been brought under Article 292 of UNCLOS as its application in these cases would render Article 292 ineffective and redundant.[956] It is also accepted that the exhaustion of local remedies would not apply at the provisional measures stage of the proceedings,[957] and would also not apply in cases of direct injury i.e. injury to the state, but would be applicable in cases of indirect injury, i.e. injury to a national of the state.[958]

While the exhaustion of local remedies rule seeks to protect the sovereignty of states, the rule also considers instances where states through their national courts are unable to provide an effective remedy to an aggrieved party. On this basis the duty to exhaust local remedies would not be applicable where:[959]

- there is no remedy available,
- there has been undue delay in pursuing local remedies, and
- the injured person is manifestly precluded from pursuing local remedies.

[954] Article 50 of the African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).
[955] Loris Marotti 'Determining the Scope of the Local Remedies Rule in unclos Disputes' (2018) 21 *Max Planck Yearbook of United Nations Law Online* 36–62; Jianjun Gao 'The Exhaustion of Local Remedies Rule in the Settlement of Maritime Disputes: A Study of the Practice of the UNCLOS Tribunals' (2020) 19 *Chinese Journal of International Law* 425–58.
[956] See for example the *Camouco case (Panama v France)* (Prompt Release) (Judgement) ITLOS Case No 5 (7 Feb 2000) para 57 where the tribunal held that due to the nature of prompt release cases it would not be logical to apply the exhaustion of local remedies requirement.
[957] See for example the *Enrica Lexie Incident (Italy v India)* (Provisional Measures) (Order) ITLOS Case No. 24 924 August 2015) para 67.
[958] Loris Marotti 'Determining the Scope of the Local Remedies Rule in UNCLOS Disputes' (2018) 21 *Max Planck Yearbook of United Nations Law Online* 36–62 at 39.
[959] Art. 15 of the ILC Draft Articles on Diplomatic Protection.

The exhaustion of local remedies rule in international human rights cases and in maritime cases applies as the general rule subject to amendments and exceptions so that the rule is applied in a manner that is suitable for the type of disputes at issues. This illustrates the flexibility of the rule and its ability to be tailored to suit the circumstances in which the rule is expected to be applied.

Considering the above-mentioned characteristics, it is possible to implement an exhaustion of local remedies rule that balances the sovereignty needs of the host state with the needs of the investor to have access to an effective dispute settlement mechanism.

Even though the rule forms a traditional part of CIL, it has been excluded from application in the international investment regime, but its use is not prohibited. Unlike in international human rights and maritime law, the default position is reversed in that the exhaustion of local remedies rule does not apply unless expressly agreed to between the parties.[960] Within the investment regime, States conclude IIAs in terms of which they give their consent in advance to international arbitration with foreign investors.[961] This has been understood to mean that investors could initiate a claim without prior recourse to the host states administrative or judicial remedies.[962] This does not serve as a prohibition to the use of the exhaustion of local remedies rule but just shifts the presumption as to when the use of local remedies should apply. States can, by express agreement in the applicable dispute resolution clause, make provision for the requirement to exhaust local remedies prior to the investor instituting arbitral proceedings.[963] In practice, some treaties expressly waive the rule on exhaustion of local remedies,[964] some make provision for the rule in its totality,[965] while others make provision for

[960] See for example Article 26 of the ICSID Convention which provides that 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'
[961] Brauch, supra n 947 at 1.
[962] *Lanco v Argentina* Decision on Jurisdiction, 8 December 1998, ILM 457 (2001) par 39-40; *Generation Ukraine v Ukraine*, (2003) ICSID Case No ARB/00/9 (Award) para 13.1-13.6; *Yaung Cho Oo v Myanmar* Award 31 March 2003 42 ILM 540 (2003) par 41.
[963] Article 26 of the ICSID Convention. See also *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan* (ICSID Case No. ARB/10/1) where the tribunal upheld the exhaustion of local remedies requirement as provided for in the Turkey-Turkmenistan BIT,
[964] For example, this is the case of several BITs signed by Belgium, Luxembourg and BLEU, the earliest being the one between Belgium and Indonesia in 1970.
[965] See for example Agreement Between the Council of Ministers of The Republic of Albania and The Government of the Republic of Lithuania on the Promotion and Protection of Investments Article 8(2); Countries such as Argentina, India, Turkey, the UAE and Uruguay have incorporated requirements for the exhaustion of local remedies as well as REIO's such as SADC and EAC

a watered- down version of the rule.[966] This change from a mandatory application of the exhaustion of local remedies rule to the opt-in mechanism that generally applies in international investment law, has narrowed the scope of the rule and has limited the protection that the rule provides to the host state.[967]

By signing IIAs that limit the exhaustion of the local remedies rule, States are in effect exercising their sovereignty albeit to limit a rule that is premised on the protection of state sovereignty. This means that the treaty provisions which exclude the exhaustion of local remedies rule, would, as *lex specialis*, supersede the application of the CIL formulation of the rule to the effect that the states sovereignty in dispute settlement is curtailed. The concern raised by states regarding the limitations on their sovereignty therefore seems misplaced. However, at the time of entering into traditional IIAs, most states were primarily focused on increasing incentives to attract FDI and it can be argued that negotiators had little knowledge regarding the agreements that they were entering into and could not have foreseen the impact that IIAs have had in the world today, which has ultimately led to the backlash against the international investment system.[968] As states entered into agreements to validly limit their sovereignty in IIAs, states can, in the very same manner, introduce provisions in their IIAs that would provide better protection to their sovereignty. In this regard, this thesis proposes for states to incorporate the exhaustion of local remedies rule into their IIAs. Affording greater significance to local remedies may address some of the concerns that have been raised with respect to the international investment law system.

### *5.2.2. Allocation of competence between the national and international level using the exhaustion of local remedies rule*

The recommendations made in chapter 4, make provision for the use of both domestic and international mechanisms for the re-balancing of IIAs and the incorporation of investor obligations.[969] Chapter 4 provided for the use of 'in accordance with' provisions which would

[966] Which require that investors pursue local remedies for a specified period before resorting to international arbitration.
[967] Generation Ukraine, Inc. v Ukraine (2003) ICSID Case No ARB/00/9 (Award) para 13.4 wherein the tribunal held that 'The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State's domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent.'
[968] Deborah L Swenson 'Why Do Developing Countries Sign BITs?' (2005) 12 *University of California, Davis* 131–54 at 143.
[969] See Chapter 4 section 4.4.

mean that investor obligations would be expressly provided for in domestic law and indirectly incorporated into IIAs.[970] When incorporating the exhaustion of local remedies rule, it is important to set out how matters will be allocated between the national and international levels respectively.

*a. Competence of the national level*

With regard to investor protections, as most of them are contained in international agreements, it has to be determined how the national level can be approached as a court of first instance for the protection of investors (in accordance with the exhaustion of local remedies rule). Investment regulation governs the vertical relationship between the state and private actors, that is, between the host state and the foreign investor. IIAs make provision for substantive rights and protections that are owed by the host state to the foreign investor. This thesis proposes that the core adjudication of investor protections should take place at the national level, through national courts and national tribunals. The question that ought to be answered in setting the adjudication of investment disputes and the interpretation of treaties at national level is whether or not the protections provided for in IIAs can be directly invoked before national courts and if not, whether there exists sufficient protection within national legislation for the protection of investors.

International law was traditionally considered to be a system of law, separate from the domestic sphere, whose adjudication took place at the international level.[971] The question as to the relationship between national courts and international law was therefore traditionally answered through the lens of the monism/dualism dichotomy.[972] On the one hand, where states are considered to be monist,[973] international law and national law are not viewed as separate legal systems but as part of one legal system, with international treaties being capable of being

[970] Ibid.
[971] Anne-Marie Slaughter & William Burke-White 'The Future of International Law is Domestic (or, The European Way of Law)' in Janne E Nijman & André Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (2007) 110–33 at 327 available at: https://academic.oup.com/book/9468/chapter/156401044.
[972] Wilfred Mutubwa 'Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution' (2019) 3 *Journal of Conflict Management and Sustainable Development* 27–37 at 22; Itumeleng Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy' (2019) 19 *African Human Rights Law Journal* 193–218 at 196.
[973] Mostly states with a civil law background. See Magnus Killander & Horace Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Magnus Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3–24 at 4.

directly invoked before national courts without need for further incorporation as domestic legislation.[974] On the other hand, where states are considered to be dualist,[975] international treaties can only be applied in domestic courts after they have been incorporated into the domestic legal framework through an act of parliament.[976] As such where states are generally considered as being monist the question as to whether international treaties can be directly invoked would be more simpler than where states were considered to be dualist.

However, in practice due to increased globalisation and the convergence of international and national law, while the theories of monism and dualism still have some role to play, their impact in determining the applicability of international treaties in domestic courts has become less pronounced.[977] This is because there are increasing overlaps in the areas of law that are governed by national legislation and international law. As such, while a matter may be raised at the domestic level and invoking principles contained in domestic legislation, one may find that the norm at issue was developed in international law and may also be adjudicated at the international level. This has created a system where the systems of domestic and international law are not separate from each other, but can be seen as jurisdictional alternatives for the settlement of a dispute as seen in international investment law.[978] Because of this, we have begun to see an expanding body of literature that speaks to the domestication of international law and the increased applicability of international law within national courts by national court judges regardless of the monist or dualist nature of the legal system.[979] Various methods are now available through which national court judges can apply international law in domestic disputes and these methods are explored hereunder.

[974] Gerrit Ferreira & Anel Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1470–96 at 1471.
[975] Mostly states with a common law background. see Killander & Adjolohoun, supra n 973 at 4.
[976] Moses Retselisistoe Phooko 'Revisiting the Monism and Dualism Dichotomy: What does the South African Constitution of 1996 and the Practice by the Courts tell us about the Reception of SADC Community Law (Treaty Law) in South Africa?' (2021) 29 *African Journal of International and Comparative Law* 168–82 at 170.
[977] Michelle Barnard 'Legal reception in the AU against the backdrop of the monist/dualist dichotomy' (2015) 48 *The Comparative and International Law Journal of Southern Africa* 144–61 at 153; Melissa A Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628–705 at 695.
[978] Joshua Paine 'Standard of Review: Investment Arbitration' (2018) *Max Planck Encylopedia of International Law* at 26.
[979] Julien Chaisse and Georgios Dimitropoulos (eds), *World Trade Review Special Issue 1: Domestic Investment Laws and International Economic Law in the Liberal International Order,* vol 22 (Cambridge University Press 2023); Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 *The American Journal of International Law* 658.

*Silent application* refers to a situation where national court judges apply domestic laws that have been derived from international law without mentioning the international source of law.[980] In the context of investment law, domestic laws regulating foreign investment are proliferating in jurisdictions all over the world.[981] The increasing proliferation of domestic investment legislation may signal a shift from the international to the domestic, making the provisions of international law rules directly applicable within domestic systems and making them justiciable in domestic courts.[982] Incorporation of international law provisions into domestic statutory provisions is one of the most effective ways for entrenching international law into domestic law.[983]

In order to assess whether or not, there has been incorporation of the protections provided for in IIAs at national level this study undertook a review of the national laws that appear on UNCTADs Investment Law database.[984] There are two hundred (200) investment laws that appear on the investment law database.[985] In order to conduct the assessment, we excluded the investment laws that only made provision for screening mechanisms, investment incentives and other provisions not related to the protection of foreign investments as these were not the subject matter of the study, and we also excluded investment laws that did not have a readily available English translation (whether official of unofficial). This left us with 89 laws which are available in English that contain the investment protections that are also contained in IIAs to varying degrees.[986] These 89 laws were assessed to determine whether they contained the most common investment protections being FET, full protection and security, MFN, national treatment, expropriation and free transfer of funds. The study found that the most common provisions were provisions relating to expropriation and related issues of compensation and provisions for the free transfer of funds with all 89 laws under review containing provisions on expropriation and free transfer of funds.

In second place were provisions on national treatment and the least domestically incorporated provisions were provisions relating to full protection and security and FET. The laws of

[980] David Sloss & Michael Van Alstine 'International Law in Domestic Courts' at 130; Waters, supra n 977 at 654.
[981] Georgios 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest' (2023) 22 *World Trade Review* 90–108 at 90.
[982] Ibid 91; Kehinde Folake Olaoye and Muthucumaraswamy Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development' (2023) 22 *World Trade Review* 109, 120.
[983] Sloss & Alstine, supra n 980 at 31.
[984] https://investmentpolicy.unctad.org/investment-laws (accessed 27 January 2023).
[985] Ibid.
[986] See attached Annexure 1 the table of reviewed laws and corresponding investor protection provisions.

Guyana[987], Kosovo[988], Myanmar[989], South Africa[990] and Zimbabwe[991], contained a majority of the provisions on investor protection as contained in IIAs. In addition to this, some of the laws[992] made provision for the binding force of international treaties concluded by the state on the subject of investment law thereby rendering international investment treaties directly applicable in their domestic courts.

As such, to the extent that provisions on the protection of foreign investment are contained in national legislations, national courts would be in a position to apply these provisions and by extension apply the provisions contained in investment treaties. With the growing trend pointing to the domestication of international investment law, it is therefore possible for foreign investors to invoke the protections contained in IIAs directly before national courts and for the national courts to interpret and apply these provisions.[993] By implementing the recommendations in Chapter 4 [994] to create regulations and policies at international level that govern a wide range of areas, investors will be able to invoke investment protections that have been incorporated into national legislation without necessarily invoking the provisions of an IIA.

*Indirect application* occurs where the national statutes do not fully incorporate the provisions of IIAs in national investment legislation. There still exists a possibility for the use and application of international law in national courts. As a general rule, foreign investors are subject to the provisions of law in the host state and as such can invoke the protection of general national law to protect their investments. For example, Vattenfall, a Swedish state-owned power energy company operating two nuclear plants in Germany was able to challenge the

[987] Guyana Investment Act 2004 contains all protections save for provisions on FET.
[988] Kosovo Law on Foreign Investment 2014 contains all the protections save for full protection and security.
[989] Myanmar Investment Law 2016 contains all the protections save for full protection and security.
[990] South Africa Protection of Investment Act contains all provisions save for MFN.
[991] Zimbabwe Investment Development Agency Act 2020 contains all the provisions save for full protection and security.
[992] See for example Article 2 of The Law of the Republic of Armenia on Foreign Investments 1994, Article 43 of the Azerbaijan Law on the Protection of Foreign Investments 1992, Article 5 of the Mozambique Law on Investment 1993, Article 22 of Iraq Investment Law 2006 , Article 19 of Kosovo Law No. 04/L-220 on Foreign Investment (2014) , Article 2 of Kyrgyzstan Law on Investments 2003, Article 2 of Law of the Republic of Moldova on Investments in Entrepreneurial Activity 2004 , Article 91 of Myanmar Investment Law 2016, s37 of Papua New Guinea Investment Promotion Act 1992, Article 3 of Russian Federation Federal Law on Foreign Investments 1999, Article 6 of Syrian Arab Republic Investment Promotion Law 2007, Article 24 of Bosnia and Herzegovina Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina 1998 , Article 4 of Timor- Leste Private Investment Law 2011and Article 2 of Law of the Republic of Uzbekistan on Investments and Investment Activity (2019)
[993] The idea behind this process being similar to the manner in which international human rights protections have been domesticated into national constitutions such that there is rarely a need to cite the international mechanism from where the norm was adopted as it is fully contained in domestic provisions.
[994] See Chapter 4 section 4.4.a

constitutionality of the Thirteenth Amendment to the Act on the Peaceful Utilization of Atomic Energy and the Protection against its Hazards in so far as it affected its investment by invoking the protections provided in the German Constitution, without necessarily referencing international investment law.[995] In the same vein, JT International SA and British American Tobacco Australasia Ltd challenged Australia's plain packaging legislation before the Australian courts by invoking the provisions of the Australian Constitution without directly invoking the protections provided for in IIAs or in national investment legislation.[996] This raises an opportunity for national courts to apply international law. This would consist of national courts making use of international law, as a tool to interpret national law. This is the most widely used mechanism by national courts judges to apply international law.[997]

National courts often apply an interpretive presumption that domestic statutes should be interpreted in conformity with international law obligations.[998] This interpretive technique, known as the presumption of conformity has been applied similarly in both monist and dualist states with dualist states extending its application even to unincorporated treaties.[999] While direct application of treaties is commonplace and unsurprising in monist states,[1000] there has been an increase in the judges of dualist states directly applying the provisions of unincorporated treaties in resolving disputes before national courts. Waters refers to this as creeping monism which he describes as a phenomenon in which common law courts are abandoning their traditional dualist orientation and are beginning to utilise unincorporated treaties in their work despite the absence of domestic legislation giving domestic legal effect to the international treaty.[1001] In so doing, judges are entrenching their nations international treaty obligations into domestic law. [1002] This trend by judges has been recognised as a being a vital duty of the judiciary to interpret and apply national laws in harmony with international laws and to develop the common law in light of the values enshrined in international law.[1003]

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995 BVerfG, Judgment of the First Senate of 6 December 2016 - 1 BvR 2821/11 -, paras. 1-407, http://www.bverfg.de/e/rs20161206_1bvr282111en.html (accessed 27 January 2023).
996 *JT International SA v Commonwealth of Australia* [2012] HCA 43 British American Tobacco Australasia Limited v The Commonwealth 250 CLR 1; 86 ALJR 1297; 291 ALR 669.
997 Antonios Tzanakopoulos, International Law Association Study Group: Principles On the Engagement Of Domestic Courts With International Law Preliminary Report Principles On the Engagement Of Domestic Courts With International Law https://www.ila-hq.org/en_GB/study-groups/principles-on-the-engagement-of-domestic-courts-with-international-law (accessed 27 January 2023).Wayne Sandholtz 'How Domestic Courts Use International Law' (2015) 38 *Fordham International Law Journal* 595 at 598.
998 Sloss & Alstine, supra n 980 at 31.
999 Ibid 33.
1000 Ibid 11.
1001 Waters, supra n 977 at 633.
1002 Ibid.
1003 Ibid 646.

This trend has mostly been seen in the area of human rights where the exhaustion of local remedies rule applies and where domestic court judges have made use of their role of judicial oversight to avoid liability for their whole country.[1004]

By introducing the exhaustion of local remedies rule in international investment law, the same principles that have already been applied by domestic judges in the area of international human rights law in contributing to the domestication of human rights law, could be applied to achieve the domestication of international investment law. Domestic courts have the potential to play a very significant role in promoting compliance with vertical treaties[1005], and in this instance, international investment treaties.

From the above discussion we then see that it is possible for the protections that are contained in IIAs to be adjudicated on and applied by national courts in the first instance thereby giving effect to the rule on exhaustion of local remedies. However, the national courts will not exercise exclusive competence over the interpretation and application of international law. As shall be shown more fully hereunder, the international level will also be granted the opportunity to interpret and apply the content of IIAs in accordance with the principles established in section 5.2.2 (b) below.

