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The American University in Cairo

School of Global Affairs and Public Policy

**A PUBLIC LAW APPROACH TO INVESTMENT TREATY
ARBITRATION:
REDRESSING THE BALANCE BETWEEN INVESTMENT
PROTECTION AND STATE REGULATION**

**A Thesis Submitted to the
Department of Law**

**In partial fulfilment of the requirements for the
LL.M. Degree in International and Comparative Law**

By

Mohamed Adel Shoaib Ali

December 2016

The American University in Cairo

School of Global Affairs and Public Policy

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In partial fulfilment of the requirements for the
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DEDICATION

For Mom and Dad, to whom I owe everything I am and all that I wish to be

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A PUBLIC LAW APPROACH TO INVESTMENT TREATY ARBITRATION:
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Mohamed Adel Shoaib Ali*

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ABSTRACT

The ICSID has shifted the scope of investor-state disputes from domestic legal systems to international law realm. It assigns regulatory disputes between states and individuals to one-off private panels rather than public law courts. While investment treaty arbitration (ITA) combines the form and procedure of commercial arbitration, it performs under the substantive principles of public law. Since the ICSID does not set out the substantive rules governing investment disputes, investment treaty tribunals have constantly been the most dynamic zone of international investment law. Drawing on the ICSID neoliberal orientation, tribunals have interpreted and applied the substantive investment standards far beyond the consent of the treaty parties. They have largely intruded into domestic matters that lie within the host state sovereign authority. Moreover, they maintained a domestic normative scheme favourable to foreign investment that obviously exceeds international minimum standards of treatment. A minimal governmental regulatory action becomes an interference with the use of foreign private property that amounts to compensatory expropriation. The aim of this thesis is to reform investment treaty tribunals' law-making from within. Remoulding ITA as public law adjudication, this thesis sets out a comparative public law methodology for refining the content and scope of the open-ended standards for investment protection. It draws on the customary rules of the Vienna Convention on the Law of Treaties as a basis for interpreting investment treaty terms. This thesis seeks to reconceptualise the objectives of ITA under the ICSID legal framework. It emphasizes the correlation between investment protection and the host state's right to economic development. Further, it integrates rules on corporate social responsibility to equiponderate the host states' international responsibility vis-à-vis foreign investors. Finally, this thesis points out to the significance of incorporating general principles of law and judicial decisions as recognized sources of public international law into the practice of ITA. It argues that accommodating the principle of proportionality as a general principle of law in the tribunals' law-making process would help draw the line between investment protection and state regulation.

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I. INTRODUCTION

The advent of the International Center for Settlement of Investment Disputes (ICSID) – under the Washington Convention – has drastically transformed traditional international arbitration from the reciprocal relationship to the regulatory sphere.¹ Through a wide network of Bilateral and Multilateral Investment Treaties (B/MITs), individuals and multinational corporations are now able to directly initiate, arbitrate and enforce international proceedings against sovereign states. In that capacity, Investment Treaty Arbitration (ITA) acts as a fundamental legal tool of public international law that reviews and adjudicates on states' exercise of public authority vis-à-vis foreign investors.² However, the lack of a multilateral legal framework on the substantive standards of investment protection under the ICSID has invested one-off investment treaty tribunals' extensive law-making powers.³

The absence of an effective mechanism to review inconsistent awards has led to divergent approaches on a case-by-case-basis.⁴ Drawing on the ICSID neoliberal orientation, most investment treaty tribunals have recognized expansive interpretations of open-ended treaty standards in favor of private transnational investment. These interpretations give rise to legal instability in the practice of ICSID tribunals. As a result of this, a large number of privately-minded awards have diminished host states' legitimate regulatory power, maintained a domestic legal order that fairly exceeds international minimum standards of treatment and deprived host states the right to counterclaim against transgressor investors for breaches committed in the course of their investment.⁵ In that sense, ICSID creates a one-sided model of adjudication that seriously demands search for an alternative approach to strike a balance between the interests of foreign investors and host state.

¹ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, U.N., World Bank Group, International Bank for Reconstruction and Development, available at <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx> (The convention is commonly known as the 'ICSID Convention' or the 'Washington Convention') (159 states have signed and 151 have ratified the ICSID Convention), available at <http://www.worldbank.org/>

² See Van Harten & Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EJIL, no. 1, 145-148 121-150, (2006)

³ See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute System Design*, 92 MINN L. REV. 191 161- 230, (2008)

⁴ *Id.* at 170

⁵ See *supra* note 2 at 127-131

Over the past decade, respondent states discontent with ICSID's inclination to private transnational investment has reached a climax. The expansionary interpretations of central investment provisions by privately-contracted arbitrators have proved to be detrimental to the legitimacy of the system at large.⁶ The lack of a conclusive basis for states consent to the ICSID jurisdiction has cursed the practice of ITA with unpredictability.⁷ Investment treaty tribunals have endorsed a restrictive approach that relies on textual meaning in defining the scope of "protected investment", while ignoring the main objective of ICSID in promoting host states' economic development. In doing so, tribunals have intruded into matters of mere administrative discretion that lie within the sovereign authority of the treaty parties. Inflexible investment protection has vigorously contravened inherent regulatory functions of the host states in pursuing legitimate policies essential to ensure public welfare. Therefore, a significant part of the literature criticizes the current practice of investment treaty tribunals for favoring multinational corporations at the expense of the developing host states' socio-economic needs.⁸

It is evident that the global network of B/MITs creates an overarching body of international investment regime.⁹ Yet, the vaguely-drafted investment treaty terms, including Indirect Expropriation, Fair and Equitable Treatment and Most Favored Nation, allow arbitrators wide leeway in reinterpreting the substantive rights of the treaty parties. In many cases, despite similarities in facts and merits, investment treaty tribunals have strikingly reached contradictory legal conclusions. Such divergent practice touches fundamentally on the claims of systematic institutional bias of the ICSID. Even though a judicial-like process was intended to disentangle the disputed public and private interests in investor-state disputes, a neoliberal ideology has been bestowed upon ICSID tribunals.¹⁰ An epistemic hegemony of commercial arbitrators

⁶ See Susan D. Franck, *the Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 22 FORDHAM L. REV. No. 73, 1521- 1625 (2005)

⁷*Id.*

⁸ See MARIE-CLAIRE CORDONIER SEGGER ET AL, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 25, 623-625, (2nd edition, Kluwer Law International Publisher) (2011)

⁹*Id.*

¹⁰See Gus Van Harten, *Perceived bias in Investment Treaty Arbitration*, in M. Waibel et al., 433-454, (2010)

over investment disputes has transformed ICSID into a multinational corporations-friendly system of dispute settlement.¹¹

Therefore, the development of international investment law as an autonomous regime has come to a standstill since tribunals' interpretive approaches are no longer supported by state practice. Despite the fact that the private law tendency provides foreign investors with a high threshold of protection against unfair and discriminatory treatment by the host state, it ultimately restrains the latter from exercising legitimate regulatory powers in matters of public policy.¹² In addition, it gives foreign investors a means to penetrate into the host states' domestic sociopolitical scheme and influence governmental choices. In fact, such penetration contradicts the principle of non-intervention at the heart of public international law. Furthermore, it challenges the negative role of ITA in blocking essential policies in matters of common concern including health, environment, human rights, finance and taxation.¹³

Since the early 1990s, innumerable arbitral awards worth billions of dollars have been rendered. These costly damages have severely impacted the host states' capacity to pursue developmental policies or implement social security programs. The precarious practice of ITA has resulted in immense confusion on whether entering into BITs is beneficial for developing economies, or it is detrimental for possibly resulting in large sums of damages to already low-income host states with modest shares of Foreign Direct Investment (FDI); does ITA actually play a decisive role in the process of economic development that justifies the surrender of sovereign immunity from adjudication in return for the promise of FDI? This discrepancy has led many states to renegotiate the terms of their B/MITs on much stricter provisions to come in line with domestic social and economic programs.¹⁴

The chain of global economic crises in the 2000s has yielded a new generation of BITs providing for more regulatory space in public law fields of action. A shift in roles between inward and outward sources has resulted in the emergence of new

¹¹ *Id.*

¹² *Id.*

¹³ See *supra* note 6 at 1589-1590

¹⁴ For example, the India-U.S. 2012 model BIT has introduced major changes regarding the Investor's scope of obligations most notably in paying taxes, fighting corruption and exhausting local remedies before Administrative and judicial bodies.

capital-exporting powers. New defences of state non-compensable measures have been triggered before arbitral tribunals. The host states' backlash to the system pitfalls has driven some investment treaty tribunals under the North American Free Trade Agreement (NAFTA) to rediscover customary principles of international law in order to balance between investment protection and state regulation, particularly in health and environmental regulation. International law principle of sovereign independence has been brought back to life in some NAFTAs' arbitrations. Nevertheless, such semantic evolution is not equally reflected in ICSID's tribunals law-making.

Observing the regulatory nature of investment treaty disputes, some academics highlight the importance of a public law approach in the process of interpreting investment treaty terms.¹⁵ Yet, the jurisprudence on investment arbitration shows meagre attempts to accommodate public law standards of review in investment treaty arbitration. Instead of a substantive law reform, a major part of the literature on ITA puts forward a number of institutional and procedural measures to address the current fragmentation of the International Investment law.¹⁶ I believe that this path of reform is contingent on either renegotiating the ICSID Convention or realizing a Multilateral Agreement on International Investment (MAI) to replace the diverse network of B/MITs. Despite being comprehensive, this reform seems infeasible due to the ongoing conflict of interests between transnational corporations and host states.

Drawing on the public law foundation of ITA, this thesis adopts a pragmatic approach based on the self-reformation of investment treaty tribunals. Thinking of ITA as a public law adjudication may allow for remolding ICSID's tribunals' law-making process to consider public law standards of judicial review. Even though investment law scholarship rarely uses a comparative public law approach, I suggest it may offer a promising avenue for reforming international investment law from within.

Against this background, in chapter I, I explore the legal hybridity of investment treaty arbitration. I contend that ITA has two different phases that go hand-in-hand.

¹⁵STEPHAN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 1-36 (2nd edition Oxford University Press) (2010)

¹⁶*Id.*

First, it involves the interplay between domestic and international jurisdiction. Second, it entails a dichotomy between public and private interests in investment disputes. Although ITA combines the form and procedure of commercial arbitration, it performs under the substantive principles of public international law.

In chapter II, I scrutinize the current network of ITA under ICSID's legal framework. In section one, I review the respective case law on the law-making process of investment treaty tribunals. First, I appraise the attitude of different tribunals towards variations in relevant investment treaty terms and whether the latter affect their final legal reasoning. In section two, I critically examine the asymmetric jurisdictional basis of ICSID in defining both the "protected investment" and the "protected investor".

In section three, I briefly investigate the allegations of institutional bias through evaluating the process of arbitral appointments under the ICSID legal system. Then, I assess the lack of binding precedent and supervisory mechanism in light of the current practice of ITA and whether such lack accounts for the fragmentation of international investment law. Finally, I analyze the main approaches used by investment treaty tribunals to define the concept of indirect expropriation and whether they respond to state legitimate regulation.

In chapter III, I set out a three-pronged framework for reforming investment treaty tribunal law-making. First, I lay out an interpretive approach for investment treaty standards of treatment. To that effect, I draw on the customary rules of the Vienna Convention on the Law of Treaties (VCLT) as a basis for interpreting the substantive rights of treaty parties. Building on the same line of argument, in section two, I rely on the conceptual framework of the Washington Convention to firstly emphasize the correlation between investment protection and the host state's right of economic development as a main objective of ICSID, and secondly integrate rules on corporate social responsibility to restore legal equilibrium between investment protection and state regulation.

In section three, I point out to the significance of the general principles of law and judicial decisions as recognized sources of public international law in reforming ITA from within. Further, I argue for accommodating the principle of proportionality as a

general principle of law in investment treaty tribunals law-making. Finally, I propose a proportionality analysis three-step test to delineate the boundary between compensatory expropriation and non-compensatory state regulation.

II. THE HYBRID NATURE OF INVESTMENT TREATY ARBITRATION

Foreign investors have always sought to protect their property rights and secure their businesses against the sovereign powers of host states. Thus, they frequently relied on the exercise of diplomatic protection by their home states.¹⁷ Yet, diplomatic protection was dependent on the full discretionary power of the investor's home state, regardless of the merits of a given dispute.¹⁸ This discretion had essentially implied political, economic and most notably military considerations *inter alia* the investor's home state and the host state.¹⁹ On the other side, domestic settlement of investment disputes through the national legal system of the host state proved to be problematic for foreign investors' interests. For that reason, investor-state arbitration was envisaged in the first place to provide foreign investors with substantive legal protection against the host-state's exercise of public authority.²⁰

In harmony with its hybrid nature, Investment Treaty Arbitration (ITA) is formed by a sovereign act whereby a host state voluntarily waives its sovereign immunity from adjudication.²¹ Domestically, a state may consent to international investment arbitration through enacting domestic investment legislation that recognizes arbitration in future disputes with foreign investors operating on its territories.²² Consequently, national courts shall be suspended from exercising their territorial jurisdiction over foreign investment disputes.²³ On the international level, a state may conclude Bilateral or Multilateral Investment Treaties (B/MITs) or join Free Trade Agreements (FTAs) which provide for investment arbitration before ICSID tribunals. In that case, the investor's home state cannot subsequently claim diplomatic protection over the dispute. This means that even though ITA is originally formulated by a public law act, it proceeds as a private law model of dispute settlement.²⁴

¹⁷ See ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 5-7 (1st edition, Kluwer Law International Publisher) (2009)

¹⁸ *Id.*

¹⁹ *Id.* at 8-10

²⁰ See CHRISTOPH H. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW: THE RELEVANCE OF PUBLIC INTERNATIONAL LAW IN INVESTMENT DISPUTES, 1- 22, (2nd edition, Oxford University Press) (2012)

²¹ *Id.*

²² *Id.* at 2-5

²³ *Id.* at 10

²⁴ *Id.*

The ICSID does not constitute a permanent court for investment disputes in the ordinary meaning of public international law. While interpreting B/MITs at issue, ICSID panels make selective reference to customary rules of international law applicable to investment including most notably rules of *lex mercatoria*. The mixed role of public and private law appears more confusing when it comes to the application of central investment standards within the merits of the dispute, namely, the rights and obligations of both parties under an investment treaty. The ICSID's inclination to private law is manifestly reflected in the practice of investment treaty tribunals.²⁵ Its *ad hoc* arbitral tribunals are made up of privately-appointed arbitrators instead of tenured judges. In reviewing and adjudicating on states conducts vis-à-vis foreign investors, they apply private law rules and procedures. Similar to commercial arbitration, strict deference to principles of confidentiality and private autonomy precludes third parties including interest groups, civil society or local communities from having access to the arbitral proceedings.²⁶ Whether the host state and the investor have already agreed on the applicable law or not, there is always leeway for the arbitral tribunal to draw on different interpretations in deciding the merits of the case.

At this point, the paradox lies in how arbitral tribunals settle the tension between domestic and international law jurisdiction. How do they assess public and private law concerns; and how do they reach conclusions that reconcile equally the competing interests of both the foreign investor and the host state. In this chapter, I argue that the legal hybridity of ITA has two different phases that go hand-in-hand. It involves the interaction between domestic and international jurisdiction since investor-state disputes have been historically distributed among national courts, *ad hoc* tribunals and claim commissions. Yet, the advent of the ICSID has somehow shifted the scope of investor-state disputes from the host states domestic legal systems to the international investment regime. In addition, investment treaty disputes concern a dichotomy between public and private interests. That is to say, ITA decides on regulatory disputes between sovereign states and private investors or corporations. As such,

²⁵*Id.*

²⁶*Id.* at 20

ICSID tribunals constitute an alternative private method of adjudication to the public law court system. In contravention of public law principles of sovereign independence and non-intervention, one-off private international tribunal reviews, evaluates and deters state authority from regulating its internal affairs in relation to foreign investors. I analyse the two phases of hybridity in the following two sections.

A. THE HISTORICAL INTERPLAY BETWEEN DOMESTIC AND INTERNATIONAL JURISDICTION

In theory, investment treaty arbitration does not totally lie within the borders of international jurisdiction; rather it lies at the intersection between both domestic and international law. This is manifest in the parties, facts, rules and procedures of investor-state disputes. Participants in the given relationship belong to two different legal systems .i.e. the state as a subject of public international law and the foreign investor whether an individual or corporation as a subject of domestic law.²⁷ When investors operate beyond their national borders, different legal regimes of hosting states govern their private international investment. Thus, there is always a question concerning which jurisdiction prevails. Does international law supersede domestic law or vice versa? Do both jurisdictions apply at the same time under certain limitations? The answer to these questions has never been the same; it constantly changes in so far as political, economic and legal contours governing international investment law change throughout history. In this section, I examine the evolution of investor-state disputes before and after the establishment of ICSID.

1. Calvo Doctrine: National Courts as “*ex officio*” Jurisdiction over Investment Disputes

The current legal framework governing international investment law is an outcome of various historical, political and economic forces. The legal status of *alius* including foreign investors had been elevated from complete outlawry in the Middle Ages to national treatment in the modern era.²⁸ It was not until the eighteenth and nineteenth

²⁷*Id.* at 2

²⁸*See, supra* note 17 at 4

centuries that states recognized aliens' rights to travel, live and trade in foreign territories under non-discriminatory norms. The shift in the international practice concerning the protection of foreigners coincided with the process of Western commercial, political and military expansion in different regions, including Turkey, Egypt, Morocco, Tunisia, and other Central and Far Eastern Asian countries.²⁹ Even though Western foreigners were relatively subject to the domestic laws of the host states, their properties were considered part of their home state's assets; and hence were organised under special legal regimes. Accordingly, any mistreatment of foreigners or expropriation of their properties in the host state constituted an injury to the latter's home state itself.³⁰

The correlation between foreigner's treatment abroad and the sovereignty of the home state had given rise to the principle of diplomatic protection in the course of transnational business. In 1924 the Permanent Court of International Justice (PCIJ) recognized states' right to exercise diplomatic protection over their nationals for an injury sustained as an elementary principle of international law.³¹ Although the exercise of diplomatic protection had taken different forms mainly claim commissions and *ad hoc* tribunals, coercive means of dispute settlement were frequently used by the powerful Western states. Throughout the colonial era, powerful countries exercised extraterritorial jurisdiction over their nationals and properties existing within colonised areas. In most cases, extraterritorial jurisdiction was exercised in the form of military intervention, annexation of territories, friendships, capitulation treaties or at best concession agreements.³² At the time, the use of force in the exercise of diplomatic protection was not contravening the essence of international law.³³

²⁹ *Id.* at 3-4

³⁰ *Id.* at 5

³¹ *Id.*

³² *Id.*

³³"The evolution and exercise of diplomatic protection must be viewed in its historical context under the colonial political and legal regimes; where diplomatic protection by powerful states was often accompanied by 'gun-boat diplomacy'." See ANDREW NEWCOMBE & LLUÍS PARADELL, *supra* note 17 at 6-8

In the late nineteenth and early twentieth centuries, several attempts to ensure the pacific settlement of international disputes were carried out notably including the Hague Convention I of 1899 on the Pacific Settlement of International Disputes, the Hague Convention II of 1907 on the Limitations of the Employment of Force for the Recovery of Contract Debts and the 1928 General Treaty for the Renunciation of War. However, the powerful colonial states had persisted in using all possible political, economic and military means to protect their interests abroad, impose diplomatic protection and coercively recover awards.³⁴ The Western socio-political expansionism drove some states, particularly Latin American states,³⁵ to adopt the *Calvo Doctrine* in respect to protection of foreign investment. The doctrine first emerged to resist the protective approach endorsed by the capital exporting countries for the protection of their nationals' properties abroad through the extraterritorial application of foreign regimes on host states.³⁶

The Calvo Doctrine is based on two essential principles: the absolute equality of foreigners with nationals and the non-intervention within the internal affairs of other states. According to the Argentinian jurist *Carlos Calvo*, the customary international law principle of sovereign equality entails that foreigners must not be entitled to a preferential standard of treatment other than the host state's nationals.³⁷ The exercise of diplomatic protection in its different forms undermines the political independence and sovereign equality of the host state. Instead of the protective approach of jurisdiction, the Calvo doctrine laid down a territorial approach based on sovereign equality and national standard of treatment. Therefore, Calvo's territorial principle of jurisdiction recognizes the absolute right of host states to delineate the boundaries of their executive, legislative and judicial powers, decide on economic, social and cultural matters of national concern and enforce their domestic laws and regulations

³⁴ See *supra* note 5 at 9-12

³⁵ For example, Great Britain had used military force many times against Latin American states to enforce diplomatic claims, recover public debts and allegedly protect its national properties; See Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*, 54 (University of California Press) (1985)

³⁶ According to Carlos Calvo, all states are equal and no state shall intervene in the internal affairs of other states under the pretext of diplomatic protection. Foreign investors must be entitled to the same treatment which accorded to nationals, treated in accordance with the domestic laws of the host state and subjected to the local courts' jurisdiction; See Carlos Calvo, *Le droit international théorique et pratique*, 5th edition, (1896)

³⁷ See *supra* note 17 at 12

on everyone within their territorial borders. Nonetheless, visitors and non-national residents are variably excluded from certain rights and obligations inasmuch as the nationality requirements dictate, such as having the right to vote, paying public tax and enlisting in military service.³⁸

Although the Calvo doctrine somehow succeeded in curtailing the abuses of diplomatic protection through requiring the exhaustion of local remedies in host state, it has never been elevated to the rank of a customary international law principle.³⁹ State practice has clearly shown that the threat or the actual use of force remains a legal means of diplomatic protection in the event a host state refuses to adhere to arbitration or to enforce an award. Furthermore, powerful exporting countries persisted in claiming the right to exercise diplomatic protection in order to apply their laws to their nationals abroad.⁴⁰ International jurisprudence on state responsibility for injuries to aliens recognizes both a minimum standard of treatment that is accepted by "civilized states" and satisfactory compensation in cases of expropriation of foreign properties.⁴¹ Yet, diplomatic protection under the Calvo's territorial approach cannot be invoked if any "available and effective local remedies" have not been exhausted before the host state domestic legal system.⁴²

2. The ICSID System: A Unique Jurisdiction for Settlement of Investment Disputes

The rift between capital exporting and capital importing states over the minimum standards of treatment of foreign investment had widened during the process of decolonization post-World War II (WWII).⁴³ The newly independent states fiercely claimed their right to either revise or annul the concession agreements that were signed under the colonial rule. Most of the decolonized states adopted a socialist economic approach towards private property in general and foreign investment in particular. A systematic process of nationalization had taken place to transfer foreign

³⁸See Vaughan Law, Jurisdiction, in M. Evans (Ed.), INTERNATIONAL LAW, 336-337 (2003)

³⁹See *supra* note 17 at 13-14

⁴⁰*Id.*

⁴¹"This minimum standard is essentially similar to standards of justice accepted by 'civilized states' including the European states and the US."

