Proceedings of the International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/44/20230087

Involvement of National Courts in the Recognition of Investor-state Dispute Settlement Awards

--A Comparative Analysis of ICSID and UNCITRAL

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Abstract: This paper examines the differences between the ICSID Convention and the UNCITRAL mechanism regarding national court involvement in ISDS. While ICSID prohibits recourse to domestic courts and offers annulment mechanisms, UNCITRAL cases may involve federal courts interpreting tribunal decisions without institutional support and court discretion for vacating awards. The paper analyzes the involvement of national courts under ICSID and UNCITRAL, discusses the debate on rebalancing between states and foreign investors, and provides suggestions for reforming the ICSID. It also highlights challenges in enforcing arbitration awards and the potential risks of politicization in ISDS. The paper concludes by emphasizing the need for a uniform and consistent approach to ensure legal coherence and effectiveness in ISDS.

Keywords: ISDS, ICSID, UNCITRAL, National Legal System

1. Introduction

Investor-State Dispute Settlement (ISDS) provisions apply to a specific type of capital investment in countries, focusing on foreign direct investment (FDI), where investors export domestic capital to establish controlled enterprises. Given that FDI plays a significant role in the progress of developing nations towards economic advancement, the implementation of ISDS as a protective mechanism for FDI was regarded as essential. However, its necessity is now being questioned [1].

1.1. Criticism against Current ISDS Mechanisms

Despite its great potential in attracting FDI, ISDS rulings can significantly undermine national sovereignty by allowing companies to bypass domestic laws through tribunals. Furthermore, the mere threat of ISDS litigation can discourage the enactment of laws, resulting in a “regulatory chill” effect [2]. It has become prevalent that companies exploit ISDS to pressure states against implementing regulations that prioritize public interest over industrial profits. The Philip Morris case against Australia imposed exorbitant costs on governments and taxpayers by evading legislative measures which secured undeserved financial gains from routine legislation rather than legitimate claims of corporate FDI expropriation [3].

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Therefore, several changes were made in the international investment agreements to limit ISDS in striking a balance between foreign investors and the government. The *United States-Mexico-Canada Agreement* (USMCA) eliminated the ISDS mechanism between the U.S. and Canada that existed in its predecessor while placing limitations on the ability to bring claims between the U.S. and Mexico under the ISDS mechanism [4]. However, since ISDS still remains to be one of the most effective mechanisms in protecting foreign investors, rebalancing government and investors under the prevalent ISDS rules, namely the International Centre for Settlement of Investment Disputes (ICSID) and the *United Nations Commission on International Trade Law* (UNCITRAL) is of great importance.

1.2. Overview of ICSID and UNCITRAL

Typically, there are three categories of ISDS arbitration rules. The ICSID mechanism, which is widely utilized, includes arbitration systems under the *ICSID Convention* and its Additional Facility Rules. On the other hand, the UNCITRAL Arbitration Rules govern alternative regimes that are also commonly employed. In addition, arbitration systems administered by different international arbitration institutions adopt various arbitral procedures, such as the Arbitration Rules of the Stockholm Chamber of Commerce [5]. This paper concentrates on comparing ICSID and UNCITRAL, which hold the major proportion of ISDS cases.

1.2.1. Introduction to ICSID and UNCITRAL

In 1964, a request was made to the World Bank to develop a convention that would establish optional mechanisms and processes for the resolution of investment disputes between nations and their citizens [6]. Currently, 165 states have ratified the Convention [7]. ICSID was established as the first international institution to administer tribunals with judicial powers, enabling private parties to initiate actions against states [8]. According to Article 44 of the Convention, ICSID arbitration operates independently from domestic legal systems [9]. Furthermore, article 26 emphasized the finality of the ICSID arbitral award, excluding other remedies [10].

UNCITRAL, formed in 1966 under the United Nations General Assembly, has the responsibility of progressively aligning and modernizing international trade law. The UNCITRAL Commission, comprising sixty member states chosen by the General Assembly, is entrusted with the task [11]. UNCITRAL was founded to advance coherence and standardization in global trade affairs through the dissemination of conventions, model laws and regulations [12].