With regard to the question on the application and interpretation of investor obligations contained in domestic law the situation is much simpler. Most constitutions and national law frameworks vest the power to interpret and apply national law in the national courts. Investor obligations contained in nation law can easily be enforced and applied at national level, with the national level exercising exclusive jurisdiction over the interpretation of national law. It is an established principle in international law that whenever an international court is called upon to apply a provision of domestic law, it must apply domestic law in the same manner that it has been applied in the state concerned.[1006] In the *Case concerning the Payment of Various Serbian Loans issued in France*, the court held that,

> '[t]he Court having in these circumstances to decide as to the meaning and scope of municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal…would not be

[1004] Ibid 661.
[1005] David L Sloss, 'Domestic Application of Treaties (Second Edition)' (13 July 2020) 27.
[1006] Peter Tomka, Jessica Howley & Vincent- Joel Proulx, 'International and Municipal Law Before the World Court: One or Two Legal Orders' (2015) 35 *Polish Yearbook of International Law* 11 37.

in conformity with the task for which the Court has been established… It is French legislation, as applied in France, which really constitutes French law.'[1007]

In the same vein, in the *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, the court held that,

> '[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force. It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based. Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law.'

These provisions have also been applied in investment arbitration cases as stating the applicable principles ought to be applied when an international tribunal ought to deal with national law.[1008] It is on this basis that this thesis advocates for the position that the national courts should be vest with the competence to interpret domestic law provisions on investor obligations and should the international level be called upon to apply the same, the international level should grant deference to the interpretation adopted by national courts.

*b. Competence of the international level*

When a national court interprets and applies international law, it may either do so in conformity with the host states international law obligations or it may render a decision that breaches them.[1009] In the latter case, the decision of the domestic court may ripen a dispute for adjudication at the international level (as in the case where exhaustion of local remedies is required as a precondition for international jurisdiction) and it may engage the international responsibility of the state (as in the case of denial of justice). [1010] It is then that the competence

[1007] *Case concerning the Payment of Various Serbian Loans issued in France* PCIJ Series A. No 20 12 July 1999 46.

[1008] See for example the case of *Fouad Alghanim & Sons Co. For General Trading & Contracting, W.L.L. and Mr Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38) para 356-358; *Bosh International, Inc And B&P Ltd Foreign Investments Enterprise v Ukraine* ICSID Case No ARB/08/11 para 280-282.

[1009] Antonios Tzanakopoulos, International Law Association Study Group: Principles On the Engagement Of Domestic Courts With International Law Preliminary Report Principles On the Engagement Of Domestic Courts With International Law https://www.ila-hq.org/en_GB/study-groups/principles-on-the-engagement-of-domestic-courts-with-international-law (accessed 27 January 2023) para 5.

[1010] Ibid.

of the international level would be invoked. The international level plays an important oversight role to ensure that in performing its dispute resolution function, the national level does so in a manner that is in accordance with its international obligations. This brings about two instances where the international level will be required to intervene and settle the dispute between the investor and the state. The first instance is where the local remedies are not available, and the investor then gains direct access to the international dispute settlement mechanism as a court of first instance. The second instance is where the investor has exhausted local remedies and approaches the international level after the fact to allege a denial of justice.

The exhaustion of local remedies rule does consider the fact that not all legal systems can provide an effective remedy to aggrieved parties. The rule makes provision for instances where the foreign investor would be able to bypass local remedies and directly access the international mechanism.[1011] The international mechanism would thereafter act as a court of first instance and deal with the merits of the dispute. It is the author's view that the instances where the exhaustion of local remedies rule can be dispensed have been dealt with on numerous occasions in other *lex specialis*. As such, the principles and interpretations that have developed over time in other disciplines can be used to advise the context of exceptions within the international investment regime considering the needs of stakeholders.

The African Commission on Human and Peoples Rights has on numerous occasions been called upon to determine instances where the exhaustion of local remedies rule would not apply. The African Commission has held that in order for the domestic remedy to be effective, it must be judicial in nature, founded on legal principles and free from the influence of other branches of the government or state actors.[1012] In the case of *Jawara v The Gambia*, the African Commission held that a remedy is available if the petitioner can pursue it without impediment, effective if it offers prospects of success and efficient if it is capable of redressing the complaint.[1013]

In the context of the international investment regime, the need to bypass local remedies arose out of a fear by investors about the lack of partiality and independence of local courts, and the

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[1011] Lilian Chenwi 'Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374–98; Silvia D'Ascoli & Kathrin Maria Scherr the Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection, European University Institute, 2007, EUI Working Papers Law 2007/02 (accessed 23 August 2022).
[1012] Communications 48/90, 50/91, 52/91 and 89/93 *Amnesty International and Ors v Sudan* 13th Annual Activity Report para 31.
[1013] Communications 147/95 and 149/96 13th Annual Activity Report para 32.

concern that local courts would be biased against investors in favour of the host state.[1014] From the above, the exceptions to the application of the local remedies rule take into account these concerns thereby ensuring that despite being required to make use of national courts, foreign investors would not be subject to approach courts that lack partiality and independence, that would be biased toward the host state or that would not be capable of providing sufficient redress.

The clause making provision for the exhaustion of local remedies clause would have to set out the instances where local remedies need not be exhausted with sufficient certainty. The ILC Draft Articles on diplomatic protection of 2006 found that international jurisprudence has set out three different instances where he exhaustion of local remedies rule need not be complied with and these include where the local remedies are obviously futile, offer no reasonable chance of success and offer no reasonable possibility of effective redress.[1015] These instances can apply to various contexts including where the local courts have no jurisdiction over the dispute in question, where national legislation prevents recourse to national courts, the local courts are notoriously lacking in independence, there is a consistent and well established line of precedent of decisions adverse to foreigners, local courts do not have the competence to grant an appropriate and adequate remedy to the alien and where the respondent state does not have an adequate system of judicial protection.[1016] Where the investor gains access to the international mechanism as a court of first instance, the international mechanism would have the competence to interpret and apply the provisions of the applicable IIA.

Where the investor has exhausted local remedies, the national courts (usually the highest court in the state) will have rendered a decision against the investor which the investor is not satisfied with. The foreign investor would therefore seek to approach the international mechanism seeking redress against the decision of the national courts. The question therefore is whether the international mechanism would be a complete alternative to national courts, or it would play a subsidiary role. In line with the principle of subsidiarity already set out above, the international level would play a subsidiary role and would not act as a 'court of appeal' nor as a mechanism with the complete authority to rehear disputes that have already been decided by national courts. The role of the international mechanism would be to act in a review capacity that would only interfere with the decisions taken by the national courts where the national

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[1014] Kyla Tienhara 'Regulatory Theory: Foundations and Applications' in Peter Drahos (ed) Investor State Dispute Settlement (2017) 677 678.
[1015] Kende, supra n 944 at 137.
[1016] Ibid 132.

level has failed to act. In particular, the international mechanism would only interfere with the decision rendered by the national courts where there has been a denial of justice in the proceedings of the national courts. Denial of justice is a principle of customary international law and arises where a state has breached its international obligation to provide a fair and effective system of justice to aliens in accordance with generally accepted principles of international law.[1017] This general formulation of the role of the international mechanism has already been adopted by arbitral tribunals,[1018] however, it has not had much effect in practice in safeguarding the sovereignty of host states as the foreign investor would still be able to bring challenges to the conduct of the state even where there was no denial of justice by alleging breaches of the other provisions in the applicable IIA. Because of the manner in which international investment law is designed, the international mechanism can act as a substitute for national courts with the power to adjudicate the dispute as a court of first instance and render a decision that is binding on the state.

The formulation proposed in this chapter differs from the status quo in this respect. In the first instance, the international mechanism would have to ascertain whether there has been exhaustion of local remedies. If the answer is in the affirmative, the second leg of the enquiry would be to ascertain if there has been a denial of justice. If there has been no denial of justice, that would be the end of the matter as there would be no basis for the international mechanism to interfere in the decision of the national court. If a denial of justice has been established, the international mechanism would be able to interfere with the decision of the national courts and determine the matter on the substantive aspects by assessing the conduct complained of against the provisions of the IIA.

While in the status quo, arbitral tribunals have sometimes extended denial of justice to encompass the substantive aspects of the decision,[1019] this thesis recommends the position that

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[1017] Newcombe, Andrew. *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International), 241.

[1018] Tribunals found that it was not their role to act as appellate courts, but rather, it was their role to ensure that justice was administered in accordance with acceptable international standards see for example *Eli Lilly and Company v Government of Canda* Case No UNCT/14/2 para 224;*GEA Group Aktiengesellschaft v Ukraine* ARB/08/16 para 312, *Dan Cake (Portugal) S.A v Hungary* ICSID Case No. ARB/12/19 para 117; *Helnan International Hotels A/S v The Arab Republic of Egypt* ICSID Case No 05/19 para 106, *Jan de Nul N.V and Dredging International N.V v The Arab Republic of Egyp*t ICSID Case No ARB/04/13 para 209; *Hassan Awdi Enterprise Business Consultants Inc v Romania* ICSID Case No ARB/10/13 para 327; *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* ICSID Case No. ARB/09/15 para 366.

[1019] *Luigiterzo Bosca v. Lithuania,* UNCITRAL PCA Case No. 2011-05 para 198. See also the decision of the tribunal *in Karkey Karadeniz Elektrik Uretim A.S v Islamic Republic of Pakistan* ICSID Case No. ARB/13/1 para 552 where the court reviewed both the substantive and procedural aspects of the Supreme Court decision to find that the decision was arbitrary and irrational; *Helnan v Egypt* para 106; *Awdi v Romania* 33 para-327 a denial of justice can only be procedural with the substantive aspects of the decision playing a role where it is used to establish the procedural deficiencies in the proceedings.

In determining the existence of a substantive denial of justice, the tribunal in *Lion Mexico Consolidated L.P v United Mexican States* held that there is no substantive denial of justice in international law and that while the dichotomy between substantive and procedural denial of justice has arisen in the decisions of some tribunals, the distinction serves no effect in practice.[1020] The tribunal quoted with authority the writings of Paulsson wherein he stated that 'in modern international law, there is no place for substantive denial of justice… if a judgement is grossly unjust, it is because the victim has not been afforded fair treatment…Extreme cases should thus be dealt with on the footing that are so unjustifiable that they could have only been the product of bias or some other violation of due process…denial of justice is always procedural.'[1021]

This view point finds support in arbitral practice in that the substantive denial of justice has never been founded on the basis of an incorrect decision or a misapplication of law, but rather on a determination as to whether the decision was so arbitrary and so manifestly unjust that no competent court would have come to that decision.[1022] This is a high threshold that is required to be met, and by its very nature, relates to the procedural aspects of the decision making process. Denial of justice would therefore constitute a failure on the state to provide a system through which a foreigner can seek redress for any injury it has suffered at the hands of public or private bodies in accordance with the national laws of the state. [1023] In *Iberdola v Guatemala* the tribunal held that,

> '…under international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that "… denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could

[1020] *Lion Mexico Consolidated L.P v United Mexican States* ICSID Case No. ARB(AF)/15/2 para 217.
[1021] Ibid 218.
[1022] See *Bosh International Inc and B & P Ltd Foreign Investments Enterprise v Ukraine* ICSID Case No ARB/08/11 para 280; *Mondev v USA* para 127; *Liman v Kazakhstan* 31 para 276 & 279; *Eli Lilly v Canada* para 224; *Loewen v USA* 37 para 130; *GEA v Ukraine* 33 para 312; *Rumeli v Kazakhstan* para 619; *Dan Cake v Hungary* para 146; *White Industries v India* para 10.4.7; *Chevron Corporation and Texaco Petroleum Company* v *Ecuador* (Partial Award on the Merits of 30 March 2010),para. 244; *Staur Eiendom AS, EBO Invest AS & Rox Holdings AS v Republic of Latvia* ICSID Case No ARB/16/38 para 473.
[1023] Clyde Eagleton 'Denial of Justice in International Law' (1928) 22 *American Journal of International Law* 538–59 at 542.

> have committed and that shows that a minimally adequate system of justice has not been provided' (footnotes omitted).[1024]

This viewpoint was also adopted in the case of *Phillip Morris v Uruguay* where the tribunal held that,

> '[t]he high standard required for establishing this claim in international law means that it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal. For a denial of justice to exist under international law there must be "clear evidence of … an outrageous failure of the judicial system" or a demonstration of "systemic injustice" or that "the impugned decision was clearly improper and discreditable." The Tribunal shares the view according to which "grave procedural errors" may result in a denial of justice depending on the circumstances of each case' (footnotes omitted).[1025]

The procedural nature of denial of justice is in line with the obligation of the state to provide an adequate judicial system for the settlement of disputes. The adequacy of the dispute settlement procedures can only be tested with reference to whether or not the host state is able to protect the due process rights of the foreign investors. By excluding the substantive aspects of the dispute and focusing on the procedural aspects in order to establish a denial of justice, the international mechanism has afforded deference to domestic courts and protected the sovereignty of the state in so far as they are able to provide an adequate system of justice.

When determining the merits of the matter, either where the tribunal is constituted as a court of first instance as there are no effective domestic remedies or after finding that there has been a denial of justice there has to be increased judicial dialogue between the national and the international level. As indicated above, there is a growing trend among national courts to apply international law and interpret domestic statutes in conformity with international obligations.[1026] This is an important aspect of judicial dialogue as national courts citing the decisions of international tribunals may reinforce the interpretation of the international tribunal in the domestic legal order[1027] and by so doing may confer an element of legitimacy on the international tribunal's interpretation which is currently lacking in the international investment law regime.

The introduction of the exhaustion of local remedies rule increases the instances under which a national court is called upon to apply and interpret legal norms that have their basis in international law. As such, there is increased risk of contestation by the national courts.

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[1024] *Iberdrola S.A v Republic of Guatemala* ICSID Case No ARB/09/5 para 432.
[1025] *Philip Morris v Uruguay* para 500-501.
[1026] Peters, supra n 139 at 177.
[1027] Andre Nollkaemper *Conversations Among Courts: Domestic and International Adjudicators* (2013) at 2, available at: https://papers.ssrn.com/abstract=2270565 (accessed 23 January 2023).

Contestation refers to instances where national courts reject decisions of international courts and tribunals and opt for interpretations that may be irreconcilable with or are at odds with international decisions or opt for interpretations that are consistent with the standards that have been adopted by national courts of the host state. [1028] Judicial dialogue has been recognised as a means by which harmonisation of international law can be achieved over time, while at the same time limiting the instances of contestation by national courts.[1029] Preventing or limiting the instances of contestation is important for international (investment) law as the supremacy of international law cannot be sustained where international law lacks support at the domestic level.[1030]

As a result, there is a need to find a manner in which the international tribunal can review the decisions of national courts without aggravating the backlash that is currently facing international law. This can be achieved by the international tribunal also engaging in some form of judicial dialogue that recognises the decisions of national courts where these decisions are compatible with international law and making use of these decisions in their judgements. Despite the numerous differences that may exist between national courts and international dispute settlement mechanisms, a court is a court and it is possible for one court to draw lessons from other courts.[1031] In determining when and how national court decisions may be relevant in international law, domestic principles may be made applicable in the international context 'through a process of abstraction, generalisation, and adjustment.'[1032]

In promoting judicial dialogue, Nollkaemper posed the question as to what should drive the international court in choosing some national court cases as building blocks for the interpretation and development of international law.[1033] In answering this question, this thesis proposes that when determining questions related to the interpretation and application of an international norm that has also been the subject of interpretation and application in a domestic case, the international tribunal may attempt to make use of interpretations that have been

[1028] Ibid at 13.
[1029] See generally Maria Papaioannou, 'Harmonisation of International Human Rights Law Through Judicial Dialogue The Indigenous Rights' Paradigm' (2014) 3 Cambridge Journal of International and Comparative Law 1037; Eduardo Ferrer Mac-Gregor', 'What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights' (2017) 30 *Harvard Human Rights Law Journa*l 89.
[1030] Nollkaemper, supra n 1027 at 16.
[1031] André Nollkaemper 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 *Chinese Journal of International Law* 301–22 at 308.
[1032] Ibid.
[1033] Nollkaemper, supra n 1027 at 30.

adopted by (other)[1034] national courts on the subject as a means to bolster or support the interpretation that has been adopted by the international tribunal. The tribunal can also make use of national court interpretations and develop them in accordance with principles of international law such that the basis of the international courts' interpretation is linked to an interpretation that has been adopted by national courts. The overarching guiding principle in determining whether or not to make use of an interpretation provided by domestic courts is that the interpretation is compatible with international law. The idea behind engaging in judicial dialogue in this manner is that where national courts are making an effort to adopt interpretations that are in line with international obligations, and where international courts recognise these interpretations, over time, both the national courts and international courts may reach a point of convergence that sees an increase in harmonisation of the interpretation and application of international law and reduces the instances of competition and contestation between the national and international courts.

This form of judicial dialogue where international courts also recognise the interpretations adopted by national courts is even more important in the context of the recommendations made in chapter 4 of this thesis. Chapter 4 advocates for states to negotiate IIAs taking into account their unique needs so that they do not bind themselves into agreements that may be contrary to their needs. As the national dimension plays a role in the creation of the treaties, the national dimension ought to play a role in the interpretation of the treaties, and where the national courts have on previous occasions engaged with the provisions at issue in a manner that is compatible with international law, there is sufficient basis for the international mechanism to acknowledge and engage with these interpretations where a dispute arises that has to be adjudicated at the international level. This form of judicial dialogue is further enhanced by the fact that the international level, also has to give deference to the interpretations of national courts on questions of the interpretation of domestic law.

In the premises, with respect to the allocation of competences, the position proposed by this thesis is that the national level must be given the opportunity to remedy any injuries occasioned by the host state conduct in accordance with the exhaustion of local remedies rule. The international level would play an oversight and review role where the local remedies are

[1034] The international tribunal may adopt interpretations that have been adopted by other national courts that have a similar background to the respondent domestic court as is done in the manner in which national courts look to interpretations of foreign courts that have similar backgrounds and have dealt with similar issues to find support for a particular interpretation.

unavailable or there has been a denial of justice and the international level would intervene and determine the issues on the merits.

### *5.2.3. Benefits of incorporating an exhaustion of local remedies rule*

As indicated above, the exhaustion of local remedies rule was designed to protect the state's sovereignty. It has been noted that, the exhaustion of local remedies rule is justified by practical and political considerations[1035] and as such, can be an effective tool to remedy some of the practical and political issues that have arisen with the use of ISDS. The ability of investors to have direct access to an international remedy ultimately undermines the authority of national courts to settle investor state disputes and perpetuates negative stereotypes against national courts by investors and against ISDS by stakeholders.[1036] This thesis argues that the incorporation of an exhaustion of local remedies rule can be an effective way to balance the need for investor protection with the sovereignty of the state as well as govern the relationship between the national and international levels of governance. The rule ensures that states are given an opportunity to remedy the harm alleged by the investor and provides investors with the opportunity to seek redress before international tribunals where the local remedies are not available or unable to provide an effective remedy. While there has been piecemeal application of the exhaustion of local remedies rule in newer generation IIAs to curb the negative perceptions and impacts of ISDS, the general inclusion of an exhaustion of local remedies requirement in international investment law would go a long way in improving the perceptions and acceptance of ISDS.