⁴²*Id.*

⁴³See *supra* note 17 at 18-24

private assets of the economy to the public ownership of the newly independent national state.⁴⁴ Since 1938, states international responsibility to pay prompt and adequate compensation for direct expropriation of foreign private properties was well-established under the *Hull* formula.⁴⁵ However, in most instances, the process of nationalization was effectuated in accordance with national protectionist laws, and without appropriate compensation according to the Hall customary rule.⁴⁶ In the same vein, on December 1962, the United Nations (UN) General Assembly (GA) passed Resolution no. 1803 on the "principle of permanent sovereignty over natural resources". The resolution emphasizes the inherent right of states to permanent sovereignty over their natural resources; yet it asserts their international obligation to pay appropriate compensation for expropriation of foreign properties and private assets:⁴⁷

[N]ationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.⁴⁸

As a result of this, capital exporting countries have shifted their rights-based language of private property and concession agreements to the notion of economic development to keep up with the new international reality. The flood of capital that accompanied the post-WWII reconstruction process stimulated a number of bilateral and multilateral treaties on Friendship, Commerce and Navigation (FCN).⁴⁹ Although the promotion of trade and the protection of investment were the primary objects of such treaties, they also included provisions for economic development of the host states. In 1958, the signing of the New York Convention on the Recognition of Foreign Arbitral

⁴⁴ *Id.*

⁴⁵ It was first known in President Roosevelt's administration when the US Secretary of State, Cordell Hull, claimed prompt, adequate and effective compensation due for American foreign investors as a result of a series of expropriations conducted by the Mexican socialist government.

⁴⁶ *Id.*

⁴⁷ See KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL*, 94-97, 1: Historical Evolution Of Foreign Investment Protection Law, (1st edition, Cambridge University Press) (2013)

⁴⁸ See General Assembly resolution no. 1803 (XVII) New York, 14 December 1962 on the Permanent Sovereignty over Natural Resources, available at http://legal.un.org/avl/ha/ga_1803/ga_1803.html

⁴⁹ See *supra* note 17 at 24-26

Awards (1958)⁵⁰ marked a concrete step towards a transnational legal arrangement for the settlement of investment disputes.⁵¹ It paved the way for the establishment of the ICSID legal framework for investor-state arbitration in 1965.

a. The ICSID as a Substitute for Two Divergent Dispute Resolution Systems, International Diplomatic Protection and Domestic Court System

In the euphoria of decolonization, diplomatic protection, whether in its imperialistic orientation or its legal form including state-to-state diplomacy, claim commissions and ad hoc tribunals proved to be irresponsive to the nature of investment disputes.⁵² On the one hand, the right to exercise diplomatic protection used to be within the absolute discretion of the investor's home state. Regardless of both the merits of the claim and the amount of economic loss, the exercise of diplomatic protection on behalf of foreign investment was entirely contingent on the political, economic and most notably the military considerations between the claiming state and the host state.⁵³ Thus, foreign investors had no power to affect the claim-making process relying on the international responsibility of states for injuries to aliens, unless the home state so desired or a treaty/contract-based right to claim already existed.⁵⁴

On the other hand, the Calvo effect on the nascent jurisprudence of investment law has yielded the recognition of exhaustion of local remedies before national courts as a requirement for the exercise of diplomatic protection.⁵⁵ In that sense, if foreign investors did not initially resort to domestic means of settlements in the host state, the international responsibility of the latter for injury to foreign nationals may not be invoked. Likewise, submission of investment disputes to the national legal systems of the host states was always problematic for foreign investors' interests.⁵⁶ In many cases, such submission exposes the transnational private business to the risk of being

⁵⁰ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (Jun 10, 1958), (entered into force 7 Jun. 1959)

⁵¹ The New York Convention acts as an executive instrument for International Arbitration in general and Investment Arbitration in specific since it provides for the recognition and enforcement of foreign arbitral awards before domestic courts of states.

⁵² See *supra* note 17 at 24

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Stephen M. Schwebel, *Arbitration and the Exhaustion of Local Remedies*, JUSTICE IN INTERNATIONAL LAW, (1994)

⁵⁶ See *supra* note 20 at 2

at the mercy of the socio-political clashes between states. Furthermore, it leads foreign investors towards immense legal uncertainty as they operate under different legal regimes. Such uncertainty is continuous in the sense that it begins the moment a business is first initiated abroad to the time a dispute may arise.⁵⁷ In the latter case, foreign investors are in many events deprived of an access to impartial tribunal to settle upon their dispute. In fact, this is due to the lack of essential expertise to resolve cross-border investment disputes at the national level as well as the direct affiliation of national administrative and judicial arrangements to the governmental authority of the host state.⁵⁸ The latter, being a part to the dispute⁵⁹ renders domestic dispute resolution including national courts to fall far short of fairness and consequently become vulnerable to politicization.⁶⁰ This tangled relationship between private international investment on the one hand, and host states on the other has highlighted the need for transnational governing arrangements at domestic, regional and international levels, particularly in the areas of dispute resolution.⁶¹

In 1965, the establishment of the International Center for Settlement of Investment Disputes (ICSID) was a turning-point in the evolution of international investment law.⁶² It was first proposed by the World Bank to overcome the drawbacks of investment dispute settlement under both diplomatic protection and domestic court systems. ICSID provides a legal framework for the settlement of investment disputes arising between contracting states and investors who are nationals of other contracting states.⁶³ It purportedly offers an impartial legal and institutional framework which aims for protecting transnational businesses as well as promoting economic development of the contracting states.⁶⁴ For such common ends, ICSID delocalises investor-state disputes through making them subject only to the ICSID's resolution system. As soon as the parties consent to the ICSID jurisdiction, other *local* remedies

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This tendency contradicts the very basis of procedural justice principle which entails that no one shall be a judge in his own cause "*nemo iudex in sua causa*"

⁶⁰ *See supra* note 20 at 2

⁶¹ *See* Detlev F. Vagts, *the Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L.J. 739 - 792, (1969 - 1970)

⁶² *See supra* note 1 (Convention on the Settlement of Investment Disputes between States and Nationals of Other States)

⁶³ *See supra* note 17 at 27-30

⁶⁴ *Id.*

are supposed to be excluded,⁶⁵ unless otherwise agreed by the parties.⁶⁶ Once a claim is initiated before the ICSID, the investor's home state cannot exercise diplomatic protection, nor can the latter's national courts review or adjudicate the given dispute.⁶⁷ If the respondent state consents to the ICSID jurisdiction whether through treaty or contractual obligation, its consent cannot be withdrawn unilaterally⁶⁸ or even conditioned on any additional requirements such as the exhaustion of local remedies before domestic arrangements, unless explicitly agreed by the parties.⁶⁹ Practically speaking, this legal structure clearly transforms the scope of protection for private international investment from a mere privilege under diplomatic protection to a substantive right under the ICSID framework.

b. The ICSID as an Exception to State Sovereign Immunity from Adjudication

The ICSID Convention is a product of the reshaping of the international investment regime in the wake of the postcolonial upheavals. Developing states took advantage of their grander number in the United Nations (UN) to reconstruct the international rules on foreign investment on the basis of economic justice.⁷⁰ Their collective effort under the United Nations Conference on Trade and Development (UNCTAD)⁷¹ has shifted the focus of investment law towards international economic development.⁷²

⁶⁵ According to the "Report of the Executive Directors on the Convention": "If a state and an investor agreed on arbitration and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, thus the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. "This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies."

⁶⁶ Article 26 of the ICSID convention 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". *also* Article 27(1) states that "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

⁶⁷ *Id.*

⁶⁸ According to article 25 (1) of the ICSID Convention: "When the parties have given their consent, no party may withdraw its consent unilaterally."

⁶⁹ *Id.*

⁷⁰ *See supra* note 17 at 86-99

⁷¹ *See* United Nations Conference on Trade and Development (UNCTAD), (1965) available at <http://unctad.org/en/Pages/aboutus.aspx>

⁷² *Id.*

Capital-exporting states have departed from the language of private property to the protection of transnational investment as a means to economic development of states. This notion is evident in the very first paragraph of the ICSID Convention Preamble which reads: “Considering the need for international cooperation for economic development, and the role of private international investment therein.”⁷³ Thus, the protection of foreign investment is no longer reduced to state responsibility for injuries to aliens on its territory, rather it becomes an object for promoting free trade and economic development among contracting states. This semantic evolution in the international investment regime has supposedly motivated most of developing states to ratify the ICSID convention with the aim of attracting Foreign Direct Investment (FDI) to their nascent economies.⁷⁴

Nevertheless, *prima facie* ratification is not sufficient for a host state to abide by the ICSID jurisdiction since the latter makes the agreement to arbitrate an investor-state dispute before its panels a parallel obligation.⁷⁵ Theoretically, a contracting state’s international responsibility may not be invoked unless it has formerly concluded B/MITs or an investment agreement that endorses the ICSID jurisdiction over future disputes with an investor of another contracting state.⁷⁶ In that capacity, ITA acts as a unique adjudicative tool of public international law that governs the relationship between states and foreign investors through reviewing and adjudicating the former sovereign acts over its territory vis-à-vis foreign investors or corporations.⁷⁷ Therefore, ICSID does not tolerate arbitration unless the respondent state, as a sovereign party to the dispute, has in advance waived its sovereign immunity from adjudication. In this respect, ITA is genuinely distinguished from both commercial and contract-based investment arbitrations as they concern a state's private rather than public act within the international commercial sphere.⁷⁸ This is due to the fact that state private acts under international commercial contracts are justiciable according to

⁷³ See *supra* note 1

⁷⁴ See MOHAMED A. ISMAIL, INTERNATIONAL INVESTMENT ARBITRATION: LESSONS FROM DEVELOPMENT IN THE MENA REGION, 84-85, (1st edition, Ashgate Publisher) (2013)

⁷⁵ *Id.* at 79-84

⁷⁶ *Id.*

⁷⁷ See *supra* note 1 at 121-150

⁷⁸ *Id.* at 125-127

the restrictive doctrine of state immunity.⁷⁹ To the contrary, customary international law on sovereign independence of states renders states regulatory acts within their territorial borders immune from the international forms of adjudication.⁸⁰ These regulatory acts encompass state executive, legislative and judicial conduct.⁸¹

The fundamental plea of state immunity from suit extends either to foreign domestic courts of other states or international tribunals like that of the ICSID.⁸² Under customary international law, foras other than those of the state in whose territories the investment dispute arise are legally barred from reviewing the latter's public acts.⁸³ Although modern international practice has broadened the criteria upon which the waiver of state immunity from adjudication may be given, still "three substantial conditions" must be met for state consent to the ICSID jurisdiction.⁸⁴ First, the consent to waive state immunity must be given directly by the beneficiary state itself, and not by any of its affiliated agencies; second, the consent must be explicit and unequivocal pursuant to an international treaty; third, the consent to waive state immunity from adjudication must not affect state immunity from execution or enforcement under international law.⁸⁵ In fact, the distinction between the plea of state immunity from adjudication and that of execution or enforcement justifies the recognition of compensation as the only form of reparation under the ICSID Convention.⁸⁶ The waiver of immunity from adjudication may be expressed by the respondent state either in the form of a self-standing offer contained in an international B/MIT or in a subsequent *compromis d'arbitrage*. Once given, ICSID claims its exclusive jurisdiction over an investment dispute; and hence the dispute

⁷⁹ See Hazel Fox, Jurisdiction, in M. Evans (Ed.), INTERNATIONAL LAW, 361-363 (2003)

⁸⁰ The principle of sovereign independence is enshrined in article 2 (1) of the U.N. Charter; See United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at <http://www.un.org/en/charter-united-nations/>

⁸¹ See *supra* note 78 at 357-361

⁸² *Id.*

⁸³ *Id.* at 365

⁸⁴ For example, the notion of *jus cogens* in the course of human rights claims.

⁸⁵ Article 55 of the ICSID convention provides that "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

⁸⁶ Article 34 of the International Law Commission draft articles on responsibility of states for internationally wrongful acts states that "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination."

must be arbitrated without interference from any domestic political or judicial organs of either the host state or the home state.

B. THE PUBLIC-PRIVATE DICHOTOMY OF INVESTMENT TREATY ARBITRATION

In the ordinary course of events, states' regulatory disputes fall within the ambit of public law adjudication, i.e. domestic courts of law as part of the state governing authority. However, this is not the case with ITA where sovereign acts of states are adjudicated by ICSID's private international tribunals. In fact, ITA combines public and private law features into a single dispute resolution system. The mixed public-private structure of ITA may be traced back to the evolution of the classical form of international arbitration from commercial transactions to regulatory conducts. Even though ITA is primarily formed by a public act of a state, it performs as a private model of adjudication. Unlike other form of international arbitration, it involves a regulatory relationship between a sovereign party – a host state – and a private party – a foreign investor.

In practice, ITA reviews, assesses and adjudicates on states' regulatory conducts vis-à-vis foreign investors' private interests. In this way, ITA has a dual effect on host states. In view of its high punitive damages, it offers foreign investors a coercive tool to deter host state's regulatory acts in relation to their private interests. Furthermore, it allows foreign investors a means to undermine prospective governmental policies through the threat of initiating arbitration proceedings. According to the UNCTAD, a large number of investor-state disputes have been amicably settled upon mutual compromises through out-of-court arrangements between foreign investors and host states.⁸⁷ It has been reported that these settlements frequently involve drastic economic concessions given by respondent host states in return for ceasing arbitral proceedings.⁸⁸

⁸⁷ See United Nations Conference on Trade and Development UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), No. 1, (May, 2013), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

⁸⁸ See *supra* note 6 at 65-70

1. The Public Law Foundation: Investment Treaty Arbitration as Regulatory Adjudication

The advent of the ICSID has strikingly extended the private model of international arbitration into the regulatory sphere. Despite the fact that the New York Convention⁸⁹ and the UNCITRAL Model law on International Arbitration⁹⁰ combined together the form of international arbitration as an alternative dispute resolution, its scope of application was confined only to commercial disputes between juridically-equal parties.⁹¹ This embraces both state-to-state and private individuals/corporations disputes where the parties to the dispute have the same legal standing. Under classical international law, claims of international responsibility may only be brought among states as subjects of public international law.⁹² Even in cases where injuries are directed towards aliens, claims of international responsibility used to be initiated exclusively by the investor's home state against the host state through diplomatic channels.⁹³

Private individuals had no direct power in the claim-making process due to the lack of jurisdiction *rationae personae* under customary international law.⁹⁴ Only sovereign states had discretion to claim international responsibility on behalf of their aliens abroad. It was not until the establishment of ICSID that individual investors and transnational corporations have been given direct access to international tribunals to initiate and enforce international claims in their own right against host states. Thus, ICSID has turned into a unique jurisdiction to private transnational investments. From this point, international investment arbitration transformed from reciprocal to regulatory relationship *inter alia* a sovereign state and a private

⁸⁹ See *supra* note 50

⁹⁰ See UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 available at

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

⁹¹ See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, 54-56, (1st edition, Oxford University Press) (2008)

⁹² See Crawford J. & Olleson A., The Nature and Forms of International Responsibility, in M. Evans (Ed.), INTERNATIONAL LAW, 445-472 (2003)

⁹³ *Id.*

⁹⁴ *Id.*

individual/corporation. These regulatory disputes were originally to be adjudicated by the host state's national courts in accordance with its municipal laws.⁹⁵

a. Analogy to Domestic Judicial review of Administrative Actions

Van Harten and Loughlin aptly suggest that ITA offers an alternative dispute resolution system akin to domestic administrative courts of states.⁹⁶ Indeed, article 1 (2) of the ICSID convention is an embodiment of "global administrative law"; it states that "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention." The function of ITA under the ICSID legal framework in reviewing and adjudicating states' regulatory conduct vis-a-vis foreign investors is quite analogous to the domestic administrative courts of states.⁹⁷ First and foremost, general consent of states to ICSID jurisdiction whether through investment contracts, national legislations or B/MITs, has converted ITA into a "compulsory adjudicative mechanism".⁹⁸ Second, investors have the right to bring "direct individual claims" before ICSID tribunals, especially that they are not obliged in most cases by the customary limitation to exhaust local remedies in the host state.⁹⁹ Third, since the procedural enforcement of the New York Convention has been extended to the Washington Convention, ICSID awards are legally enforceable vis-à-vis all state parties and not subject to any subsequent domestic or international supervision.¹⁰⁰ Finally and most seriously, ITA enables foreign investors to influence host state policy choices through threats of initiation of arbitral proceedings.¹⁰¹

⁹⁵ *Id.*

⁹⁶ *See supra* note 2, Van Harten & Loughlin (This article sets forth a strong argument that ITA has developed an internationally recognized set of rules that is fairly analogous to the administrative law system of states. ITA is formed by a sovereign act, by which states consent generally to investment arbitration. This may be done through either enacting a law or concluding bilateral or multilateral investment treaties that impose arbitration in future disputes that may arise from the states' exercise of public authority vis-à-vis foreign investors.)

⁹⁷ *Id.* at 122-123

⁹⁸ *Id.* at 142-145

⁹⁹ *Id.* at 127-131

¹⁰⁰ *Id.*

¹⁰¹ *See* Organization for Economic Development and Cooperation, *Government Perspectives on Investor-State Dispute Settlement: A Progress Report*, 7-10 (Freedom of Investment Roundtable, December 14, 2012)

This evolutionary shift from the reciprocal to the regulatory nature of disputes under the ICSID jurisdiction has brought about a broader jurisdiction *rationae materiae* in investment disputes. In this respect, article 25 (1) of the ICSID convention provides that “The jurisdiction of the Centre shall extend [to any legal dispute] arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.” The logical corollary of this article is that the scope of application of ITA goes beyond the limits of private contractual relationships to cover all host state regulatory conducts that may negatively affect foreign investors over its territory.¹⁰² In contrast to commercial arbitration, ITA is not limited to private reciprocal disputes, rather it encompasses all governmental actions against foreign investors regardless of their private or public nature.

b. ICSID Tribunals' Variable Scope of Review

ICSID investment tribunal's scope of review is not the same in all case. It may vary depending on the nature of the legal instrument sanctioning investor-state arbitration. In this regard, three scenarios are contemplated. If the ICSID jurisdiction is triggered only by an investment contract where state consent is expressed by a private rather than a public act, the authority of the arbitral tribunal will be limited to such contractual relationship. In this case, the host state's exercise of public authority over the foreign investor will be assessed in light of the given contractual provisions.¹⁰³ On a different account, if the ICSID jurisdiction is invoked through a sovereign act in the form of national legislation or international B/MIT (which is the focus of this study), the authority of the arbitral tribunal will be extended to cover all state public conducts vis-à-vis an investor regardless of their nature, whether public or private. In this event, the scope of reviewability of state conduct includes acts and omissions undertaken by any organ of the state irrespective of its functions, including executive, legislative and judicial organs.¹⁰⁴ Finally, it is worth mentioning that in many events the ICSID

¹⁰² *Id.* at 125-127

¹⁰³ See JOSE E. ALVAREZ & KARL P. SAUVANT, THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS, 175-178, (1st edition, Oxford University Press) (2007)

¹⁰⁴ Article 4 (1) of the International Law Commission draft articles on responsibility of states for internationally wrongful acts provides that "The conduct of any state organ shall be considered an act

jurisdiction may be triggered through both private and public legal instruments; for example, a contracting state may sign an investment contract with a foreign investor with whom country it has already entered into a BIT. In this case, the investor's claim may be based on either contractual or treaty term violation or both of them. Therefore, the threshold of protection is far higher for such an investor since arbitral tribunals frequently draw on the more preferential terms for an investment. Further, some investment treaty tribunals elevate contractual provisions to the rank of treaty obligations.¹⁰⁵

2. The Private Law Foundation: Investment Treaty Arbitration as Private Model of Dispute Settlement

Arbitration has long been used to settle commercial disputes arising between private parties. Since the early 1960s onwards, the practice of investor-state arbitration as an alternative method of dispute settlement has materialised under various international legal instruments;¹⁰⁶ especially the European Convention on International Commercial Arbitration (1961)¹⁰⁷, the Inter-American Convention on International Commercial Arbitration (1975)¹⁰⁸ and most notably the UNCITRAL model law on International Arbitration (1985).¹⁰⁹ However, the scope of international arbitration under these legal instruments was entirely limited to commercial acts of states within the private law sphere. As a result, commercial arbitration was used in its classical form to review only a state commercial conduct within a given contractual relationship. The unusual function of ITA as a private law mechanism to resolve

of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state."

¹⁰⁵ See *supra* note 103

¹⁰⁶ See *supra* note 91 at 54

¹⁰⁷ The European Convention on International Commercial Arbitration, UN, Geneva (April 21, 1961) available at https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf

¹⁰⁸ The Inter-American Convention on International Commercial Arbitration, Panama (January 30, 1975, entered into force on the 6th of June, 1976) available at <http://www.oas.org/juridico/english/treaties/b-35.html>

¹⁰⁹ See *supra* note 90

regulatory disputes *inter alia*, the state and foreign investors, first emerged under the ICSID legal framework.¹¹⁰

Under ICSID's framework, states consent to a private international regime for investment protection. By doing so, contracting states voluntarily grant foreign investors and transnational corporations the right to arbitrate, initiate and enforce international claims for injuries towards their assets or properties. A wide network of roughly 3,000 bilateral treaties incorporates states' self-standing consent to ICSID's private legal framework.¹¹¹ To that effect, both commercial arbitration and ITA are initiated through an individual claim made by a private party. Analogous to international commercial arbitration, sovereign acts of a contracting state become subject to a private panel of contracted-arbitrators rather than a public law court system.¹¹² Instead of a permanent court, one-off arbitral tribunals are in charge of investor-state disputes. Privately appointed arbitrators as a substitute for state-tenured judges undertake the process of settlement since the ICSID's Chair bestows comprehensive jurisdiction upon an arbitral panel to settle a specific dispute on a case-by-case basis.¹¹³

Investment arbitration under the ICSID legal framework transplants rules of international commercial arbitration into regulatory disputes. On the one hand, ITA cherishes the principle of the confidentiality of proceedings, being at the heart of private law adjudication. This is evident in article 48 (5) of the ICSID Convention which provides that “The Centre shall not publish the award without the consent of the parties”. Since the ICSID is not authorized to publish arbitral awards without the consent of the concerned parties to the dispute, the latter may intend to block the legal reasoning of ITA for political or economic considerations. Although the overwhelming majority of ICSID decisions are published, It has been recently reported that there are some other anonymous arbitral decisions that never been reported due to the political sensitivity that surrounds investment disputes.¹¹⁴

¹¹⁰ See *supra* note 1

¹¹¹ See Organization for Economic Co-operation and Development, (Dec 14, 1960), available at <http://www.oecd.org/>

¹¹² See *supra* note 2 at 140

¹¹³ See *supra* note 91 at 50

¹¹⁴ See Legal Information Institute, Cornell University. available at <https://www.law.cornell.edu/>

In conformity with the commercial practice, ITA raises the principle of party autonomy over state sovereignty; hence the protection of transnational investment prevails over public policy considerations such as health, environment and social security. In practice, these considerations have nothing to do with the settlement of investor-state disputes.¹¹⁵ Therefore, third parties other than the state and the foreign investor including epistemic groups, civil society and local communities in the host state are absolutely precluded from joining arbitration proceedings.¹¹⁶ As to the legal remedy, ICSID recognizes compensation as the sole remedy in investor-state disputes. Despite the fact that compensation equally applies as a public law remedy in the event restitution seems to be impossible, it is still at the heart of private law remedies.¹¹⁷ Further, awarded damages in investor-state disputes are recovered in accordance with the enforcement framework of international commercial arbitration under the New York Convention.¹¹⁸

3. Investment Treaty Arbitration as a One-Sided System of Litigation

The Preamble of the ICSID Convention states that “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”¹¹⁹ This provision was essentially formulated in deference to the contracting states' sovereign immunity from adjudication under international law. The Preamble is also supplemented by article 25 (1) which requires that the parties consent in writing to the ICSID jurisdiction.¹²⁰ Indeed, states, as sovereign powers are at liberty to accept the ICSID jurisdiction depending on their legal, political and economic standing. Yet, the interplay between national and international jurisdiction along with the public-private structure that uniquely present in ITA has considerably reflected in the prospects of investment disputes under the ICSID.¹²¹

¹¹⁵ See *supra* note 2 at 141

¹¹⁶ *Id.*

¹¹⁷ See *supra* note 20

¹¹⁸ See *supra* note 2 at 139-140

¹¹⁹ See *supra* note 1

¹²⁰ *Id.*

¹²¹ See *supra* note 2

a. An Individualized Claim-Making Process

Even though the ICSID Convention abstractly features both host states and foreign investors bringing arbitration requests against each other, only foreign investors have practical legal access to the ICSID litigation.¹²² In contrast to the reciprocal nature of typical international arbitration, the ICSID legal framework creates a one-sided system of international adjudication. Investor-state disputes constantly depict an investor whether an individual or a corporation filing a claim against a host state on the basis of an investment contract, an investment treaty or more commonly on both. This is not to suggest that the Convention does not anticipate the host state other than a respondent. Rather, the neoliberal mindset of the ICSID together with investment tribunals law-making have developed a one-sided body of law that only allows foreign investors to appear as claimant.¹²³ Some private law practitioners have justified this biased model of the claim-making process by the fact that the host state, being sovereign, is the stronger party in investment disputes.¹²⁴ It has comprehensive customary powers over its territory whether in relation to nationals or aliens.¹²⁵ Drawing on its political and economic influence, it may exercise unchecked regulatory powers against foreign investors.¹²⁶ For this reason, foreign investment protection was the primary objective of the Washington Convention's drafters. Moreover, it may be argued that sovereign states have various domestic legal avenues of relief other than investment arbitration including domestic administrative and judicial arrangements; consequently, the host state may internally pursue legal proceedings on its own legitimate authority to have its rights sufficiently and expediently fulfilled.¹²⁷

On the contrary, I believe that it is the restrictive approach of most of arbitral tribunals rather than the conceptual framework of the ICSID that diminishes the host states'

¹²² Article 36 (1) provides that "Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party."