The differences between the *ICSID Convention* and UNCITRAL rules mainly affect parties' access to domestic courts and review for challenges to arbitrator conduct. ICSID prohibits recourse to domestic courts, offering annulment mechanisms [13]. In contrast, UNCITRAL cases may involve national courts interpreting tribunal decisions, without institutional support and court discretion for vacating awards [14]. Therefore, parties out of different concerns may be inclined to make different choices between ICSID and non-ICSID rules led by UNCITRAL.

1.2.2. Application of ICSID and UNCITRAL

According to United Nations Conference on Trade and Development (UNCTAD), there are in total 1257 ISDS cases until 2022, among which 59% adopted the ICSID (including ICSID Additional Facility) mechanism while 75% of the rest disputes resorted to the arbitral rule of UNCITRAL [15]. ICSID and UNCITRAL together make up more than 2/3 of all ISDS cases each year from 1993 to 2022. Whereas UNCITRAL consists of more than 60% of the non-ICSID cases in most of the years.

Despite the widespread use of ICSID and UNCITRAL for resolving investor-state disputes, there are criticisms directed toward both mechanisms. Countries such as Bolivia, Ecuador, Nicaragua and Venezuela, which have either withdrawn from the ICSID convention or expressed intentions to do so,

DOI: 10.54254/2753-7048/44/20230087

argue that the ICSID process suffers from a lack of fairness [16]. The occurrence of seemingly incorrect awards like the Philip Morris case against Australia strengthens their position [17]. The frequent lawsuits by investors against these countries likely influenced their decision to withdraw due to the potential for significant damages and lack of review. This uncertainty makes many countries reluctant to expose themselves to ongoing liabilities [18]. In addition, inconsistent interpretations of treaty provisions in past awards can make predicting future cases difficult [19]. Investors are structuring their investments across various investment treaties and engaging in forum selection, leading to a greater likelihood of conflicting rulings. For instance, in a case involving Deutsche Bank AG, the tribunal issued a decision solely relying on a hedge agreement that does not involve a substantial investment in the host country [20]. Investors seeking to expand state liabilities may further challenge regulatory schemes and public interests through ISDS.

Opponents of maintaining investor-state arbitration claim that the European Union's agenda to create a multilateral investment court has exerted influence on the UNCITRAL mechanism [21]. This concern highlights the importance of UNCITRAL maintaining independence and avoiding any perception of being instrumentalized by the European Union [22]. Nevertheless, the most widely debated criticism against ICSID and UNCITRAL rests on the involvement of national courts as discussed above, which on the one hand serves as a supervising mechanism, on the other hand, represents the incursion of domestic political agenda.

2. Involvement of National Court in ISDS

Be it ICSID or UNCITRAL, national courts always have a role to play in the process of ISDS cases. While actively participating under UNCITRAL, it is not rare for national courts to intervene in ICSID proceedings. The academic debate over the involvement of national courts in ISDS mainly concerns the "set aside" theory. The power to set aside awards is seen as a valuable tool in addressing possible inequities and injustices in international commercial arbitration. However, the traditional authority to set aside awards encounters significant challenges due to a strong trend toward independence and internationalism in the field of arbitration [23].

2.1. Different Stages of National Court Involvement in ISDS

Despite the intention of the ICSID Convention to minimize the impact of national courts and domestic political influences, the decisions made by national courts from the home state still carry a certain degree of influence over the tribunal's decisions. On the contrary, UNCITRAL and other regulatory conventions like the *New York Convention* marked various stages where national courts have the ability to step in.

The *UNCITRAL Model Law*, which generally aligns with global arbitration standards and relevant national laws, incorporates provisions comparable to those found in the *New York Convention* [24]. However, the UNCITRAL mechanism grants courts a wider scope of involvement in international arbitration proceedings [25]. UNCITRAL clearly states that courts should not intervene unless specified. Court involvement is limited to the following three areas. Firstly, courts can assist in appointing a tribunal when the appointment mechanism fails, or there are challenges to an arbitrator's independence. Secondly, courts have the power to review issues of fundamental jurisdiction based on the arbitration agreement. Additionally, in exceptional circumstances, courts have the authority to invalidate an award, particularly when it pertains to the extent of the arbitration agreement or procedural irregularities. The Model Law also covers the recognition and enforcement of foreign awards in a manner similar to the provisions of the *New York Convention* [26].