Mandating the use of the exhaustion of local remedies rule could provide impetus for host states to improve their national legislation, build the capacity of their national courts and strengthen their judicial systems.[1037] This is because foreign investors would not be bound by the exhaustion of local remedies rule where the remedies are ineffective or unavailable, and this would act as a means by which states are encouraged to improve the state of their domestic courts where these are found to fall short of providing an adequate remedy. This would not

[1035]Udombana, supra n 950 at 3.
[1036]Maria Rocha, Martin Dietrich Brauch & Tehtena Mebratu-Tsegaye 'Advocates Say ISDS Is Necessary Because Domestic Courts Are "Inadequate," But Claims and Decisions Don't Reveal Systemic Failings Columbia Center on Sustainable Investment', *Columbia Center on Sustainable Investment*, 2021, available at: https://ccsi.columbia.edu/news/advocates-say-isds-necessary-because-domestic-courts-are-inadequate-claims-and-decisions-dont (accessed 11 October 2022).
[1037] Richard C Chen, 'Bilateral Investment Treaties and Domestic Institutional Reform' *Columbia Journal of Transnational Law* 586.

only be beneficial for investors (both foreign and domestic) but improve overall access to justice and strengthen local judicial systems.

The inclusion of exhaustion of local remedies rule also allows for the settlement of disputes through domestic courts that are created in line with national constitutions that are subject to control mechanisms and are therefore viewed as being more determinate, more accountable and more legitimate[1038] in comparison to tribunals that are created on an ad hoc basis with no oversight authority. As opposed to trying to create an entirely new legitimate system at international level, it would be much easier to make use of the already existing domestic court system, whose existence, structure and use is already accepted as having perceived legitimacy.[1039] It would address the concern that ISDS functions as a form of international judicial review without the backing of any constitutional system.[1040] By grounding ISDS within the framework of the national court system, it will be seen as a part of the national system for the settlement of disputes and can, by extension, be conferred with legitimacy and acceptance that is already enjoyed by national courts. The national courts and international mechanisms will not be seen as competitors working against each other, but as one whole unit aimed at ensuring the effective resolution of investment disputes.

Further, by making the review function of the international mechanism dependent on the existence of a denial of justice, the instances under which an international tribunal would be in a position to set aside and interfere with the decisions of the domestic court would be significantly limited and only applied in cases where the state would have failed to fulfil its international obligation with regard to provision of access to justice to foreign investors. As illustrated above, the threshold to establish the existence of a denial of justice is a high one and a significant amount of deference is afforded to the national courts, thereby protecting the sovereignty of the state and the sanctity of national court decisions, while at the same time affording foreign investors recourse where an inadequate judicial system exists. This creates a system of checks and balances between the national and international level as the national

[1038] George K Foster 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2010) 49 *Columbia Journal of Transnational Law* 201–67 at 249.
[1039] Filiz Kahraman, Nikhil Kalyanpur & Abraham L Newman 'Domestic courts, transnational law, and international order' (2020) 26 *European Journal of International Relations* 184–208 at 189.
[1040] Daniel Kaldermis 'Back to the Future: Contemplating a Return to the Exhaustion Rule' in Jean E Kalicki & Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*1 ed (2015) 310–43 at 334.

courts are afforded room to carry out their functions and the international mechanism is granted power to intervene where there has been a fundamental failure by the national level to perform.

National courts also serve as 'sites for endogenous' change in that they can redefine participating actors and shape critical norms.[1041] This would be beneficial for international investment law as there have been calls for greater participation of other stakeholders in the investment dispute settlement process as most domestic courts allow for the participation of all interested parties in a matter. In this regard, the use of national courts and the exhaustion of local remedies can provide access to justice and a remedy for all affected parties and provide for the enforcement of domestic investor obligations as provided for in Chapter 4.[1042]

Further, its ability to shape norms within the constitutional framework of the state would provide a basis for more acceptable interpretations of the protections that can be offered to investors.[1043] In most domestic legal systems, primary remedies are used when action is directed against governmental acts.[1044] Primary remedies are preventative, and are devised to avoid or prevent future loss or injury and encompass the acts of rescission, declaratory actions and orders of mandamus.[1045] Within domestic legal systems, secondary remedies which involve the award of monetary redress for governmental acts are awarded where primary remedies would not be available or would be inadequate.[1046]

This is in contrast with the international investment law system where secondary remedies in the form of large amounts of damages are the default remedy with no use of primary remedies.[1047] With the introduction of the exhaustion of local remedies rule, primary remedies on the national level would be the first option and where these have failed, then secondary remedies of damages at the international level would be available. The interplay of both primary and secondary remedies would address the concerns of excessively high damages awards that have become common place in investor state disputes while ensuring that foreign investors retain an effective means of attaining a remedy.

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[1041] Kahraman, Kalyanpur & Newman, supra n 1039 at 185.
[1042] Chapter 4 section 4.3(d).
[1043] This would be in response to criticisms regarding the interpretation of treaty provisions by arbitral tribunals who are far removed from the local realities of the host state and its citizens.
[1044] Anne Van Aaken 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 721–54 at 724.
[1045] Ibid.
[1046] Ibid.
[1047] Ibid at 746.

The use of domestic remedies would also inadvertently address the concern raised with multiple proceedings.[1048] This is because a majority of national laws already have mechanisms in place to address and prevent the occurrence of multiple proceedings. Many systems of domestic law generally apply a no reflective loss principle to shareholder claims.[1049] In domestic law systems, shareholders can only claim for the direct injury to their rights as shareholders but cannot claim for any injury that has bene occasioned on the company. In the English Supreme Court in the case of *Prudential Assurance v Newman Industries* [1050] the court stated that:

> ‘what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a “loss” is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only “loss” is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a three per cent shareholding.’

The court in *Sevilleja Garcia v Marex Financial Ltd*, upheld the rule of no reflective loss claims and stated that the basis of this rule was to: prevent double recovery and was supported by the fact that there was no causation between the actions of the wrongdoer and the harm to shareholder, noting that the shareholders harm would have been caused by the failure of the company to seek redress and to avoid conflict of interest and preserve company autonomy.[1051]

In South Africa, the Supreme Court in *Itzikowitz v Absa Bank Ltd* held that the underlying principles that find application with regard to the rule preventing reflective loss are, first, that a company has a distinct legal personality, secondly, that holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company and, in the light thereof, a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived.[1052]

This viewpoint was also followed in the matter of *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* where the Court held that,

> ‘Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset

[1048] Chapter 2 section 2.3(b)(i).
[1049] Gaukrodger, supra n 277 at 8; Richter, supra n 266 at 410.
[1050] (No. 2) [1982] 1 Ch 204.
[1051] [2018] EWCA Civ 1468.
[1052] [2016] ZASCA 43 para 9.

> value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action.'[1053]

As such, shareholders would not be able to make claims before domestic courts. This would prevent the likelihood of similar actions being brought by both the shareholder and company thereby doing away with multiple proceedings being brought by similar or related parties.

An additional facet of the domestic courts character to deal with the concerns of multiple proceedings is in the application of the 'once and for all' rule. As noted in Chapter 2, multiple proceedings can also arise in instances where one investor only initiates parts of their claim before one tribunal and initiates other parts of their claim before different tribunals to increase their chances of success.[1054] This kind of behaviour is frowned upon by the domestic courts of most states. For example, stemming from English law, the South African courts have entrenched the application of the 'once and for all' rule in claims for damages. According to the common law, the once and for all rule mandates that all losses arising from the same facts and the same cause of action must be claimed in one action.[1055] It entails that a plaintiff may not bring more than one claim for damages insofar as the action is based on the same cause of action.[1056] The ability of the once and for all rule to deal with multiplicity of proceedings has been set out in domestic case law discussing the same. In the case of *Evins v Shield Insurance*, this Court restated the once and for all rule as follows,

> '[The once and for all rule] is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. Closely allied to the "once and for all" rule is the principle of *res judicata* which establishes that where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. . . Similarly, the defence of *lis alibi pendens* is designed to prevent the institution of a second action between the same parties in respect of the same subject-matter and based upon the same cause of action while another such action is already pending'.[1057]

The same principles have been entrenched in a number of decisions for example the court in *Olesitse NO v Minister of Police* found that,

[1053] (1423/2018) [2020] ZASCA 83 para 21.
[1054] See chapter 2 section 2.3.1.
[1055] L Steynberg '"Fair" mathematics in assessing delictual damages' (2011) 14 *Potchefstroom Electronic Law Journal (PELJ)* 1–37 at 3.
[1056] Andre Mukheibir '(Mis)understanding the Once-and -for -all Rule: Member of The Executive Council for Health and Social Development, Gauteng v DZ obo WZ 2018 (1) SA 335 (CC)' (2019) *Obiter* 252–62 at 252.
[1057] [1980] 2 All SA 40 (A) 835B-D.

> 'the once and for all rule was considered and the court held that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. The court explained the *ratio* underlying the rule is that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*. The rationale in our law is to prevent inextricable difficulties arising from discordant or conflicting decisions due to the same suit being aired more than once in different judicial proceedings or actions. Furthermore, the rule has its origin in considerations of public policy, which require that there should be a term set to litigation and that an accused or a defendant should not be twice harassed in respect of the same cause. [1058]

Domestic courts have already developed rules and mechanisms that can effectively deal with the concern of multiple proceedings such that the use of the exhaustion of local remedies rule will deal with the occurrence of multiple proceedings. In order for a claimant to initiate their claim before the international mechanism, they ought to have first exhausted domestic remedies. As only the company has the right to initiate claims for loss it has suffered, only the company will have the right to approach the international mechanism. As such, to a larger extent multiple proceedings will have been dealt with at the stage of the domestic dispute.[1059] This is also in line with the multilevel governance principles already described where the lower levels of governance due to their capabilities and capacities are left to deal with certain issues that may arise in the dispute.

In determining the balance that ought to be struck between the protection of state sovereignty and the protection of investors, it must be noted that it would not be ideal to have a system of complete deference to national courts decisions in a bid to protect sovereignty, neither would it be ideal to have a system of no deference in a bid to afford foreign investors protection. There has to be a middle ground where some deference is granted to host state national courts without completely depriving investors of access to an international mechanism. The proposals made in this chapter seek to achieve that balance; allowing the national level to resolve investment disputes does not deprive foreign investors of their investment protections and allowing the international level to intervene where the national level cannot perform or has failed to provide an adequate system of justice does not constitute an unwarranted level of interference. As such, the incorporation of exhaustion of local remedies rule has the potential to address a number of concerns that have been raised with regard to ISDS including concerns regarding the erosion of state sovereignty that has been raised by host states, concerns regarding the preferential

[1058] (470/2021) [2022] ZASCA 90 (15 June 2022) para 19.
[1059] There remains the question of multiple proceedings where the claimant has approached the international mechanism directly because the host state does not have effective remedies or may have waived the exhaustion of local remedies requirement. The prevention of multiple proceedings arising in this instance will be dealt with in Chapter 6.

treatment accorded to foreign investors over domestic investors, strengthens the functioning of domestic courts and limits the tensions between the national and international level with regard to the settlement of investment disputes. It would signify a move away from a fight for exclusive competence over the settlement of investment disputes to a system of shared competence and co-operation in line with the spirit of the multilevel governance framework. It would also do away with the need to create an appellate mechanism at the international level thereby narrowing down the options for reform at the international level.

## 5.3.CONCLUSION

This chapter set out to answer the question of how the competence to settle investment disputes should be allocated between the different levels of governance. This question is an important one as is it instructive in creating a harmonious relationship among the various levels of governance, but also has an impact on the legitimacy of the dispute resolution process, its acceptance by stakeholders and the reform option that should be adopted. Traditionally, ISDS was created to replace the role played by domestic courts in the settlement of disputes that arise between an investor and a state. This conception of dispute settlement may have contributed to the legitimacy crisis that has arisen in ISDS particularly regarding the respect of state sovereignty and ensuring equal treatment between domestic and foreign investors.

The multilevel governance framework has been used to address this concern as it is capable of not only determining an equitable allocation of competence but also ensures that the allocation results in the development of a harmonious and beneficial relationship among the various levels of governance.

The principle of subsidiarity provides a starting point in that it dictates that a subordinate institution must be responsible for taking a decision and only where the subordinate institution is incapable then the superordinate institution can intervene. It is on this basis and after analysis of the current ISDS framework and the role of national courts in the same, that this thesis proposed that the national level through its domestic courts ought to be responsible for investor state disputes, and where the national level was not capable of providing a remedy, then the international mechanism would intervene. In practice, it is recommended that this could be achieved by the incorporation of the exhaustion of local remedies rule into international investment law. The exhaustion of local remedies rule would ensure that in the first instance, the subordinate institution, being the domestic courts of the state would be responsible for the settlement of investment disputes and where the state was not capable of providing an adequate remedy, the superordinate institution, being the international mechanism would intervene. The relationship between the two levels of governance would be a complimentary one of mutual assistance.

In this scenario, the role of the international mechanism would be twofold. The international mechanism could be approached by an investor who has exhausted local remedies but remains dissatisfied with the outcome and can illustrate that the proceedings in the domestic courts amounted to a denial of justice. Where successfully established, the international mechanism would then be able to interfere with the decision reached before the national courts and render a new decision. An aggrieved investor would also be able to have direct access to the international mechanism where they are able to show that complying with the exhaustion of local remedies rule would be ineffective, futile or unduly prolonged.

The author is of the view that the incorporation of the local remedies rule would signify a shift from the current state of competition for the competence of dispute resolution to a state of shared competence and assistance between the various levels of governance. It also affords sufficient deference to the national level but still ensures that investors can receive redress where they have been aggrieved by the conduct of the state. Further, it ensures that the reform options that are adopted at the international level are compatible with the sovereignty re-assertion efforts that have been taking place at the other levels of governance.

As noted, the exhaustion of local remedies rule is directed by practical considerations. This is evident in the benefits that have been identified with the use of the rule. By their very nature, domestic courts contain rules and mechanisms to address a wide range of procedural issues that arise in dispute settlement including access to court and prevention of multiple proceedings. As is evidenced by the ISDS system, some of these rules may be difficult to effectively incorporate at the international level. Introducing the exhaustion of local remedies rule inadvertently provides a mechanism for addressing some of the procedural concerns that arise even at the international level. By dealing with these issues at the domestic level, the international level also enjoys insulation from the same. This speaks to the interdependence and inter-connectedness of the different levels of governance as advocated by this thesis, where they are able to work together as in a ‘five-storey house’ to achieve common objectives.

Having established the allocation of competence between the national and international level, it would then need to be determined what method of dispute settlement should be adopted as the mechanism for the settlement of investment disputes at the international level. Chapter 6 seeks to explore the options available and make recommendations on the same that would be compatible with the recommendations made in this chapter.

# CHAPTER 6: IDENTIFYING THE MECHANISM FOR THE SETTLEMENT OF DISPUTES AT THE INTERNATIONAL LEVEL

## 6.1.INTRODUCTION

In addition to the lack of incorporation of the national level as discussed in the previous chapter, chapter 2 also identified the continued use of international arbitration, the lack of access to justice and the occurrence of multiple proceedings as some procedural deficiencies that exist in the international investment law system that are not adequately addressed by current reform efforts. The previous chapter concluded with the recommendation that a complementary relationship should exist between the national and international levels of governance, with the national level being vest with the primary responsibility for the settlement of disputes, and the international level intervening when the national level is incapable of fulfilling its role. The next stage in the process of reform would be to ascertain what dispute settlement mechanism can be used at the international level for the resolution of investor state disputes that will, in addition to the concerns already under discussion under Working Group III, also address the additional concerns identified above.

While the current ISDS procedures may slightly vary across IIAs, most IIAs make provision for a combination of conciliation, mediation and arbitration or just make provision for recourse to arbitration.[1060] The contentious aspect of these dispute settlement procedures relates to the use of international arbitration as a binding mechanism to resolve disputes between the host state and the investor.[1061] While other mechanisms can be provided for in IIAs, this thesis is limited to exploring reform options that result in a binding decision that is enforceable against the respondent. There have been significant concerns that have been raised with the perceived privatisation of dispute settlement with the growth of alternative dispute settlement mechanisms.[1062] The concerns that have arisen in respect of the use of international arbitration to settle investor- state disputes have already been outlined in Chapter 2. There is a need for a

[1060] Susan Franck ‘chapter 9: Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements’ *Appeals Mechanism in International Investment Disputes* (2008) 143–192 at 152 available at:
https://digitalcommons.wcl.american.edu/facsch_bk_contributions/152?utm_source=digitalcommons.wcl.american.edu%2Ffacsch_bk_contributions%2F152&utm_medium=PDF&utm_campaign=PDFCoverPages.
[1061]See generally Maria Laura Marceddu & Pietro Ortolani ‘What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments’ (2020) 31 *The European Journal of International Law* 405–28.
[1062] Chris Gill et al ‘Designing consumer redress: a dispute system design (DSD) model for consumer-to-business disputes’ (2016) 36 *Legal Studies* 438–63 at 438.

dispute settlement mechanism that can address the concerns that have arisen with the use of investor state arbitration and provide an effective method for the settlement of investment disputes.

Having a properly designed dispute resolution system can constructively draw conflict to the surface, channel its productive forces and avoid more potentially destructive by- products.[1063] The approaches that parties can use for the settlement of disputes are using power to impose a solution, relying on legal rights to determine the merits of the parties' position and focusing on the parties underlying interests to create mutually acceptable solutions that meet the party's needs. [1064]

Scholars suggest that many dispute resolution systems start with a power-based approach and eventually move towards a right- based methodology and ultimately adopt an interest based conflict management system.[1065] This evolution can be seen within the context of the settlement of investment disputes, as it has moved from a power- based approach (within the era of diplomatic protection), to a rights based approach (as provided for in IIAs) and may well advance to an interest based approach in response to the current backlash.

While there seems to be consensus that there is a need to reform the system to provide a more effective dispute settlement mechanism, the question as to the manner of reform remains unanswered.[1066] This chapter of the thesis seeks to answer that question. Section 6.2 will provide an overview of the general features of the MIC that make it suitable to address the concerns identified by Working Group III. In order to build on these features so that the MIC is not merely an entrenchment of the current system but also achieves the type of fundamental reform required to change the system, section 6.3 will propose some design features that can be incorporated into the international investment law dispute settlement in addition to those already identified in the previous section. The incorporation of these design features will be aimed at ensuring that real reform that focuses on all issues is achieved. Section 6.4 will conclude.

[1063] Susan Franck 'Chapter 9: Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements' *Appeals Mechanism in International Investment Disputes* (2008) 143–192.
[1064] Ibid. see also, Melinda Jone 'A dispute systems design evaluation of the tax dispute resolution system in the United States and possible recommendations from Australia' (2018) 16 *eJournal of Tax Research* 56–86 at 60.
[1065] Susan Franck 'chapter 9: Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements' *Appeals Mechanism in International Investment Disputes* (2008) 143–92 at 146.
[1066] Schill, supra n 130 at 1.

## 6.2.GENERAL FEATURES AND STRUCTURE OF THE MIC

Institutional design has a significant role to play in the success and acceptability of an international organisation.[1067] In order to determine the institutional design for the mechanism for the settlement of investment disputes, the starting point would be to determine the principles and values that are guiding the reform effort so that these principles and values dictate the institutional design of the dispute settlement mechanism. By so doing, a dispute settlement mechanism that aligns with the guiding principles and values and can meet the needs of stakeholders is developed.