¹²³ See Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1, No. 1, Journal of International Dispute Settlement, 97-122 (2010)

¹²⁴ See *supra* note 101 at 9

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *supra* note 123

substantive rights and accordingly gives rise to a biased claim-making process. ICSID's arbitral tribunals tend to question the conduct of the host state more than that of the investor regardless of the merits of the case. This inclination towards private international investment produces a one-sided avenue of relief that foregrounds the protection of foreign investment over public policy concerns of the host state; especially in health, environment and human rights matters.¹²⁸ In doing so, investment tribunals employ an immense disciplinary influence over a state's legitimate regulatory power. No doubt, the need for substantive legal protection for transnational investment cannot be denied; yet, the right of the host state to counterclaim in an international venue must not to be disputed under any circumstance. In interpreting the parties' interests under ICSID's litigation, tribunals should account for the host state's substantive right to development as perceived by the Washington Convention.¹²⁹ Further, they have to consider the state's countermeasure against serious breaches committed in the course of an investment.¹³⁰

In line with Van Harten's argument, I submit that the one-sided claim-making of ITA renders it close to public administrative law review. Although the consent to ICSID arbitration is no different than ordinary "offer and acceptance" in contract law, it varies considerably in the practice of ITA under the ICSID legal framework.¹³¹ Once a state has ratified the Washington Convention, its consent to ICSID jurisdiction may be extrapolated from different domestic and international legal instruments. This includes most notably a national legislation, investment contract or an international treaty. It is such consent that forms a state outstanding offer and consequently gives rise to recurrent arbitrations without legal privity.¹³² In Paulsson's view, this legal privity is twofold. For one thing, it means that a foreign investor whether individual or corporation, who is not a party to an international B/MIT with a host state, can avail himself/herself of the latter's protection as long as his/her home country is a party to

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *supra* note 91 at 54

¹³¹ See William B. McElhiney, *Responding to the Threat of Withdrawal: On Emphasizing the Interests of States, Investors and the Transnational Investment Systems*, 10, 610 (2014)

¹³² See Jan Paulsson, *ICSID Review, Arbitration Without Privity*, 10, Foreign Investment Law Journal, 232-41 (1995)

it.¹³³ In this regard, the home state's international rights and obligation under the investment treaty are transferred to its aliens. Another thing relates to the *rationae temporis* of investment arbitration; that is "arbitration without privity" entails that even investments that did not exist at time a given B/MIT was concluded may become a subject of arbitration claims against the host state treaty party in the future.¹³⁴ Therefore, investor's claim *ipso facto* establishes a legal acceptance that perfects a host state self-standing offer to arbitrate included in a B/MIT. In all cases, ICSID's tribunals have the competence to settle in their own jurisdiction any preliminary objection made by either party to proceedings.¹³⁵

b. State Prospective Consent:

ICSID's case law endorses broad criteria in recognizing states' consent to its jurisdiction. It draws on a variety of domestic and international legal instruments including investment contracts, national investment laws and international B/MITs to extract states' consent to ITA.¹³⁶ In the case where a state's consent to ICSID arbitration is contained in either a *clause compromissoire* in an investment contract or a subsequent *compromis d'arbitrage* of an international treaty, the ICSID jurisdiction is explicit and consequently will be deduced easily by a given arbitral tribunal.¹³⁷ Such way of consent to ITA follows the exact means of consenting to traditional commercial arbitration. However, the difficulty lies in cases where the state's consent to ICSID arbitration is incorporated in either national legislation or B/MIT provision. Although the requirement of "written consent" is seemingly fulfilled in the *form* of a sovereign act whether a domestic law or an international treaty, the *substance* of states' consent to arbitration remains implicit. In the meantime, this sort of state consent constitutes the basis for the overwhelming majority of ICSID arbitrations particularly when a foreign investor invokes customary rules of international law applicable to the dispute such as Fair and Equitable Treatment (FET) and Most Favored Nation (MFN). According to 2016 ICSID caseload statistics, nearly 70% of

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Article 41 (2) of the convention puts the dispute in the hands of the arbitral tribunal to deal with any objection to the ICSID jurisdiction; thus the tribunal will have the competence to "determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

¹³⁶ See *supra* note 131

¹³⁷ *Id.*

investor-state disputes where the ICSID jurisdiction has been upheld were based on either national investment legislation of the host state or a BIT provision.¹³⁸

In the first scenario, a state unilateral act in the form of national investment legislation contains the state's self-standing consent to ITA. The landmark *Pyramids case SPP v. Egypt*¹³⁹ marked such a development of state prospective consent.¹⁴⁰ It was a turning point in the practice of international investment law to establish the consent to arbitration on a unilateral public act.¹⁴¹ Although Egypt as a party to the Washington Convention had not entered into an investment contract with Mr *Siag*, nor had it signed an ICSID arbitration agreement or *compromis d'arbitrage*, its binding consent to the ICSID was found in article (8) of its National Investment Law no. 43 of 1974.¹⁴² While the arbitral tribunal held that *SPP's* consent is simply given through filling out the arbitration claim, it has concluded as to Egypt's consent that “although consent by written agreement is the usual method of submission to ICSID jurisdiction, it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a contracting state.”¹⁴³ In this case, the interaction between international and domestic jurisdiction is quite evident in establishing the ICSID jurisdiction. Whereas state consent was found in domestic legislation, investor's consent was effectuated by a private law act invested in the filling in of a written arbitration claim. In order to establish the ICSID jurisdiction, the tribunal had employed an expansive treaty interpretation in light of both domestic statutory provisions and international law that governs unilateral juridical acts.¹⁴⁴

In the second scenario, the state prospective consent to the ICSID jurisdiction is triggered only by a BIT clause. This sort of consent governs the current mainstream

¹³⁸ See The ICSID Caseload – statistics (Issue 2016-1), International Center for Settlement of Investment Disputes, available at

<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>

¹³⁹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Decision on Jurisdiction, April 14, 1988)

¹⁴⁰ See *supra* note 103 at 175-178

¹⁴¹ For example, in *tradex v. Albania*, Albania's consent to arbitration was upheld on the basis of its 1993 National Investment Law

¹⁴² See *supra* note 103 at 176

¹⁴³ See *supra* note 139

¹⁴⁴ See *supra* note 20 at 4

practice of ITA under ICSID's case law. The (1990) *AAPL v. Sri Lanka*¹⁴⁵ was the first case in which a state consent to ICSID arbitration has been solely found in a BIT. It marked a serious shift in the basis of states' consent to the ICSID. Up to that time, there had been few BITs compared to over the 3000 existing today.¹⁴⁶ In an attempt to assert the private law foundation of ITA, the tribunal concluded that "the BIT *per se* does not contain the parties' agreement to arbitration; rather it contains the state offer of consent to arbitration which has been perfected by the investor's subsequent acceptance through filling an arbitration claim". Contrary to what stated by *AAPL v. Sri Lanka*, one can perceive a dichotomous process for extracting the parties' consent to arbitration in such a case. In this respect, the mixed Public-Private nature of ITA comes into play. The first step involves a public act represented by a BIT arbitration clause between the host state and the investor's national state which offers the host state consent; the second step involves a private act epitomized in the acceptance of the host state offer through filling in of an arbitration claim.¹⁴⁷ Despite the fact that the language of the Sri Lanka-United Kingdom BIT is pretty conclusive in expressing the parties' consent to the ICSID jurisdiction,¹⁴⁸ it contradicts article 25 of the Convention which requires a "written consent". This expansive approach in interpreting state's consent seems precarious in relation to the international principle of sovereign independence; yet, for others with a privately oriented mind-set, it is justified to some extent by the fact that ITA is a private international adjudicative mechanism (if that can even be said).

Comparing the rationale of the two above-mentioned cases, it would be illogical if investment treaty tribunals decided that a state is able to give its consent to *international* arbitration through a unilateral *municipal* legislation, while few years later the latter is held powerless to do so pursuant to international legal instruments.

¹⁴⁵ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (Final Award, June 27, 1990)

¹⁴⁶ See ICSID Database available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx>

¹⁴⁷ See *supra* note 20 at 4-5

¹⁴⁸ The Sri Lanka-United Kingdom BIT stipulates that "Each contracting party hereby consents to submit to the Centre for the Settlement of Investment Disputes...for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between states and nationals of the other states...any legal dispute arising between that contracting party and national or company of the other contracting party concerning an investment of the latter in the territory of the former."

Nevertheless, this is not to justify these two expansive approaches in extrapolating a state consent to ITA, nor to suggest that all BITs intrinsically serve as a state's prospective consent to arbitration. There are still numerous BITs that contain instead an ICSID arbitration clause explicitly requiring subsequent *compromis d'arbitrage* between the parties. This narrow scope of interpretation did in fact prevail at the time the convention was signed. ICSID's drafters themselves have incorporated such approach of interpretation of state consent into the Convention Preamble and again in article 25 (1).¹⁴⁹ Despite the fact that a broad scope of interpretation to state consent is in the foreign investor's best interest, it conversely brings up immense legal uncertainty to the host state.¹⁵⁰ Indeed, ITA is designed in the first place to protect transnational investment as the weaker party over host state's territory, yet state "subsequent written consent" to an international regulatory adjudication serves as a guarantee for its sovereign independence.

C. CONCLUSION:

In this chapter, I have explored the legal evolution of ITA from two different yet interrelated dimensions: domestic and international jurisdiction and public and private law. In section one, I have demonstrated how investor-state disputes do not lie in full within the ambit of international law, rather they lie at the intersection between domestic and international laws. The governing regime of investment disputes has changed in so far as political, economic and legal contours of international investment law evolved throughout history. Diplomatic protection proved to be irresponsive to the nature of investment disputes; the notorious forms in which it was exercised by the powerful exporting states have undermined the host states political independence and sovereign equality. Although the *Calvo* Doctrine has partially succeeded in curtailing the abuse of diplomatic protection through requiring the exhaustion of local remedies in respondent states, it has never been elevated to the status of customary international law. Likewise, deciding investment disputes through national court systems puts private transnational business at risk of being denied justice or facing

¹⁴⁹ See *supra* note 131 at 611

¹⁵⁰ See *supra* note 91 at 133

unspecialized or unfair domestic arrangements. It further exposes foreign investor's interests to underlying socio-political clashes between states.

In section two, I have explained how the mixed public-private structure of ITA is traced back to the evolution of the classical international arbitration from the reciprocal relationship in "commercial transactions" to the regulatory relationship in investor-state disputes. While ITA is primarily formed by a public act of a state, it performs as a private model of dispute settlement under the ICSID. On the domestic level, a state may consent to international investment arbitration through enacting domestic investment legislation that allows arbitration in future disputes with prospective foreign investors operating on its territories. On the international level, a state may conclude B/MITs or join FTAs which provide for investment arbitration before ICSID tribunals. In reviewing states' regulatory conduct vis-a-vis foreign investors, I have analogized the function of ITA to the domestic judicial review of administrative actions. In that sense, the ICSID legal framework constitutes an alternative private method of adjudication to the public law court system; nevertheless, investment treaty tribunals apply private law rules that originate in the practice of international commercial arbitration.

In contrast to the reciprocal nature of typical international arbitration, the ICSID legal framework creates a one-sided system of litigation that perceives investors only as claimants. A one-off private international tribunal reviews, evaluates and adjudicates state authority to regulate its internal affairs of public policy vis-a-vis foreign investors. A considerable amount of case law shows broad criteria in recognizing states consent to ICSID jurisdiction. Investment treaty tribunals draw on a variety of domestic and international legal instruments to extract the contracting state consent to arbitration. In sum, I argued that ITA combines the form and procedures of international commercial arbitration, yet it performs under the substantive principles of public law. In fact, regulatory disputes that govern the relationship between states and private individuals essentially require the incorporation of public rather than private law standards of review. Since ITA is formed by a sovereign act of a state by which the latter voluntary waives its sovereign immunity from adjudication, it must legally be reviewed as public law adjudication.

III. PRIVATIZING INVESTMENT TREATY ARBITRATION: ELEVATING INVESTMENT PROTECTION OVER STATE REGULATORY POWER

The legitimacy of the current network of ITA under the ICSID legal framework is believed to be at stake.¹⁵¹ In addition to the precarious basis of consent to the ICSID jurisdiction, as discussed in chapter one, the ICSID's neoliberal philosophy has bolstered expansive interpretations of investment treaties at the expense of host state regulatory power. This is due to the absence of a comprehensive legal framework that balances equally between the interests of investors and host-states, accounts for the economic disparities between developed and developing countries and clearly sets up the limits between investment protection and state regulatory functions.¹⁵² Whereas the developed countries, being representatives of mainstream transnational business, have long sought to maximize the scope of protection in favor of foreign investors, developing countries strove for FDI flows side-by-side with securing their national policies.¹⁵³ Even though most of Investor-state arbitrations are concluded under the legal framework of the ICSID, interpretations of central investment provisions included therein have proven to be volatile and hence vulnerable to change on a case-by-case basis.¹⁵⁴ This applies particularly with respect to the scope of minimum standards of treatment including Most Favored Nation (MFN), Fair and Equitable Treatment (FET), definition of protected investment, concept of indirect expropriation, limits of investment guarantees in host state and provisions on corporate social responsibility (CSR) concerning health, environment, labor and taxation.¹⁵⁵

International investment law has become plagued with uncertainty and fragmentation. ICSID's neoliberal foundation has persisted in privatizing international investment law through the broad law-making power of commercial arbitrators and private international law firms.¹⁵⁶ The legal framework of the Washington Convention establishing the ICSID was vehemently criticized by a large number of academics and

¹⁵¹ See *supra* note 6 at 1521-24

¹⁵² See *supra* note 3 at 163-65

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* note 8 at 111-15

¹⁵⁶ See *supra* note 91 at 124-31

practitioners in the field for favoring inflexible investment protection to the detriment of the host states' socio-economic scheme.¹⁵⁷ Some scholars have attributed the fragmentation of the international investment regime to the variation in treaty terms, negotiating powers and the quality of legal expertise based on a state's political and economic level of development.¹⁵⁸ On the other side, the lack of a binding precedent to govern the practice of ITA as well as an effective mechanism to review and correct potential legal errors has largely generated many conflicting arbitral awards.¹⁵⁹ Over the past two decades, innumerable arbitral awards worth billions of dollars have been rendered against middle and low-income states.¹⁶⁰ The divergent practice of ITA has ultimately folded into two principal solutions; namely, either to amend the Washington Convention in order to accommodate host states' right to regulate along with investment protection or to renegotiate a Multilateral Agreement on Foreign Investment (MAI) to fairly consider the host states' public law concerns. Nevertheless, differences between developed and developing countries over both the scope of the minimum standards of investment protection and the limits of states' regulatory space have hindered any amendment to the Washington Convention.¹⁶¹

The failure of negotiations on a MAI to replace the current diverse network of BITs has maintained the imprudent interpretations of ICSID investment treaty tribunals. Moreover, applying extreme neoliberal policies has proven to be risky amid arduous economic crises. Even developed countries have been forced to rethink their free market-based ideals for the sake of economic salvation and social security protection. States practice' has witnessed a shift towards creating a safe space for exercising regulatory power over economic functioning. Therefore, investment treaty tribunals cannot further tolerate interpretations which are no longer supported by state practice. The rising discrepancy among ICSID arbitral panels has led some developing countries to renegotiate their BIT provisions on much stricter terms to be in line with domestic social and economic policies. This tendency is evident in the practice of

¹⁵⁷ See *supra* note 8 at 623-25

¹⁵⁸ See SORNARAJAH M., *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT*, 183-87, (3rd edition, Cambridge University Press) (2010); also See *supra* note 103 at 63-64

¹⁵⁹ See Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EJIL. No. 3, 875- 908, (2011)

¹⁶⁰ See *supra* note 146 available at

<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>

¹⁶¹ See *supra* note 103 at 153-160

many middle and high-income developing states, especially with regards to financial, labor, health and environmental fields of function.¹⁶² Other countries have managed to initially limit their consent to the ICSID jurisdiction to avoid unpredictable claims.¹⁶³ A third category of states have taken an extremist attitude towards ITA and decided to opt out of the ICSID¹⁶⁴ system altogether, rescind their investment treaties¹⁶⁵ or to challenge the ICSID arbitral awards through the available annulment procedures.¹⁶⁶

A. INTER-STATE BARGAIN OF AN INVESTMENT TREATY: DOES VARIATION IN TREATY TERMS ACCOUNT FOR FRAGMENTATION OF INVESTMENT TREATY ARBITRATION

Until the end of WWII, investment protection was subject to the power and persuasion of states. The scope of protection for foreign investment was mainly dependent on the political, economic and military influence of either the host state or the investor's home state.¹⁶⁷ In the wake of the postcolonial era, the schism between capital-exporting and capital-importing countries over the minimum standards of treatment for foreign investment forced the former to negotiate comprehensive BITs so as to secure long-established interests over the latter's territories.¹⁶⁸ Above all, having a minimum standard of protection for foreign investment was a prerequisite

¹⁶² India-U.S. (2012) model BIT which replaced the 1993 model; even though retained the investor-state dispute system under the ICSID, it has embraced major changes regarding foreign investor's scope of obligations most notably in paying taxes, fighting corruption and exhausting local remedies before administrative and judicial bodies.

¹⁶³ In, March 12, 2015, Egypt has passed crucial amendments to the Egyptian Investment Law no. 8/1997, by which its consent to investor-state arbitration under the ICSID becomes limited to subsequent agreement and pending submission of the claim to a governmental committee for settlement of investment disputes. It was reported that such amendments were intended by the Egyptian legislator in order to limit Egypt's exposure to investor-state arbitration that hiked up to dozens of claims after the January 25th revolution in 2011.

¹⁶⁴ Bolivia withdrew from the ICSID Convention in November 3, 2007; *See* 'Bolivia Denounces ICSID Convention', 46 ILM (2007) 973; On July 6, 2009, the World Bank received a written notice of denunciation from the ICSID Convention *available* at <http://icsid.worldbank.org/ICSID>

¹⁶⁵ For example, Venezuela terminated its BIT with the Netherlands in April 2008, *Investment Arbitration Reporter* (May 16, 2008) *available* at <http://www.iareporter.com/Archive/IAR-05-16-08.pdf>.

¹⁶⁶ *See* The ICSID Caseload – Statistics (Issue 2014-1), Up until 2014, a total of sixty one ICSID annulment proceedings were filled, fifty of which were decided and eleven others were pending. Out of this, thirteen awards were fully or partially annulled, twenty two annulment applications were rejected and fifteen proceedings were discontinued by the parties *available* at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

¹⁶⁷ *See supra* note 17 at 65-70

¹⁶⁸ *Id.*

for developed states to deploy more assets in the newly independent states. A salient part of the literature on investment arbitration supports the view that term variations over a diverse network of BITs have yielded an increasing number of inconsistent arbitral awards and consequently accounts for fragmentation of the system at large.¹⁶⁹ In this regard, I explain how bilateral investment treaties have developed an overarching regime for the protection of private international investment. Further, I evaluate the divergent approaches of investment treaty tribunals to the minimum standards of treatment that included in different bilateral investment treaties.

1. Bilateral Investment Treaties as a Normative Basis for International Investment Regime

It was in the best interest of capital-exporting countries representing mainstream transnational investment to establish a hegemonic model of investment protection.¹⁷⁰ Under the neoliberal philosophy, bilateral treaties were seen as a substitute for both the deceased *gun-boat* diplomacy and the implausible multilateral treaty on transnational investment. This interest corresponded to the capital-importing countries' aim to attract FDI essential for economic development.¹⁷¹ For such an end, the latter were keen to convey positive messages to the former through entering into comprehensive bilateral investment treaties.

In fact, these matching interests explain why BITs have historically developed in an adverse order between developed and developing countries. On the other side, the New International Economic Order Declaration (NIEO) has reinforced South-South economic cooperation leading to the conclusion of numerous BITs among capital-importing countries themselves.¹⁷² Oil explorations in North Africa and the Middle East have driven many developing countries to sign BITs to assist their nascent oil inter-trade.¹⁷³ Besides, the industrial boom in South Eastern Asia has witnessed a

¹⁶⁹ See *supra* note 158 at 183; (for different argument) See *supra* note 159 at 875- 908

¹⁷⁰ *Id.*

¹⁷¹ See *supra* note 70 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

¹⁷² The Declaration on the Establishment of a New International Economic Order (May 1st, 1974) U.N. G.A. Res. 3201, 29 (1974)

¹⁷³ See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES*, 9-13 (2nd edition, Kluwer International Law Publishers) (1995)

significant diffusion of BITs amongst Far Eastern developing countries in order to facilitate manufacture and technology transfer.¹⁷⁴

All these factors have resulted in a considerable increase in the number of BITs concluded between developing states from only 42 BITs in 1990 to over 1000 BITs in force today.¹⁷⁵ Being relatively recent, most of BITs concluded between developing states were initially guided by the capital-exporting countries model investment treaties. In particular, the U.S. was and still playing a prominent role in developing a body of laws through updated model BITs.¹⁷⁶ Thus, the interest in uniform rules on investment protection came up along with neoliberal views that lead private transnational businesses to gain access to domestic markets.