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2.2. Debate on National Court Involvement in ISDS

According to the "set aside" theory, primary and secondary jurisdictions play crucial roles in post-award judicial supervision [27]. In traditional "seat" theory [28], primary jurisdictions can nullify awards, rendering them unenforceable globally, while secondary jurisdictions can only refuse recognition or enforcement. Thus, some scholars argue that primary jurisdictions' power to set aside awards is vital for supervising international arbitration [29].

However, the notion of "delocalization" represents one of the challenges against the long-recognized concept of primary jurisdiction. "Delocalization" seeks to remove the "nationality" aspect of international arbitration and establish an arbitration process loosely tied to the physical location [30]. The extreme delocalization school proposes that local court decisions or annulment rulings should not affect the enforcement of awards in other jurisdictions [31]. This trend has significantly influenced national laws and international rules [32].

In conclusion, the debate on rebalancing between states and foreign investors within the proceedings of ISDS mainly focuses on the involvement of the national court, which either serves as the judge who determines the jurisdiction of a tribunal beforehand or acts as a remedy that has the power to review an award afterward. Thus, this paper aims to analyze national court involvement under ICSID and UNCITRAL arbitration, respectively, while providing constructive suggestions on the reform of ICSID via necessary comparison and evaluation of specific cases as well as sufficient statistics.

3. Current National Court Involvement in Recognition of ISDS Awards

The recognition and enforcement of ISDS awards play a crucial role in the effectiveness and credibility of the ISDS mechanism. The process involves a divergent role for national courts within the ICSID and UNCITRAL frameworks. While ICSID awards benefit from automatic enforceability without significant involvement of national courts, the recognition of UNCITRAL awards relies on domestic court procedures and the applicable national laws on the recognition and enforcement of arbitral awards. Nevertheless, both mechanisms are created by the sacrifice of governments to protect the interest of foreign investors. Thus, either ICSID or UNCITRAL faces the conflict between rejection and involvement of national courts, which represents domestic concerns.

3.1. Rejection of National Court Involvement in Recognition of Awards

Academics have noted that the drafters of the ICSID Convention placed greater importance on ensuring the conclusiveness and procedural fairness of the system rather than achieving absolute precision in outcomes. As a result, the convention offers a restricted and exceptional remedy for challenging arbitral awards [33]. Initially, the annulment mechanism of ICSID provided benefits to investor-state arbitration by addressing the limitations often associated with domestic legal systems in international commercial arbitration [34]. However, with the rising concern of governments on domestic regulations and potential damage to sovereignty, the complete rejection of national court involvement of ICSID has become questionable while limited derecognition power under UNCITRAL becomes more favorable to developing nations who view ISDS awards as great liability.

3.1.1. Annulment Committee under ICSID

Under the provisions of the *ICSID Convention*, parties who have given their consent to ICSID arbitration are not allowed to seek alternative remedies in national courts [35]. Unlike the *New York Convention*, there are no grounds for challenging the enforcement of an ICSID arbitral award in a domestic court, as long as that court is located in a state that is a party to the *ICSID Convention* [36].

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The sole means of review available is the annulment process, which involves a specialized ad hoc Committee consisting of three individuals, as prescribed in Article 52 of the *ICSID Convention*. It is important to note that this process does not operate as an appellate system since the ad hoc committee can only annul awards based on specific grounds outlined in Article 52. In the event that an award is annulled, the parties have the choice to resubmit the dispute to a new tribunal and initiate a new round of arbitral proceedings [37].

According to UNCTAD Investment Policy Hub, among the ICSID tribunals with a verdict, there have been 215 cases decided in favor of the state while 242 are in favor of the investor. As shown in Figures 1 and 2, there is a significant difference in the willingness to initiate an annulment proceeding between cases in favor of the state and investor. 38% of cases decided in favor of the investor were challenged by the government. In comparison, only 23% of the investors chose to apply for an annulment when the ICSID tribunal decided against them [38].