When considering institutional design, two features are of particular importance for the survival of any international organisation or institution, that is centralisation and flexibility.[1068] Centralisation is important as it enables the actors to manage uncertainties and external pressures that an international organisation may face.[1069] The ability of international organisations to adjust and respond to external pressures is dependent on its internal institutions and their ability to co-ordinate and communicate between participants.[1070] As such, the more centralised the institution is, the more likely it is to be able to adapt to external pressures. This aspect of institutional design goes hand in hand with the multilevel governance principle of ensuring strong processes that allows for national and regional systems to work together.[1071]

The second aspect of institutional design is flexibility. Flexibility has been described as one of the most important aspects of institutional design as it is the primary way to deal with differences that may arise within the international organisation, ensures the ability to adjust to changing environments and face new demands from domestic institutions or clusters of states.[1072] Flexibility goes hand in hand with the multilevel governance principles of acknowledging the differences that exist within and between states and ensuring that this diversity is embedded in the architecture of the global governance system and is an intrinsic feature of the global community and not an exception to the general rule.[1073] The only way in

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1067 Maria Josepha Debre & Hylke Dijkstra ‘Institutional design for a post-liberal order: why some international organizations live longer than others’ (2021) 27 *European Journal of International Relations* 311–39 at 312.
1068 Ibid.
1069 Barbara Koremenos, Charles Lipson & Duncan Snidal ‘Rational Design: Looking Back to Move Forward’ (2001) 55 *International Organization* 1051–82 at 1054.
1070 Ibid; Debre & Dijkstra, supra n 1067 at 314.
1071 See chapter 3 section 3.2(a).
1072 Debre & Dijkstra, supra n 1067 at 315; Koremenos, Lipson & Snidal, supra n 1069 at 1054.
1073 United Nations (ed), *Global Governance and Global Rules for Development in the Post-2015 Era: Policy Note* (United Nations 2014) viii.

which diversity can be embedded in institutional design is through flexibility that will allow the institutional design to accommodate the differences that exist between states, while still providing coherence within the design which will be brought about through centralisation.

In addition to the above, it is important to also ensure legitimacy in the reform option that is chosen. The ability of global governance systems to enforce rules and solve problems in an effective way lies heavily on the systems acceptance as a legitimate actor as viewed by the stakeholders of the system.[1074]

This chapter proposes the use of the core aspects of institutional design, being centralisation and flexibility to determine the design of the MIC with the values and principles of global governance and multilevel governance, being used to flesh out the design of the dispute settlement mechanism.

The following sections will illustrate how these values and principles can be utilised to implement features in the MIC that will address specific concerns that have been raised with the use of investor-state arbitration and bring overall legitimacy to the system for the settlement of investor state disputes. The establishment of a MIC is a significantly difficult process that requires a complete overhaul of the current system and the buy in of a large number of states in order to make the project viable.[1075] In light of this, there are a number of aspects that would have to be negotiated and implemented so that the MIC can replace investor state arbitration as the method for the settlement of disputes. The areas for discussion regarding the implementation of the MIC are vast and cannot be fully discussed in the context of this thesis. This thesis will therefore focus on recommendations that will assist in addressing the concerns that have been identified in chapter 2 of this thesis and propose features that can be implemented in the MIC to address those concerns.

Within the proposals for a MIC, there are various forms that the court can take, each with its own implications on the institutional design of the MIC. The proposals for a MIC have been championed by the European Union and its member states. To this end, the EU has put forth a proposal for the establishment of a MIC before Working Group III.[1076] The proposal suggests

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[1074] Ingo Take 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 *Swiss Political Science Review* 220–48 at 221.

[1075] Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer Nature 2020) 2.

[1076] UNCITRAL Working Group III Investor state dispute settlement 37th session, Possible Reform of investor state dispute settlement Submissions from the European Union and its Member States A/CN.9/WGIII/WP.159/Add.1 (hereinafter UNCITRAL WG III Submissions from the EU) the creation of a first instance and appellate tribunal both made up of qualified and tenured judges, with ethical and diversity requirements, an appointment process for judges which consists of both nomination by contracting parties and application by individual candidates, provision for state-to-state dispute settlement and the possibility for submissions by non-disputing third parties.[1077] The proposal also provides for enforcement through the New York Convention and this pre-supposes that the proposed court will make use of arbitral procedures in determining its cases.[1078] Working Group III has built on these suggestions[1079] and has issued a report that focuses on the possible structure of the MIC either as a framework convention with protocols or a single convention with annexes,[1080] how to achieve coherence and flexibility in the application of reform efforts,[1081] its scope of application with existing treaties[1082] and a possible structure of the MIC.[1083]

It is noted that the main features of the MIC, being a standing court, with permanent judges ethical, qualification and diversity requirements are similar across various proposals of the MIC. At its 39th Session, Working Group III noted that the actual architecture of the multilateral instrument would be considered once there was clarity on the reform option to be pursued.[1084] As such, the proposals made herein go beyond the proposals already before Working Group III as they seek to propose specific institutional design features that can be incorporated into the MIC that will be aimed at addressing a wider range of concerns beyond those tabled under Working Group III.

The starting point is to create a centralised institution for the settlement of investment disputes. It would take the form of an international organisation on the basis of a treaty with its own

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1077 UNCITRAL WG III Submissions from the EU para 3.
1078 Ibid.
1079 UNCITRAL Working Group III Investor State Dispute Settlement Reform 43rd session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.221.
1080 UNCITRAL Working Group III Investor State Dispute Settlement Reform 43rd session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.221 3.
1081 UNCITRAL Working Group III Investor State Dispute Settlement Reform 43rd session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.221 4.
1082 UNCITRAL Working Group III Investor State Dispute Settlement Reform 43rd session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.221 7.
1083 UNCITRAL Working Group III Investor State Dispute Settlement Reform 43rd session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.221 11.
1084 UNCITRAL Working Group III Investor State Dispute Settlement Reform 39th session, Possible reform of investor state dispute settlement multilateral instrument on ISDS reform: Note by the Secretariat A/CN.9/WGIII/WP.194 para 14.

organs and its own legal personality and allow for the accession of states, REIOs and territories with independent powers.[1085] There are significant examples for the creation of a centralised institution by way of treaty, with the signatory parties to the treaty gaining membership to the organisation and forming the plenary of the organisation.[1086] The plenary, made up of state parties to the treaty will be responsible for the running of the organisation such as the setting of secondary law including the rules of procedure, the appointment of permanent judges, setting the budget and the remuneration of judges.

The plenary would be supported by a secretariat, which would be responsible for administering the procedures, supporting the adjudicators, preparing translations and the general public relations of the organisation.

An independent judicial commission would be established to assist in the selection and appointment of judges as well as to administer disciplinary proceedings as shall be illustrated more fully hereunder. The independent judicial commission can be compromised of (former) presidents/vice presidents of major regional courts such as the African Court of Human and Peoples Rights, European Court of Justice, European Court of Human Rights, Inter American Court, International Criminal Court, International Court of Justice. In addition to these, there shall also be representatives from major international organisations such as International Judges Association and International Bar Association. This will allow for adequate representation of various stakeholders and expertise in determining the issues entrusted to the independent judicial commission.

An additional feature would be a ministerial commission made up of foreign ministers of member states or their equivalent who would be mandated to work on matters related to interpretation of treaty provisions.[1087]

The duties of these structures will be explored more fully below. Their incorporation into the MIC has been recommended so that there is legitimacy, transparency and accountability in the procedures of the MIC.

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[1085] Marc Bungenberg and August Reinisch (n 123) 4.

[1086] See for example in the WTO, for example, this Plenary Body is the Dispute Settlement Body (DSB), the General Assembly at the UN, the Assembly at the World Health Organization (WHO), the General Conference at the International Labour Organization (ILO) or the administrative council under ICSID. Bungenberg & Reinisch, supra n 183 at 32.

[1087] See section 6.3.2 (c) below.

### *6.2.1. Selection and appointment of judges*

As the MIC will be composed of permanent judges, the starting point in any judicial composition process is the selection and appointment process. The manner of appointment of judges has fundamental implications for the functioning and legitimacy of the judiciary and has been described as an important element in the establishment of a court.[1088] The presence of legally qualified, professional judges is a strong indicator of independence and is viewed as a guarantee against outside pressure.[1089] A corollary to independence and impartiality is the need for diversity among the judges.[1090] The need for a diverse judiciary has been acknowledged in a number of treaties and soft law instruments. For example, Art 36.8 of the 1998 Rome Statute provides that when appointing judges, the members shall consider the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of male and female judges. [1091] Solanke notes that, '[i[t is questionable whether a racially and ethnically homogenous court can ever be independent. In order to be wholly independent, the court must represent the diversity of its peoples.' When selecting judges, the MIC statute must provide representation requirements that are specifically targeted at remedying the concerns regarding lack of diversity among arbitrators. In particular, it must provide for geographical representation, gender representation and the representation of different legal systems of the world. This requirement on representation must also be a requirement in the nomination process undertaken by states. This will ensure that there is a diverse pool of candidates from which the selection of judges can be made, and the representation criteria applied.

As indicated above, the MIC's organisational structure will contain a plenary body that will be made up of member states that are signatory to the MIC. Each member state will have the option of nominating a maximum of three candidates for selection as judges of the MIC. In nominating candidates for appointment, the MIC statute will require states to engage in a transparent and fair selection process that is open to public scrutiny. While the determination

[1088] *Guðmundur Andri Ástráðsson V. Iceland*, Grand Chamber Judgement of 1 Dec 2020 no 26374/18 para 227.
[1089] *Maktouf And Damjanovic v. Bosnia and Herzegovina* Grand Chamber Judgement 18 July 2013 nos 2312/08 and 34179/08.
[1090] Diversity in this context refers to diversity of adjudicators in relation to gender, race, geography and legal background.
[1091] This inclusion of diversity is also included several other instruments in varying degrees for example Article 14.2 of the Protocol to the African Charter on human and Peoples Rights, Article 9 of the Statute of the ICJ, Article 3.2 of the International Tribunal of the Law of the Sea Statute, Article 2.2 of the Burgh house Principles on the Independence of the International Judiciary and the 2011 Resolution of the Institute of

of the exact procedure to be followed will be left to individual states, the requirement that the process be transparent and based on merit will contribute to ensuring that the nomination process does not taint the independence and impartiality of the potential judges. Following their nominations, candidates will be vetted by the independent judicial commission and a shortlist of candidates will be generated. The shortlisted candidates will undergo public interviews by the independent judicial commission. Interested stakeholders will be invited to make any comments regarding the interviewed candidates, based on the selection criteria which will also be made public. These comments shall be considered by the independent judicial commission who will thereafter make recommendations to the plenary body on which candidates to appoint. The plenary body will review the recommendations and by way of voting, select the candidates for appointment.

One of the major concerns that may arise against the appointment of judges by member states is that adjudicators appointed by states may be biased towards states as states would choose adjudicators that are more inclined to their cause. However, the author argues that by setting the selection of adjudicators in this manner, the system will take advantage of the two-step legitimation process that exists in the multilevel governance framework.[1092]

In the current context of international investment law, the state plays a dual role of home state (where its citizens seek investment abroad) and a host state (where it seeks to attract foreign investment). As such, the state representatives, duly appointed by elected officials, are the only entities within the international investment law framework that are mandated to represent the interests of more than one group of stakeholders. In determining strategies for the appointment of adjudicators, the state representatives would be representing the interests of local communities, investors, and national interests, and it is the convergence of these interest that will ensure that the representatives selected are well balanced. In addition to this, there is consensus on the fact that the appointment of judges by states does not necessarily inhibit independence and impartiality, especially where there are other safeguards that are put in place to counter the possibility. [1093] These additional safeguards will be discussed below.

[1092] See Chapter 3. section 3.2(b).

[1093] Biljana Braithwaite, Catharina Harby & Goran Miletic (eds) *Independence and Impartiality of the Judiciary: An Overview of Relevant Jurisprudence of the European Court of Human Rights* (2021) at 36. See also Article 10 of the UN Basic Principles on Judicial Independence Principle which allows for the use of any mode of selection of judges as long as there are safeguards to protect against appointment for improper reasons Montreal Declaration Universal Declaration On The Independence Of Justice https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf Article 2.14 which provides that '[p]articipation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments

### 6.2.2. *Independence and impartiality of adjudicators*

Majority of general universal and regional human rights instruments guarantee the right to a fair hearing before an independent and impartial court or tribunal.[1094] There are also a number of soft law instruments that have been enacted to give effect to and flesh out the scope and content of independence and impartiality.[1095] While these instruments were largely developed in the context of national court judges, these same principles of independence and impartiality can and have often been transposed into the context of the international court judge.[1096] The United Nations Basic Principles on the Independence of the Judiciary 1985 provide for the following aspects being independence of the judiciary, freedom of expression and association, qualification, selection and training, conditions of service and tenure professional secrecy and immunity and discipline, suspension and removal of the judges.[1097] While all these aspects of independence and impartiality are important, this section will focus on the qualification, selection and training of judges, the allocation of cases and discipline, suspension and removal of judges as being the core areas that the MIC will have to focus on in order to guarantee independence and impartiality.

Independence of the judiciary refers to freedom from external pressure when making judicial decisions and implies the existence of measures or safeguards that have been put in place to guard against undue influence on judges in the performance of their adjudicatory functions.[1098] The level of independence or dependence of judges will be assessed on the basis of the safeguards that have been put in place to secure their independence.[1099] One of the concerns that have been raised with regard to the EU ICS proposal, is the lack of information regarding

of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.' (accessed 10 May 2023).

1094 See for example Article 10 of the UDHR, Article 14.1 of the ICCPR, Article 7.1 of the ACHPR, Article 8.1 of the American Convention on Human Rights, Article 6.1 of the European Convention on Human Rights.

1095 See for example the 2004 Burgh House Principles on the Independence of the International Judiciary and the 2011 Resolution of the Institute of International Law: The Position of the International Judge, http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf.

1096 Paul Mahoney 'The International Judiciary - Independence and Accountability Selected Papers Presented at Lancaster House: The Conference on International Courts and Tribunals - The Challenges Ahead' (2008) 7 *Law and Practice of International Courts and Tribunals* 313–50 at 317; Ben Olbourne 'Independence and Impartiality: International Standards for National Judges and Courts' (2003) 2 *Law and Practice of International Courts and Tribunals* 97–126 at 121.

1097 Basic Principles on the Independence of the Judiciary 1985 adopted by the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders endorsed by the General Assembly.

1098 Braithwaite, Harby & Miletic, supra n 1093 at 33.

1099 Ibid.

the safeguards that are in place to ensure independence and this has raised concerns that state appointments would lead to bias in favour of states.[1100]

*a. Tenure and Discipline of judges*

These additional safeguards will be considered in the removability and discipline of the judges. As a starting point, all judges will be appointed for a fixed term and will not easily be removed from office. The security of employment for judges is an important factor in ensuring their independence,[1101] as their continued appointment is not based on the extent to which the judge can bend to the whims of the appointers. In addition to this, the judges will not be removable by the plenary as the power to make decisions relating to discipline and conduct of judges will be vest in the independent judicial commission. The independent judicial commission will also be vest with the power to determine rules governing the code of conduct of the judges, determine specific challenges of judges in relation to particular cases, and general issues and complaints of misconduct against the judges.

As part of its mandate, the independent judicial commission will be the body in charge of determining instances where a judge can be removed from office, including where the judge has become incapacitated or unfit to continue to hold office or gross misconduct. As a general rule, a judge will not be removed from office solely based on the dissatisfaction of a party or parties with a decision rendered by a judge. This freedom will allow the judges to act independently and impartially without fear or favour as their livelihoods are not being controlled by any of the parties to the dispute. This freedom also improves the perception of the judge's independence to the parties and general public as there are limited instances where a judge could be influenced by external powers.

In addition to this, the committee will have the power to sanction states or parties that are found to have interfered in the functioning of an independent and impartial judiciary for example

[1100] Katia Fach Gómez 'Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court' (2018) 17 *Law & Practice of International Courts & Tribunals* 78–97 at 88. Investment Treaty Working Group of the International Arbitration Committee, American Bar Association Section on International Law, Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal, October 14, 2016, 27–29, http://apps.americanbar.org/dch/thedl.cfm?filename=/IC730000/newsletterpubs/DiscussionPaper101416.pdf

[1101] See article 11 and 12 of the UN Basic Principles on the Independence of the Judiciary which provide that, '11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.'

through issuing financial penalties against offenders. These penalties could then be enforced through the clean hand's principle,[1102] in that, where a party has a pending financial penalty against them -they temporarily lose their right of appearance before the court until such a time as they have purged their non-compliance.

*b. Allocation of cases*

An additional safeguard in ensuring independence and impartiality would be in the allocation of cases to a particular bench. It is proposed that the MIC should make use of legal technology for the random assignment of cases. While the use of legal tech is generally a new phenomenon in the legal field and in the judiciary, the use of technology in this manner can be a way to improve efficiency, streamline procedures and enhance the independence and impartiality of the judiciary. The software used can be specifically programmed to consider various factors in the allocation of cases including availability of judges and diversity of the panel. The allocation software can also be linked to case management software for the seamless administration of cases by the registry.[1103]

Random assignment prevents parties from engaging in 'judge shopping' or from individual judges lobbying to hear certain cases as randomisation ensures that the outcome of the process cannot be influenced or predicted in advance.[1104] Random selection or assignment is a commonly used method to guarantee impartiality as there are limited loopholes which can be used to manipulate the process.[1105] In order for the use of software for the allocation of cases to promote independence and impartiality, the process must still be transparent and information regarding the method of allocation must be available not only to the judges but to the general public as well. Incorporating principles of security by design, which rely on transparency and auditability as powerful tools for implementing security features ensures that the random assignment mechanism complies with the necessary levels of transparency and accountability while maintaining protection against cyber-attacks which may undermine the integrity of the

[1102] See for a general discussion on the clean hands principle Agata Zwolankiewicz 'The Principle of Clean Hands in International Investment Arbitration' (2021) 3 *ITA in Review: The Journal of the Institute for Transnational Arbitration* 4–31; Patrick Dumberry 'The Clean Hands Doctrine as a General Principle of International Law' (2020) 21 *The Journal of World Investment & Trade* 489–527.
[1103] The use of electronic case management systems will be discussed in greater detail a s6.3.2.(d)(i) below.
[1104] Ori Aronson *Forum by Coin Flip: A Random Allocation Model for Jurisdictional Overlap* (2014) at 16, available at: https://papers.ssrn.com/abstract=2426134 (accessed 24 April 2023).
[1105] Diego Marcondes, Cláudia Peixoto & Julio Michael Stern 'Assessing randomness in case assignment: the case study of the Brazilian Supreme Court' (2019) 18 *Law, Probability and Risk* 97–114 at 3.

process.[1106] The characteristics of the randomisation procedures would include statistical soundness, procedural, cryptographical and computational security, complete auditability, open source programming multiple hardware platform and operating system implementation, user friendliness, transparency, flexibility and adaptability for the needs and requirements of multiple application areas.[1107] By implementing randomisation procedures on this basis, there can be greater impartiality in the decision making process and limit instances of real or perceived bias in the allocation of cases to particular judges.