Over the time, there have been changes in BIT terms upon individual limitations. Some states have adapted investment treaty language to their social, political and cultural identity. Yet, such changes in BIT terms were always concerned with generalities rather than details of minimum standards for investment protection.¹⁷⁷ Thus, the continuing attempts to conclude a multilateral investment treaty have failed because of the differences over the exceptions and not the principles of investment protection.¹⁷⁸ Arbitral tribunals have eventually decided on the substantive rights and obligations of either party through interpretation. Nevertheless, the scope of interpretation the tribunal may exert increases or decreases depending on the degree of clarity and flexibility of treaty language.¹⁷⁹

Although the treaty parties create their own investment treaty law, arbitral tribunals are the supreme interpreters of when and how treaty term applies. Once the parties recognize an investment treaty, they impliedly delegate comprehensive interpretive power to the prospective arbitral tribunal. In that capacity, investment treaty tribunals replace treaty parties as law-maker for the given investment treaty. In asserting its law-making function, the tribunal in *Sempra Energy International v. Argentine*

¹⁷⁴ *Id.*

¹⁷⁵ See *supra* note 17 at 58

¹⁷⁶ See For example, the U.S. model BITs of 1994, 2004 and 2012

¹⁷⁷ See *supra* note 173 at 20-25

¹⁷⁸ See *supra* note 17 at 13

¹⁷⁹ *Id.*

concluded that it has the exclusive competence to interpret the meaning of BIT terms upon which it was entitled by the parties to settle the given dispute.¹⁸⁰

Theoretically, arbitral tribunals as consensual adjudicative mechanisms are not formally bound by the judicial rule of *stare decisis*.¹⁸¹ Even though arbitral awards are not given the status of formal precedent, they are frequently relied on by investment treaty tribunals. In practice, the use of precedent creates a body of case law that applies independently from the governing treaty provisions.¹⁸² Even so, investment treaty tribunals have in many occasions deviated from well-established precedents drawing on certain legal reasoning underlying the tribunal's conviction instead of treaty term variations.¹⁸³

Before the advent of the ICSID, investment treaties provided at most for state-to-state arbitration as an alternative to diplomatic protection.¹⁸⁴ At that time investment arbitration claims had not been individualized yet. Only states were parties to international investment arbitrations. Dispute resolution was exercised through submitting a treaty claim by a state party to the International Court of Justice (ICJ), an arbitral tribunal or *ad hoc* committee.¹⁸⁵ Even after the emergence of the individualized version of investment arbitration for the first time under the legal framework of the Washington Convention, the ICSID jurisdiction had to be built on a pre-existing investment contract *inter alia*, a foreign investor and a host state.¹⁸⁶

It was not until the *AAPL v. Sri Lanka* award in 1990 that the pervasive network of BITs became a comprehensive source of states' consent in investor-state treaty-based arbitrations.¹⁸⁷ In that way, customary international law on both *lex mercatoria* as well as state responsibility for injuries to aliens was reflected in a vast network of bilateral, multilateral and free trade agreements.¹⁸⁸ In fact, this network forms the

¹⁸⁰ *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (Final award, September 28, 2007)

¹⁸¹ *See supra* note 6 at 1611

¹⁸² *Id.*

¹⁸³ *See supra* note 159

¹⁸⁴ *See supra* note 17 at 65-70

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 44

¹⁸⁷ *See supra* note 145

¹⁸⁸ *See supra* note 17

modern bulk of international law on foreign investment. It is impliedly understood from article 42 of the ICSID Convention that BITs constitute the primary source of international law on the protection of foreign investment against non-commercial risks.¹⁸⁹

2. Divergent Interpretations of International Minimum Standards of Treatment

One may suggest that *quid pro quo* bargains and relative negotiating powers of treaty parties underlying the concept of BITs render the latter essentially variable in content and structure. While some BITs may require negotiations between treaty parties, exhaustion of local remedies or expiration of a grace period prior to submitting arbitration claim, others may not require any prerequisites.¹⁹⁰ Undeniably, BITs are not identical, yet they form an overarching body of international standards governing foreign investment.¹⁹¹ BITs have developed a striking convergent structure whether in terms of language or objectives which advance the promotion and protection of private transnational investment and the economic development of the host states.¹⁹² Drawing on standardized treaty terms, they typically contain provisions on non-discrimination, prohibition of direct and indirect expropriation, Most Favored Nation (MFN), Fair and Equitable Treatment (FET), Free Transfer of Capital (FTC) and most importantly arbitration as an alternative dispute resolution.¹⁹³

Even when it comes to almost identical BIT terms, some arbitral tribunals have not arrived at consistent legal reasoning. For instance, in *CME Czech Republic B.V v. the Czech Republic & Ronald S. Lauder v. the Czech Republic*, despite the fact that both tribunals were deciding on the same facts and merits under the same applicable arbitration rules, they reached different interpretations of compensatory expropriation. Whereas the former holds the Czech Republic liable for approximately U.S \$ 270

¹⁸⁹ See *supra* note 1

¹⁹⁰ See *supra* note 173 at 20-22

¹⁹¹ See STEPHAN W. SCHILL, MULTILATERIZATION OF INTERNATIONAL INVESTMENT LAW, 65-67 (2nd edition, Cambridge University Press) (2009)

¹⁹² *Id.*

¹⁹³ See *supra* note 173

million in damage for breach to the Czech Republic-Netherlands BIT,¹⁹⁴ the latter awarded no damages for lack of unlawful expropriatory activity under the Czech Republic-United States BIT.¹⁹⁵ Likewise, the question rises before arbitral tribunals with respect to the application the “Umbrella Clause” in some BITs, and whether it elevates a contractual breach to the level of a treaty violation. Two ICSID panels have divergently applied the umbrella clause, despite clear textual similarity in the given BITs.¹⁹⁶ The tribunal in *SGS v. Philippines* upheld jurisdiction over the dispute on the grounds that the Philippines contractual obligation to observe undertakings which were entered into with SGS at the time the latter has first commenced its investment is essentially covered by the treaty umbrella clause.¹⁹⁷ In contrast, the tribunal in *Salini v. Jordan* found that the umbrella clause does not apply to Jordan’s contractual claim at issue, and accordingly the tribunal dismissed jurisdiction over the claim.¹⁹⁸

From international law perspective, BITs develop a normative basis for international minimum standards of treatment. As Stephan Schill argues, they usher in an era of multilateralized investment protection for private international investment.¹⁹⁹ The Most Favoured Nation Clause (MFN) as one of the key standards governing investment protection provides the clearest example in this respect. The MFN clause is frequently incorporated in most bilateral, multilateral, regional and sectorial investment treaties in an unconditional and reciprocal form.²⁰⁰ The existence of MFN clause in a BIT automatically extends the host state beneficial treatment that may be given to third parties to the party of such BIT, particularly if the latter is treated less favourably by the host state. Therefore, MFN clause does not only apply the minimum standards for investment protection in a normative manner, but also

¹⁹⁴ *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL (Partial award, September 13, 2001) (Final award, March 14, 2003)

¹⁹⁵ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final award, September 3, 2001)

¹⁹⁶ See *supra* note 103 at 63-65

¹⁹⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Decision on preliminary objections to jurisdiction, January 29, 2004)

¹⁹⁸ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Decision on jurisdiction, November 9, 2004) (Final award, January 31, 2006)

¹⁹⁹ See *supra* note 191

²⁰⁰ Article 16 (2) of the Energy Charter Treaty provides that "Nothing in such terms of the other agreement shall be construed to derogate from any provision of part III or V of this treaty or from any right to dispute resolution with respect thereto under this treaty, where any such provision is more favourable to the investor or investment."

multilateralize the access to BITs beneficial terms by foreign investor/investment.²⁰¹ Nevertheless, jurisprudence on ITA shows divergent approaches to the application of the MFN clause. This is manifest in the two ICSID conflicting awards, *Maffezini v. Spain* and *Palma v. Bulgaria*.²⁰² Whereas the *Maffezini* tribunal allowed the investor to benefit from a more favorable dispute resolution system under the Spain-Chile BIT,²⁰³ the *Palma* tribunal, relying on a restrictive approach to treaty terms, rejected to extend the application of the MFA clause in the Cyprus-Bulgaria BIT concerning the dispute resolution clause to the other Bulgarian BIT.²⁰⁴

Moreover, the concept of "Corporate Structuring" similarly exemplifies the multilateralization of international investment law through BITs. Corporate structuring allows foreign investors to avail themselves of the protective regime of a third party investment treaty.²⁰⁵ In the total absence of an investment treaty between the host state and the investor's home state, ITA can be invoked under the ICSID jurisdiction if the intended investor establishes an affiliation or subsidiary of his investment in a third state which has already entered into an investment treaty with the respondent host state.²⁰⁶ In fact, both the MFN clause and the corporate structuring best epitomize the "depoliticization" of investor-state disputes through eliminating the state-to-state power equation from the settlement process as central argument for the establishment of the ICSID.²⁰⁷ I argue that the ICSID private law inclination inherently supports legal solutions that mostly fit into the nature and structure of private transnational investment rather than host states' regulatory functions.²⁰⁸ It is the arbitral tribunals' variable interpretations of key investment provisions rather than the variation in BIT terms themselves that have brought about the "fragmentation" in the international investment regime at large. Even though one can easily note variations among BIT

²⁰¹ See *supra* note 191 at 120-123

²⁰² See *supra* note 103 at 63-64

²⁰³ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 (Final award, November 13, 2000) (Rectification of the award, January 31, 2001)

²⁰⁴ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Decision on jurisdiction, February 8, 2005) (Final award, August 27, 2008)

²⁰⁵ See *supra* note 191 at 399

²⁰⁶ *Id.*

²⁰⁷ See Ibrahim F. Shihata, *Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA*, International Centre for Settlement of Investment Disputes (1993)

²⁰⁸ See *supra* note 6 at 604-663

terms, the effect of the latter has proven to be secondary to investment treaty tribunals' interpretations in predicting outcomes of investor-state disputes.

B. AN ASYMMETRIC BASIS OF JURISDICTION UNDER THE ICSID LEGAL FRAMEWORK

Since the early 1990s, the growing number of BITs has formed the modern body of international law on foreign investment. International minimum standards of treatment have shifted from customary rules to treaty-based law. Yet, the deep private-law-oriented framework of the ICSID has resulted in a diffusion of ITAs through direct individualized claims.²⁰⁹ Paradoxically, neither the Preamble of the ICSID Convention, nor do its conventional terms provide a comprehensive definition of the "protected investment". Although the very first paragraph of the Preamble clearly associates private international investment with the contracting states' economic development, it does not elaborate on such association for the purpose of ICSID's mainline jurisdiction. Thus, the convention leaves the matter of determining the ICSID jurisdiction *rationae materiae* to the given B/MITs as a first guess and the interpretation of the intended investment treaty tribunal as a second guess. In light of the vaguely drafted BIT terms, arbitrators have taken an expansive approach in deciding what is qualified as a protected investment under the ICSID legal framework.²¹⁰

On the other hand, the ICSID jurisdictional basis *rationae personae* maintains a normative legal order that favours Multinational Corporations (MNCs) whether on the international or the domestic level.²¹¹ Considering the ICSID's costly proceedings, developed countries' investors have a smooth access to its facilities and consequently better chances of victory over developing countries' investors.²¹² In addition, domestic investors and corporations are denied access to the ICSID for lacking jurisdiction *rationae personae* under the latter's framework. They are deprived of any substantive

²⁰⁹ See *supra* note 17

²¹⁰ See *supra* note 8

²¹¹ See *supra* note 103 at 4

²¹² See Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 5 Int'l. Dispute Settlement J. 553 (2013)

legal protection on an equal footing with their foreign counterparts. As a result of that, domestic investors are double-burdened under the ICSID legal framework. First, they are entitled to a less preferential treatment than foreign investors and corporations. Second, they do not have the choice to overshoot bureaucratic administrative and judicial procedures to an alternative dispute settlement.

1. Undefined Protected Investment: Investments Are Not Alike

For the purpose of the Washington Convention, an investment establishes the jurisdiction *rationae materiae* of the ICSID. However, the Convention does not provide a definition of "protected investment". As a threshold jurisdictional issue, investment treaty tribunals have to primarily decide whether the substance of the claim qualifies as an investment in the meaning of the Washington Convention as well as the relevant B/MIT.²¹³ Even though the Preamble of the ICSID does not comprehensively define protected investment, it emphasizes the relationship between the investment and the economic development of contracting host states. It reads as follows: "Considering the need for international cooperation for economic development, and the role of private international investment therein; bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States."²¹⁴ Thus, the Preamble requires that an investment contributes to the host state's economic development in order to qualify as protected under the ICSID framework. On the conventional level, chapter two of the convention entitled "jurisdiction of the centre" does not assist at all in defining an investment. In this regard, article 25 (1) states that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State."²¹⁵ This provision provides a broad definition of protected investment, and hence transfers the burden of defining the latter to the B/MITs on which the parties agree.

²¹³ See CAMPBELL M. ET AL, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, 163-64 (1st edition, Oxford University Press (2008)

²¹⁴ See *supra* note 1

²¹⁵ *Id.*

Christoph Schreuer traces this jurisdictional lacuna whether partially in the Preamble or fully in article 25 to the contracting parties contradicting views reflected in the convention *travaux preparatoires* on the definition of protected investment.²¹⁶ In spite of the fact that the parameters set forth in most BITs on what constitutes an investment are frequently similar, if not identical in term and content, they often provide general conditions for qualifying an investment.²¹⁷ This lack calls on investment treaty tribunals to draw on customary rules of interpretation to define an investment under the ICSID. In doing so, they have to essentially consider the ICSID preambular limitation as well as the BIT terms in question.²¹⁸ To the contrary, investment arbitration jurisprudence denotes divergent approaches in deciding what qualifies as protected investment. Investment treaty tribunals have broadly expanded their law-making authority relying on the well-established procedural rule as stipulated literally in article 41 of the Convention that "the tribunal shall be the judge of its competence."²¹⁹ Whereas some tribunals adopted an integrationist approach in defining investment, others applied a restrictive definition to the preambular text and ignored the requirement on the contribution to the host state's economic development.

The practice of most arbitral tribunals is laid down by the earliest award *Fedax NV v. Republic of Venezuela* (1998).²²⁰ The substance of the claim concerned promissory notes signed by Venezuela and endorsed to Fedax. The tribunal accepted the Venezuelan argument that Fedax had not made any foreign direct investment in Venezuela and that it had indirectly acquired such promissory notes by way of a third party endorsement. The tribunal upheld Venezuela's defense and dismissed the claim for lack of direct investment made towards the host state's economic development.²²¹ Four years later, by the same token the tribunal in *Salini v. Morocco* drew on an integrationist approach of an investment,²²² and further required an investment to have four essential elements: a contribution of money or assets; a fixed duration; an

²¹⁶ See CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, 1082, International Centre for Settlement of Investment Disputes (1st edition, Cambridge University Press) (2001)

²¹⁷ See *supra* note 173 at 10-18

²¹⁸ *Id.*

²¹⁹ See *supra* note 1

²²⁰ *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 (Final award, March 9, 1998)

²²¹ See *supra* note 173 at 165

²²² *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on jurisdiction, July 31, 2001)

element of risk; and a contribution to the host state's economic development.²²³ Clearly, the objective test in both *Fedax* and *Salini* is consistent with the customary rules of international law under the Vienna Convention on the Law of Treaties (VCLT). In emphasizing the importance of the object and purpose under article 31 (1) of the VCLT, the tribunal in *Saluka* concludes that "The protection of foreign investments is not the sole aim of the treaty, but rather a necessary element alongside the [overall aim] of encouraging foreign investment and extending and intensifying the parties' economic relations."²²⁴ In *Saluka*, the tribunal not only acknowledges the relationship between investment protection and the host state's level of economic development, but also uplifts the latter as the "overall aim" of such a relationship.

Nevertheless, more recent investment jurisprudence denotes dissenting practice by other investment treaty tribunals. In *Victor Pey Casado & President Allende Foundation v. The Republic of Chile*,²²⁵ although the Tribunal referred to the four-part test in qualifying an investment, it did not fully apply the latter.²²⁶ Indicating ostensible deference to the VCLT interpretive guidelines, the tribunal argued that the ICSID preambular requirement on the contribution of an investment to the host state's economic development is not an *ipso facto* condition for qualifying an investment; rather it is a potential outcome of an investment. Accordingly, the Tribunal filtered out the definition of investment from the fourth condition.²²⁷ More extreme words were used by the *Quiborax v. Bolivia* tribunal in rejecting both *Fedax* and *Salini* integrationist approach.²²⁸ In that meaning, the *Quiborax* tribunal concludes that "It is true that the Preamble to the ICSID Convention mentions contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment."²²⁹

²²³ See Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, 15 289-90 287-309, Chicago Journal of International Law (2014)

²²⁴ See *supra* note 213 at 222

²²⁵ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Final award, September 13, 2016)

²²⁶ See *supra* note 223 at 299

²²⁷ *Id.* at 300

²²⁸ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Decision on jurisdiction, September 27, 2012) (Final award, September 16, 2015)

²²⁹ See *supra* note 223 at 301-303

In my view, both *Victor Pey* and *Quiborax* tribunals flagrantly contradict customary international law rules of interpretation as stipulated in articles 31 and 32 of the VCLT which explicitly qualify the Preamble and the annexes as inherent parts of the treaty text for the purposes of interpretation. Dissenting tribunals endorse a restrictive approach that relies on mere textual meaning while ignores the object and purpose of the treaty as embodied in the Preamble. The Convention *travaux preparatoires* unequivocally show that developing states, in particular, first joined the ICSID with the primary aim to withstand economic challenges and attract FDI flows for the sake of economic development and public welfare.²³⁰ For such an end, states voluntarily authorize foreign investments penetration into areas of public policy, entitle them to minimum standards of treatment and waive their sovereign immunity from adjudication so as to allow for alternative means of dispute settlement. In return for this, foreign investment should abide by the host state's laws and regulations and make substantial contribution in terms of value-added to the host state's economic development.²³¹

2. Unequal Access to ICSID Tribunals: Multinational Investment versus Domestic Investment

Modern international investment law has freed foreign investors from their home state's discretion to exercise diplomatic protection through the individualized form of claims.²³² Yet, access to ITA under the current legal framework of the ICSID has proven to be problematic for many investors whether on the international or domestic levels. Several studies have criticized the scope of the ICSID jurisdiction *rationae personae* as it only enables Multinational Corporations (MNCs) easy access to ITA.²³³

On the other hand, lesser concerns in the relevant literature, though significant in my view, have been raised over excluding domestic investors from the international minimum standards of treatment under the ICSID. I argue that this jurisdictional

²³⁰ See *supra* note 216

²³¹ See Felix O. Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States*, 13 *Richmond Journal of Global Law & Business* (2014)

²³² See *supra* note 17

²³³ See *supra* note 212 at 553

deficit strongly contravenes the well-established public law principles of procedural fairness and equality which dictate that all parties to a given dispute must be granted legal protection on an equal footing.

a. Favours Multinational Corporations over Individual Investors

Some commentators maintain that MNCs enjoy smooth access and better chances of victory under the ICSID legal framework.²³⁴ The high degree of legal sophistication and procedural complexity in the ICSID dispute resolution system places many hurdles in front of the respondent developing states as well as their investors. In fact, ICSID litigation requires the competing parties – corporations, individual investors and host states – to be well-advised by reliable legal arbitrators, counsels and experts throughout the proceedings.²³⁵ The respondent state has to have the adequate analytical tools and econometric studies to assess its domestic investment policies in light of the relevant international minimum standard of treatment. These instruments are quintessential in either proving or disproving the negative impact on a given foreign investment.²³⁶

Aside from legal expertise, developing states are double-burdened by the ICSID lengthy proceedings that often last for years.²³⁷ Undoubtedly, the financial standing of investment treaty parties may be reflected on the prospects of ITA. While developed states endeavor to secure transnational protection for their MNCs, developing states enter into BITs to primarily attract FDI to their modest economies. Thus, the latter accept the former's standardized investment provisions on a take-it-or-leave-it basis.²³⁸ Given the potential for large damages under the ICSID litigation, one may suggest that ITA is a precarious dispute resolution system for developing countries. The situation may be even worse if we consider the fact that the financial resources of

²³⁴ *Id.*

²³⁵ See Leon E. Trakman, *The ICSID Under Siege*, 45, 611-604-665, *Cornell International Law Journal* (2012)

²³⁶ *Id.* at 617-19

²³⁷ *Id.* at 611-14

²³⁸ *Id.*

some MNCs exceed the total GDP of some low and middle-income contracting states of the ICSID.²³⁹

Recent empirical findings clearly support the view that the ICSID dispute resolution system favours MNCs over developing host states. While low and middle-income developing countries' share from Global FDI is around 10%, they are respondents in the overwhelming majority of ITAs.²⁴⁰ According to the 2016 ICSID caseload statistics, developing states have been involved in more than 70% of the total number of investor-state arbitrations registered before the ICSID since 1972.²⁴¹ Furthermore, geographic distribution of cases surprisingly reveals that North American and Western European states have been respondents in only 11 % of the ICSID investor-state disputes, while South American, African, and Middle Eastern Countries have been subjected to roughly 50% of disputes.²⁴²

As a result of this private law inclination towards MNCs, the developing host states' socio-economic rights appear to be severely undermined under the ICSID legal framework for the sack of investment protection. In this regard, the 2010 UNCTAD database on ITA reveals that the American-based MNCs are the most likely to take developing states to ITA before ICSID tribunals; as the number of claims filed by MNCs against developing host-states reached 93 claims compared to only 12 claims filed by developing-states' corporations against the US.²⁴³ These data together with the fact that the US share of global FDI exceeds the wholesale shares of the low and middle income developing countries demonstrates that the developed states' MNCs

²³⁹ See YEN, TRINH HAI. INTERNATIONAL LITIGATION IN PRACTICE: THE INTERPRETATION OF INVESTMENT TREATIES 321 (1st edition, Martinus Nijhoff Publishers) (2014); (for example, in the course of litigations that were triggered after its economic crisis, Argentina had to pay a total amount of damages that fairly exceeds its entire annual budget. Also, Pakistan was entitled to pay damages equivalent to total national reserve as a result of a chain of investment arbitrations.)

²⁴⁰ See Organization for Economic Co-operation and Development, (December 14, 1960), available at <http://www.oecd.org/>

²⁴¹ See *supra* note 138 available at

<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>

²⁴² *Id.*

²⁴³ UNCTAD, Database of Treaty-Based Investor-State Dispute Settlement Cases. (2010). available at http://www.unctad.org/iia-dbcases/cases.aspx?col_aa=show

enjoy a better legal standing under the ICSID framework than those of developed countries do.²⁴⁴

Even though the ICSID bolsters the penetration of MNCs into public law matters such as health, environment and taxation, it does not provide for relevant rules on corporate social responsibility. Further, it does not even allow access to its proceedings by the host state's affected individuals or groups.²⁴⁵ Oddly enough, an investor who seeks fair and equitable treatment in the host state cannot be held accountable by the latter for his transgression against the host state's population.²⁴⁶ Nevertheless, international efforts have been made to bring corporate conduct under the rule of law.²⁴⁷ The NIEO Declaration has moved to develop international law rules on corporate social responsibility that consider host states' sovereign independence in the course of transnational investment operations.²⁴⁸ In consequence, the 1977 UN Code of Conduct on Transnational Corporations came out to comprehensively elaborate on foreign investors' obligations in host states. Yet, it has never been put into force due to the profound disagreements between developed and developing countries concerning the scope of minimum standards of treatment for foreign investors.²⁴⁹

b. Excluding Domestic Investors from International Minimum Standards of Treatment

Article 25 (1) of the Washington Convention excludes domestic investors/corporations from the substantive protection under the ICSID dispute resolution system.²⁵⁰ In contrast to the comprehensive jurisdiction of other international adjudicative bodies such as the European Court of Human Rights

²⁴⁴ See Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, Harvard Int'l J. No.50, (2009)

²⁴⁵ It is worth mentioning that many commentators have called for an access to ICSID proceedings by the civil society in host states. This may appear to be vital in many fields of common concern including breaches to environment, human rights and workers' privileges in the host state. (Despite being crucial, this topic of discussion goes beyond the focus of the present thesis.)

²⁴⁶ See Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 no.3, 729-747 (2009)

²⁴⁷ However, there are on-going jurisprudential efforts to accommodate corporate social responsibility into the law-making process of investment treaty tribunals. (As I propose in chapter three, progressive interpretation of ICSID's provisions may help refine the essence of investment standards such as the concept of indirect expropriation, NT and FET.)