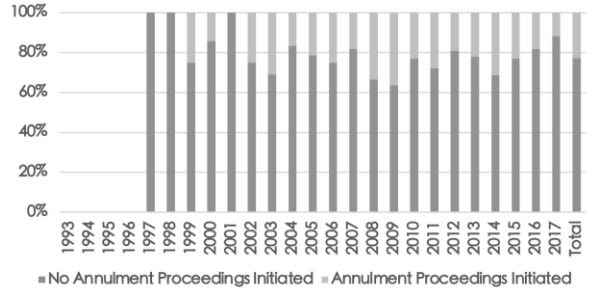

Figure 1: Initiation of Annulment Proceedings among ICSID Cases Decided in Favor of the State (1993-2017)

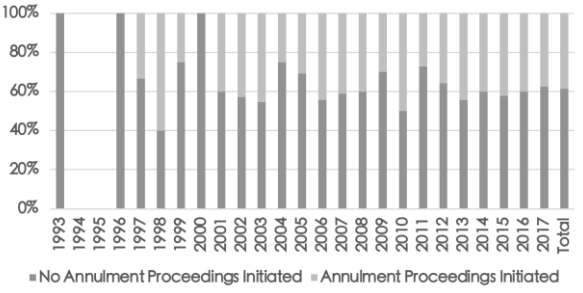

Figure 2: Initiation of Annulment Proceedings among ICSID Cases Decided in Favor of the Investor (1993-2017)

Source of figure 1-2: Data for the initiation of annulment proceedings among ICSID cases (1993-2017) are from "Investment Dispute Settlement Navigator." UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed on Jul. 5, 2023).

ICSID arbitration's key advantage is its self-contained enforcement mechanism [39]. Under the *ICSID Convention*, awards are recognized and enforced by contracting states without review based on national laws [40]. Noncompliance constitutes a breach of treaty obligations, allowing for effective enforcement through means such as World Bank financing suspension [41].

Carlos Garcia, who represents Mexico in investor-state arbitration, has highlighted a notable flaw in the ICSID mechanism, namely the absence of a robust and consistent mechanism for reviewing or appealing decisions [42]. Since the *ICSID Convention* allows the resubmission of arbitration after nullification, inconsistent results are likely to arise when judging the same case resulting in confusion and harming efficiency. *Klöckner v. Government of Cameroon* was the first case reviewed for annulment [43]. The tribunal ruled against Klöckner, with Klöckner's appointed arbitrator, Professor Dominique Schmidt arguing that errors and contradictions in the award made it null [44]. The entire award was nullified by an ad hoc committee on October 21, 1983, which led to a second arbitration. The second award was again challenged in an annulment proceeding, but the committee rejected the applications on May 17, 1990 [45].

In a word, though the annulment committee ensures the independence of ICSID arbitrations, its consistency and effectiveness can be challenged by multiple tryouts and unilateral derecognition.

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3.1.2. Limited Derecognition Power under UNCITRAL

Under the *UNCITRAL Model Law*, article 34 outlines specific reasons for setting aside arbitral awards, while Article 36 (1) (a) (v) presents similar grounds for refusing enforcement [46]. Under the *UNCITRAL Model Law*, parties have the ability to challenge an award based on exceptional circumstances. However, the grounds for such challenges are limited to determining whether the issues addressed in the award fall within the scope of the arbitration agreement or if there were procedural irregularities during the arbitration process. No provision within UNCITRAL permits national courts to review the merits of the tribunal's decision [47].

In essence, this approach maintains the finality and autonomy of the arbitral process under the UNCITRAL framework. In promoting the efficiency and effectiveness of ISDS, the UNCITRAL framework though involving national courts, also restricts the review of awards to procedural matters and prevents a re-evaluation of the merits of the dispute.