By implementing the above-mentioned features into the MIC, the independence and impartiality of the judges is provided for as well as the promotion of diversity and representation, which is critical to fostering public respect in the dispute resolution procedure which in turn leads to more people making use of and accepting the outcomes of the dispute settlement procedures as they can trust in the guarantee of a fair hearing.

### *6.2.3. Interpretation as a tool for ensuring correctness of decisions.*

Due to the reciprocal nature of IIAs, home states have an interest in the interpretation and application of the provisions contained in IIAs. However, there have been concerns, whether perceived or real, that international justice, and investment arbitration in particular, is a tyranny of unaccountable foreign adjudicators who apply vague standards which they interpret in a manner that ignores the intention of the states, as the drafters of treaties.[1108] It is important for the state parties to IIAs that the judges in the MIC attach the correct interpretation to the provisions at issue. This could be achieved by making more room for the home state to participate in the interpretation process of the treaty.

In addition to allowing home states the right to make submissions in the dispute settlement process, treaty parties, could also make use of binding interpretative agreements to direct the way judges interpret treaty provisions. Most treaties are silent on the treaty parties' powers to issue interpretative texts on the treaty save for NAFTA which provides that the FTC can issue binding interpretive notes on NAFTA treaty provisions.[1109] By making use of binding interpretive notes, states, who are the masters of the agreement[1110] are able to provide greater

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[1106] Ibid 5.
[1107] Ibid 14.
[1108] Mahoney, supra n 1096 at 319.
[1109] Article 1131(2) of NAFTA.
[1110] Tarcisio Gazzini 'Beyond Protection: The Role of the Home State in Modern Foreign Investment Law' in Catharine Titi (ed) *Public Actors in International Investment Law* (2021) 19–36 at 22 available at: https://doi.org/10.1007/978-3-030-58916-5_2.

clarity on the scope and content of treaty provisions such that investors will be in a position to exercise their rights, and judges to exercise their adjudicatory power subject to the interpretations that would have been adopted by the treaty parties. The court in *ADF Group Inc. v United States,*[1111] held that the use the interpretive note was an "authentic and authoritative" source of instruction as to what the parties had intended in the conclusion of NAFTA.[1112] The use of interpretive notes by the treaty parties would also be in line with Article 31(3) of the VCLT which provides that when undertaking treaty interpretation, the tribunal shall take into account subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions.[1113] For the appropriate weight to be placed on treaty parties interpretive notes, provisions providing for the rights of the state parties to the treaty to issue interpretive notes should be incorporated into IIAs. These provisions would also set out the binding effect of any interpretive notes issued by the parties.

In addition to the above, treaty parties would form a ministerial commission that would be tasked with reviewing the interpretations reached by judges in respect of any of the substantive provisions provided for in IIAs. The ministerial commissions would then make recommendations to the state parties on the potential impact of any interpretations adopted by judges. By so doing state parties would be able to either expressly adopt the interpretations produced by judges as defining the meaning of any substantive provisions or reject the same as having a far-reaching effect not intended by the parties. This would also assist in countering the instances of judges discounting interpretations provided by the home state and respondent state in their submissions in a dispute.

For example, in *Infinito Gold v Costa Rica*, the tribunal rejected the interpretation offered by the respondent and home state, which was evidence of the parties' subsequent agreement on the meaning of the FET standard. The tribunal opined that submissions made in the context of disputes should be discounted if adverse to the claimant's interests.[1114] In *Eco Oro v Colombia*, the respondent and home state provided detailed submissions, including on their (shared)

[1111] ICSID Arb (AF)/001/1 par 177.
[1112] This approach was also adopted by the tribunal in Methanex v United States, where the tribunal endorsed the use of interpretive notes as providing clarity on the proper intention of the parties in concluding the treaty.
[1113] For a discussion on the use of Article 31(3) of the VCLT see generally Anthea Roberts 'Power and Persuasion In Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *The American Journal of International Law* 179–225.
[1114] *Infinito Gold v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021), para 339 wherein the tribunal held that '[t]he submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an agreement as just described over the interpretation of the BIT.'

interpretation of the general exceptions clause. The tribunal, however, disagreed with their interpretation, on the basis that if the parties had intended a particular interpretation, they would have incorporated it into their treaties, even though the state parties made their intentions abundantly clear in their respective submissions.[1115] In *Philip Morris v Uruguay*, when the respondent host state sought to rely on the home state's interpretation of an identical provision in another BIT, which corresponded with its own interpretation, the tribunal dismissed it on the basis that it would raise due process concerns.[1116] The ministerial commissions would be in a position to prevent such instances from occurring through adopting binding interpretations that would ensure the parties interpretations are given effect to. This could be achieved by assessing the submissions made by both the home and respondent state in a dispute, and where there are significant points of convergence, propose their incorporation into the text of the treaty. This would also be the case, wherein the corresponding interpretations were raised in different matters. The ministerial commissions would identify instances where treaty parties' advance interpretations on similar provisions albeit in different cases. These would serve as the basis for negotiating binding interpretations between treaty parties regarding a particular provision.

The procedure of the ministerial commission would be open and transparent to the public and allow stakeholders to make their comments and recommendations regarding any interpretations under discussion or to propose interpretations that ought to be reviewed. This ensures that this process is not only state centred, but also reflects the needs and concerns of other stakeholders as well ensuring that the interpretations issued are well- balanced and issues of concern can be dealt with prior to the adoption of the binding interpretations.

The use of interpretive agreements in this manner comes with the concern that treaty parties could issue interpretations that are aimed at unduly limiting the protections enjoyed by investors or reject interpretations by tribunals that are aimed at fulfilling the aims of the treaty. In this regard, the treaty party would only be able to adopt interpretations that are in line with the spirit and purport of IIAs and would not be allowed to adopt interpretations that would render any right enjoyed by an investor in the IIA completely ineffective. In instances where an investor can show that the treaty interpretation adopted by the treaty parties has rendered its protections ineffective or has been implemented for the sole purpose of avoiding liability in respect of a particular issue, the judges would not be bound by that interpretation but rather

[1115] *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras 826–37.
[1116] *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016), para 476.

have the discretion to give effect to the spirit and purport of the treaty considering the entire treaty. This approach would be in line with the requirement that treaties are to be interpreted in a manner that gives effect to the objects and purpose of the treaty.[1117] When giving effect to the objects and purpose of the treaty, the judges will have to engage in a balancing exercise and ensure sufficient protection for both the states and investors. [1118] This creates a more balanced relationship in the interpretation of treaty provisions to give effect to the treaty as a whole.

In order to balance the relationship between judicial decisions and the authoritative nature of the interpretations adopted by the ministerial committee and administrative council, the MIC statute could incorporate a rule similar to that of Article IX (2) of the WTO Agreement which provides that only the ministerial conference and the general council have the exclusive authority to adopt interpretations of the Agreement. In this regard, the relationship between decisions of the Dispute Settlement Body and the ministerial interpretations was clarified in *US- Foreign Sales Corporation* where it was held that, '[t]he distinction between an authoritative interpretation and an interpretation made in dispute settlement proceedings is made clear in the WTO Agreement. Under the WTO Agreement, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the DSU, the rulings and recommendations of the DSB serve only "to clarify the existing provisions of those agreements" and "cannot add to or diminish the rights and obligations provided in the covered agreements.'[1119]

The use of interpretations by treaty parties in this manner would lead to greater clarity in treaties and limit the discretion of the judges in providing unintended interpretations.

## 6.3. ADDITIONAL DESIGN FEATURES NECESSARY TO ADDRESS BROADER CONCERNS

[1117] Article 31(1) of the Vienna Convention on the Law of Treaties.
[1118] This is in light of the recommendations made in Chapter 4 regarding the introduction of preambular text that recognises the State's right to regulate as well as the state's sovereignty, and the inclusion of an express right to regulate and investor obligations balances the purpose of the IIA such that the sole focus is not on investor protections.
[1119] *United States Tax Treatment of Foreign Sales Corporations* Appellate Body Report WT/108/AB/R 24 February 2000 page 40 FN 127.

The MIC can be a useful tool to address the entirety of concerns that have arisen with investor state dispute settlement. The systems that are necessary to reform ISDS are inherent in permanent court systems. As noted by UNCTAD,

> 'a standing investment court would be an institutional public good serving the interests of investors, states and stakeholders…[i]t would go a long way to ensure the legitimacy of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of adjudicators. However, this solution would also be the most difficult to implement as it would require a complete overhaul of the current regime through co-ordinated action by a large number of states.'[1120]

However, when implementing the MIC, it is important that it is not a tool that will be used to entrench the flaws of the already existing system. Alvik finds that while an investment court may

> '[B]e a step in the right direction … the creation of a permanent court however will not by itself satisfy the legitimacy challenge posed by the present procedural architecture of the investment regime, whereby it functions as a substitute for domestic courts and a parallel legal regime with reserved access for foreign investors.'[1121]

In the same vein Odumosu-Ayanu notes that,

> '[I]f what a court would add is people with expertise in diverse areas of the law such as human rights, security of tenure, and resolution of other relevant procedural issues without addressing the relationship between the market and the socio-political realities in domestic spaces, it will not add much. It would lead to a system that retains investment protection as its focus and retains the investor-State framework, with the change being the forum of adjudication.'[1122]

The purpose of this section is to propose additional features that must be incorporated into the MIC so that it can also address broader issues that are plaguing the ISDS system.

Despite advocating for the establishment of an MIC, this thesis departs from the entrenched view that the mode of dispute settlement utilised by the MIC must be arbitration. As already identified in chapter 2, arbitration is not suitable for the settlement of investment disputes nor is it suitable for the kind of reform that is required to adequately address the concerns of ISDS. The use of arbitration as the mode of dispute settlement and existing arbitral rules of various institutions will not be compatible with the other recommendations made herein and will undoubtedly work to entrench the already existing system. As such, this thesis proposes the use of judicial settlement as the mode of settlement of disputes as opposed to arbitration. The core goal of a judicial system is to provide a forum in which they can obtain justice through the

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[1120] UNCTAD (2013) Reform of investor-state dispute settlement: in search of a roadmap. IIA Issues Note No. 2, June 2013.
[1121] Ivar Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) 31 EJIL 289 311.
[1122] Odumosu-Ayanu, supra n 509 at 807.

correct application of the law to legal disputes.[1123] Secondly, the goal of the courts is to handle peoples matters in ways that lead them to accept to be bound by the decisions of the court.[1124] The effectiveness of the courts in managing conflicts is their ability to issue authoritative decisions that direct the behaviour of current and future litigants.[1125] Courts also want to retain and even enhance public confidence and trust in the courts, judges and the law in order to maintain the legitimacy of the dispute settlement system.[1126] This is true for all courts but more especially in the re-design of ISDS as these are the goals that the new system ought to aspire to achieve. Tyler notes that how people are treated in the process of dispute settlement has a much greater impact on the individual perception of the court than the actual outcome of the case.[1127] Key elements that are necessary for a fair procedure are that the decision-making is viewed as being neutral, consistent, rules based and without bias; that the parties rights are acknowledged and considered and that the parties have an opportunity to make representations, i.e. being given an opportunity to explain their views about the dispute and how they think the dispute should be resolved.[1128] The quality of the decision making process and the treatment of parties, coupled with the a fair procedure leads to the achievement of legitimacy, which in turn produces compliance and cooperation with the system.[1129] The following design elements speak to these achievement of these fundamental goals.

### *6.3.1. Access to the court*

While the incorporation of the exhaustion of local remedies rule will rebalance the system by requiring all parties to make use of the same dispute settlement process and ensure that local communities are able to effectively participate, there is still a need to rebalance the circumstances at the international level of governance. As investors are able to have a remedy at the international level, it is equally important that local communities and other affected stakeholders have the same remedy within the confines of the international investment law system. This is necessary because while there are a significant number of benefits to the incorporation of exhaustion of local remedies, this does not answer all the issues that have

[1123] Tom R Tyler 'Procedural Justice and the Courts' at 26.
[1124] Ibid at 27.
[1125] Ibid at 26.
[1126] Ibid.
[1127] Ibid.
[1128] Tom R Tyler 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283–357 at 300.
[1129] Ibid at 307.

arisen and may arise in the context of international investment disputes. As noted by Laryea, there may be instances where local remedies are inadequate requiring recourse to international mechanisms.[1130] This is inherently noted in the design of the exhaustion of local remedies rule which takes into account that sometimes-local remedies may not be available or effective, however, this does not detract from the implementation of the rule as discussed in chapter 5.

Access to justice is sustainable development goal 16 and Target 16.3 of the SDGs seeks to achieve the promotion of the rule of law at the national and international level and ensuring equal access to justice for all.[1131] Access to justice has also been identified as the third pillar of the UN Guiding Principles on Business and Human Rights which enshrine the duty of the state to provide for access to a remedy for the adjudication and enforcement of business and human rights claims.[1132] Access to justice has also been recognised by the former Special Rapporteur on Extreme Poverty and Human Rights who has urged states to include the elimination of inequality in access to justice viewing this as a vital feature of human centred social and economic development. [1133] In this regard it is necessary that local communities are also able to access the international mechanism in designing the reformed international dispute settlement system.

This section of the thesis is concerned with procedural access to justice which focuses on the process by which claims are adjudicated in legal systems.[1134] Procedural access to justice can include the types of institutions that are created to deal with claims and complaints, the rules that govern the claims, complaints and conduct of the parties once the claim is submitted, the mandate of given institutions and the factors which influence that nature and quality of the entire process. [1135] Directly linked to the concept of access to justice is the right to an effective remedy. The right to an effective remedy speaks to the ability of an affected individual to obtain

[1130] Emmanuel T Laryea 'Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845 at 2852.
[1131] United Nations Department of Economic and Social Affairs Sustainable Development https://sdgs.un.org/goals/goal16 (accessed 10 October 2023).
[1132] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect Remedy" Framework 2011 HR/PUB/11/04 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 11 October 2023).
[1133] M Sepulveda 'Equality and Access to Justice in the post 2015 Development Agenda.
[1134] Virginie Rouas *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (2022) at 28 available at: https://directory.doabooks.org/handle/20.500.12854/100153.
[1135] Ibid.

reparation or compensation for a loss suffered.[1136] The right to a remedy has two core elements being process and outcome with rights holders being central to the entire remedy process.[1137] As such, in order to achieve effective reform that addresses the broader challenges of ISDS and promotes the achievement of sustainable development there is a need for the MIC to be accessible to all individuals that may be affected by investment activity or investment regulation and that the MIC must be able to provide an effective remedy.

Chapter 4 of this thesis made recommendations for the creation of host state obligations in respect of local communities and host state citizens regarding investment, obligations for the foreign investor so that their investment activities do not cause harm to the local communities, the host state or the environment and rights for the host state in recognising their regulatory power.[1138] The recommendations in chapter 4 sought to effectively regulate the different relationships that come into play with the use of FDI. In this regard the rights holders are no longer just foreign investors but also the host states and the citizens of the host state. All these actors therefore ought to be given an opportunity to enforce their rights through an equal and accessible dispute settlement process.

In addressing the inequalities in access to ISDS that have been raised as a criticism against the current system,[1139] the question of the jurisdiction of the proposed international mechanism for the settlement of disputes becomes very important. Jurisdictional provisions of dispute settlement bodies are considered to be some of the most important as they determine who can bring matters to the court and what types of cases the court will hear.[1140] The jurisdictional mandate of the MIC will determine if the ISDS reform process is reformist in that it seeks to make changes to legitimise the current system or whether the reform process is non-reformist in that its goal is to achieve genuine change that questions the underlying presumptions of the system that exclude important stakeholders from the system.[1141] As this thesis has adopted a non-reformist stance,[1142] the recommendations on the jurisdiction of the court are aimed to make the court as accessible as possible to all affected parties. Of particular importance to the issues that have been traversed by earlier chapters of this thesis are the components of subject

[1136] Ibid at 29.
[1137] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises UNDOC A/72/162 (18 July 2017) para 13-17.
[1138] See Chapter 4 section
[1139] See Chapter 2 section 2.5.2(b).
[1140] Robert Wundeh Eno 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *Afrcan Human Rights Law Journal* 223–33 at 224.
[1141] For a general discussion on reform and retrenchment see Gathii & Mbori, supra n 107; Heath, supra n 107.
[1142] See chapter 1 section 1.7.

matter (ratione materiae) and personal jurisdiction (ratione personae). The jurisdiction of the international court can be said to be delegation of the state's power to adjudicative authority over certain individuals and specific cases.[1143]

When ensuring the right of access to justice and the right to an effective remedy, there must be provision made for affected parties to bring claims directly seeking redress, reparation and compensation for any harm done or loss suffered. There must also be provision for third parties to intervene in a dispute where their interests stand to be affected by the decision of the court. To give effect to this, the MIC should allow for various parties to have standing before the court. As signatories to the instrument establishing the MIC as well as signatories to IIAs, state parties should be able to make use of the MIC. This will also allow for states to be able to institute claims and counterclaims against errant investors where they have violated their obligations as provided for in IIAs.

The MIC should also make provision for individuals- both natural and juristic persons, to have direct access to the court. This will allow foreign investors to still be able to approach the court as in traditional investor state dispute settlement but also allow affected third parties that same access. Allowing individuals access to the court will provide a mechanism through which local communities and other affected stakeholders can directly approach the MIC and have access to an international mechanism for the enforcement of their rights. This will resolve the problem, where affected local communities would often find themselves without an effective remedy within the international investment law system to have their rights protected. It is submitted that the availability of the MIC which local communities can directly petition to seek reparation or enforcement of their rights would go a long way in ensuring the protection of local communities both at the national and international levels of governance. It also addresses the idea that ISDS is a privilege only accessible by foreign investors. By extending the right of access to local communities and other affected stakeholders, the MIC ensures that the dispute settlement mechanism works for a wide range of stakeholders.

The MIC will therefore have jurisdiction to hear complaints arising from the interpretation and application of IIAs, as well as complaints concerning rights violations that have been committed in the course and scope of foreign investment activity or in the regulation of foreign

[1143] Yuval Shany *Questions of Jurisdiction and Admissibility Before International Courts* (2016) at 27 available at: http://0-search.ebscohost.com.innopac.wits.ac.za/login.aspx?direct=true&AuthType=ip&db=nlebk&AN=1105181&site=ehost-live&scope=site.

investment activity by a state where these complaints are be submitted by a state party [1144](1st state party) or a natural and juristic person of the 1st state party against another state party (2nd state party) or the natural and juristic persons of the 2nd state party that are carrying on investment in the territory of the 1st state party.