²⁴⁸ See *supra* note 172

²⁴⁹ See *supra* note 191 at 63-96

²⁵⁰ See *supra* note 1

(ECHR), the ICSID jurisdiction *rationae personae* apply only to the foreign investors of a contracting state.²⁵¹ This means that the domestic investors are deprived from the unique features of ITA. Whereas foreign investors are entitled to international minimum standards of treatment, alternative dispute resolution system and direct enforcement of arbitration claims, domestic investors are denied corresponding rights over investment disputes. In that sense, domestic investors do not take advantage of the deterrent function of ITA in reviewing and assessing state's unlawful conduct vis-à-vis private individuals and corporations (as illustrated in chapter one).²⁵²

In spite of the fact that domestic investors are operating on the national level, they do not have equal access to the incentives and guarantees offered to foreign investors. Instead, they are bound to deal with non-specialized domestic arrangements in accordance with national policy stipulations which are often replaced by one-window apparatus for foreign investors. While the latter benefit from both international and domestic means of dispute settlement, domestic investors benefit only from domestic means of dispute settlement.²⁵³ Accordingly, domestic investors do not have the option of overshooting bureaucratic administrative and judicial proceedings. Moreover, the ICSID legal framework not only saves transnational investment from having resort to national courts system, but also from any "unilateral judicial action" taken by the host state. In contrast to domestic legal systems, judicial actions may constitute unlawful interference with an investment under international law. Finally, investors are likely to be awarded far higher amounts of damages by ICSID arbitral panels than the host state's national courts.²⁵⁴

In the ordinary course of means, state sovereign immunity from jurisdiction prevents its national investors from bringing an action before international adjudicative fora.²⁵⁵ Further, host states think twice before exceptionally allowing a domestic investor access to international Tribunals including ICSID's additional facility.²⁵⁶ Yet,

²⁵¹ *Id.*

²⁵² See *supra* note 91

²⁵³ See *supra* note 74 at 115

²⁵⁴ *Id.*

²⁵⁵ See *supra* note 38

²⁵⁶ The ICSID's Additional Facility was created on September 27, 1978; It provides for arbitration, conciliation and fact-finding services for disputes between a State and a foreign investor, one of which

economic and political consideration may accord better negotiating power to some domestic investors through either contractual or treaty-based investment guarantees.²⁵⁷ For example, in concentrated economies, powerful investors may attempt to manoeuvre through exerting economic pressure on the host state in order to achieve an alternative dispute resolution.²⁵⁸ Contrariwise, in countries with underdeveloped institutions, unofficial dispute resolution methods may frequently include recourse to violence, political pressure or fraudulent practices against foreign investors.²⁵⁹ However, it has been suggested that ITA has a secondary function on the domestic level in promoting good governance particularly in developing states. It may drive the host state towards improving domestic alternative means for settlement of investment disputes whether in administrative or judicial form.²⁶⁰ In that view, domestic investors will avail themselves of better policy making, minimum standards of treatment, fair access to justice and consequently higher threshold of protection.

It is true that the deterrent function of ITA may to some extent lead host states to develop preventive mechanisms for amicable settlement of investment disputes so as to avoid exposure to costly damages under the ICSID. In that case, both international and domestic investors will make use of it. The point does not lie with the existence of an effective alternative dispute system on the national level; rather it lies with the bargaining power of an investor to persuade the state to sit for an amicable settlement in the first place and to negotiate decent terms in the second place. This is not an easy task for a domestic investor compared to powerful MNCs that function on the international plane. In sum, the current legal framework of the ICSID tends to grant foreign investors far higher threshold of protection while excluding their domestic counterparts from any substantive form of protection. Whereas the former can simply rely on the Washington Convention, B/MITs, FTAs or at least an arbitration contract in order to initiate compulsory arbitration against the host state, the latter are largely shackled by sovereign immunity restrictions, administrative formalities and

is not an ICSID member state or a national of an ICSID Member State; *available* at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx>

²⁵⁷ See *supra* note 244

²⁵⁸ See Gaukrodger D. & Gordon K., *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 10-17 (OECD Working Papers on International Investment, 2013)

²⁵⁹ *Id.* at 12

²⁶⁰ See *supra* note 2 at 121-150

unspecialized national arrangements. This is unless a domestic investor or corporation has in advance signed an arbitration agreement providing for investment arbitration.²⁶¹

C. FRAGMENTATION OF INTERNATIONAL INVESTMENT LAW: DYNAMICS OF INVESTMENT TREATY TRIBUNALS

Aside from treaty term variations on the one hand, and the asymmetric basis of jurisdiction on the other, investment treaty tribunals themselves tend to interpret substantive standards of investment protection on a case-by-case basis. The lack of binding precedent to govern the practice of ITA has yielded divergent interpretations of central investment standards particularly on the application of indirect expropriation, Fair and Equitable Treatment (FET) and Most Favoured Nation (MFN) clauses.²⁶² The absence of supervisory mechanisms to review and correct inconsistent awards adds more fuel to the already fragmented international investment regime. Jurisprudence on international investment law has failed to integrate a unified doctrine on the protection of foreign investment. As a result of this failure, increasing number of inconsistent arbitral awards worth billions of dollars in damages has been rendered against host states.²⁶³ Therefore, many scholars have vehemently criticized the current practice of investment treaty tribunals for elevating inflexible investment protection over the socio-economic regulatory power of host states.²⁶⁴

The scope of international minimum standards of investment treatment has become unrestrained in relation to the host state's regulatory space.²⁶⁵ The inconclusive basis of states consent to the ICSID together with the imbalanced mainline jurisdiction has cursed the practice of ITA with legal uncertainty. At a maximum point of public disquiet, many countries have reconsidered their stances toward the ICSID system and investment treaty arbitration at large. Most of developed and developing countries have reacted to inflexible protection through either terminating or renegotiating their

²⁶¹ See *supra* note 74 at 79, 128

²⁶² See *supra* note 17 at 57-60

²⁶³ See *supra* note 159

²⁶⁴ *Id.*

²⁶⁵ *Id.*

BITs in order to meet domestic social and economic needs.²⁶⁶ State regulation in matters of public concern has been brought up in the new generation of B/MITs, especially in finance, labor, health, environment and human rights fields. Disinclination to accept controversial awards is also evident in the practice of some states through making use of annulment procedures before the ICSID.²⁶⁷ In this section, I briefly evaluate the process of institutional appointments under the ICSID system. Then, I examine the lack of binding precedent and supervisory mechanism in the practice of ITA as being sources of fragmentation in the international investment regime. Finally, I set out relevant case law on the concept of expropriation with an aim to appraise the different approaches used by investment treaty tribunals in order to distinguish between compensatory expropriation and state lawful regulation.

1. Institutional Appointments of Arbitrators under the ICSID Framework

Since the first case was registered in 1972, the ICSID has exercised control over the appointment process of arbitrators, conciliators and *ad hoc* committees. Some empirical studies suggest that arbitrator/counsel-related variables are among the most widely used models to predict investor-state disputes' outcomes.²⁶⁸ Up until 2015, less than 20% of ICSID's arbitral appointments embrace nationals of developing countries.²⁶⁹ Furthermore, the 2016 ICSID annual report notes that the same basis of

²⁶⁶See Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time-Treaty Practice and Interpretation in a Changing World*, 31-35 (OECD Working Papers on International Investment, 2015) (The majority of recent BITs contain provisions referring to treaty amendments. Starting from 1990s, most of treaty changes related to exceptions to MFN clause, NT for custom unions, security and protection standards, tax-related issues and most notably investor-state dispute settlement.)

²⁶⁷See United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement ISDS*, 7-8 (UNCTAD, IIA issues note) (April, 2014) (Argentina is the most frequent state to file applications for annulment proceedings before the ICSID since it has been respondent in more than 50 Investor-State Arbitrations) available at

http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

See also International Centre for Settlement of Investment Disputes, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, Annex 1 (1-31) (May 5, 2016) (Until April 15, 2016, Argentina has requested the annulment of 16 ICSID awards, out of which eight annulment requests have been rejected, two discontinued and only four awards have been annulled including *Vivendi*, *Enron*, *CMS* and *Sempra*) available at <https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf#search=Argentina>

²⁶⁸See *supra* note 244 at 18-20

²⁶⁹*Id.*

appointment distribution is still applied by the Centre's Administrative Council.²⁷⁰ In light of these findings, developed countries and their MNCs have a better legal representation than developing host states in investor-state disputes. This biased process of appointment has always been traced back to the high degree of sophistication that requires certain academic and professional credentials for arbitral appointments.²⁷¹ Given the limited number of qualified arbitrators from developing states, the appointment process would ultimately favour developed countries interests. However, the lack of cultural diversity on the arbitral bench raises increasing concerns over ICSID's private law inclination that enables developed states' transnational businesses a smooth access to the Centre's facilities and consequently higher chances of victory.²⁷²

According to the Washington Convention, the ICSID performs under the auspices of the World Bank (WB). Both the ICSID's chair and the Administrative Council are granted broad discretionary power in appointing arbitrators in investor-state disputes under article 38 of the Convention. Thus, developing states have little, if any, freedom regarding the selection of arbitrators in investment disputes.²⁷³ It is even disconcerting to identify that the ICSID is affiliated to the WB, since the president of the latter is the chair of the former. The conflicting interests manifest in the fact that the WB and the Centre share almost the same contracting states, staff members, administrative bodies as well as the headquarters. Most of the ICSID hearings are held in Washington, the same seat as the WB, and if not, in other developed countries like Britain, France or Germany.²⁷⁴ Furthermore, The WB as one of the global financial institutions that supports free-market values funds the ICSID Secretariat General.²⁷⁵ A network of appointed commercial arbitrators, private law firms and large financial institutions

²⁷⁰ See The 2015 ICSID Annual Report (27-29), International Center for Settlement of Investment Disputes, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR15_ENG_CRA-highres.pdf

²⁷¹ See *supra* note 244

²⁷² See *supra* note 212 at 522

²⁷³ It has been reported that the Africans judges, counsels and arbitrators are the least participating nationals in the international dispute resolution mechanisms.

²⁷⁴ See *supra* note 235 at 611-12

²⁷⁵ See SORNARAJAH M., RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 58-62 (1st edition, Cambridge University Press) (2015)

backed by developed states insist on fidelity to inflexible protection.²⁷⁶ It is enough then to figure out that the ICSID neoliberal orientation favours private international investment as embodied in MNCs over states' regulatory power.

The evidence also seems to suggest that a considerable number of assigned arbitrators put up with the WB's free market economic solutions. International arbitrators and lawyers who are engaged in investor-state disputes before the ICSID were already absorbed in a commercial environment.²⁷⁷ Thus, they perceive ITA as a branch of international commercial law rather than public international law.²⁷⁸ As I have argued in chapter one, the form and procedure of investment arbitration has historically evolved from the practice of commercial arbitration to investor-state arbitration. The paradox lies here in the fact that commercial arbitrators are now operating in a regulatory, rather than a commercial sphere. The legal contours of regulatory disputes in which states public authority is involved are utterly different from commercial relationships.²⁷⁹ In contrast to the public law principles of transparency, impartiality and neutrality, the practice of ITA under the ICSID draws heavily on political influence, professional patronage and sponsorship.²⁸⁰ Arbitrators advance expansionary interpretations that favor the financial stability of MNCs even at the expense of public policy concerns such as environment protection and human rights. These expansionary interpretations are deliberately sought to perfect the task of investment treaties in protecting private transnational investment.²⁸¹ Given the neoliberal institutional context along with the commercial law background, a systemic community of arbitrators, academics, lawyers, economists and commentators interprets BITs far beyond the state parties' consent in promoting states' economic development side-by-side with investment protection.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 27

²⁷⁹ *See supra* note 91

²⁸⁰ *See supra* note 275 at 60

²⁸¹ *Id.* at 60-63

2. The Lack of Binding Precedent and Supervisory Mechanisms

Although ITA is a relatively novel method for the settlement of investment disputes, it has developed a considerable amount of literature especially over the past two decades.²⁸² The establishment of the ICSID has stimulated the penetration of private international investment into the host states' territories. Jurisprudence on ITA is fundamentally built on the pervasive investment provisions as included in thousands of B/MITs.²⁸³ Investment treaty terms have codified most of the customary international rules on the minimum standards of treatment and the international responsibility of states for injuries to aliens.²⁸⁴ But still, there is no multilateral legal framework to define investment, settle on the scope of investment standards of protection and account for the economic disparities between developed and developing countries.²⁸⁵ The ICSID legal framework under the Washington Convention does not set out the substantive rules governing the regulatory relationship between foreign investors and host states. Thus, investment treaty tribunals have been and remain the most dynamic zone of international investment law. Since they have a dual effect on both private investment interests and public-policy-making, they presumably combine public and private international law rules into a single dispute resolution system.²⁸⁶ Yet, the overlapping standpoints of both private investment and host states have cursed the practice of investment treaty tribunals with more divergence.²⁸⁷ Investment treaty tribunals have never balanced between the host state's socio-economic rights and the protection of foreign investors against non-commercial risk.²⁸⁸

Consistent with the general rule in public international adjudication,²⁸⁹ international investment law does not recognize a rule of *stare decisis*. Article 53 (1) of the ICSID

²⁸²The literature on investment treaty arbitration is an outcome of a discipline that until recently has been a field of few practitioners and now is shifting mainstream.

²⁸³ See *supra* note 173

²⁸⁴ *Id.*

²⁸⁵ See *supra* note 3 at 876-77

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 884

²⁸⁸ See Stephan W. Schill, *The Jurisprudence of Investment Treaty Tribunals: between Public Good and Common Concern*, 9 in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS, Tullio Treves et al, ed., 1st edition, Routledge Research in International Economic Law (2014)

²⁸⁹ According to article 59 of the statute of the International Court of Justice "The decision of the court has no binding force except between the parties and in respect of that particular case."

convention impliedly ignores the rule of legal precedent: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." This means that investor-state disputes are to be settled on a case-by-case basis with respect to particular facts and parties in a specific context. Nevertheless, this is not to say that investment treaty tribunals disregard precedent in full; rather they do rely on each other's decisions in supporting their legal reasoning. International practice reveals that arbitral panels variably apply legal precedent depending on the subject-matter in question whether inter-state conflict, international trade, human rights or investment.²⁹⁰ The growing body of investment treaty law that stems from a network of more than 3000 B/MITs was seen as establishing a multilateral legal system on the minimum standards of investment protection.²⁹¹ However, the jurisprudence of investment treaty tribunals shows a considerable amount of divergence rather than convergence. The lack of a binding rule of *stare decisis* in the practice of ITA has compelled arbitral tribunals to draw on variable textual interpretations for investment treaty standards.²⁹² This includes most notably, direct and indirect expropriation, Fair and Equitable Treatment (FET) and Most Favoured Nation (MFN) clauses. Paradoxically, investment treaty tribunals sought to largely expand the scope of investment protection far beyond the treaty parties' consent to its object and purpose. Even though most Investor-state treaty-based arbitrations are undertaken under the ICSID legal framework, interpretations of investment standards included therein are frequently divergent and subject to change on a case-by-case basis. This discrepancy undermines the principles of legal stability and consistency that should exist in any sound legal system and consequently threatens the legitimacy of ITA.²⁹³

From my perspective, fragmentation of international investment law may be attributed to two main reasons. First, Tribunals do not stick to the customary international law rules of interpretation under the Vienna Convention on the Law of Treaties

²⁹⁰ See Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2, 5-23, *Journal of International Dispute Settlement* (2011)

²⁹¹ See *supra* note 288 at 9-10

²⁹² See *supra* note 159

²⁹³ See *supra* note 6

(VCLT).²⁹⁴ On the contrary, Investment treaty tribunals adopt a restrictive interpretive approach which considers only the ordinary textual meaning of an investment treaty while ignoring the treaty parties' consent. The second reason is that investment treaty tribunals have never settled the public-private conflict between the host state's regulatory power and the foreign investor's protection. I agree with Stephan Schill that investment treaty tribunals do create international investment law through precedent.²⁹⁵ However, the Washington Convention's *travaux préparatoires* supports the view that the doctrine of *stare decisis* does not apply to the ICSID arbitrations.²⁹⁶ One may suggest that some investment standards of treatment have *relatively* formed an overarching applicable law in investor-state disputes. Drawing on the similarity of BIT terms, Kaufmann-Kohler argues that investment treaty tribunals, in particular, must be bound in their legal reasoning by the rule of precedent.²⁹⁷ In contrast to both commercial and contract-based-investment tribunals, investment treaty tribunals form a part of the international legal order and hence they are under a "moral obligation" to follow precedent in their decisions.²⁹⁸ For example, MFN clauses in bilateral investment treaties have played a significant role in bringing uniformity into international investment standards of protection as previously illustrated in section one. Nevertheless, MFN clause has never been elevated to the status of precedent.²⁹⁹ Sufficient evidence demonstrates that ICSID tribunals' law-making on international investment standards of protection does not construct a coherent body of precedent.³⁰⁰ Instead, the frequent exceptions and derogation in the practice of investment treaty tribunals is anathema that lends investor-state dispute settlement to unpredictable outcomes.³⁰¹

²⁹⁴ See The Vienna Convention on the Law of Treaties, U.N. (signed on May 23, 1969) (entered into force Jan. 27, 1980).

²⁹⁵ See *supra* note 288 at 10-14

²⁹⁶ See *supra* note 288 at 1082

²⁹⁷ See Gabriela Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *Arbitration Int'l* 357 (2007)

²⁹⁸ *Id.*

²⁹⁹ See *supra* note 204 (*Palma v. Bulgaria*)

³⁰⁰ See *supra* 275 at 50

³⁰¹ See *supra* 288 at 11

In the course of Argentina's economic crisis,³⁰² some tribunals that involve the same facts and merits have adopted divergent approaches in making reference to earlier ICSID arbitral awards.³⁰³ In this respect, I compare three ICSID awards that adopt different approaches in deciding on the applicability of precedent to investor-state disputes. The tribunal in *AES Corporation v. Argentina* not only took a negative attitude towards precedent, but also acknowledged its contribution to the on-going process of fragmentation. In very odd language, the *AES* tribunal stated that “each tribunal remains [sovereign] and may retain, as it is confirmed by ICSID practice, [a different solution] for resolving the same problem.”³⁰⁴ In the same year, using a different approach while responding to a one party's claim arguing for departure from earlier case law, the tribunal in *Camuzzi v. Argentina* adopted a positive approach towards precedent by concluding that “the tribunal has no reason not to concur with conclusion, even though some of the elements of facts in each dispute may differ in some respect.”³⁰⁵ A more balanced approach in deciding on the applicability of precedent to investor-state arbitration was endorsed by the tribunal in *Daimler Financial Service AG v. Argentine*. In spite of acknowledging that there is no such rule of *stare decisis* under international investment law, the tribunal concluded that “Each case must be decided on the basis of the applicable treaty texts and in light of the relevant facts... it is a fundamental principle of the rule of law that 'like cases should be decided alike' unless a strong reason exists to distinguish the current case from previous ones.”³⁰⁶ It appears from this language that the *Daimler* Tribunal used an investigative approach vis-a-vis “all alike cases” in order to ensure a minimum degree of legal stability in its legal reasoning.³⁰⁷ This balanced approach is quite

³⁰² Following its arduous economic crisis in the early 2000s, Argentina has faced dozens of ICSID arbitration claims under different BITs for over \$ 100 billion in damage as a result of a series of governmental emergency measures including cutting national spending, devaluation of the Argentinian Peso against the US Dollar and imposing restrictions on capital transfer.

³⁰³ See Christina Binder, *Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of Public International Law Approach to Investment Arbitration*, 5 in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS, Tullio Treves et al, ed., 1st edition, Routledge Research in International Economic Law (2014)

³⁰⁴ *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, (Decision on jurisdiction, April 26, 2005)

³⁰⁵ *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, (Decision on objection to jurisdiction, May 11, 2005)

³⁰⁶ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, (Final award, August 22, 2012)

³⁰⁷ See KRISTA NADAKAVUKAREN, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS, 56-58, (1st edition, Edward Eldgar publishing limited) (2013)

different from *AES*'s clear departure from the concept of the rule of law on the one hand and *Camuzzi*'s disregard for the 'necessary evolution of the law on foreign investment.

In light of these divergent interpretations of the scope of legal precedent in ITA, central investment standards have been inconsistently applied by one-off investment treaty tribunals. The absence of an appellate body to the institutional framework of the ICSID has exacerbated legal inconsistency whether at the jurisdictional or substantive level of ITA. As a result of this, more conflicting awards are expected to come out.³⁰⁸

In many legal systems, the concept of legal precedent is in some way attached to the higher courts' judgments in final appeals. On the contrary, the lack of hierarchy among arbitral tribunals in international investment law makes it impossible to pursue such a concept of precedent.³⁰⁹ In my view, this fragmentation is essentially driven by the private law inclination of most investment treaty tribunals towards the interests of transnational foreign investment. The International Court of Justice as a form of international adjudication enjoys a relative *jurisprudence constant*, though has no formal rule of precedent.³¹⁰ On the other side, annulment procedure under the ICSID has reflected more illegitimacy in the process of investor state dispute settlement. They have proven to be complex, costly and futile to many respondent states that opted to contest ICSID awards.³¹¹ An independent adjudicative body would be essential for reviewing and correcting possible inconsistent arbitral decisions. Indeed, this body would inspire the legal conduct of the key actors in investor-state disputes including arbitrators, international lawyers, economists and multinational corporations. Finally, challenged awards would help create an international normative order on the minimum standards of treatment for investment protection.³¹²

³⁰⁸ *Id.* at 625

³⁰⁹ *See supra* note 290 at 6

³¹⁰ *See supra* note 289

³¹¹ For example, in *Malicorp v. Egypt*, in spite of acknowledging a manifest excess of power by the Tribunal for serious departure from fundamental rule of procedure *equality of arms*, the annulment committee rejected the application for annulment; *See Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18 (Decision on the application for annulment, July 3, 2013)

³¹² *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, *Am J. of Int'l L.* 104, 179-225 (2010)

3. Equating Indirect Expropriation with State Regulatory Measure: A Threefold Formulation

The *per se* prohibition of non-compensatory expropriation of foreign investment is well-established under customary rules of international law. Under the Hull formula, states international responsibility to pay prompt, adequate and effective compensation for expropriating foreign assets is undisputed.³¹³ The wide network of B/MITs³¹⁴ virtually prohibits expropriation except in cases where it is taken for public purpose, non-discriminatory, in accordance with due process of law and accompanied by proportionate compensation.³¹⁵ Since expropriation was attached to the dispossession of private property owned by foreign investors in the aftermath of nationalisation, its definition did not apply to a situation where a foreign investor is still holding the alleged property. The proliferation of B/MITs after the advent of the ICSID has rendered this classical form of direct expropriation rarely applicable.³¹⁶ States' modern practice of interference with the mere use of foreign investment without formal transfer of title has driven the jurisprudence on ITA to reverse "the possession paradigm" of expropriation to include other forms of indirect expropriatory conducts. Indirect expropriation has been frequently applied where no material deprivation resulting from the state public conduct, yet the use of an investment is negatively impacted.³¹⁷ This tendency is justified under most legal systems by the investor's right to effective management and control as prerogatives to private ownership.³¹⁸ Some capital-importing states, such as China and India, have turned to be a source of outward investment even to traditional exporting states. While developed states, particularly under NAFTA, have reacted by taking protectionist regulatory measures to protect people's health, environment and human rights, developing states managed to lower standards of national protection so as to attract bigger share from FDI.³¹⁹

³¹³ See *supra* note 45

³¹⁴ Almost all B/MITs provide for the prohibition of direct and indirect expropriation including the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT).