3.2. Potential Involvement of National Court in Recognition of Awards

While arbitration provides an alternative mechanism for resolving disputes outside of national court systems, the involvement of national courts remains inevitable, particularly in the recognition and enforcement stage. The potential involvement of national courts in the recognition of awards raises important considerations regarding the relationship between domestic legal systems and international arbitration frameworks. UNCITRAL awards must go through domestic court procedures and adhere to the relevant national laws for recognition and enforcement. Despite ICSID's explicit denial of granting national courts the authority to review arbitral awards, there are instances where national courts become involved, thereby compromising the independence of the tribunal.

3.2.1. Intervention of National Court under ICSID

The above-mentioned annulment process may sometimes lack effectiveness due to its inherent restrictiveness. The case of *CMS v. Argentina* presents such a challenge to the ICSID annulment mechanism. The annulment committee recognized the erroneous legal reasoning of the initial tribunal but chose not to invalidate the award based on the provisions of the Convention [48]. Despite the committee's correct ruling, Argentina still refused to comply with the award [49].

As a result, without an effective appeal system, enforcing arbitration awards against states can be challenging. *ICSID Convention* awards are automatically recognized by contracting states, but their execution is subject to foreign state laws [50]. Even with a favorable award, investors face obstacles in enforcing it against the respondent state. Argentina, Russia, Venezuela, Thailand, Kyrgyzstan, and Zimbabwe have repeatedly refused to satisfy awards [51]. Especially for governments with limited resources, when facing a great amount of payment under the ICSID award, the investor-state struggle may be pushed back to national courts [52]. The Metalclad case exemplifies how domestic Canadian arbitration law influenced the outcome of the award [53].

In addition, though the ICSID awards must be treated as final decisions of a local court for recognition purposes, the selection of the authority responsible for recognition and the courts with which ICSID awards are equated are at the discretion of governments like the U.S. and the U.K [54]. In the U.S., federal district courts exclusively handle enforcement actions regardless of the dispute's value [55]. In the U.K., the High Court is designated as the recognized authority according to the enabling legislation [56].

Therefore, since the annulment process in ICSID can be ineffective and restrictive, enforcing arbitration awards against states becomes challenging without an effective appeal system. Multiple countries have refused to comply with ICSID awards, pushing the investor-state dispute before

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national courts. As a result, governments like the U.S. and the U.K. began to involve domestic courts in the process of recognizing ICSID awards.

3.2.2. Power to Set Aside of National Court under UNCITRAL

Article 34 of the *UNCITRAL Model Law* outlines the reasons for which awards can be set aside [57]. However, in practice, national courts often prioritize their domestic provisions when reviewing awards. Furthermore, international provisions lack clear guidance on the consequences of setting aside decisions, leaving enforcement courts with considerable discretion. Consequently, national courts still determine whether to enforce or reject the enforcement of awards that have been set aside based on their understanding and application of international rules and local laws [58].

According to UNCTAD Investment Policy Hub, among the UNCITRAL tribunals with a verdict, there have been 96 cases decided in favor of the state while 69 were in favor of the investor. As shown in Figures 3 and 4, although a similar difference in the willingness to initiate a judicial review process between cases in favor of the state and investor has manifested as the ICSID cases, its significance is outstanding. Only 22% of cases decided in favor of the investor were challenged by the investors while 75% of the governments chose to apply for setting aside the award via its national courts when the UNCITRAL tribunal decided against them [59].

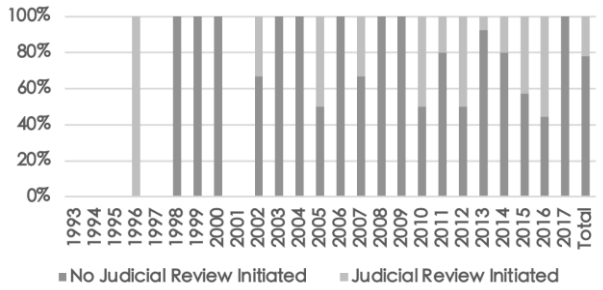

Figure 3: Initiation of Judicial Review among UNCITRAL Cases Decided in Favor of the State (1993-2017)