When a dispute or the outcome of a dispute impacts the rights and interests of others, procedures must be in place to determine those interests and how the process can accommodate and adjudicate them. [1145] The general rule, especially in most domestic legal systems is that the law should require meaningful participation in the dispute resolution process for any person that has been affected by that process. [1146] According to Francioni,

> '[i]n international law, as in any domestic legal system, respect and protection of rights can be guaranteed only by the availability of effective judicial remedies. When a right is violated, access to justice is of fundamental importance for the individual and it is an essential component of the system of protection and enforcement of human rights.' [1147]

In ensuring that affected interested parties can have access to the dispute settlement mechanism article 10 of the WTO Dispute Settlement Understanding (DSU) makes provision for the participation of third parties. In particular, Article 10 of the WTO DSU makes express provision for the consideration of the interests of affected Members in determining a dispute, allows for parties with a substantial interest in a matter to have an opportunity to be heard, make written submissions and receive submissions made by other parties. [1148] In terms of the WTO dispute settlement process, third parties have substantial rights that go beyond what is afforded to amicus curiae. In the US- Shrimp case, the appellate body held that,

> '…only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions…'[1149]

Further, in order to ensure full and effective participation of interested parties, the dispute settlement body has on occasion granted enhanced participation rights to third parties, even where there disputing parties objected to such participation. For example, in the case of EC

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[1144] State party refers to a state that would have signed and ratified the constitutive treaty of the MIC.
[1145] Frank J Garcia & Brooke S Guven 'Designing a Multilateral Investment Court for Porcedural Justice' (2023) 24 *Journal of World Investment & Trade* 461–86 at 471.
[1146] Ibid.
[1147] Francioni, 'The Right of Access to Justice in Customary International Law' 1.
[1148] Article 10 of the WTO Dispute Settlement Understanding.
[1149] Appellate Body Report US- Shrimp WT/DS58/Ab/R para 101.

Bananas III, third parties made requests to have greater access to the dispute settlement process by having the right to attend all panel meetings, receive copies of all written submissions and other documents and to be allowed to present written submissions at both the 1st and 2nd panel meetings. [1150] As there was no consensus between the parties as to whether third parties should be granted enhanced rights, the panel had to determine the question and held that third parties would be entitled to enhanced participation rights including being allowed to observe the subsequent meetings of the panel, make brief oral submissions and respond to questions posed in the first meeting. [1151] In coming to this decision, the panel considered: (i) the economic effect of the disputed EC banana regime on certain third parties which appeared to be very large; (ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC; (iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and (iv) the parties to the dispute could not agree on the issue. [1152] As a consequence of the ruling, the third parties in EC Bananas III enjoyed broader participatory rights than are granted to third parties under the DSU.[1153]

Further the decisions of the WTO dispute settlement body have often operated to favour third party participation. For example, the WTO dispute settlement body has adopted a wide definition of the 'substantial interest requirement noting that the interest need not be legal, nor does it have to be an economic interest. The WTO has accepted as third parties, states with a systemic interest in the dispute.[1154] As noted by Busch and Reinhardt, the recognition of systemic interests allows states to raise broader and more axiomatic concerns regarding the dispute that may be of benefit to a wider audience and not just the parties.[1155]

In the context of international law, it is possible for the rules of dispute settlement bodies to respect and promote the effective participation of affected parties in accordance with the limits provided for in their rules. These rules need not be overly restrictive especially when it comes to the participation of third parties, as the trend has been to promote the participation of interested third parties in the proceedings.

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[1150] European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC Bananas III) WT/DS27/R para 7.4.
[1151] EC Bananas III para 7.8.
[1152] EC Bananas III para 7.8.
[1153] EC Bananas III para 7.8.
[1154] Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products WT/DS98/R 21 June 1999 para 7.13.
[1155] Marc L Busch & Eric Reinhardt 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58 *World Politics* 446–77 at 452.

In addition to providing direct access to the MIC for individuals, there is also a need for the rules of the MIC to make provision for parties with an interest in a dispute between two parties to be able to intervene in the dispute and have their interests taken into account. The above discussion illustrates that it is possible, within the international law system, to grant enhanced participation rights to parties that may be negatively affected by the outcome of a dispute. This is necessary within the international investment system as a dispute between a foreign investor and a host state can have far reaching impacts beyond the two parties and can affect the rights and interests of other parties. It would therefore be important that the MIC also allows for enhanced third party rights where a third party may want to intervene in a dispute. This will ensure that where a dispute arises between a host state and a foreign investor, which dispute has implications for other members of the community, they will be able to participate in the dispute settlement proceedings and have their interests taken into account prior to a decision being made.

By ensuring access to the court in this manner, there is a shift from international investment law being a system which protects the rights of a select group of people to realising that many stakeholders can be affected by host state regulation regarding investment and by investment activity thereby providing all affected parties with equal remedies before the law.

### *6.3.2. Interpretive power of the court*

The increase in investor state arbitrations has led to a growing increase in the overlap between investment obligations and environmental, human rights and other international obligations.[1156] This may cause conflicts between the different branches of international law where more than one branch of international law is implicated in the investment dispute. The integration of non-investment values that are protected by other fields of international law (which often limit or affect foreign investment) into the international investment law system has rarely been considered by arbitral tribunals and where they have been considered, it has been done in an unpredictable manner.[1157] This has led to the fragmentation of international law with calls to

[1156] Moshe Hirsch, 'Interactions between Investment and Non-Investment Obligations in International Investment Law' ILA Committee on International Law on Foreign Investment (206) 3.
[1157] For example, in Compania del Desarrollo De Santa Elana v Mexico ICSID Case No ARB/96/11 the tribunal did not consider or analyse the submissions of the state regarding its international environmental obligations which ought to have been balanced with its international investment law obligations. At footnote 32 the tribunal noted that "[f]or this reason, the Tribunal does not analyse the detailed evidence submitted regarding what the Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elana property." See also Tecmed S.A v The United Mexican States ICSID Case No ARB (AF)/00/2 para 121.

rebalance the system to allow for the consideration of broader public international law in the settlement of investor state disputes.

The creation of the MIC presents an opportunity to address this. This section explores the ways in which the MIC can play an active role in addressing the fragmentation of international investment law so that the interpretations adopted by the judges of the MIC do not impede the ability of states to fulfil their other international law obligations.

To address this concern, the subject matter jurisdiction of the court becomes important. The MIC must be empowered to interpret the substantive rules contained in IIAs considering general international law and considering any other relevant treaties that are applicable between the State parties.[1158]

Such a provision would grant the judges of the MIC the authority to interpret and apply the provisions contained in IIAs, in a manner that is consistent with the rights and obligations contained in other relevant lex specialis thereby giving effect to the protection of host states policy space, the rights of individuals affected by investment activity and the harmonisation of international law. This will mean that even where there are no express provisions incorporating protections found in other international law regimes into IIAs, these can still be considered in the settlement of investment disputes with due regard being had to the same. Approaching the interpretation of IIAs in this manner, will show that the achievement of investment objectives and economic growth need not come at the expense of other equally important international obligations. This however would not allow for the inclusion of all rules of international law in the interpretation of IIAs. The clause making provision for subject matter jurisdiction in this matter would be limited to treaties that are relevant to the dispute and that are applicable between the state parties, i.e., that have been ratified by both state parties to the IIAs.[1159]

This process of harmonisation through interpretation is known as systemic integration which is based on two presumptions. The first being that international law provides the framework for addressing questions which the treaty at hand does not resolve.[1160] The second presumption being that States do not intend to act inconsistently with general international law or with pre-

[1158] This approach is not foreign to African treaty practice as Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights not only empowers the African Court to deal with issues arising from the African Charter but also from other relevant international treaties that have been ratified by the parties.

[1159] See for example similar limitations in Article 3(1) of the Protocol on the African Court and a discussion on the same in Eno, supra n 1140.

[1160] Johannes Hendrik Fahner & Matthew Happold 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) *ICLQ* at 749.

existing treaty obligations.[1161] The principle of systemic integration finds its legal basis in Article 31(1)(3)(c) of the VCLT which provides that when interpreting treaties, any relevant rules of international law applicable in the relations between the parties shall be taken into account.[1162] The provision for extended subject matter jurisdiction, coupled with the use of Article 31 (1)(3)(c) of the VCLT would allow the MIC judges to be able to consider other rules of international law such as human rights or environmental rights in the resolution of an investment dispute.

It is important to note that the judges would not be applying another treaty to determine the questions raised in the dispute but rather employing a tool to interpret the treaty that it is obliged to apply.[1163] Care needs to be taken to ensure that the distinction between direct application of external treaty provisions to resolve the dispute and the use of external treaty provisions to interpret the applicable treaty is maintained. An example of this form of interpretation can be found in *Tulip v Turkey* where the ad hoc committee found that:

> 'Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation.' [1164]

A conclusion that can be drawn from the decision of the ad hoc committee is that if resort to human rights law is legitimate to interpret references to procedural issues in the ICSID Convention, it seems equally legitimate to resort to human rights law in interpreting the substantive provisions of investment treaties.[1165]

Extending the courts subject matter jurisdiction and interpretive power in the constitutive treaty of the MIC and resorting to systemic integration, the applicable law as determined by the parties does not operate to exclude a wide range of considerations that ought to be considered when settling investments disputes. In this way, the harmonisation of international investment law with non-investment treaties can thus be achieved making use of the framework of the MIC.

### 6.3.3. *Making use of de facto precedent*

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[1161] Fahner and Happold (n 1098).
[1162] Campbell McLachlan, "The principle of systemic integration and article 31(3)(c) of the Vienna Convention" International & Comparative Law Quarterly (2008) 54.
[1163] Fahner and Happold (n 1098) 750.
[1164] *Tulip Real Estate Investment and Development v Netherlands B.V v Turkey* ICSID Case No. ARB/11/28 Annulment Proceeding para 92.
[1165] Fahner and Happold (n 1098).

There is a commonly held view that the doctrine of precedent does not form a part of international law as the general rule is that judgements rendered by international courts and tribunals are only binding on the parties to the dispute. [1166] However, despite general acceptance of the lack of a binding rule of precedent in international law, there has emerged in practice a trend by which international courts, by way of practice, follow their prior decisions, and this has come to be understood as a de facto precedent.[1167]

De facto precedent refers to the normative authority that international courts and tribunals place on their past decisions irrespective of the existence of a legal norm to that effect.[1168] This normative authority that is vest in judicial decisions enhances their perceived legitimacy amongst stakeholders and has a positive impact on their acceptance of the legitimacy of judicial decisions.[1169]

There are varying levels of precedent that have been identified being binding precedent, presumptive deference where respectful consideration is given to prior decisions that are followed if possible, persuasive precedent which is followed where the court is convinced of the reasoning of the judgement or where the jurisprudence has been developed as part of *jurisprudence constante*, which treats a line of cases as precedent as opposed to individual decisions.[1170] While not applying previous cases as having binding de jure precedent, international courts have frequently treated their past decisions as if they set precedent for new decisions.[1171] There have been a number of reasons that have been advanced for this occurrence, the main reasons being the recognition among international courts on the need for coherence and predictability within the system, enhance the degree to which their decisions are perceived as being legitimate and avoiding the fragmentation of international law.[1172] This reasoning is illustrated in a number of decisions of international courts and tribunals. In the *Continental Shelf* case, the ICJ held that 'the justice of which equity is an emanation, is not

[1166] Hans Mahncke & Anne Scully-Hill 'The Emergence of the Doctrine of Stare Decisis in the World Trade Organization Dispute Settlement System' (2009) 36 *Legal Issues of Economic Integration* 133–56 at 133. See also Article59 of the ICJ Statute which provides that a decision of the Court is only binding between the parties.
[1167] Raj Bhala 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' (1999) 14 *American University International Law Review* 847–956.
[1168] Niccolò Lanzoni 'The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case' (2022) 2 *The Italian Review of International and Comparative Law* 296–322 at 300.
[1169] Ibid.
[1170] Chanya Punyakumpol The Evolution and Current Status of Stare Decisis in International Trade and Investment Tribunals: How to Understand the Present by Looking into the Past, CTEI-2019-02, Working Paper at 11.
[1171] Yonatan Lupu & Erik Voeten 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413–39 at 413.
[1172] Ibid.

abstract justice, but justice according to the rule of law, which is to say that its application should display consistency and a degree of predictability even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it, to the principles of more general application.'[1173] In determining what the court in Continental Shelf *supra* meant, Judge Elaraby in *Armed Activities on the Territory of the Congo,* in a separate opinion explained that in the Continental Shelf case, the ICJ intended to emphasise that there is a desire for consistency and stability in the courts case law when the court is dealing with legal issues which have been before it in previous cases. [1174] in Genocide Croatia v Serbia, the court held that,

> 'To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.'[1175]

As a result of the manner in which judges of the ICJ treat their previous decisions, ICJ advisory opinions have developed into a strong authority in international law.[1176]This line of reasoning has also been adopted in other judgements where the court explicitly acknowledges the importance of consistency and treating like cases alike and the significant amount of deference that the court gives to its own judgements.[1177] This approach has also been adopted by other international courts who in their judgements explicitly acknowledge the importance of consistency by following prior decisions of the court where similar matters have been decided by the court.[1178] As noted by Punyakumpol regarding the WTO dispute settlement body, '[i]n a highly centralised international trade regime, the Appellate Body follows the de facto rule of precedent quite religiously.[1179] In *US- Oil Country Tubular Goods Sunset Review* the Appellate Body held that, 'following the Appellate Body's conclusions in earlier disputes is

[1173] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgement 3 June 1985 ICJ Reports (1985) 13 para 45.
[1174] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* Dec 1995 ICJ Reports (2005) 168 Separate Opinion of Judge Elaraby 332 para 19.
[1175] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide {Croatia v. Serbia),* Preliminary Objections, Judgment, /ICJ Reports 2008, p. 412, para. 53.
[1176] Niccolò Lanzoni 'The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case' (2022) 2 *The Italian Review of International and Comparative Law* 296–322 at 320.
[1177] See for *example Legality of the Use of Force (Serbia and Montenegro v Germany)* Preliminary Objections Judgement 15 December 2004 ICJ Reports (2004) 720 766 where the court held that consistency is the essence of judicial reasoning especially regarding closely related case.
[1178] See for example the decision of the *ICTY Zlatko Aleksovski* appeal judgement 24.03.2000 (IT-95-14/1-a) para 107f where it was held that in the interests of certainty and predictability, the tribunal should follow its previous judgements but should be free to depart from them for cogent reasons in the interests of justice such as when the previous decision has been decided on the basis of wrong legal principles.
[1179] Punyakumpol, supra n 1170 at 27.

not only appropriate, but is what would be expected from panels especially where the issues are the same.'[1180] In Japan- Alcoholic Beverages II, the Appellate Body found that

> '[a]dopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.'[1181]

In *United States- Final Anti-Dumping Measures on Stainless Steel from Mexico*, it was held that,

> 'It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decadendi in the previous Appellate Body Reports adapted by the DSB…Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'[1182]

It is much easier for permanent dispute settlement mechanisms to embody a de facto doctrine of precedent that is necessary for the development of a coherent and predictable body of jurisprudence that quickly stabilises.[1183] This is in contrast to the decisions of investor-state arbitral tribunals who have often noted that they are not bound in any way by the decisions of other tribunals, with limited de facto application of precedent such that any consistencies are not by design but rather by chance. When determining whether a court is suitable for the introduction of a rule on (de facto) precedent, the following characteristics are taken into account: the existence of a centralised system, whether there is a need for like cases to be treated alike, the desire for certainty in law, the need for rationality in decision making and an extensive system of law reporting.[1184] These requirements are met within the proposal for the MIC. The MIC will be based on a centralised system with permanent judges and a secretariat, there is a need for like cases are decided in the same manner so as to address the concerns of investor state arbitration where like cases were not decided in the same manner, and the increased transparency that will be adopted in the MIC making law reporting the rule rather than the exception. As such, a rule that makes provision for some form of precedent can be incorporated into the MIC statute. One way of doing this, is making judicial decisions a source of law, [1185] and by making use of practice directives that emphasize that while a decision is

[1180] Appellate Body Report, US Oil Country Tubular Goods Sunset Reviews para 188.
[1181] Appellate Body Report Japan-Alcoholic Beverages II. p 14 DSR 1996:1 97 at 108.
[1182] United States- Final Anti-dumping Measures on stainless Steel from Mexico Appellate body Report WT/DS344/AB/R 30 April 2008 para 158-160.
[1183] Punyakumpol, supra n 1170 at 27.
[1184] Mahncke & Scully-Hill, supra n 1166 at 137–9.
[1185] For example, see Article 38 of the ICJ statute,

only binding between the parties, where a question of law has arisen, with similar facts, circumstances and parties as has been decided before, the court is enjoined to follow its previous judgements but is also free to depart from them for cogent reasons in the interest of justice. By so doing, a rule of precedent that is compatible with general international law is incorporated that will ensure predictability and consistency while at the same time making room for any deviations should it be necessary.

It is noted here that in Chapter 4, recommendations were made for the incorporation of investor obligation provisions using national laws.[1186] This diversity of national laws might bring about the apprehension of further fragmentation and inconsistency in the jurisprudence arising from the MIC leading to more unpredictability. The desire for consistency as used in the context of this thesis and in scholarly writings on the subject relate to the treatment of 'like cases.[1187] The recommendations made in the broader context of the thesis are compatible with achieving consistency and predictability between like cases. '

As a starting point, investor obligations provided for in national laws of the host state will be determined by the national courts of the host state. Most states already make use of the principle of *stare decisis* in some form and as such, consistency and predictability are maintained in the jurisprudence of national courts. Where a host state has to apply the domestic law of the home state, the courts of the host state are bound to interpret and apply the national laws of the home state in the same manner that it would have been applied in the home state, therefore maintaining consistency and predictability between home and host state courts regarding the application of a particular rule. By granting national courts with the exclusive competence to determine the interpretation of investor obligations, the international mechanism will apply domestic law in the same manner that it has been applied in either the host or home state. This manner of application of national law will ensure that like cases relating to the application of a particular national law principle will be dealt with in the same manner at both the international and national level thereby achieving the desired level of consistency and predictability.

In this regard, it must be noted that national laws from different countries can be interpreted differently from each other, as this acknowledges the different national law systems and

[1186] See chapter 4 section 4.4(b).
[1187] See for example, David M Howard, 'Creating consistency through a world investment court' (2017) 14 *Fordham International Law Journal* 1 27; Giovanni Zarra, 'The Issue of Incoherence in Investment Arbitration: Is there a need for systemic reform?' (2018) 17 Chinese Journal of International Law 137 151; Silvia Karina Fiezzoni, 'Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries' (2012) 7 Frontiers of Law in China 521 537-541. See also a discussion of the same at Chapter 2 section 2.4(a) of this thesis.

policies, and this differential treatment does not fall into the ambit of the concerns regarding consistency and predictability that this thesis seeks to address.

Despite this, due to the nature of the international court system, many judgements have emphasised the importance of consistency and predictability in litigation to ensure that like cases are treated alike.