³¹⁵ See Paolo Bertoli & Crespi Reghizzi, *Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes*, 3 in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS, Tullio Treves et al, ed., 1st edition, Routledge Research in International Economic Law (2014)

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *supra* note 275 at 208

³¹⁹ *Id.* at 192-95

This shift in roles was reflected in the BITs boom in the 1990s through introducing a third category of measures which are "tantamount to expropriation". The lack of clear distinction between indirect expropriations and the new category of acts tantamount to an expropriation in the overwhelming majority of BITs have provided the basis for an expansionist approach to state regulatory acts in relation to foreign investors.³²⁰

This threefold formulation of state regulatory measures to direct, indirect and acts tantamount to an expropriation has no comparable application in domestic law on regulatory takings. It was primarily intended by drafters with neoliberal backgrounds to construct a system of investment protection based on free market values and the sanctity of private property.³²¹ The lack of any distinction under BITs between compensable indirect expropriation and non-compensable state regulation has mostly appeased the privately oriented commercial arbitrators and lawyers who aim to amplify the legal cause of arbitration with a view to bolster their profitable industry. Thinking of ITA as a form of commercial arbitration, most investment treaty tribunals have taken the law of expropriation beyond the treaty object and purpose as consented to by the treaty parties. A minimal governmental regulatory action becomes interference with the use of foreign investment that amounts to an expropriation.³²² In interpreting and applying the vaguely drafted substantive standards of protection, investment treaty tribunals assume a powerful quasi-legislative function.³²³ In doing so, they intend to create a course of precedents on the international minimum standard of treatment, especially on indirect expropriation, FET and MFN clauses. Whereas some tribunals have ostensibly referred to the customary rules of interpretation under the VCLT as a means to legitimize their expansive interpretations, others have conversely used the latter's interpretive technics to derogate from previous decisions.³²⁴

The existence of a third category of acts tantamount to takings without a precise definition gives rise to legal instability and inconsistency in the practice of ITA. Investment treaty tribunals have largely extended the applicability of indirect

³²⁰ *Id.* at 210

³²¹ *Id.* at 208-214

³²² *See supra* note 159 at 888

³²³ *Id.* at 892

³²⁴ *Id.* at 60-62

expropriation terms to almost all state regulatory measures. Thus, they maintain a domestic normative scheme favourable to foreign investment that obviously exceeds international minimum standards of treatment.³²⁵ The threefold formulation magnifies the substantive principles of state responsibility to cover lawful regulatory actions while leaving the state defenceless against foreign investors' transgressions. Furthermore, opponent arbitrators' proposals to develop a counterclaim mechanism in the practice of ITA as a means of distinction between indirect expropriation and lawful regulation were ignored by ICSID arbitral panels.³²⁶ Instead of examining host state's intention behind taking regulatory measures, arbitral tribunals have endorsed an "all or nothing" paradigm that either grants investor full compensation or denies the latter any kind of indemnification. ICSID case law indicates that even if a regulatory measure is taken in the course of the state traditional role in advancing public welfare with no intention to cause injury to an investor and do not contravene investment legitimate expectations, it may invoke state responsibility for affecting the economic value of an investment.³²⁷ In fact, the ambiguity of the requirements that establish indirect expropriation in the first place makes it more problematic to differentiate the latter from the newly introduced acts tantamount to takings in the second place. Under this authority, two main doctrines have emerged in the jurisprudence of ITA to distinguish compensatory expropriation from state lawful regulation.³²⁸

The "sole effect doctrine" is considered the founding form of the "all or nothing" paradigm. The impact of a governmental measure on an investor is the sole factor required for the occurrence of a compensable expropriation. This is regardless of whether the regulatory measure is taken for attaining a public purpose such as health or environment protection.³²⁹ In *Metalclad v. Mexico*, a US corporation alleged loss of "an expected economic benefit" as a result of a Mexican municipality rejection of a construction permit for a hazardous waste transfer landfill was deemed as sufficient for establishing compensatory expropriation.³³⁰ The tribunal concluded that "covert or

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ See Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 no. 5, 718-720 717-745, *The Journal of World Investment & Trade* (2007)

³²⁸ *Id.* at 720

³²⁹ *Id.* at 724-25

³³⁰ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, (Final award, August 30, 2000)

incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."³³¹ The *Metalclad* case is an outcome of the "tantamount clause" in newer BITs. In my view, the Tribunal flagrantly undermines the principle of sovereign independence of states which is at the heart of general international law. Such a precarious approach does not only rely on inexistent factual evidence represented in the alleged lost-opportunity, but also impedes state power to regulate matters of public policy concern such as protecting its population from hazardous waste in the present case. Although there was no imminent value depreciation which is an essential requirement for compensatory expropriation, the tribunal relied on the "tantamount" development to maintain a normative condition favourable to the foreign investor in recovering compensation.

On the other hand, some Tribunals have used the "police power doctrine" to distinguish between compensable expropriation and non-compensable regulatory measure. The excessive reliance by foreign investors on the broad definition of indirect expropriation to thwart state regulations has driven some recent tribunals to develop a public purpose criterion. For such an end, they draw on a restrictive approach which mainly focuses on the the nature rather than the impact of state measure.³³² For instance, in the NAFTA case, *Methanex v. United States*, the tribunal held that the US. Executive order banning the use of 'MTBE' substance, which is used as a fuel additive, for its serious threat to human health and environment is a lawful regulatory measure; and accordingly the tribunal provided for no compensation.³³³ In contrast to *Metalclad*, the Tribunal in *Methanex* refuted the investor's claim based on the deprivation of a reasonably-to-be-expected economic benefit. The latter maintained that since the challenged governmental order is taken for general welfare and without discrimination, the state is not liable for compensation. Later in *Saluka v. Czech Republic*, the Tribunal stated that "it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal

³³¹ *Id.*

³³² See *supra* note 327 at 725

³³³ *Methanex Corporation v. United States of America*, UNCITRAL, (Final award on jurisdiction and merits, August 3, 2005)

exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."³³⁴ Under the police power doctrine, if the state measure is non-discriminatory, taken for a legitimate public purpose and in accordance with due process of law, no compensation will be awarded, unless a specific commitment was initially made vis-à-vis an investor.³³⁵ However, the *Saluka* award recognizes the difficulty of such approach in application by concluding that "international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered permissible and commonly accepted as falling within the police or regulatory power of States and, thus, non-compensable."³³⁶

The adoption of "public interest" as a decisive criterion in both *Methanex* and *Saluka* awards to distinguish lawful regulation from expropriation may be seen as a step forward in curbing the inflexible protection of investment. However, the volatile definition of public interest under international law makes it practically impossible to distill comprehensive requirements for non-compensable regulations under the police power doctrine. Further, the restrictive approach in interpreting indirect expropriation through disregarding the effect of the state measure on an investor is detrimental to international investment law at large.³³⁷ Finally, it is worth mentioning that both decisions, *Methanex* and *Saluka*, were decided in accordance with the UNCTRAL model law. Some commentators have justified this restrictive approach to indirect expropriation regulatory power by the fact that both cases have involved regulatory powers taken by developed states to deal with increasing challenges to national security, health or environment.³³⁸ I believe that similar awards in the same vein under ICSID's arbitration rules are rare, if they exist at all.

³³⁴ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, (Decision on jurisdiction, May 7, 2004) (Partial award, March 17, 2006)

³³⁵ See *supra* note 327 at 725-30

³³⁶ See *supra* note 334

³³⁷ See *supra* note 327 at 726

³³⁸ See *supra* note 47 at 163-65

D. CONCLUSION

In this chapter, I examined the governing legal framework of investment treaty tribunals under the ICSID. The Washington Convention does not constitute a self-contained substantive regime for ITA. In section one, I sought to answer whether variations in investment treaty terms have driven international investment law to fragmentation. It is suggested that *quid pro quo* bargains and relative negotiating powers of treaty parties underlying the concept of BITs have rendered the latter essentially variable in content and structure. Nevertheless, I argued that changes in BITs terms are mainly concerned with generalities rather than details of substantive standards of treatment. Most of BITs contain standardized provisions for investment protection particularly on the prohibition of non-compensable expropriation, FET and MFN. I found that even in cases of almost identical treaty terms, arbitral tribunals arrive at consistent interpretation of international minimum standards. It is true that the treaty parties create their own investment treaty, yet arbitral tribunals turn out to be the supreme interpreters of when and how treaty law applies. Treaty parties are assumed to impliedly delegate comprehensive interpretive power to one-off arbitral tribunals. However, the scope of interpretation the tribunal may exert increases or decreases depending on either the clarity or the ambiguity of treaty language. The more ambiguous is the treaty language, the wider is the scope of interpretation to an investment tribunal. I concluded that despite variations in treaty terms, the effect of the latter remains subordinate to tribunals' interpretations in predicting outcomes.

In section two, I critically scrutinized the ICSID's asymmetrical basis of jurisdiction in defining both the "protected investment" and the "protected investor". It is quite odd that neither the Convention Preamble, nor the conventional terms provide a definition for what is to be qualified as a protected investment for the purpose of the ICSID litigation. Despite the fact that the Preamble clearly requires a certain contribution by a private international investment to the contracting states economic development in order to be qualified as an investment, some tribunals have intentionally ignored such a requirement. The parameters set forth in most B/MITs on what constitutes an investment are frequently similar in term and content, yet they often provide vague conditions for defining an investment. In light of this lacuna,

ICSID arbitral panels take a broad approach in interpreting protected investment with an aim to amplify protection for transnational investment. Even though earlier decisions defer to the preambular condition regarding the contribution of an investment to the host state's economic development, recent jurisprudence shows divergent approaches in defining an investment. Some tribunals like *Victor Pey* and *Quiborax* endorse a restrictive approach that depends on mere textual meaning while ignoring the object and purpose of the ICSID Convention. Moreover, the high degree of legal sophistication, technical complexity and costly proceedings in the ICSID litigation limits the jurisdiction *rationae personae* of the ICSID to multinational corporations and developed countries' investors. I noted that a little amount of the literature on ITA discusses the discriminatory nature of the ICSID litigation in excluding the domestic investors from the international minimum standards of protection. I argued that such jurisdictional deficit rigorously contravenes the well-established procedural rules of fairness and equality.

In section three, I drew on the different approaches used by investment treaty tribunals to interpret the definition of indirect expropriation. Jurisprudence on ITA has reversed "the possession paradigm" in expropriation to include other forms of indirect takings. Yet, it provides no definite distinction between the latter and the state lawful regulation. Thus, Investment treaty tribunals rely on variable textual interpretations for defining expropriation as the central standard in international investment law. The lack of a binding rule of precedent along with an appellate body in the practice of ITA has exacerbated inconsistency whether at the jurisdictional or substantive level. Furthermore, introducing a third category of measures "tantamount to expropriation" in the newer version of BITs provides a basis for an expansionist interpretation to state regulatory acts in relation to foreign investors. Thinking of ITA as a form of commercial arbitration, most investment treaty tribunals have taken the law of expropriation beyond the treaty parties consent. Instead of objectively examining the governmental regulatory action in the course of awarding damages, arbitral tribunals endorse an "all or nothing" paradigm that considers the interests of either party. Neither the "sole effect criterion" nor the "police power doctrine" provides for a comprehensive approach to the distinction between compensatory expropriation and non-compensable state regulation.

IV. INVESTMENT TREATY ARBITRATION AS PUBLIC LAW ADJUDICATION: MAPPING OUT A REGULATORY SPACE FOR THE HOST STATE

Even though investment treaty arbitration combines the form and procedures of international commercial arbitration, it performs under the substantive principles of public international law. As I argued in chapter one, the function of ITA in reviewing and adjudicating states exercise of public authority vis-à-vis foreign investors makes it akin to public law's judicial review of governmental actions. Yet, the private law inclination of investment treaty tribunals towards inflexible protection of transnational investment hinders the host state's right to pursue legitimate public policy objectives. The expansive interpretations of international investment standards which were set out in chapter two extend investment protection beyond the treaty parties' intention under the ICSID conceptual framework. A significant part of the literature on ITA puts forward a number of remedial measures to address the current fragmentation of international investment regime. Most of these remedies focus on the institutional reform of the ICSID legal framework. They vary from establishing an "independent international investment court"³³⁹ to developing an "ICSID appellate body".³⁴⁰ Undoubtedly, that would help revise inconsistent awards that may be rendered under one-off investment treaty tribunals.³⁴¹ Other institutional proposals suggest a fairer institutional process for appointing arbitrators in order to increase objectivity, accountability and transparency in the practice of ITA.³⁴² On the procedural level, some studies recommend the "consolidation of claims", whenever applicable, to avoid potentially conflicting conclusions by different tribunals on the same subject matter.³⁴³ This technique would ensure procedural uniformity in the practice of ITA, raise predictability of the host state and foreign investor and prevent over-litigation and double recovery.³⁴⁴

³³⁹ See *supra* note 91;(Gus Van Harten's thesis on the establishment of an international investment court)

³⁴⁰ See *supra* note 6

³⁴¹ *Id.*

³⁴² See *supra* note 10

³⁴³ See Catherine Yannaca, *Consolidation of Claims: A Promising Avenue of Investment Arbitration?* 92, OECD 64-02689-4, (2006)

³⁴⁴ See Joseph D' Agostino, *Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions and Compulsory Joinder*, 98 VA. L. REV. 177 - 230, (2012)

However, I contend that both institutional and procedural reforms are basically contingent on either renegotiating the ICSID convention, or realizing a Multilateral Agreement on investment protection (MAI) to replace the diverse network of BITs existing today. Despite being comprehensive, these reform proposals seem unfeasible due to the everlasting conflicting interests of developed and developing states, multinational corporations, commercial arbitrators, and host states' civil society.³⁴⁵ Instead, this chapter presents a pragmatic approach based on the self-reformation of investment treaty tribunals law-making. The hybridity of ITA is the entry point for remoulding the law-making process on public law concepts of adjudication. I argue that reintroducing ITA as a public law model of adjudication may drive the system to self-reformation. To that effect, I set out a workable three-pronged framework for investment treaty tribunals law-making; namely, interpretive, conceptual and comparative. In section one, I lay out an interpretive approach for investment treaty tribunals. I draw on the customary rules of the Vienna Convention on the Law of Treaties (VCLT) as a basis for interpretation of substantive standards of protection.³⁴⁶ In section two, by applying the VCLT interpretive guidelines on the conceptual framework of the Washington Convention, I emphasize the correlation between investment protection and the host state's right to economic development as an object to the ICSID. Further, I rely on article 42 (1) of the Washington Convention, whenever a given BIT term allows, as a basis for integrating rules on corporate social responsibility. In section three, I suggest a comparative framework for investment treaty tribunals law-making. First, I point out to the significance of the general principles of law and judicial decisions as formal sources of public international law in reforming ITA from within. Second, I examine the use of proportionality in comparative public law review of governmental actions. Considering its relevance to ITA, I argue for accommodating the principle of proportionality as a general principle of law in investment treaty tribunals law-making. For such an end, I lay out a three-step test to delineate the boundary between compensatory expropriation and non-compensable lawful regulation.

³⁴⁵ See Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 Duke L. J. 343- 2009, (2010)

³⁴⁶ See *supra* note 312

A. THE INTERPRETIVE FRAMEWORK: CUSTOMARY RULES OF INTERNATIONAL LAW UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES

Investment treaties cannot be interpreted in isolation from general international law. It is well established under the principle *pacta sunt servanda* that treaty parties are bound to carry out their international obligations in good faith. Still, international investment law has not generated a self-contained system of substantive rights and obligations. The open-ended investment standards and guarantees stated in a wide body of B/MITs have yielded divergent interpretations by one-off arbitral tribunals. Only a few investment treaties, like NAFTA,³⁴⁷ Canada, and the US model BITs, explicitly refer to the customary rules of international law on treaty interpretation.³⁴⁸ Additionally, the latter elaborates on the definition of customary international law.³⁴⁹

Even if there is no such explicit stipulation, investment treaty tribunals, operating within the ambit of public international law, have a formal room for reference to customary rules of international law applicable to investment disputes. Through consenting to investment arbitration, treaty parties impliedly delegate their law-making powers, including most notably interpretive authority, to potential arbitral tribunal. Since investment treaties create general rather than specific standards for the protection of foreign investment, such standards must be interpreted before they can

³⁴⁷ Under the NAFTA, article 1105 (1) on the minimum standard of treatment provides that "Each Party shall accord to investments of investors of another party treatment in accordance with international law." similarly, article 1131 (1) on the governing law stipulates that the "Tribunal established under this Section shall decide the issues in dispute in accordance with this agreement [and] applicable rules of international law." The clear language of article 1131 (1) of the NAFTA refers to the compulsory application of the rules of international law on investment disputes; (In fact, this is quite different from the apparent supplementary application of customary international law under article 42 (1) of the ICSID which states that:"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. [In the absence of such agreement], the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.")

³⁴⁸Article 5 (1) of the US – 2012 – model BIT on the minimum standard of treatment states that "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

³⁴⁹Annex (A) of the US – 2012 – model BIT treaty provides a definition to the "Customary International Law" mentioned in articles 5 (1) and 6 concerning expropriation and compensation; it states that "The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in... results from a general and consistent practice of States that they follow from a sense of legal obligation."

be applied. This justifies the fact that investment tribunals have historically taken the lead in developing international investment law through law-making.³⁵⁰

1. A Restrictive Approach to the VCLT Interpretive Guidelines

Since the very first treaty-based investment arbitration, *AAPL v. Republic of Sri Lanka*, the interpretive guidelines of the Vienna Convention on the Law of Treaties (VCLT) have been presumably considered in the tribunals' law-making process.³⁵¹ Yet, most investment treaty tribunals take a restrictive approach in applying the latter's "general rule of interpretation" under article 31. In doing so, tribunals limit their interpretations to the ordinary meaning of investment treaty text under article 31 (1) while ignoring its object and purpose. It is quite odd that a large number of investor-state tribunals have not even mentioned the interpretive guidelines of the VCLT in defining the substantive principles of investment protection.³⁵² As truly observed by Sornarajah, the paradox lies in the fact that arbitral tribunals only satisfy the ordinary meaning of treaty terms and turn a blind eye to the object and purpose of the treaty as envisaged by article 31 and 32 of the VCLT.³⁵³ Such restrictive approach not only abstracts investment standards from their intended purpose as originally anticipated by the treaty parties, but also extends their application to undesired areas of mere regulatory discretion of states. In that regard, the challenged award of *Sempra Energy International v. Argentina* concludes that "interpretation is not the exclusive task of States; it is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty."³⁵⁴ Despite the clear reference to the VCLT interpretive rules, the award has been challenged on grounds of manifest errors of law, excess of power and failure to state reasons.³⁵⁵ Censuring *Sempra's* selective adherence to the general rule of

³⁵⁰ See *supra* note 213 at 15-17

³⁵¹ See *supra* note 145

³⁵² See SORNARAJAH M., A COMING CRISIS: EXPANSIONARY TRENDS IN INVESTMENT TREATY ARBITRATION, 55-73 (2nd edition, Oxford University Press) (2008)

³⁵³ *Id.*

³⁵⁴ See *supra* note 180

³⁵⁵ In interpreting article XI of Argentine-US BIT on the state of emergency, the annulment committee states that "The Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship... The Tribunal considers that there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI." See *Sempra Energy International v. The Argentine*

interpretation, the annulment committee concludes that "relevant rules of international law should be used to interpret BIT provisions that either reflect customary international law or are not defined in the BIT. The Tribunal interpreted Article XI in accordance with relevant rules of treaty interpretation, as codified in Articles 31 and 32 of the VCLT."³⁵⁶

On a different account, the tribunal in *Tokios Tokéles v. Ukraine* made a controversial decision on jurisdiction as a result of using a restrictive approach to interpretation.³⁵⁷ Despite the fact that the claimant Lithuanian corporation was controlled by Ukrainian nationals who own (99) percent of the company's shares, incorporated under Ukrainian law, maintained its administrative headquarters in the latter; the Tribunal considered the company as falling within the category of protected investors under the ICSID framework.³⁵⁸ This expansive approach misinterprets the *rationae personae* jurisdictional basis of the ICSID in providing substantive protection only for foreign investors as explicitly stated in both the Preamble and article 25 (1) of the Convention. Further, it confuses the legal theories on nationality of international corporations whether under civil law or common law systems. Whereas the former endorses the nationality or domicile of individuals dominating the majority of shares as a decisive criterion, the latter recognizes the administrative seat as a basis for the enterprise nationality.³⁵⁹ Thus, the *Tokios Tokéles* tribunal did not comprehensively apply the VCLT interpretive guidelines. First, the tribunal has restricted the definition of investors to the ordinary textual meaning of the Lithuania-Ukraine BIT, while ignoring the main object of the Washington convention as only protecting foreign rather than domestic investors. Second, the non-exhaustive interpretation of the VCLT guidelines in examining the definition of protected investors under the Lithuania-Ukraine BIT has expanded the scope of protection beyond the treaty party intention – Ukraine in the given case.

Republic, ICSID Case No. ARB/02/16 (Decision on the Argentine's application for annulment of the award, June 29, 2010)

³⁵⁶ *Id.*

³⁵⁷ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Decision on jurisdiction, April 29, 2004) (Final award, July 26, 2007)

³⁵⁸ See *supra* note 239 at 113-115

³⁵⁹ See Aleksander Fillers, *Corporate Nationality in International Investment Law*, 1 1857, European Scientific Journal (2014)

2. A Comprehensive Methodology for Investment Treaty Tribunals' Law-Making

Against this backdrop, I believe that the faithful application of customary international rules on treaty interpretation provided for in articles 31 and 32 of the VCLT would tackle the inconsistent practice of ITA from within. In fact, both articles offer an interpretive methodology which covers both bilateral and multilateral investment treaties. I argue for an interpretive methodology for investment treaty tribunals' law-making process that fulfills two essential features: it must be inclusive and exhaustive. First, I mean by the inclusive application that the VCLT interpretive rules must be inclusively applied to the substance of both the Washington Convention and the BIT in question. The Washington Convention is perceived as constituting the overarching legal framework of ITA that gives rise to the conclusion of thousands of B/MITs. This follows that the latter should not by any mean contravene the former's general provisions as in the case of *Tokios Tokéles* with respect to the definition of an investor under the ICSID framework. Thus, the inclusive application of article 31 and 32 of the VCLT interpretive rules appears to be indispensable in discerning the full understanding of the minimum standards of protection in the case at hand. Moreover, I argue that such application of articles 31 and 32 has a specific importance in striking a balanced conceptual framework as to the rights and obligations of both parties under the ICSID litigation, as I will elaborate on in the next sub-section.³⁶⁰ In spite of the fact that article 31 may suffice in some cases to extract the essence of the treaty conventional terms, it does not do the same to the preambular terms of the ICSID Convention or other BITs. Therefore, article 32 comes into play whenever article 31 leads to indefinite, vague or unreasonable conclusions³⁶¹ like what has been experienced by many arbitral tribunals while interpreting the definition of investment under article 25 (1) of the Washington Convention.³⁶² There is no doubt that the historical context, socio-political conditions and negotiation circumstances that

³⁶⁰ See *supra* note 239 at 104

³⁶¹ According to article 32 "Recourse may be made to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; (b) Leads to a result which is manifestly absurd or unreasonable."