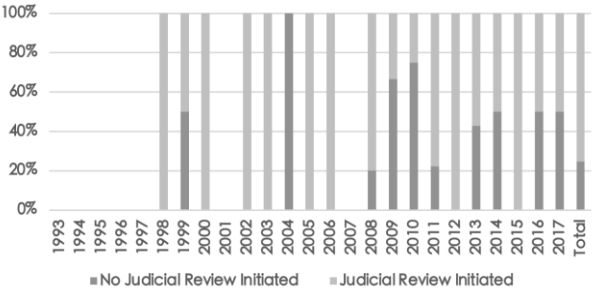

Figure 4: Initiation of Judicial Review among UNCITRAL Cases Decided in Favor of the Investor (1993-2017)

Source of figures 3-4: Data for the initiation of judicial review among UNCITRAL cases (1993-2017) are from "Investment Dispute Settlement Navigator." UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed on Jul. 5, 2023).

4. Discussion on National Court Involvement in Recognition of ISDS Awards

As stated above, the involvement of national courts in recognizing ISDS awards is a complex and varied landscape. The ICSID mechanism offers the advantage of self-contained enforcement, but the lack of an effective review or appeal mechanism poses challenges to state sovereignty. The UNCITRAL framework involves national courts but restricts their review to procedural matters, creating potential inconsistencies. Whereas national courts often prioritize domestic laws when reviewing awards, while international provisions lack clear guidance on setting aside decisions. These factors contribute to a lack of harmonization and predictability in enforcing ISDS awards. Addressing these issues is crucial for ensuring a more effective and balanced system in the recognition of ISDS awards.

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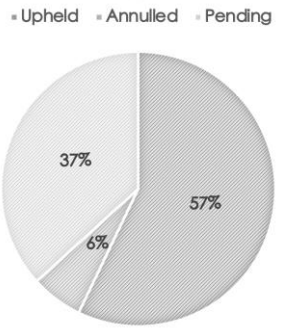

Figure 5: Decision of Annulment among ICSID Cases Decided in Favor of the State (1993-2017)

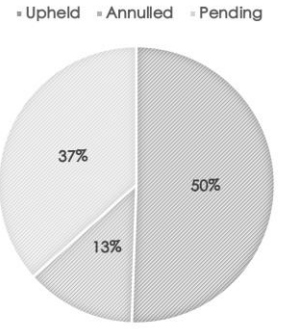

Figure 7: Decision of Annulment among ICSID Cases Decided in Favor of the Investor (1993-2017)

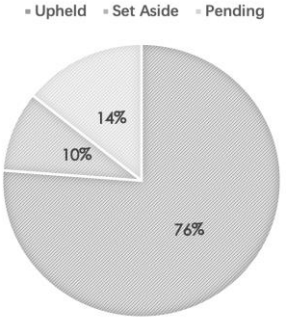

Figure 6: Decision of Judicial Review among UNCITRAL Cases Decided in Favor of the State (1993-2017)

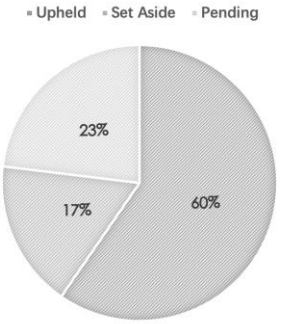

Figure 8: Decision of Judicial Review among UNCITRAL Cases Decided in Favor of the Investor (1993-2017)

Source of figures 5-8: Data for decisions of annulment among ICSID cases (1993-2017) and judicial review among UNCITRAL cases (1993-2017), respectively, are from "Investment Dispute Settlement Navigator." UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed on Jul. 5, 2023).

According to UNCTAD Investment Policy Hub, the annulment outcome under the ICSID mechanism and judicial review result under the UNCITRAL regime manifest obvious distinctions. As shown in figure 5-8, among the 43 cases decided in favor of the state via ICSID tribunals, 57% of which upheld the initial award nearly 10 times the cases approved an annulment. Within the 21 cases under the UNCITRAL mechanism, 76% of the decisions were upheld while only 10% of the awards were set aside. When the original decision was against the state involved, 50% of the 93 ICSID cases upheld the awards, while only 13% were annulled. On the other side, 60% of the 52 UNCITRAL cases upheld the awards, with a third being set aside [60]. From the statistics shown above, it is harder to annul a verdict when it was decided in favor of the state under the ICSID mechanism. It is also true when it comes to the ISDS cases in favor of the investor, while the distinction is next to insignificant.