### *6.3.4. Prevention of multiple proceedings*

As set out in Chapter 5, through the application of the rules that already exist in domestic court systems because of the introduction of exhaustion of local remedies rule, issues related to multiple proceedings are dealt with.[1188] There is a need for rules at the international level that are aimed at preventing the occurrence of multiple proceedings.[1189] The premise of this thesis is dependent on the use of the multilevel governance framework to develop a symbiotic relationship between the international and national levels of governance. As noted by Ratner, it is possible for the domestic law to influence international law, a concept which he describes as the upstream flow of influence.[1190] The upstream flow reflects the reality of international law making that States bring their own experiences and policy preferences as reflected in domestic law when they negotiate international treaties. [1191] Parties to a treaty can employ concepts from domestic law as an inspiration for norms where international law lacks them, which process can lead to the development of very detailed rules at the international level.[1192]

While traditional investor state arbitration has attempted to deal with the question of multiple proceedings through the application of the principle of res judicata (which is also a domestic law principle that has been accepted as a general principle of international law), there has been difficulty in applying the rule in practice to prevent multiple proceedings. This has arisen because of the application of the triple identity request that requires the same parties, the same object and relief and identical legal grounds.[1193] Within the context of investor state arbitration, the requirements of the triple identity can be difficult to meet because where a shareholder and a company institute parallel proceedings (as in the CME and Lauder arbitrations), the parties

[1188] See Chapter 5 section 5.3.3.
[1189] As noted in Chapter 2, the absence of a framework to address the question of multiple proceedings has arisen in a number of submissions by governments and yet sufficient time has not been devoted to this aspect in the reform discussions.
[1190] Ratner, supra n 385.
[1191] Ibid at 2.
[1192] Ibid at 22.
[1193] Jose Magnaye & August Reinisch ‘Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration’ (2016) 15 *Law & Practice of International Courts & Tribunals* 264–86 at 275.

being the shareholder in one case and the company in the other, are considered as being different legal personas thereby falling short of the identity requirement. Further, where the proceedings are instituted under different IIAs, the legal grounds for the dispute would be considered as legally distinct. As such it would be difficult to meet all three grounds for the application of the triple identity test.

While some tribunals have adopted a more flexible approach regarding the application of the triple identity test,[1194] there has not yet developed a *jurisprudence constante* regarding the manner of application of the triple identity test thereby perpetuating inconsistencies in arbitral jurisprudence.

This thesis therefore proposes the incorporation of other rules that are applied in national courts that can be applied at the international level in a consistent manner that will address the concern of multiple proceedings. As already discussed in chapter 5, the incorporation of the exhaustion of local remedies inadvertently addresses the concerns of multiple proceedings due to the existence of rules to deal with such instances albeit at the domestic level. Based on this, the thesis proposes the incorporation of the once and for all rule and the rule against shareholder claims for reflective loss into the procedural rules of the MIC. The incorporation of these rules will do away with the strict requirements of the triple identity test. For example, in applying the rule against claims by shareholders for reflective loss, due regard is given to the fact that shareholders are different legal personalities from their company's and as a result of these different personalities, shareholders cannot claim for loss that has been directly suffered by the company. As such, where the shareholder seeks to institute parallel proceedings in the MIC, the question ceases to focus on whether the parties are identical as in the case of res judicata, but rather focuses on whether the shareholder has a right to bring the claim. If, as in the application of the rule against reflective loss the answer is in the negative, that would be the end of the matter, thereby effectively terminating the parallel proceedings.

In dealing with multiple proceedings brought under different BITs based on the same facts, the once and for all rule again shifts the focus from the form of the underlying causa to a question of the substance of the claim, i.e., whether the claim under the different BIT has arisen from a different cause of action. Where the claim under the different BIT arises from the same cause

[1194] See for example *Apotex Holdings v. United States* ICSID Case No. ARB(AF)/ 12/1, Award, 25 August 2014, para 7.58. For a discussion of these cases see Magnaye & Reinisch, supra n 1193.

of action as the previous claim, the subsequent or parallel claim will be disallowed on the basis that the claimant ought to have made all their claims under the initial complaint.

Applying these rules in the settlement of investment disputes ensures that a claimant does not get multiple attempts to seek redress for the same conduct thereby protecting the rights of the respondent but still safeguards the rights of the claimant to approach the court. It also limits the instances where the MIC will issue conflicting decisions as all matters arising from the same cause of action will be dealt with at once.

*6.3.5 Limitations on the exercise of judicial discretion*

When allocating dispute resolution powers to the MIC, due care has to be taken to put in place mechanisms that allow for the proper exercise of discretion by international adjudicators. The exercise of judicial discretion cannot be completely eradicated because this exercise of judicial discretion, even in the context of international courts is at the heart of the institutional and social function known as judgement.[1195] The recommendations made in this thesis, while allocating some adjudicative power to the international level of governance, also incorporate mechanisms that can be used to constrain the exercise of judicial discretion in the adjudication of international investment disputes.

In describing the exercise of judicial discretion, Ford notes that

> 'Judges doubtless spend most of their time applying well-established law to disputed circumstances of fact, but while there is judgment and discernment involved in such endeavors, such activities do not involve the articulation of new legal norms. Where judging excites the imagination, pricks the conscience and excites passions of all varieties, is in the rarer cases where real law is made, new precedents set, and new rules established where before different ones-or none-clearly existed. This is the exercise of judicial discretion. Not surprisingly, its exercise remains deeply controversial.'

As noted by Ford, discretion is normally applied in areas where there may be gaps or uncertainties in the law. In the context of international investment law, gaps arose *inter alia* in the applicability of human rights provisions in international investment law, in interpreting the right to regulate, the acceptance of submissions on non-parties (amicus curiae) and the relationship between the different levels of governance. [1196] The recommendations made in this thesis serve to limit the instances of gaps and uncertainties occurring by making express provision for the applicability of human rights and sustainable development,[1197] providing

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1195 Christopher A Ford 'Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"' 5 *Duke Journal of Comparative and International Law* 35–86 at 35.
1196 See discussion on the same in chapter 2 of this thesis.
1197 See Chapter 4 section 4.3(c) and 4.3(d).

clarity on the right to regulate,[1198] clarifying the relationship between the national and international levels both in terms of substance and procedure,[1199] and providing access to the court for all affected stakeholders.[1200] While this does not cater to the wide range of possible issues where judges may have to exercise their discretion, expressly providing for the rules to be applied in the above mentioned scenarios limits the gaps and uncertainties in the law and sets the parameters within which the exercise of discretion ought to be applied.

In describing methods that can be applied to constrain the exercise of judicial discretion, Ginsburg notes that international courts have interdependent law-making power in that their interpretations of international law are constrained by the preferences of states and other actors.[1201] State parties are able to use their 'voice' to constrain the exercise of judicial power by being able to overrule the court interpretation by making use of formal interpretations.[1202] This thesis makes express provision for the use of states and stakeholders voices to constrain the exercise of judicial power. Though the use of the ministerial commission[1203] which is designed to be a multistakeholder process, states and other affected parties are able to expressly accept and formally adopt interpretations of the judges of the MIC or decline the same as not reflecting the true intention of the parties.

In addition to this, the incorporation of the exhaustion of local remedies rule limits the actual use of adjudicative power that is exercised by the court. This is because the requirement of exhaustion of local remedies favours the settlement of disputes through national court systems in the first instance, with the MIC only exercising its judicial power where there has been a denial of justice or where local remedies are not available. This reduces the potential number of cases that will be decided by international adjudicators and by extension, limits the instances where their judicial discretion will be applied.

The exercise of judicial discretion is an inescapable reality of any dispute settlement system. However, it is possible to design the dispute settlement procedures to place limitations or constraints on the exercise of judicial discretion to address the concerns related to the potential overreaching impact of international adjudicators.

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[1198] See Chapter 4 section 4.3(b)
[1199] See Chapter 4 section 4.4 and Chapter 5.
[1200] See Chapter 6 section 6.3.1.
[1201] Tom Ginsburg 'Bounded Discretion in International Judicial Lawmaking' (2011) 45 *Virginia Journal of International Law* 1–42 at 3.
[1202] Tom Ginsburg 'Bounded Discretion in International Judicial Lawmaking' (2011) 45 *Virginia Journal of International Law* 1–42 at 29.
[1203] See Chapter 6 section 6.2.3.

## 6.4.CONCLUSION

This chapter set out to determine the design of the mechanism that can be used at the international level for the settlement of investor state disputes. The chapter proceeded to make recommendations as to how a multilateral investment court could be designed to adequately address the concerns that have arisen in the dispute settlement system of international investment law.

The chapter recommended the adoption of a MIC based on a treaty. In addition to an administrative or plenary body made up of member states, the MIC would incorporate a secretariat from which all disputes and general procedures of the MIC would be administered, an independent judicial commission which would assist in the selection appointment and discipline of permanent tenured judges, and a ministerial commission which would provide authoritative and binding interpretations so that the interpretations adopted by the judges are in line with the intention of the parties. In addition to these functional departments or bodies, the MIC would leverage the use of ICT and legal technology to streamline procedures of the MIC, improve on efficiency and effectiveness. In making recommendations on these aspects of the MIC focus was had on applying multilevel governance principles such as the participation of stakeholders, flexibility, transparency and measures to improve the overall legitimacy of the initiative.

In addition to the general characteristics of the MIC, there has to be the incorporation of features that will address the broader concerns arising out of the status quo so that these concerns are not entrenched in the new system.

In particular, there has to be a concerted effort by states to ensure that the MIC is accessible to all parties who may be negatively impacted by investments regulations or investment activity. This would require the incorporation of rules that allow for all affected parties to approach the courts seeking redress for any harm done within the confines of the international investment law system thereby fulfilling the right to an effective remedy. Further, making provision for third party access will ensure that the MIC does not issue decisions that may impact the rights of other stakeholders without affording them the opportunity to be heard. By ensuring increased participation and accessibility the international investment law system will contribute to the attainment of SDG 16 on access to justice.

The design of the MIC based on a system of judicial settlement as opposed to arbitration, will allow the judges of the MIC, much like the judges of other international courts and tribunals to introduce a rule of de facto precedent into the international investment law system therefore contributing to the development of consistent and predictable international investment law jurisprudence.

In keeping with the broad theme of this thesis, being the development of a symbiotic relationship between the different levels of governance, principles that are applied in domestic courts can be useful in addressing issues and filling gaps that exist at the international level of governance. Transposing the once and for all rule and the rule on reflective loss into the MIC provides an avenue to effectively deal with the occurrence of multiple proceedings.

While the proposals made above being doing away with use of arbitration, focusing on access to the court for all parties, use of de facto precedent and the use of domestic court rules to prevent multiple proceedings may seem trivial in the grand scheme of the design of the MIC,[1204] these recommendations address concerns that are of fundamental importance specially to developing countries and vulnerable communities. These recommendations ensure that in designing the MIC, we are not merely replacing the existing system of ISDS with a similar mechanism that entrenches inequalities between the different stakeholders of the international investment law system.

Due the substantial nature of the MIC project, there are still several issues that would need to be tackled, including the implementation of the MIC and the applicable procedural rules. However, the chapter has attempted to provide a starting point on some salient characteristics of the MIC, that will undoubtedly contribute and direct the implementation process as well as the procedural rules as an area of further research.

Finally, the recommendations made herein would give effect to the substantive changes proposed in Chapter 4 and would also be compatible with the use of the exhaustion of local remedies rule proposed in Chapter 5.

[1204] Perhaps accounting for their limited incorporation in the discussions for reform.

# CHAPTER 7: CONCLUSION

## 7.1. INTRODUCTION

FDI is an essential component for the development of national economies. It is necessary to achieve infrastructural development, promote the realisation of socio-economic rights and to achieve the sustainable development goals.[1205] The regulation of FDI is necessary to govern the different interactions that may arise through cross border investment activities. International investment law developed out of the need to regulate cross border FDI and govern the relationship between investors and host states. The international investment law system consists of specific rules meant to provide substantive protections to investors and a unique dispute settlement system that makes use of arbitration to resolve the disputes that may arise between the investor and the host state. However, over the years, international investment law has come under significant scrutiny. Meant to regulate the relationship between foreign investors and the host state, the international investment law regime has had unforeseen and unintended consequences. This has led to calls for the reform of international investment law.

The question on the reform of international investment law is a topical issue, and the discussion on reform spans across various stakeholders including states, academics, legal practitioners, local communities, intergovernmental organisations and NGOs.[1206] The main questions regarding reform relate to what must be reformed and how it must be reformed. Discussions on reform at the international level have largely centred on procedural reform with options proposed for the establishment of a multilateral investment court, the use of an appellate mechanism, recalibrating the current system of investor- state arbitration and removal of the system all together with recourse being had to domestic or state-to- state mechanisms.[1207] Despite the extensive focus on the procedural aspects, reform of the substantive aspects of the international investment regime is also just as important as the protections that are provided in IIAs are the law that is interpreted and applied by dispute settlement bodies and determines the outcome of disputes. The substantive aspects play a significant role in re-balancing the rights and obligations provided in the international investment law system.

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[1205] Gary B. Born *International Arbitration* (2012) 411.
[1206] See for example the discussions taking place under UNCITRAL Working Group III and UNCTAD.
[1207] These are the reform options under discussion at UNCITRAL Working Group III.

The objective sought to be achieved by this thesis was to illustrate how the international investment law system could be reformed making use of a multilevel governance framework so that international investment law works for all stakeholders thereby going beyond the discussions taking place at the Working Group III. This final chapter of the thesis seeks to recapitulate the processes, findings and recommendations outlined in earlier chapters and set out the reform options that have been recommended for international investment law. It brings together the discussions that have been had throughout this thesis to show how the objective of the thesis to make recommendations on how international investment law can be reformed to cater to the needs of all stakeholders has been achieved. Section 7.2 will provide a summary of the findings and recommendations made in the chapters that were discussed in the thesis. This section will also set out the importance and implications of the research findings. Section 7.3 will outline the limitations experienced throughout the research process and set out areas for further research. Finally, section 7.4 will provide the final thoughts for the thesis.

## 7.2. FINDINGS AND RECOMMENDATIONS

This thesis sought to address the concerns that arise from the use of FDI, and the inadequacies of current investment regulation as contained in IIAs as well as the deficiencies in the reform process. As pointed out in chapter 1, the regulation of FDI should be able to effectively govern the different relationships that arise from the use of FDI.[1208] The different relationships identified were the relationship between the host state and the investor, between the foreign investor and the local communities and the environment, the local communities and the host state, and the relationship between investment and development.[1209] The problem with international investment law and the current reform process as identified in this thesis is their inability to effectively govern and regulate these different relationships across the different levels of governance. As such, the reform process would not be able to address the broad range of criticisms and concerns that have been raised by various stakeholders regarding the operation of the international investment law system.

As noted by Harten, any proposals for the reform of the international investment law system should be evaluated against the criteria of balance in the allocation of foreign investor rights and responsibilities, respect for domestic institutions, judicial independence and procedural

[1208] See chapter 1 section 1.7.
[1209] Ibid.

fairness.[1210] Akinkugbe further notes that radical reforms that curtail the over reach of foreign investors that has constrained the legislative autonomy of states will be necessary.[1211] In addition to this, Gatthi and Mbori note that reform must lead to a restructuring of international investment law as we know it and go beyond improving how ISDS functions to advancing the rights of those directly affected by the regime.[1212]

This thesis sought to provide options for the reform of the international investment law system that meet the criteria as set out above and can effectively achieve the governance of the different relationships arising from the use of FDI.

To organise the interactions between different actors and different levels of governance within the international investment law system, the multilevel governance framework was used. The multilevel governance framework was selected due to its ability to organise a wide range of actors across different levels of governance making use of widely accepted principles and practices. As the multilevel governance framework regulates the relationship between the different levels of governance, the five-storey house theory is used to illustrate how the different levels of governance ought to interact with each other.

In the five-storey house theory, neither level of governance is more important than the other; rather, they all work together in concert, each level playing a particular role to achieve a common objective. In addition to this, systems for legitimacy must be put in place to provide societal acceptance of the reform effort. These systems must provide for input legitimacy, throughput legitimacy and output legitimacy.

The principles of accountability, transparency, stakeholder participation, subsidiarity and supremacy of international law were identified as the guiding principles which would inform the design of the substantive and procedural aspects of international investment law as explored in Chapters 4 – 6. By grounding the reform effort in the multilevel governance framework, the reform process is infused with the necessary principles that are key to bring about a re-balancing of international investment law and promote legitimacy of the process.

[1210] Gus Van Harten 'Is It Time to Redesign or Terminate Investor-State Arbitration', *Centre for International Governance Innovation*, available at: www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/.
[1211] Olabisi D Akinkugbe, 'Africanization and the Reform of International Investment Law' (2021) 53 *Case W Res J Intl L 13*.
[1212] Gathii & Mbori, supra n 107 at 563.

The recommendations made throughout the thesis focus on ensuring that there is transparency in the process, that the process allow for the participation of stakeholders and ensures that there are mechanisms in place for accountability. By incorporating the needs of stakeholders and providing mechanisms through which they can participate in the decision-making processes of both the substantive and procedural aspects of the regime, input legitimacy is established. By making all processes of the international investment regime transparent and open to the public, with means through which decision makers can be held accountable, the throughput dimension of legitimacy is achieved. By putting in place all these measures and mechanisms through the multilevel governance framework, output legitimacy is achieved as stakeholders, even where the process does not yield the results that they desire, will be able to accept the outcome of the process, because there is a general acceptance of the process. Stakeholders will view the process as being fair, transparent and in conformity with their needs for access to justice, thereby resolving the legitimacy crisis currently facing international investment law. The use of the multilevel governance, by its very nature will assist in meeting the criteria identified above, as these criteria are imbedded within the principles of multilevel governance framework.

### 7.2.1. *Rebalancing IIAs*

In order to achieve the rebalancing of the system that takes into account the needs of and protects the rights of other stakeholders including vulnerable groups such as local and indigenous communities, the thesis focused on providing a framework for the renegotiation of old generation IIAs, bringing greater clarity on the right to regulate, making use of sustainable development obligations in IIAs and incorporating the national level of governance into the development of the rules and regulations applied in international investment law.

Developing a framework for the renegotiation and replacement of older generation IIAs will give greater effectiveness to the recommendations that are made in this thesis. It will limit the likelihood of the creation of parallel systems of international investment law whereby some disputes are resolved under older generation IIAs, and some disputes are resolved under new generation IIAs. The thesis recommended that the framework agreement be developed under the auspices of UNCITRAL, as an extension of the work of Working Group III, with the aim of complementing the work on procedural reform. The agreement would make provision for undertakings by states to terminate or renegotiate older generation IIAs by a set date, undertakings to limit the impact of sunset clauses in existing IIAs and undertakings to negotiate

IIAs taking into account the need to promote sustainable investment for sustainable development and equal protection and participation of all affected stakeholders.[1213] Such a framework agreement would give impetus to efforts aimed at reforming substantive law so that the reform effort does not have the unintended consequence of creating multiple systems of investment regulation.

The content of substantive reform would be focused on ensuring that the goals of economic growth do not come at the expense of the other equally important objectives such as the achievement of sustainable development, the protection of human rights and the environment. In order to achieve this, there is a need to recognise the link between sustainable development and investment and embed the process of the reform of the substantive aspects in the achievement of sustainable development.