³⁶² See *supra* note 239 at 107

coincided with the treaty conclusion are of mounting concern in distilling the parties' real intentions.³⁶³

Second, investment treaty tribunals must exhaustively apply the interpretive techniques set forth in the general rule of interpretation under article 31 of the VCLT. This exhaustive approach is in fact required by the clear language of article 31 (1) which provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [in their context *and* in the light of its object and purpose]." The word "and" demonstrates that the examination of the interpretive means should not be confined to the treaty's ordinary meaning of the texts; rather it should go further to examine the parties' mutual intent at the time they have signed an investment treaty. This dictates a cumulative application of the "ordinary meaning" as well as the "object and purpose criteria" as stated in article 31 (1) as a first step. In that meaning, I emphasize that the tribunal must ascertain that the ordinary meaning criterion *matches rather than supplements* the object and purpose of the treaty. In a second step, the tribunal proceeds to examine all other prescribed interpretive techniques provided for under the general rule of interpretation in article 31 to ensure a comprehensive understanding of the treaty terms in light of its object and purpose. In this meaning, article 31 (2) of the VCLT elaborates on the context stipulated in article 31 (1): "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes..." This language requires that the process of interpretation must not stop at article 31 (1) of the VCLT, rather it must proceed with the examination of other interpretive guidelines provided for under article 31 (2), (3) and (4) in the first place and article 32 in the second place.³⁶⁴

³⁶³*Id.* at 109

³⁶⁴Article 31 (2) of the VCLT stipulates that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

Article 31 (3) states that: "There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties."

B. THE CONCEPTUAL FRAMEWORK: COUNTERBALANCING INVESTOR'S RIGHTS WITH OBLIGATIONS UNDER THE WASHINGTON CONVENTION

The expansive interpretations of investment treaty tribunals have elevated the foreign investor's private rights over the host state's public interests. Public international law principles of sovereign independence and non-intervention are blatantly eroded under the current practice of ITA.³⁶⁵ The Preamble of the Washington Convention confirms the role of private international investment in promoting economic cooperation and development among contracting states. Particularly, developing countries had perceived the advent of the ICSID as a global tool for attracting FDI to their nascent economies.³⁶⁶ They have signed B/MITs with the intention of giving the capital-exporting states positive signals that they owe their investors preferential treatment over their territories. In that sense, the ICSID is primarily seen as a balancing equilibrium between sovereign states and foreign investors.³⁶⁷ However, as critically shown in chapter two, some empirical findings question the relationship between ITA under the ICSID and the promotion of economic development in the host states. In particular, low and middle-income developing countries are double-burdened by costly proceedings and highly punitive awards under ICSID litigation. Thus, the decisive function of ITA in boosting the economic development of the host states becomes more dubious by the unrestrained interpretations of investment treaty standards.³⁶⁸

The unpredictable application of the minimum standards of protection has largely barred host states from pursuing national econometric policies essential for development.³⁶⁹ Moreover, it has even disallowed the latter from holding Multinational Corporations (MNCs) accountable for their wrongdoing against the residing population in matters of common concern such as healthcare, environmental

Article 31 (4) states that "A special meaning shall be given to a term if it is established that the parties so intended."

³⁶⁵ See *supra* note 103 at 291-93

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ See United Nations Conference on Trade and Development UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), No. 1, (May, 2013), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

³⁶⁹ See *supra* note 103 at 292

protection, human rights, labour entitlements, fighting corruption, taxation and financial regulation. Although there has been a shift in state practice towards curtailing the penetration of ITA into the public regulatory sphere, tribunals seem hesitant to respond to non-investment concerns. Building on the proposed comprehensive methodology for interpretation, I intend to reconceptualise the objectives of ITA under the ICSID legal framework. In doing so, I aim to restore the legal equilibrium between the protection of foreign investment and the host state's right to pursue economic development. Second, I draw on an integrationist interpretation of both article 31 (3) (C) of the VCLT and article 42 (1) of the Washington Convention, when applicable, to develop rules on corporate social responsibility vis-à-vis host states. These rules, I argue, would essentially equiponderate the host state's international responsibility for injuries to foreign investors.

1. Identifying the Host State's Right to Economic Development as an Object to ICSID Litigation

In the midst of the ICSID negotiations, contracting states have disputed the definition of protected investment and consequently have left the matter to the parties consent in each BIT and then to the tribunal's discretionary power.³⁷⁰ While developing states have managed to stress the essence of public interest in investor-state disputes, developed states aimed to maximize the sanctity of private property. For example the United Kingdom, as a capital-exporting country, has proposed a definition of investment based on economic activity rather than economic development.³⁷¹ This conflict has ultimately led the contracting states not to assign a definition of investment to the Washington Convention at all.³⁷² Article 25 (1) establishing the mainline jurisdiction of the ICSID stipulates that “the jurisdiction of the Center shall apply to [any legal dispute arising directly out of an investment] between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by that State to the Center) and a national of another Contracting State.”

³⁷⁰ See *supra* note 216

³⁷¹ *Id.*

³⁷² See *supra* note 231 at 237

Obviously, the language in "any legal dispute" maintains a broad scope of what may qualify as an investment for the purpose of the ICSID convention.³⁷³ Therefore, the Washington convention has principally transferred the burden of defining the protected investment to the law-making power of investment treaty tribunals depending on the BIT terms at issue.³⁷⁴

In contrast to ICSID's conventional terms, the Preamble has clearly emphasized the correlation between protection of private international investment and promotion of economic development in the contracting states. In this meaning, the very first paragraph of the Preamble provides that "Considering the need for international cooperation for economic development, and the role of private international investment therein; bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States."³⁷⁵ Even though the Preamble does not provide comprehensive definition of investment, it sets out a general condition for qualifying the protected investment, that is, the contribution of the protected investment to the host state's economic development. Nevertheless, historical political and economic circumstances denote that the promotion of economic development of the host states side-by-side with the protection of transnational investment has been the main object of ITA under the ICSID framework.³⁷⁶ In that sense, ITA is perceived as a decisive tool for economic development more than an alternative method for dispute settlement.³⁷⁷ States agreed to grant foreign investors and multinational corporations a preferential treatment with the intention of attracting foreign capital flows as essential for the process of economic development.³⁷⁸

³⁷³On the contrary, the (1987) ASEAN Agreement for the Promotion and Protection of Investments requires the host state's written approval of an investment; article (2) of the Convention states that: "This agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any contracting party by nationals or companies of any other contracting party and which are specifically approved in writing and registered by the host country."

³⁷⁴ *Id.*

³⁷⁵ *See supra* note 1

³⁷⁶ *See supra* note 216

³⁷⁷ *See supra* note 8 at 9-10

³⁷⁸ *See supra* note 17 at 3-8

Despite the fact that each BIT encompasses a self-standing definition of investment, most BITs use the same exact provisions for qualifying protected investment.³⁷⁹ While some investment treaties, like the US model BITs of 1994, 2004 and 2012, have maintained the same preambular condition on the contribution to the host state's economic development, others have remained silent towards the latter.³⁸⁰ Following the same line of argument in chapter two, I believe that the investment treaty tribunals' inconsistent interpretations of the definition of investment rather than treaty term variations brought about the fragmentation of international investment law. Some recent decisions like *Victor Pey Casado & President Allende Foundation v. The Republic of Chile* and *Quiborax v. Bolivia* have ignored the criterion of the “contribution to the host state's economic development” in qualifying an investment for the purpose of the ICSID jurisdiction *rationae materiae*.³⁸¹ These tribunals have restricted the interpretation of investment definition to the ordinary meaning of treaty terms through selective application of article 31 of the VCLT. I contend that such restrictive reading of treaty terms neither reflects the BIT parties' intention, nor observes the central object of the ICSID in promoting states economic development. In this respect, I argue that the inclusive and exhaustive application of the interpretive guidelines laid down by the VCLT would help in defining the protected investment.

On the one hand, the inclusive application of the VCLT interpretive guidelines entails that the tribunal's interpretation of investment under a given BIT be consistent with the overarching framework of the ICSID convention. Thus, the definition of the protected investment must primarily satisfy the general condition set out by the ICSID Preamble, i.e. foreign investment contribution to the host state's economic development. This comprehensive methodology for qualifying an investment is quite supported by article 31 (2) (a) and (b) of the VCLT general rule which provides that:

[T]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion

³⁷⁹ See for example, article I in both the UK (2005) model BIT and France (2006) model BIT which contain identical language on the definition of investment.

³⁸⁰ For example, the Preamble of the German (2005) model BIT does not provide for the investment's contribution to the host state economic development.

³⁸¹ See *supra* note 225; See *supra* note 228

of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.³⁸²

Undoubtedly, this essentially involves the Washington Convention, being recognized in advance by both parties to a given BIT. Furthermore, article 31 (2) also comprises the United Nations Charter as a multilateral legal instrument of public international law.³⁸³ In spite of its generic nature, the UN Charter embraces a considerable amount of international law principles, particularly the principle of sovereign equality of states.³⁸⁴ Since it is mutually accepted by state parties, the latter must be considered by investment treaty tribunal while interpreting the definition of an investment pursuant to a given BIT term. In that sense, sovereign equality entails that the host state must authorize a certain activity over its territory in order to be qualified as a protected investment for the purpose of the ICSID Convention.³⁸⁵

On the other hand, the exhaustive application of the VCLT guidelines requires that the tribunal satisfy all interpretive techniques under the general rule of article 31(1), (2), (3) and (4).³⁸⁶ This means that the tribunal must understand that the ordinary meaning of a treaty text complements rather than contradicts the object and purpose of the ICSID. For such an end, it shall equally consider preambular texts side by side with conventional texts in deciding what qualifies as an investment. In addition to that, the exhaustive approach of interpretation allows the tribunal, in the event the general rule of interpretation under article 31 does not produce consistent conclusion recourse to the supplementary means of interpretation under article 32 (a) and (b). The latter stipulates that "Recourse may be made to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the

³⁸² See *supra* note 1

³⁸³ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at <http://www.un.org/en/charter-united-nations/>

³⁸⁴ Article 2 (1) of the UN Charter states that "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles; (1) The Organization is based on the principle of the sovereign equality of all its Members."

³⁸⁵ See *supra* note 223 at 305

³⁸⁶ *Id.*

meaning ambiguous or obscure; (b) Leads to a result which is manifestly absurd or unreasonable.”³⁸⁷ This may be useful where a BIT does not provide for the general criterion on the contribution to the host state's economic development such as in the (2005) German model BIT.³⁸⁸ Such recourse, I believe, is imperative to maintain an interpretive balance between the given BIT terms and the ICSID convention.

In defining the protected investment under the Jordan–Italy BIT, the remarkable award of *Salini et al. v. Morocco* (2001) considers the Preamble's limitation on the ICSID jurisdiction *rationae materiae*.³⁸⁹ While interpreting the definition of investment under the given BIT, the tribunal concluded that “[the common intention] of the Parties is reflected in this clear text.” These words obviously contest the textual argument in defining protected investment as relying on mere "economic activity or asset" and goes further to examine ICSID's purpose in promoting the contracting states economic development. Presided over by Judge Guillaume, the tribunal laid down an interpretive methodology based on the inclusive and exhaustive application of the VCLT interpretive guidelines. In doing so, *Salini* duly observes the parties' intention beyond the ordinary meaning of article 31 and 32 as evidenced whether in the ICSID Preamble or its *travaux preparatoires*. Finally, the tribunal develops a "four-part test" which requires an investment to have four essential elements in order to be qualified as protected under the ICSID jurisdiction; namely: “a contribution of money or assets; a fixed duration; an element of risk; and a contribution to the host state’s economic development.”³⁹⁰

The jurisprudential adherence to the *Salini* four-part test would not only promote economic development of the contracting states as an object of the ICSID, but also provide the host states with more predictability in the practice of ITA. Yet, a counterargument against the suggested comprehensive methodology for interpretation is that the VCLT general rule of interpretation applies only to state-to-state disputes and consequently does not cover international disputes involving individuals. In this regard, Weeramantry confirms that the VCLT customary rules are applicable to all

³⁸⁷ See *supra* note 294

³⁸⁸ See *supra* note 380

³⁸⁹ *Id.* at 294-96

³⁹⁰ See *supra* note 222

international disputes regardless of their subject matter or involved parties. He contends that this methodology is best exemplified by the European Court of Human Rights' interpretive approach which consistently refers to the VCLT customary rules of interpretation, despite featuring individual-state disputes.³⁹¹ From a public law perspective, customary rules of international law justify the application of the *Salini* test in the practice of ITA as public law adjudication. In my view, *Salini* award offers a balanced approach to the interpretation of the definition of investment as it accounts equally for private corporate interests and public policy concerns. Further, the *Salini* four-part test lays down a strong jurisdictional precedent that respects the principle of sovereign independence of states in approving investment entry into their territories.³⁹²

2. Integrating Rules on Corporate Social Responsibility in Investor-State Disputes

The core concept of investment treaty arbitration is to provide foreign MNCs an alternative dispute resolution system away from the national court system. At the same time, the legal status of MNCs renders them practically unbound whether by the international investment law principles or the host state's internal laws and regulations. In exploring the reform of international investment law in the area of corporate conduct, the hybrid nature of ITA comes again into play. The difficulty here lies in the fact that multinational corporations (MNCs), unlike state parties, are not counted among subjects of international law. Instead, they are private law entities operating on the international sphere.³⁹³ This legal status is what I believe makes ITA a one-sided litigation since investment treaty tribunals have not so far developed a methodology that fits into the unique public-private nature of ITA.³⁹⁴ In this regard, Stephan Schill insightfully points out that "When the two streams of investment protection and corporate responsibility meet and mix, it will be difficult to maintain a system of inflexible investment protection."³⁹⁵ The emergence of new defences with

³⁹¹ See Romesh Weeramantry J., *Treaty Interpretation in Investment Arbitration*, 4 Oxford University Press, 347-48 (2012)

³⁹² See *supra* note 373

³⁹³ See *supra* note 47 at 217

³⁹⁴ *Id.* at 213 -20

³⁹⁵ See *supra* note 191 at 64

respect to corporate responsibility in the newer generation of BITs strongly pushes towards a balanced law-making process. In the same vein, I propose the adoption of an integrationist approach that embraces the customary rules of interpretation as enshrined in articles 31 and 32 of the VCLT insofar as the conceptual framework of the given BIT permits. I propose a two-fold approach to ITA self-reformation that suits the hybridity of the ICSID dispute resolution system.

First, I argue for integrating domestic legal instruments and mechanisms on corporate compliance. The conceptual framework of article 42 (1) of the Washington Convention, whenever applicable, constitutes a basis for an integrationist approach to reform. According to article 42 (1) of the Convention: “The tribunal shall decide disputes in accordance with such rules of law as may be agreed by the parties. [In the absence of such agreement], the tribunal shall apply the law of the contracting state party to the dispute (including rules on the conflict of laws) and such rules of international law that may be applicable.” Although article 42 (1) concludes that the substantive law to ICSID disputes is to be determined in accordance with the parties agreement, it advances the applicability of the host state internal law in the absence of an agreement. The remarkable award of *World Duty Free v. Kenya* presents jurisprudential evidence towards the integration of corporate responsibility in arbitral tribunals law-making.³⁹⁶ The award relied on English law, particularly the common law rule of "unclean hands", to invalidate an investment agreement for proven allegations of corruption at the inception of foreign investment. Even though the *World Duty Free* arbitration was contract-based investment dispute, it opens a door to the host state counterclaims in cases of proven corruption.³⁹⁷ This unequivocally suggests the possibility of embracing corporate social responsibility (CSR) into the domestic law of the host state. In the case of contractual investment arbitration, foreign investors are frequently subject to the host state's internal law pursuant to a contractual relationship.³⁹⁸ However, I contend that article 42 (1) allows investment treaty tribunals interpretive leeway for integrating domestic rules on CSR into the

³⁹⁶ *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7, (Final award, October 4, 2006)

³⁹⁷ See ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION, 200-206 (1st edition, Oxford University Press) (2014)

³⁹⁸ *Id.*

law-making process. Thus, even though the host state and the foreign investor agree on the substantive applicable law to the dispute, this does not, by any means, render the domestic law of the host state irrelevant to the merits of the dispute.³⁹⁹

I believe that the ICSID legal framework diminishes the jurisdiction of the host state law insofar as the latter contradicts or minimizes the international standards of protection for foreign investment. In fact, this is consistent with the customary rules of international law. In this respect, article 27 of the VCLT entitled, "Internal Law and Observance of Treaties", provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Conveying the same meaning, article 3 of the ILC draft articles on state responsibility for internationally wrongful acts insists on the same customary rule: "The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."⁴⁰⁰ This means that the host state's domestic laws and regulations may be applied in ITA on two main conditions: first, the absence of investment contract providing for "Stabilization Clause"; second, the internal law or regulation in question is consistent with the general international law as *lex fori*. Indeed, it is quite impossible to decide an investor-state dispute without reference to the host state internal laws, regulations or governmental decisions. It is indispensable for investment treaty tribunals to apply the host state's law while deciding both preliminary and substantive matters of a given dispute. This essentially includes issues of jurisdiction, nationality of the treaty parties and legality of governmental acts or omissions vis-à-vis foreign investors.⁴⁰¹

Second, I suggest that international investment law should be reconceptualised on the basis of international mutual responsibility. The scope of investor-state disputes should move beyond the traditional notion of corporate profitability to social benefits. For such an end, I argue that the investment treaty tribunal's fullest application of article 42 (1) in light of the VCLT customary rule of interpretation particularly under article 31 (3) (c) would better accommodate international corporate responsibility into

³⁹⁹ See *supra* note 288 at 27-30

⁴⁰⁰ See *supra* note 104

⁴⁰¹ See *supra* note 288 at 30

the practice of ITA. Article 31 (3) (c) of the VCLT stipulates that “There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties.” In addition to the substantive law agreed upon by the parties in accordance with article 42 (1), investment treaty tribunals may rely on article 31 (3) (c) of the VCLT to incorporate any international instruments applicable to the dispute in question into its legal reasoning.⁴⁰² Although the second method of reform which is based on the integrationist approach to the VCLT general rule of interpretation is much more palatable to most international law academics and practitioners, it seems to me impractical in some way. This is since the two most prominent attempts to adopt internationalised rules on CSR have never entered into force. Intriguingly, both attempts were led under the auspices of the OECD. In 1976, the latter adopted guidelines addressing transnational corporate responsibility for the first time. Once again in 1998, it proposed a Multilateral Agreement on transnational Investment (MAI) including comprehensive rules on corporate conduct. Indeed, there are a large number of soft law instruments on CSR that have been adopted on the international plane, yet none of which have found way to multilateral legal framework. Thus, soft law instruments and preambular provisions on CSR have rarely been encompassed in the law-making process of investment treaty tribunal.⁴⁰³

In fact, the natural inclination of the ICSID system towards private interests shows hesitancy in giving legal weight to other areas of international law, such as human rights, sustainable development or environmental protection. Nonetheless, the major shift in state practice towards a more comprehensive version of BITs which account for non-investment standards proves to be significant with respect to the development of a normative order on corporate compliance.⁴⁰⁴ Yet, the current version of preambular terms has proven to be impractical in informing the treaty parties' intention. It offers the investment tribunal a negative rather than positive room for discretion. This vagueness has yielded many inconsistent interpretations of non-investment standards and consequently has affected the legitimacy of ITA at large.⁴⁰⁵ In order to

⁴⁰² See *supra* note 231 at 141-43

⁴⁰³ See *supra* note 47 at 306

⁴⁰⁴ *Id.* at 307

⁴⁰⁵ See *supra* note 239 at 18

blunt the one-sided nature of investor-state disputes, Muchlinski suggests the inclusion of investor responsibilities along with that of the host state in the tribunals' process of interpretation.⁴⁰⁶

For instance, many states have revised their model investment treaties to account for more strict provisions on corporate social responsibility; these include for example, the Russian Federation amendment in 2002, France in 2006 and the United States in 2004 and 2012. Other countries are currently in the process of developing a new model BIT such as Argentina, South Africa, Egypt and Turkey. In redrafting the treaties, states aim to achieve an “appropriate balance between protection of the rights of foreign investors on the one hand, and recognition of the legitimate sphere of operation of the host State on the other.”⁴⁰⁷ From the standpoint of domestic law, corporate social responsibility of foreign investors takes place through ensuring a minimum standard of corporate conduct. As such, foreign investors undertake social and environmental commitments to national laws, regulations, and codes of conduct. In addition to the legal obligations, some developing states set up CSR on the basis of developmental obligations in domestic infrastructural fields such as healthcare, education, public utility, urbanization, sanitation and energy.⁴⁰⁸

C. THE COMPARATIVE FRAMEWORK: ACCOMMODATING PUBLIC LAW STANDARDS OF REVIEW IN INVESTMENT TREATY ARBITRATION LAW-MAKING

The chain of global economic crises which erupted in the 2000s has dramatically changed the dynamics of the international investment regime. Argentina's arduous course of litigation brought about new-fangled defences in the practice of ITA such as the state of necessity.⁴⁰⁹ The inconsistent arbitral decisions that grew out of over fifty claims against Argentina severely affected the credibility of ITA in advancing host

⁴⁰⁶ See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, 189 (1st edition, Oxford University Press) (2007)

⁴⁰⁷ See *supra* note 239 at 193

⁴⁰⁸ See *supra* note 231 at 252

⁴⁰⁹ In over fifty claims before different investment Tribunals, Argentina has excessively relied on the customary law on the state of necessity to justify its emergency powers against foreign investors and corporations following the 2000s economic crisis; See *supra* note 303 at 71-73

states' economic development.⁴¹⁰ The emergency measures undertaken by many states in the wake of the 2008-2009 financial crises have considerably altered the theory of expropriation towards a more nuanced understanding of non-compensable regulation.⁴¹¹ In contrast to Argentina's case, the US and other European states' interventions to contain economic calamity especially in the banking system have been faced with great appeasement on the global financial level.⁴¹² This contradictory approach has raised significant questions concerning the scope of state regulatory powers vis-à-vis investment protection. More intriguingly, some traditional capital-importing powers, like the BRICS countries, became key transnational investment players in Western capital-exporting countries. This shift in roles between inward and outward sources of investment along with some host states backlash against the ICSID has been echoed by a new version of BITs which provides for states' regulatory measures in public policy matters including health, environment and taxation.

States' reaction to the system pitfalls has driven most of investment treaty tribunals to rediscover customary principles of international law in order to balance between investment protection and state regulation. Thus, public law principles of sovereign independence, non-intervention and administrative discretion have been revived in the practice of ITA. Investment treaty tribunals' scope of reviewability and interpretation of the open-ended investment standards has become in some way limited by investment treaty terms. Moreover, sufficient jurisprudential evidence shows variable attempts to accommodate public law concepts in tribunals' decision making process.⁴¹³ Understanding the regulatory nature of ITA, some academics and practitioners in the field highlight the importance of a comparative public law

⁴¹⁰ See *supra* note 275 at 196

⁴¹¹ *Id.*

⁴¹² See DONAL DONOVAN & ANTOIN E. MURPHY, *THE FALL OF THE CELTIC TIGER: IRELAND & THE EURO DEBT CRISIS*, 189-192 (1st edition, Oxford University Press) (2013) (The US Federal Reserve has rescued hundreds of the American domestic and international investment enterprises and national banks including Goldman Sacks, Lehman's Brothers, Bear Stearns and Citi Group. Under the 'National Emergency Insurance Program' special loans, lines of credits and governmental purchasing were designed to stabilize the US Banking System following the 2008-2009 financial crises. This governmental intervention with the domestic market inherently contravenes the international minimum standards of treatment most notably NT and FET.)