4.1. Rebalance between State and Investor under ICSID

To strike a balance between the state and investors under ICSID now mainly faces two issues. Firstly, the absence of consistency in the interpretation of Bilateral Investment Treaties (BITs) hampers the establishment of a coherent investment law framework. Furthermore, the ICSID system also allows corporations to bypass the scrutiny applied to claims brought before the domestic courts.

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4.1.1. Inconsistency of Interpretation of BITs

The issue of precedent in investment arbitration is contentious [61]. While parties aim to maintain flexibility in interpreting BITs, the absence of consistent interpretation of similar provisions within or across BITs presents a challenge [62]. Achieving legal coherence in international investment laws requires a standardized and consistent approach to interpretation, which is essential for ensuring their effectiveness.

The umbrella clause is among the most debatable concepts in the interpretation of BITs. The purpose of umbrella clauses is to safeguard investors' contractual rights from interference caused by contract breaches or administrative and legislative actions [63]. Nevertheless, there is ongoing discussion regarding whether the protections provided by an umbrella clause can transform a breach of contract into a violation of a treaty. Certain viewpoints suggest that while a breach of contract may have transpired, it may not meet the criteria to be considered a breach of a treaty under international law [64]. Others believe that international law can consider an act as a breach of contract even if it does not qualify as one under domestic law [65].

In the SGS cases, two ICSID tribunals reached contradictory conclusions. The SGS tribunal in Pakistan was the first international arbitration to examine the interpretation and application of the umbrella clause in an investment treaty [66]. The tribunal in Pakistan determined that the Switzerland-Pakistan BIT could not convert SGS's contractual claims into claims under the BIT. They noted that a state can violate a treaty without breaching a contract [67]. In contrast, the case against the Philippines reached a different conclusion which favored protecting covered investments and interpreted the umbrella clause more broadly [68,69].

In conclusion, the issue of precedent highlighted by cases like the inconsistent interpretation of umbrella clauses requires a uniform and consistent approach to ensure legal coherence and effectiveness in ICSID tribunals which is hard to be provided by ad hoc arbitrations.

4.1.2. Bypassing National Legal System

Critics have been arguing that corporations can evade the rigorous scrutiny applied to claims in the domestic court systems of advanced and competent nations within the ISDS system while remaining able to proceed with cases against governments [70]. These concerns arise from the interpretation of Article 26, especially its indications on the "Exhaustion of Local Remedies" (ELR) principle within the ICSID framework [71]. The case of *Lanco International v. Argentina* clarified that the exclusivity rule in Article 26 implies that there is no obligation to exhaust domestic procedures before initiating arbitration unless otherwise specified [72]. This reasoning was later reaffirmed in the case of *Generation Ukraine v. Ukraine*, where the tribunal emphasized that if a state intends to make ELR a prerequisite for consenting to ICSID arbitration, such a requirement must be explicitly stated in the investment treaty containing the arbitration clause [73].

Even when national courts are initially involved and rule against the foreign investor, the case will still be admissible to the ICSID arbitration, which holds the power to practically overturn the ruling of the domestic judicial system. For instance, before TECO Guatemala Holdings, LLC (TGH) resorted to arbitration against the government of Guatemala, Empresa Electrica de Guatemala, S.A. (EEGSA), 24% ownership interest of which was held by TGH indirectly, filed multiple actions before the local administrative agencies and courts, all to no avail [74]. Yet, in the subsequent ICSID arbitration, the tribunal ruled in favor of TECO and found that Guatemala had breached its obligations under the *Dominican Republic-Central America-United States Free Trade Agreement* (CAFTA-DR). The tribunal awarded significant damages to TECO, which it would not have obtained had it solely relied on the national legal system [75].