By making use of the five- storey house theory and the principle of subsidiarity, the thesis was able to make recommendations on the incorporation of sustainable development and investor obligations into IIAs. In particular, the thesis proposed that framework clauses be incorporated into IIAs that would establish broader commitments of the parties at the international level and leave the setting of specific targets to national legislation. The international level would be responsible for setting common targets and goals regarding sustainable development and investor obligations, while the national level would be responsible for setting out the methods or specificities of the same. At the international level, the thesis proposed the incorporation of a provision that explicitly recognises the importance of sustainable development and the link between sustainable development and investment.[1214] The clause would also recognise that sustainable development is best regulated at the national level. The provision also sets out the criteria to be followed by states when enacting laws for the promotion of sustainable development. This ensures that states are free to regulate investment for sustainable development at national level, but still provides protection to investors, in that, where national regulations are not enacted in compliance with the guidelines in the IIA they are open to challenge. The guidelines themselves are not far reaching and are aimed at ensuring transparency, rule of law and the prevention of arbitrary decisions.

In the same vein the thesis also advocates for the direct and indirect incorporation of investor obligations in IIAs. Direct obligations would create binding obligations for investors in IIAs.

[1213] See Chapter 4 section 4.3.a.
[1214] See Chapter 4 section 4.3.c.

However, given the difficulty in reaching consensus on the scope and content of binding investor obligations, these obligations can be incorporated indirectly into IIAs through the use of provisions that mandate investors to comply with and act in accordance with domestic laws, and ensuring that the national level provides for investor obligations in their domestic laws.

These domestic laws that provide for the achievement of sustainable development and investor obligations would be enacted pursuant to the exercise of the states right to regulate which would protect host state regulation against challenge by investors, if the regulatory process complies with the guidelines set out in IIAs. [1215] It was therefore important to provide clarity on the scope and content of the right to regulate. As an extension of the exercise of state sovereignty, this thesis embedded the right to regulate as a CIL principle that would be applicable in international relations even in the absence of an express recognition of the right in IIAs. In order to give scope and content of the right, the thesis looked to international law to identify methods used in international law that can be useful in setting out the exercise of the right to regulate. The principles of common concern to humankind and that of public goods were identified to determine the types of regulation that would fall under the protection of the right to regulate and exclude the payment of compensation.

Making use of these approaches would limit the scope of application of the right to regulate to regulation in certain fields if great public importance and provide objective criteria that could be used to identify the areas that are of importance to the wider global community that require regulation to address. So that the right to regulate is not exercised in a discriminatory and arbitrary manner, the thesis recommended the use of principles embedded in global administrative law aimed at ensuring that the process through which the regulation is made is not discriminatory, not arbitrary, does not violate the legitimate expectations of investors, has been enacted in good faith, in a transparent manner and with respect to the principles of necessity and proportionality.[1216]

These recommendations give effect to the shared regulatory competence between the different levels of governance and ensures that regulation is taken at the level that is best able to make the regulation. The recommendations made herein would also remove the complex and difficult process of negotiating human rights and sustainable development obligations for investors

[1215] See Chapter 4 section 4(3)(b).
[1216] As noted in Chapter 3, these principles, which mirror the global administrative law principles inform the scope and content of the FET standard and as such one would still be applying the principles that are applicable in international investment law and would be compatible with the general import of international investment law.

from the international level and leave it to each individual state to determine what obligations they may want to impose on investors in line with the limitations provided at the international level.

To give effect to these provisions, domestic investment regulation at the national level must also be reformed. The national level would have to implement domestic laws that specifically govern the relationship between business and human rights and sustainable development and create obligations and place responsibility on investors. The ‘in accordance with’ provision could also be applied to the domestic laws of the home state where, an investor, in carrying out their investment, is bound to comply with the domestic laws of their home state in so far as they make provision for the protection of human rights when carrying out business activities.[1217] This allows the host state, to benefit from advanced protections that may be in place in the home state and enjoins the home state to play an active role in the protection of human rights that may arise by the actions of their nationals in another state. In order to differentiate investor obligations requiring states to promote human rights from performance requirements, states must make use of ‘within their means’ clauses which will allow investors to partake in activities that are within their available means so as to ensure that this obligation is not too onerous and do not affect investor profits.

As the reform of the substantive aspects will take place at bilateral level between states, states have an important role to play as the main actors under national and international law. States have the ability to drive the reform effort both internally and externally and have the main task of co-ordinating the reform effort so that the needs of stakeholders are met, while at the same time maintaining coherence between national policies and international obligations. To this end states must create a conducive environment for the operation of the multilevel governance framework. They must create systems that allow for the exchange of information and the contribution of stakeholders for the creation of national policy objectives as they relate to investment. They must also increase communication and co-operation among different government departments so that other national objectives are in line with national investment objectives, and so that at the negotiation of IIAs at the international level, that state representatives do not bind the state into obligations that are inconsistent with their national

[1217] States would be free to agree on the home state laws that they envision would apply to the investors in the host state.

objectives and policies. States should also take corrective measures where necessary by creating model BITs, renegotiating their existing IIAs and entering into new IIAs that reflect an adequate level of policy coherence and make provision for the right to regulate, investor obligations, provide greater clarity on investor protection and promote investment.

While rights and obligations are negotiated and agreed to at international level between states, they are put into practical effect at the local level, where investors carry out their obligations and where the negative or positive effects of the investment will be largely felt. As such there is need to increase co-operation, communication and co-existence between local communities, investors and local authorities. To this end, investors ought to carry out their investment in a manner that ensures that they do not endanger or negatively impact the lives of local communities and the environment within which they operate.

When carrying out their corporate social activities, they must meaningfully engage with local communities so as to provide services that have meaning and can positively impact the local communities. In addition to this, engagement with local communities is important so that investors carry out their investment giving due regard to the traditional and cultural practices that are observed by the local communities. A harmonious relationship between investors and local communities is essential as it limits contestation between the investors and the local communities. To achieve this, local authorities, who are closest to the local communities and the investment activity, will have the initial oversight role to ensure that investors are in compliance with their international and national obligations and to control local communities so as that they do not cause undue hardship for investors especially where investors are in compliance with their obligations. Local authorities will also have the duty to report on issues of compliance or non-compliance to the national level so that were necessary, the national level can affect corrective action.[1218]

The recommendations made above work to create, within the substantive provisions of international investment law, a system that caters to the needs of all stakeholders and allows the state to effectively regulate for the management of the various relationships that arise in the use of FDI in a manner that does not undermine the traditional aims of international investment

[1218] For example, where the state intends to initiate counterclaims against the investor, they will need to have sufficient information to put forward a case that illustrates that the investors has violated any of their obligations and the effects of those violations so that adequate redress can be awarded.

law but seeks to ensure investment protection while at the same time meeting the needs of other stakeholders and promoting sustainability.

### 7.2.2. *Respect for domestic institutions*

The different proposals for the reform of the dispute settlement procedures either take place at the international level of governance through MIC, appellate mechanism, or recalibration of the current arbitration system, or at the domestic level through the use of ombudsmen, or domestic courts. As such it would be important to allocate the power to settle investment disputes between the different levels of governance.[1219] This analysis showed that in the first instance, the national level of governance, through its national courts should be vest with the competence for the resolution of investment disputes. Where the state is not able to properly perform this function, the international level would intervene and provide a remedy at the international level. As opposed to competing for competence to resolve disputes, the national and international level should work together in a complementary nature for the effective resolution of investment disputes. To this end, the chapter proposed the use of the exhaustion of local remedies rule.[1220] The exhaustion of local remedies is already an established principle in CIL and serves to balance the tensions between state sovereignty and the needs of investors by giving the states the opportunity to remedy their wrong within their domestic courts and by providing investors with an alternative remedy at the international level should the state not be in a position to provide an effective remedy.[1221]

Having identified that the exhaustion of local remedies rule should be applied, the next step was to determine the allocation of competence between the national and international level. In the first instance, investors would have to resort to, and exhaust local remedies provided by the host state. As most investor protections are contained in IIAs, the chapter set out the means through which international investment law principles could be directly applied in the national courts of the host state, through silent application, by applying domestic investment laws that make provision for investor obligations such as those contained in IIAs, and indirectly, through the use of international investment law as a tool to interpret domestic laws in conformity with international law obligations. When interpreting and applying international investment law in this manner, the national courts would not have exclusive competence over the interpretation

[1219] See Chapter 5.
[1220] See section 5.3.1 of Chapter 5
[1221]Douglas Wong, 'From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration' (2017) 35 *Singapore Law Review* 114.

and application of international investment law principles. The national courts would also have the competence to interpret and apply national laws that make provision for investor obligations.[1222] This would occur by operation of the law as most domestic law frameworks vest the power to interpret and apply national law with the national courts. In this regard, the national courts will have exclusive competence to interpret their national laws. As such, where national law ought to be applied at the international level, the international level will have to apply the national law in the same manner that it is applied in the national courts and give deference to the interpretations of national law that have been adopted by the national courts of the state concerned. This principle would also apply where host states have to apply home state laws. The hosts state would be enjoined to adopt the interpretation of the law as it is applied in the courts of the home state thereby ensuring uniform application of domestic laws.

Where a party is not satisfied with the outcome of the matter before the domestic courts, they may have the option to approach the international mechanism. In determining whether the international mechanism would have the jurisdiction to hear the matter, the court would have to determine whether there has been a denial of justice.[1223] If it is found that there has been a denial of justice, then the international mechanism will have the jurisdiction to hear the matter. Where there has been no denial of justice, the international mechanism will not be able to hear the matter. In the second instance, the international mechanism can be approached directly where the investor can show that the local remedies in the host state are not available or able to provide an effective remedy. In that instance, the international mechanism can be approached as a court of first instance and determine the matter on the merits.

The exhaustion of local remedies rule would be coupled with increased judicial dialogue between the national courts and the international court to limit instances of contestation and gradually develop, over time, a system of consistence interpretations by national and international courts.[1224] By introducing the exhaustion of the local remedies rule, a few concerns raised against ISDS can be addressed. It balances the interests of the host state and investor. By creating a complementary relationship between the national and international level of governance, the international level of governance is clothed with an element of legitimacy as it is not seen as competing against the national level but rather as an extension of it. By placing investment disputes within the domestic courts, issues of correctness of decisions,

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[1222] Through the use of in accordance with domestic law provisions set out in Chapter 4 section 4.4(b).
[1223] It is not envisioned that the international mechanism will act as a court of appeal against all the matters and decisions taken by the national courts.
[1224] See section 5.3.2 of Chapter 5.

coherence and predictability, multiple proceedings and high awards of damages can be resolved through the rules that are already applied in domestic court systems.

In order to give effect to the exhaustion of local remedies rule, there must be an independent and impartial judiciary that is easily accessible to investors, local communities, and other stakeholders. The judicial system in the country must be in conformity with the state's national constitutional mandate as well as its international law obligations in so far as they relate to questions of access to justice. To this end, the judicial system must be accessible and effective so as to give full effect to the benefits that can be brought about by the introduction of the exhaustion of local remedies requirement. The state must therefore take adequate steps so that they can provide state based judicial and non-judicial dispute settlement mechanisms, that the public has sufficient information regarding their existence and their use, and that barriers to access such as high court fees for filing are limited or removed.[1225]

### 7.2.3. *Respect for judicial independence and procedural fairness*

For the settlement of disputes at the international level, the thesis proposed the use of a MIC with a more court like structure that does away with the use of arbitration as the mode of dispute settlement. Given the benefits that exist in traditional court systems, the use of a more court like system at the international level will allow rules and procedures to be implemented in the MIC that address the concerns that have been identified with investor state arbitration. [1226] The MIC would have the general features of all international courts including a centralised institution with a plenary, secretariat and independent judicial commission that will be responsible for dealing with issues related to the appointment, discipline and conduct of judges. The MIC will have permanent judges that are appointed through an independent and transparent process, that allows for the participation of all state parties and other stakeholders. The judges will be appointed in a manner that ensures that independence, impartiality and diversity is maintained.

In order to address specific concerns identified in chapter 2, the MIC will be open and accessible to all stakeholders of the international investment law system. Foreign investors,

[1225] See for example obligations provided for in Article 7 of the OEIGWG Chairmanship Third Revised Draft 17.08.2021 Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.
[1226] See Chapter 6.

state parties and affected third parties such as local communities will be able to access the dispute mechanism to seek protection of and enforcement of the rights and obligations contained in IIAs. Non- disputing third parties will also be able to intervene in a given disputes where their rights are fundamentally impacted, with the court being enjoined to take into consideration the submissions of the non-disputing third parties in their decisions. These enhanced participation rights will go a long way in giving effect to substantive reforms proposed in chapter 4 as these reforms will now be coupled with an effective enforcement mechanism. Further, the enhanced participation of other stakeholders in the dispute settlement process dispels concerns that ISDS is a special privilege granted only to foreign investors. Increasing the opportunities for participation of affected third parties illustrates that the creation of the MIC is not just the same as investor state arbitration with a new name, but that there has been a concerted effort to make provision for the effective participation of local communities and redress the inequalities of the system in so far as they relate to access to justice.

The use of a MIC will also allow for the incorporation of features that are inherent in traditional court systems that were absent in investor state arbitration. For consistency and coherence in decision making, a system of de facto precedent that exists in other international courts can be incorporated in the MIC. This will ensure that, to as far an extent as possible, like cases are treated alike and that consistency and coherence is maintained in the jurisprudence of the MIC.

Finally due to the court like nature of the MIC, procedures that have been utilised at the national level to prevent multiple proceedings and thus further promote consistency and coherence can be incorporated into the MIC. The once and for all rule can be used to so that all claims, arising from the same cause of action (even when based on a different BIT) are all instituted at the same time under one claim. As one bench will be constituted to hear all claims arising from the same cause of action, there is no likelihood that another bench might be seized with similar issues from the same or similar parties and come to a different conclusion. This will be coupled with the rule against shareholder claims for reflective loss so that similar parties, being the company and shareholders are not able to bring the same matters before different judges. This limits the instances of multiple proceedings but also ensures the promotion of consistency and coherence.

When measured against the evaluative criteria proposed by Harten,[1227] the recommendations made above balance the rights and obligations of foreign investors, respect domestic

[1227] Harten, supra n 1210.

institutions, ensure procedural fairness and take into account the needs of a wider group of stakeholders including vulnerable groups such as local and indigenous communities.

## 7.3. LIMITATIONS OF THE STUDY AND AREAS FOR FUTURE WORK

Considering the nature of international investment law and the vast and varying content of investment treaty provisions that require reform, this thesis could not explore all the provisions that require reform. As a starting point, despite the wide range of concerns that have been raised against the investment regime, this thesis has focused on the procedural concerns that have been identified by Working Group III and the substantive aspects that have contributed to these procedural concerns. The reader will note that chapter 4 on substantive aspects only focused on three areas of reform being the incorporation of sustainable development into IIAs, the clarification of the right to regulate and the incorporation of investor obligations. In chapter 6, while there are several aspects that will have to be negotiated when attempting to create a multilateral investment court, the thesis focused on features that would be necessary to address the concerns identified in chapter 2. There are more aspects of the international investment law system that still need to be explored using the same framework to illustrate the full extent of what the reformed international investment law system will look like. There is room for further work on the subject looking at aspects such as clarifying other substantive provisions, the implementation of the MIC, its rules of procedure, questions on the relief that will be provided by the MIC including the calculation of damages and issues on the enforcement of the judgements of the court. Research into these areas will provide further direction as to the possibilities that are open for the reform of international investment regime and aid states in negotiating reformed IIAs, whether on a bilateral basis (mainly for substantive aspects) and on a multilateral basis (for the procedural aspects).

This thesis also applied the principle of subsidiarity to some aspects for reform. As already noted in chapter 3 there are questions as to the applicability of subsidiarity in international law. While this thesis sought to establish a basis on which subsidiarity can be applied, further research is required to appropriately centre the application of the principle of subsidiarity in international law in general and specifically to international investment law so as to establish its applicability without a doubt.

## 7.4. FINAL THOUGHTS

The research and findings discussed in the foregoing chapters have a direct impact on the reform process of international investment law. In the absence of a co-ordinated effort regarding all aspects of the reform process, this study sets out how states and stakeholders can work together to achieve reform of international investment law in a manner that can, to a larger extent, cater to the needs of all stakeholders.

The study provides a roadmap through which equitable reform of international investment law can be achieved. Further, it illustrates how grounding the reform effort on principles that already make up the national and international legal order may yield more favourable results and areas of agreement than merely focusing on the pros and cons of each of the different reform proposals put forward by states.

By engaging in a process that requires significant introspection on the part of states to ascertain their own needs, the needs of its citizens, (including local communities and investors) and their regional and international goals with a view of reaching consensus on how these goals can best be achieved, areas of convergence can be easily identified and built upon, and areas of divergence can also be identified and addressed. The inherent flexibility of the process proposed takes into account the intrinsic differences between the negotiating states and makes room to accommodate those differences while at the same time bringing together their similarities to achieve a coherent reform agenda.

As the national level seeks to re-assert its sovereignty while the international level attempts to address global problems, this thesis has attempted to propose a non-reformist stance to the reform of international investment law.[1228] When considering the framework illustrated by Heath setting out the manner in which non-reformist reform can be achieved, the reforms made herein fulfil the said criteria. In this regard, the recommendations for substantive reform shrink the system doing harm by making recommendations that achieve the rebalancing of the international investment law system at a large scale and introducing rights and protections for host state citizens, local communities and wider objectives aimed at addressing global problems.

The introduction of substantive reforms and the introduction of access rights to the dispute settlement mechanisms works to shift the power balance from solely lying in the hands of

[1228] Heath, supra n 107.

investors (who traditionally had exclusive rights provided for them in IIAs and could exclusively initiate claims and receive compensation) to providing a more balanced international investment law system where all affected parties are able to access and make use of the system for the protection of their rights within the context of investment activity and regulation.

The proposal to make use of the multilevel governance framework as the organising framework for the reform of the international investment law system allows for the consideration of wider areas of reform and the principles used in multilevel governance point to the use of reform options that go beyond the reformist approach that is currently seen within the system.

In the premises, the processes and recommendations made in this thesis challenge the existing reform process by going beyond reforms that maintain the system and tests the commitments of states to achieving real and systemic reform that addresses a wide range of concerns.

Through this process, the thesis was able to make recommendations for the reform of the substantive and procedural aspects of international investment law which can be shortly stated as follows:

- make use of the multilevel governance to co-ordinate the reform effort, organise the different actors in the international investment law system and allocate competence over various areas between the different levels of governance,
- clarify the scope and content of the right to regulate,
- incorporate sustainable development into the reform process,
- incorporate the exhaustion of local remedies rule into the international investment law regime,
- strengthen domestic laws and domestic judicial systems,
- create coherence between national and international laws and systems, and
- make use of a MIC that uses court like procedures and allows equal access to the court.

These recommendations bring out the interconnectedness of the different levels of governance and the different stakeholders in the quest to achieve reform of international investment law. The research has implications for all sectors of society as it envisages the coming together of the stakeholders across different levels of governance, each with a role to play that contributes to the success of the proposed reform effort. To give effect to the recommendations made herein and address the concerns that have arisen against international investment law, there needs to be a concerted effort by states (as the primary subjects of international law) as well as the political will, to take active and meaningful steps in ensuring that the reform effort does not merely entrench the current system, but rather addresses systemic challenges and difficulties in a meaningful way to result in a completely new international investment law system for all.

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