⁴¹³ See *supra* note 275 at 380

approach to the interpretation of investment standards.⁴¹⁴ For some, this may be realised by reference to the public law principles which are applicable to individual-state disputes such as the World Trade Organisation's appellate body (WTO) and the European Court of Human Rights (ECHR).⁴¹⁵ Others trace the crux of investor-state disputes back to the general principles of domestic administrative judicial review of governmental actions.⁴¹⁶ As Professor Crawford aptly noticed, international investment law as sub-discipline of public international law "is presently in a period of comparative openness and reformation."⁴¹⁷ It is true that the current "sense of fluidity" in the practice of investment treaty arbitration threatens its future as the most preferred mechanism for the settlement of transnational investment disputes,⁴¹⁸ yet such fluidity marks an invaluable opportunity towards the substantive self-reformation of ITA.⁴¹⁹

The ultimate purpose of this section is to figure out a legal margin for investment treaty tribunals in order to reconcile the host state's legitimate regulation with the protection of foreign investment. Depending on the public law interpretive framework laid out in section one, I seek to explore the prospective role of both general principles of law and judicial decisions as formal sources of public international law in reforming the substantive investment law from within. In sub-section one, I set out a comparative public law methodology for refining the content and scope of the open-ended standards of investment protection. I intend to emphasize the interaction between treaty-based investment arbitration and a comparative public law approach through referring to administrative law adjudicative principles applicable to regulatory disputes. In that sense of use, I propose accommodating the principle of proportionality as a general principle of law in major legal systems into the law-

⁴¹⁴ See *supra* note 15 at 1-35

⁴¹⁵ See Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, *supra* note 327 at 729-733

⁴¹⁶ See *supra* note 2 at 129 (Investment treaty tribunals feature a global mechanism for judicial review of states' conduct vis-à-vis individual investors; thus, it seems quite analogous to domestic administrative judicial review yet in an international cloak.); See also Schneiderman D., *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* 223 (2008)

⁴¹⁷ See Crawford, J., *International Law as an Open System: Selected Essays*, P. 17, London: Cameron (2002)

⁴¹⁸ Organization for Economic Co-operation and Development, (Dec 14, 1960), available at

<http://www.oecd.org/>

⁴¹⁹ See *supra* note 17

making process of investment treaty tribunals.⁴²⁰ In sub-section two, I lay out a "three-step test" for delineating the boundary between compensatory indirect expropriation and non-compensable state regulation.

1. The Legal Foundation for Substantive Investment Law Reformation: General Principles of Law and Judicial Decisions

Investment treaty tribunals must not interpret international investment principles in a legal vacuum; rather they have to resort to the concept of sources of International Law as enshrined in article (38) of the Statute of the International Court of Justice (ICJ). In the event treaty terms run out of a legal solution, arbitral tribunals may appeal to customary rules of international law. The Vienna Convention on the Law of Treaties (VCLT) sets forth the legal basis for interpreting the treaty parties' substantive rights and obligations. Consistent with the regulatory nature of investor-state disputes, a comparative public law methodology seems feasible for informing the unbounded substantive provisions of investment treaties. The on-going change towards ensuring the host state's right to regulate in BITs terms supports the idea of interpreting international investment standards through a public law lens.⁴²¹ As Professor Pierre Lalive puts it: "an international arbitration should be decided by a truly 'international arbitrator', i.e. someone who is more than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adopt a comparative and truly international outlook."⁴²² Therefore, it is crucial for an international arbitrator to grasp the sources of international investment law in order to define its substance. Unraveling the debate that underlies the different sources of

⁴²⁰ The principle of proportionality was first originated in European domestic administrative and constitutional judicial review and subsequently transplanted to civil law system states most notably Germany, France and Egypt. In the meantime, proportionality techniques are commonly used in domestic administrative, constitutional and criminal legal fields as a means to balance the interests of individuals with that of the state. Further, proportionality analysis has recently been applied by many international law-based forms of adjudication including the International Court of Justice, the European Court of Human rights and the Appellate Body of the World Trade Organisation; See STEPHAN W. SCHILL, *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, 1-36 (2nd edition, Oxford University Press) (2010); also See ADEL A. KHALIL, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS AND COMPARATIVE LAW*, 57-79 (1st edition, Dar El Kutub) (2010)

⁴²¹ See Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39, *Denv. J. Int'l L. & Pol'y.* 87, 88-100 (2010)

⁴²² See Pierre Lalive, *The Neutrality of the Arbitrator and of the Place of Arbitration*, in *RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL* 23, 27 (Claude Reymond & Eugene Bucher eds., 1984)

public international law would determine what substantive law applies in the resolution of investor-state disputes.⁴²³ Make no mistake, this is not an easy task, rather it requires a high degree of legal diligence and objectivity.

In order to address the current pitfalls of ITA, I suggest the integration of new sources of international law into the investment treaty tribunals' law-making process. Chief among these sources are the general principles of law and judicial decisions.⁴²⁴ Indeed, the content of some reliable sources of general international law may seem irrelevant to an arbitrator while deciding a specific dispute because of treaty term limitation, notwithstanding the fact that most BITs offer wide latitude for analyzing different sources of law. Both general principles of law and judicial decisions are encompassed in article 38 (1) (c), (d) of the statute of the International Court of Justice (ICJ) among traditional sources of international law.⁴²⁵ Although the essence of article 38 (1), which exhaustively enumerates sources of international law, reveals no legal hierarchy among sources, general principles of law and judicial decisions are often perceived as secondary sources of international law.⁴²⁶ Yet, international practice has yielded a critical change regarding the concept of sources of international law, since states become purportedly bound by new set of norms to which they have never been explicitly consented.⁴²⁷ The relatively modern concept of *jus cogens* presents a strong proposition in this regard especially that it has a doctrinal avenue under article 53 of the VCLT. However, there remains a heated debate concerning the cogency of modern sources of international law due to the consent-based nature prevailing over the concept of sources under article 38 of the ICJ statute. Nonetheless, I confine the present analysis to the traditional sources of international law for the purposes of study limitation.

⁴²³ See GAZZINI, TARCISIO, AND DE BRABANDERE, ERIC. INTERNATIONAL INVESTMENT LAW. THE SOURCES OF RIGHTS AND OBLIGATIONS : THE SOURCES OF RIGHTS AND OBLIGATIONS, 134-137 (1st edition, Leiden, NL: Brill) (2012)

⁴²⁴ *Id.* at 138-143

⁴²⁵ See The Statute of the International Court of Justice, U.N. ICJ , available at <http://www.icj-cij.org/documents/?p1=4&p2=2>

⁴²⁶ See Dinah Shelton, *International Law and Relative Normativity*, in M. Evans (Ed.), INTERNATIONAL LAW, 145- 172 (2003); See also (for different argument), Prosper Weil, *Towards Relative Normativity in International Law?*, 77, AJIL, 413 (1983)

⁴²⁷ See Hugh Thirlway, *The Sources of International Law*, in M. Evans (Ed.), INTERNATIONAL LAW, Oxford University Press, 117- 144 (2003)

Theoretically, general principles of law and judicial decisions come into play through filling gaps in the absence of applicable treaty terms, or international customary rules. As Sir Hersch Lauterpacht concluded that the "general principles of law may be a necessary and inevitable way of filling a lacuna in the interpretation of a specific question."⁴²⁸ Even though there is no rule of *stare decisis* in international law adjudication whether under article 59 of the ICJ statute or article 53 (1) of the ICSID Convention, investment treaty tribunals frequently rely on domestic and international law jurisprudence.⁴²⁹ In light of this analysis, I contend that the issue does not lie in the lack of interpretational means, rather it lies in the misapplication of the existing ones. I argue that the legal foundation for a comparative public law approach to ITA may be found whether in the VCLT interpretive guidelines or the ICSID conceptual framework. On the one hand, the comprehensive application of article 31(3) (c) of the VCLT interpretive rules may produce relevant customary international law rules applicable between the treaty parties including general principles of law in national and international law-based adjudications.⁴³⁰ As Stephan Schill asserts, this depends on the interpretative leeway allowed under a given international investment agreements.⁴³¹ On the other hand, article 42 (1) of the ICSID Convention typically provides for the application of domestic law alongside with customary rules of international law "as may be applicable"; this may possibly cover general principles of law and comparative law jurisprudence. This is no doubt contingent on the treaty parties' agreement concerning the applicable law to the dispute.⁴³² Yet, a comparative public law approach is supported by recent investment treaty arbitrations despite the absence of explicit consent by the treaty parties.⁴³³

Furthermore, evidence has been found in international investment law scholarship that a comparative public law approach may improve the practice of ITA. Some model

⁴²⁸ See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, 180 (2nd edition, Cambridge University Press) (1958)

⁴²⁹ See *supra* note 421 at 89

⁴³⁰ Article 31 (3) (C) stipulates that "There shall be taken into account, together with the context... Any relevant rules of international law applicable in the relations between the parties."

⁴³¹ See *supra* note 15

⁴³² *Id.*

⁴³³ For example, in *Tecmed v. Mexico*, the Tribunal has applied proportionality analysis as a means to the distinction between compensatory expropriation and non-compensable regulatory taking, though the parties have not explicitly agreed on its application; See ICSID, Case No. ARB(AF)/00/2, (Final award, May 29, 2003)

BITs currently provide for the use of domestic law concepts as general principles of law in interpreting and applying the minimum standards of investment protection.⁴³⁴ On their part, investment treaty tribunals have frequently relied on the jurisprudence of previous national administrative and constitutional courts.⁴³⁵ In the course of regulatory takings and environmental protection, recent investment treaty tribunals have relied on the US Supreme Court's "*Penn Central balancing test*" in order to assess the legitimacy of regulatory takings in light of the investment-backed expectations.⁴³⁶ Other investment treaty tribunals have made recourse to the ICJ and the European Human Rights Court (EHRC) case law to elaborate on key legal concepts most notably full protection and security, indirect expropriation and corporate nationality.⁴³⁷ For instance, in *Soufraki v. United Arab Emirates*,⁴³⁸ the arbitral tribunal referred to the ICJ's *Nottebohm* case while discussing the issue of the investor's nationality. Also in *Occidental Petroleum Corp. v. Ecuador*, the tribunal drew on the limits of applying proportionality analysis in the course of investor-state disputes.⁴³⁹ Furthermore, the Iran-U.S. Claims Tribunal has been and still one of the most reliable sources for investment treaty tribunals. For example, in *Saipem v. Bangladesh*, the Tribunal relied excessively on the latter's case law to assess the lawfulness of the state's expropriatory measure.⁴⁴⁰ Drawing on this authority, I argue that developing a qualitative methodology for the operation of general principles of law in the practice of investment treaty tribunals would help in disentangling the competing interests of investors and host states in ITA.⁴⁴¹

⁴³⁴ See *supra* note 423 at 141

⁴³⁵ See *supra* note 421 at 85

⁴³⁶ See Karl P. Sauvant, *Yearbook on International Investment Law & Policy, 2010-2011*, P. 784, Oxford University Press (2012); See also Thomas Walde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L. Q. 811, 821 (2001)

⁴³⁷ *Id.*

⁴³⁸ *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7/ICSID, Case No. ARB(AF)/00/2, (Final award, July 7 2004)

⁴³⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No. ARB/06/11 (Award, 5 October 2012)

⁴⁴⁰ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, (Final award, June 30 2009)

⁴⁴¹ See *supra* note 423 at 146-47

2. Delineating the Boundary between Compensatory Expropriation and Non-compensable State Regulation: A Three-part Proportionality Test

The 'threefold' formulation of direct, indirect and acts tantamount to expropriation has proven to be futile in application. It has ended up widening the scope of indirect expropriation to include most regulatory actions of host states. Investment treaty tribunals have never succeeded in drawing the line between compensatory indirect expropriation and non-compensable state measure. As previously mentioned in chapter two, this formula has no comparable application in any domestic legal system. The neoliberal-oriented drafters intentionally introduced them to maintain a normative preferential treatment for foreign investors in host states.⁴⁴² The tribunals' expansive approach towards inflexible investment protection has largely shackled the host states hands in regulating public law matters of common concern relating to the protection of health, environment, human and labour rights.⁴⁴³ None of the prevailing doctrines used by investment treaty tribunals have succeeded in either curbing the unbound requirements for indirect expropriation or deciding the scope of non-compensatory regulation of states.⁴⁴⁴

In deciding whether an expropriation has occurred, the "sole effect doctrine", constituting the mainstream practice of investment treaty tribunals, examines the economic impact of governmental action on investment. A minimal deprivation of reasonably to-be-expected economic benefit is sufficient to establish compensatory expropriation regardless of the lawfulness of state conduct.⁴⁴⁵ The "police power doctrine" on the other hand, focuses on the gravity of the governmental action and thus lessening of investment benefits to certain extent does not entitle an investor to any compensation as long as the regulatory measure is taken lawfully.⁴⁴⁶ This "all or nothing" approach of arbitral tribunals is mainly reduced to investigating the occurrence of an expropriation instead of assessing its lawfulness or wrongfulness.

⁴⁴² See Reisman W. Michael and Sloane D. Robert, *Indirect Expropriation and its Valuation in the BIT Generation*, The Yale Law school Faculty Scholarship at p. 116

⁴⁴³ See *supra* note 275 at 205

⁴⁴⁴ See Andrew Newcombe, *Boundaries of Regulatory Expropriation in International Law*, 1 ICSID Review, at 21 (2005)

⁴⁴⁵ See *supra* note 275 at 208-10

⁴⁴⁶ See *supra* note 333

Since cases of regulatory takings involve wide governmental discretion in proportion to public policy objectives, this approach has always yielded imbalanced arbitral awards. It is either the foreign investor who gets fully compensated in sacrifice to the host state's interest to pursue public policy objectives, or it is the latter that gets exempted from expropriation letting the former alone to incur the full economic burden of its regulatory conduct. In other words, it is either full compensation or nothing at all.⁴⁴⁷

Against this background, I argue that accommodating the principle of proportionality into investment treaty tribunal law-making would help inform the definition of indirect expropriation.⁴⁴⁸ To the extent that a given BIT terms allow interpretive leeway, proportionality analysis may be used in reviewing the governmental action in question in order to decide whether it meets the substantive requirements of an expropriation.⁴⁴⁹ In contrast to the sole effect doctrine, proportionality analysis would account for the host state's right to pursue public policy objectives through exercising its inherent regulatory powers. Moreover, it would rationalize the rising police power doctrine under some NAFTA arbitrations, particularly in health and environmental issues, which has been criticized for undermining the very essence of investment protection in investor-state disputes. I believe that proportionality analysis would nip the recent notion of judicial activism in the bud as some voices have suggested channeling the NAFTA attitude into investor-state arbitrations under the ICSID legal framework.⁴⁵⁰

Nevertheless, most states have reacted to tribunals' unrestrained interpretations through a new generation of BITs which include more strict terms on state regulatory

⁴⁴⁷ See *supra* note 327 at 720

⁴⁴⁸ It is worth mentioning that a majority of common law writers criticizes the replacement of the rule of reasonableness by the principle of proportionality in investment treaty arbitration. See SORNARAJAH, M., RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 366 (2015); (Sornarajah argues that: "The principle of proportionality does not constitute a general principle of law in common law systems, as even European systems have not accepted it in totality." See also (for different argument in support of this thesis) LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, (1958); See STEPHAN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 1-36 (2nd edition, Oxford University Press) (2010)

⁴⁴⁹ See Benedict Kingsbury & Stephan Schill, *Investor-state Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 21, NYU School of Law (2009)

⁴⁵⁰ *Id.* at 22

power with respect to non-investment objectives. Most of the recent BITs have been skimmed from the third category of "actions tantamount to takings", embraced new defences to the host state's non-compensable interventions and reverted back the law on expropriation to its original twofold formula, i.e. direct and indirect expropriation.⁴⁵¹ This on-going conceptual transformation in BITs opens a door to consider comparative public law standards of review in ITA law-making. It further marks a chance for arbitrators to develop comparative methods, integrate proportionality analysis and respond to the competing public-private dichotomy in order to keep the system alive.⁴⁵² Kingsbury and Schill confirm this meaning: "Proportionality analysis is a method of legal interpretation and decision-making in situations of collisions or conflicts of different principles and legitimate public objectives."⁴⁵³ In order to draw the line between compensatory expropriation and state lawful regulation, the principle of proportionality furnishes a restrictive three-step test. It is restrictive in the sense that it works within the conceptual framework of the BIT in question on the one hand, and the customary rules of international law on the other. Further, the test has three main themes that must be considered cumulatively yet separately: the suitability of the given measure as to the ultimate object; the necessity of the measure in light of its impact on an investment; and finally the proportionality between the overall effects of the measure and its legitimate objective.⁴⁵⁴

The first step in the proportionality analysis is two-fold. It encompasses both psychological and material elements. The former relates to the state's intention and whether the challenged governmental measure is taken to serve a legitimate public interest. This means that the measure must be adopted for general welfare and on a non-discriminatory basis.⁴⁵⁵ The material element concerns the suitability of the governmental measure to attain a legitimate public purpose. The arbitral tribunal has to establish a causal link between the taken measure and the targeted public purpose. Further, suitability of an act entails that such act must be taken in accordance with the

⁴⁵¹ *Id.*

⁴⁵² *See supra* note 327 at 717-19

⁴⁵³ *See supra* note 449

⁴⁵⁴ *Id.*

⁴⁵⁵ *See supra* note 327 at 731

due process of law.⁴⁵⁶ In this regard, the tribunal must assess the legality of the challenged act in light of the national law of the host state as well as customary international law according to article 3 of the ILC.⁴⁵⁷ Thus, if the state action constitutes a violation of an international legal norm it would be deemed illegitimate even if it is lawful under the host state law. Finally, it may happen at any point that the tribunal finds out that the governmental measure is illegitimate, discriminatory, corrupt or aimed at private benefit. In any of these cases, the tribunal would not proceed to the next two steps of the proportionality analysis.⁴⁵⁸

The second step of the proportionality test involves analysis of the necessity of the challenged measure. It questions whether the government could have adopted another measure that is less detrimental to the rights and interests of the given investment yet equally attain the targeted public purpose as identified in the first step. In that sense, the arbitrator has to examine all alternative policies before the decision-maker and whether there were more feasible and effective choices that do not equally encroach upon the investor's rights and interests as the challenged measure has done. For instance, a state cannot justify its regulatory measure either on the basis of suitability or necessity in order to violate a fundamental human right under customary rules of international law. This means that the second step not only requires examining the necessity of the governmental measure compared to other effective public policy alternatives, but also the proportionality of the measure to the investor's protected rights and interests.⁴⁵⁹

Lastly, in the third step, and if the challenged measure has fulfilled the two previous steps, the tribunal would engage in a proportionality analysis *stricto sensu* that initially requires balancing the aggregate impact of the challenged governmental measure on the investor's rights and interests with the genuineness of the targeted public purpose.⁴⁶⁰ This step is crucial as to deciding whether there is an obligation to pay compensation at first, and assessing the amount of such compensation at second.

⁴⁵⁶ *Id.*

⁴⁵⁷ *See supra* note 104

⁴⁵⁸ *See supra* note 449 at 28-30

⁴⁵⁹ *Id.* at 29

⁴⁶⁰ *See supra* note 327 at 733-734

In this regard, proportionality analysis *stricto sensu* must consider all available factors on a case-by-case-basis. This essentially includes, the genuineness and legality of the targeted public purpose, the gravity of the regulatory measure, the substance of the protected right, the contribution of investor's own conduct, the investment-backed expectations, the degree of loss based on a cost-benefit analysis, the quantity and period of interference, the available alternative measures and their degree of effectiveness and the adequacy of indemnification made, if any. Finally, the third step is central to the proportionality analysis in that it restricts the suitability (first step) and the necessity of pursuing a public purpose (second step) to the extent the latter is proportionate to all other substantive rights and interests involved. In the course of deciding the lawfulness of a regulatory measure vis-à-vis an investor, if proportionality analysis stops at the second step, the investor's rights and interests would be largely jeopardized in relation to an insignificant public interest.⁴⁶¹

Against what some commentators have suggested that proportionality analysis responds to the imbalance BITs, I rather submit that proportionality responds to the unrestrained law-making of investment treaty tribunals.⁴⁶² Further, I argue that the proportionality test has an advantage over other deferential standards of review, since it requires the adjudicator not only to consider the reasonableness of the governmental measure *ipso facto*, but also to go farther in assessing the proportionality of the public purpose objectives to the substance of the affected rights. In that capacity, it aims at providing a legal interpretation of treaty terms in cases of conflict between competing rights and interests of foreign investors on the one hand, and host states on the other.⁴⁶³ Undoubtedly, the tribunal must stick to the conceptual framework of the BIT while interpreting treaty terms using customary rules of treaty interpretation. However, investment treaty tribunals may consequently have recourse to proportionality analysis to investigate whether the challenged state measure is consistent with the governing legal framework under a given BIT. Therefore, by making use of proportionality analysis, tribunals are not second-guessing the

⁴⁶¹ *Id.* 734

⁴⁶² See Prabhash Ranjan, *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal*, 3, 854-856, 853-883, Cambridge Journal of International and Comparative Law (2014)

⁴⁶³ *Id.* 880

relevance of host states regulatory measure to public interest, nor do they reinterpret BITs provisions on the substantive rights of the parties. It is already settled that the treaty parties have given arbitral tribunals the onus to review and correct their own public conduct vis-à-vis prospective investors.⁴⁶⁴

V. CONCLUSION

It is imperative for the purpose of this thesis not to confuse the ICSID's unique private model of dispute settlement with the public law foundation of ITA. Since the latter essentially emanates from a state sovereign power as a subject of international law. Through its consent to the ICSID jurisdiction, a state willingly refers its regulatory disputes with individual investors to an alternative dispute settlement to its domestic court system. In that sense, host states delegate their law-making power to one-off investment treaty tribunals. The logical corollary of understanding ITA as public law adjudication is that public law concepts most notably sovereign independence, non-intervention and administrative discretion have to be duly observed in both jurisdiction and merits of investor-state disputes. Despite the fact that B/MITs are subject to relative bargain power, term variations and individual limitations, investment treaty tribunals have wide discretionary power through the process of interpretation. If there is a gap in an investment treaty, the competent tribunal fills it in through the back-door of interpretation. From an international law perspective, investment treaty tribunals are bound by the customary rules of international law applicable to investment disputes. The Vienna Convention on the Law of Treaties lays down the legal basis for interpreting the substantive rights of treaty parties in an international context. I maintain that this interpretive approach is indispensable to reconceptualise the host states' right to economic development as intended by the drafters of the Washington Convention. Furthermore, such an approach would allow arbitral tribunals, in so far as treaty terms so apply, to integrate rules on corporate social responsibility vis-à-vis the host state. International minimum standards of investment protection cannot be applied in isolation from corporate compliance with national legal rules applicable to investment. It is the duty of investment treaty

⁴⁶⁴ *Id.* at 882

tribunals to consider these rules provided that they are consistent with general international law. I submit that a public law approach to investment tribunals' law-making process would help map out a predictable space for the host state in its exercise of regulatory powers in areas of public policy concerns such as health, environment, human rights, finance and taxation.

Investment treaty tribunals must not interpret international minimum standards in a legal vacuum; rather they have to resort to the concept of sources of international law as provided by article (38) of the ICJ statute. In the event treaty terms run out of a legal solution, arbitral tribunals may appeal to customary rules of international law. I argue that the integration of new sources of international law into investment treaty tribunals' law-making would help define the open-ended substantive standards of investment protection. Yet, this entails disentangling the debate that underlies the different sources of international law in order to determine the substantive principles applicable to a given investor-state dispute. This process requires a comparative qualitative analysis of context-related legal principles in both civil and common law traditions whether at the domestic or international level. I believe that the on-going semantic transformation of BITs would allow for a more nuanced understanding of comparative public law standards of review in international investment law. Drawing on the regulatory nature of ITA, I argue that accommodating the principle of proportionality as a general principle of law into investment treaty tribunal law-making would help inform the definition of indirect expropriation, delineate the boundary between compensatory expropriation and non-compensatory regulation and consequently account for the host state's right to pursue public policy objectives. Finally, I contend that developing comparative methods in ITA not only enables investment treaty tribunals' to resolve interpretational conflicts between competing rights and interests of foreign investors and states, but also marks an invaluable opportunity for international arbitrators to save the legitimacy of the ICSID at large.