Consequently, despite cases like *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* [76], in which foreign investors are protected from domestic political concerns by bypassing national legal systems, state sovereignty is facing

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challenge when its judicial rulings can be overruled by international arbitrations and result in billions of payments.

4.2. Lack of Efficiency and Effectiveness under UNCITRAL

Unlike the *ICSID Convention*, the UNCITRAL regime encourages forum shopping where diverse reviewing courts risk politicizing oversight and undermining awards. Furthermore, its weak enforcement mechanism has also been exemplified compared to ICSID tribunals.

4.2.1. High Occurrence of Forum Shopping

The growing involvement of multiple reviewing courts in considering challenges to enforcement or vacatur introduces the potential for further confusion surrounding the interpretation of international investment rights. Firstly, there is a potential risk of politicizing the supervision of arbitral awards, as national courts might be inclined to employ domestic laws to weaken an award by citing concerns related to international and domestic public policy [77]. Secondly, due to the lack of uniformity and fragmented oversight, astute investors may strategically select forums that align with their interests [78], leading to forum shopping and inefficiencies in enforcement proceedings brought across multiple jurisdictions where assets are located [79].

4.2.2. Lack of Powerful Enforcement Mechanism

Unlike the provisions in the *ICSID Convention*, where an investor is allowed to seek enforcement of an arbitral award through the courts of a country with assets belonging to the host state, the *UNCITRAL Model Law* does not directly address the enforcement aspect. The UNCITRAL mechanism only provides a framework for conducting arbitration proceedings, including recognizing and enforcing arbitral awards [80]. The Model Law promotes the uniformity and effectiveness of arbitration processes, but the specific enforcement mechanisms can vary depending on national laws and the relevant conventions in force.

In conclusion, the involvement of multiple reviewing courts in the oversight of investor-state dispute settlement raises concerns about the risk of politicization and undermines the consistency and uniformity of enforcement. Moreover, the lack of a powerful enforcement mechanism under the *UNCITRAL Model Law* can lead to inefficiencies as investors strategically select jurisdictions that align with their interests. While the *ICSID Convention* provides a more robust enforcement mechanism, the *UNCITRAL Model Law* lacks direct provisions in this regard, relying instead on national laws and relevant conventions to govern enforcement proceedings.

5. Conclusion

The differences between the *ICSID Convention* and UNCITRAL rules in terms of national court involvement and the review of awards have significant implications for the parties involved in ISDS cases. ICSID restricts recourse to domestic courts and provides an annulment mechanism, while UNCITRAL cases may involve national courts interpreting tribunal decisions with no institutional support and court discretion for vacating awards. The role of national courts in ISDS remains a subject of academic debate, particularly concerning the power to set aside awards. However, the trend towards autonomy and internationalism in arbitration has posed challenges to traditional set-aside authority.

This paper analyzes national court involvement under ICSID and UNCITRAL arbitration with respect to the importance of rebalancing state and investor interests. While the UNCITRAL framework involves national courts, the Model Law restricts the review of arbitral awards to procedural matters and prevents the re-evaluation of the merits of the dispute. On the other hand,

DOI: 10.54254/2753-7048/44/20230087

the ICSID annulment process can be ineffective, leading to the potential involvement of national courts and difficulties in enforcing awards.

The issue of inconsistent interpretation and the need for legal coherence in ICSID tribunals further underscores the importance of a uniform approach. Ultimately, the involvement of multiple reviewing courts under the UNCITRAL Convention raises concerns about politicization and undermines enforcement consistency and uniformity. Efforts should be made to strengthen enforcement mechanisms and ensure a balance between state sovereignty and investor protection. Therefore, to ensure a fair interpretation of provisions in investment or trade agreements, as well as the establishment of precedent and an appellate mechanism. Instead, the assessment and ruling on claims should be entrusted to a judicial court with appointed judges with rules strengthened to ensure the selection of impartial arbitrators. The interpretation of investment agreements by ISDS arbitral tribunals may differ from that of courts because tribunals are shielded from the considerations of public policy and governmental sovereignty that courts must take into account [81]. This is why it is preferable for courts to be responsible for making ISDS decisions. However, it is still a topic under debate in the mechanism of court selection.

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