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Investor-state Arbitration in the Sultanate of Oman: Lessons to be Learned from the European Union's Approach to the Investment Court System

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Dedication

I dedicate this thesis to

My great country, Oman

My dearest father, Saleem Marhoon Al Badi

My wonderful mother, Moza Mubarak Al Badi

My beloved wife, Amal Rashid Al Badi

My sweetheart Al Harth, Al Jood, and Tariq

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Abstract

The Sultanate of Oman strives to promote economic growth. Foreign investment is one of the most important vehicles for achieving this purpose. The Oman Vision 2040 identifies Foreign Direct Investment as the basis of future economic development. To make Oman a more attractive destination for foreign direct investment, the government has developed and implemented a variety of policies. Modernizing the legal framework governing FDI is central to these policies. Considering this, the question arises as to whether the legislative structure governing investor-state arbitration as a means to ensure that Oman fulfils its obligations to international investors requires modification.

Investor-state arbitration has played a crucial role in promoting direct foreign investment. It represents one of the legal procedures for resolving investment disputes between host states and foreign investors. Typically, bilateral investment treaties or multilateral free trade agreements provide for investor-state arbitration as a means of settling potential disputes between host states and international investors. However, investor-state arbitration has been criticised in recent years for being partial, less transparent, and severely impacting the regulatory authority of the host state. This critique has prompted calls for reform of the system for resolving investment disputes. The European Union has undertaken reforms to this system through the investment court system (ICS).

This thesis analysis the legislative framework governing investor-state arbitration in Sultanate of Oman and evaluates the need for reform considering mentioned conditions and the Oman's desire to become a more attractive destination for international investments. This necessitates an examination of Oman's national laws pertaining to arbitration and foreign investment in order to identify potential weakness. In addition, bilateral and regional investment treaties, as well as international Conventions related to investor-state arbitration, to which Oman is a signatory, are examined in order to determine Oman's obligations in relation to investor-state arbitration. Furthermore, a comparison is made between ICSID arbitration and the EU's model of the Investment Court System in order to assess the EU's approach to reforming the investment dispute settlement system. This thesis concludes that many aspects of Oman's legal framework governing investor-state arbitration require revision. As a result, the Oman government must adopt an integrated plan to review and modernise this framework in response to Oman Vision 2040 and as part of its broader foreign investment and economic development policy.

Contents

List of Abbreviations

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CETA	The Comprehensive Economic and Trade Agreement between Canada, and the European Union and its Member States
CJEU	The Court of Justice of the European Union
CRCICA	The Cairo Regional Centre for International Commercial Arbitratio
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FPI	Foreign Portfolio Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GCC	Gulf Cooperation Council
GCAC	Gulf Co-operation Council's Commercial Arbitration Centre (GCAC)
GDP	Gross Domestic Product
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ISDS	Investor-State Dispute Settlement
ICS	Investment Court System
IMF	International Monetary Fund
IIA	International Investment Agreement

KLRCA	The Kuala Lumpur Regional Centre for Arbitration
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured-Nation
MENA	The Middle East and North Africa
MIC	Multilateral Investment Court
NCSI	National Centre for Statistics and Information (Oman)
NAFTA	North American Free Trade Agreement
NT	National Treatment
OAC	The Oman Commercial Arbitration Centre
OIC	The Organization of the Islamic Conference
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
TIPs	Treaties with Investment provisions
TTIP	Transatlantic Trade and Investment Partnership between the EU and US
UNCTAD	The United Nations Conference on Trade and Development
UNCITRAL	The United Nations Commission on International Trade Law
WTO	The World Trade Organization

Chapter 1 Introductory chapter

1.1 Introduction

With the discovery of oil in 1955, the economic situation of Oman changed, and the Omani economy became engaged with international trade.[1] Because of the recent decline in oil prices and globalization gaining impetus, the need for foreign investment has become urgent for the economy of Oman.

The Sultanate of Oman is actively seeking to attract foreign investments with a view to achieving several goals, which include economic development, diversification of national income and access to modern industrial technologies and techniques. The Omanis believe that such goals can be achieved through the wider encouragement of foreign investment which would create direct and indirect job opportunities.[2] These new opportunities and the economic activity they generate could stimulate economic activity by developing the natural resources and wealth of Oman; support the development of SMEs and value-added taxes and contribute to the development of public service such as energy and water. In this regard, and in order to encourage and attract foreign capital, Oman made an effort and adopted some decisions. First, and in drawing up public economic policies, The National Programme for Enhancing Economic Development -TANFEEDH - which is part of the 9th Five-Year development plan (2016-2020) in the Sultanate of Oman. The main aim of this programme is to achieve economic diversification by focusing on non-oil sectors (manufacturing, tourism, transport and logistics, mining, and fisheries). It involves an increasing investment in these sectors in order to raise their contribution to the state's Gross Domestic Product (GDP).[3] Secondly 'The Public Authority for Investment Promotion and Exports Development' (Ithraa) was established to play a key role in attracting sustainable investment and promote the export

[1] Mohamed Khalfan Ali Al-Siyabi, 'A legal analysis of the development of arbitration in oman with special reference to the enforcement of international arbitral awards', ProQuest Dissertations Publishing 2008) 2

[2] About the importance of investment flows and its advantages and disadvantages for both the developed and developing countries see David Collins, *An introduction to international investment law* (Cambridge : Cambridge University Press 2019);Christopher F Dugan; and others, *Investor-state arbitration* (Oxford University Press 2008) 4

[3] , 'Tanfeedh programme to review ways to enhance investment' *Oman Tribune* (Muscat, Oman <https://search.proquest.com/docview/1820462357> 17 September 2019

of Omani non-oil goods and services in support of Oman's ambition for growth and prosperity.[4] Further, it was decided to establish the Oman arbitration centre (Decree NO 26/2018) as an important step forward to stimulate the climate of investment in Oman. Moreover, there was a move to promulgate and replace some laws which were intended to provide a motivational legal environment for investors, for instance: The Foreign Capital Investment Law promulgated by Royal Decree 50/2019(replacing the Law of 1994).This act ,Like the foreign investment legislations in many countries which aim to attract and regulate foreign capital[5], grants safeguards relating to settlement of dispute that could arise from foreign investment in Oman in which a foreign investor could submitted this dispute to investment arbitration. Also, Oman has promulgated the Privatization Law by Royal Decree 51/2019, and the Public Private Partnership Law promulgated by Royal Decree 52/2019. All these acts are important for the stimulation of direct foreign investment. However, internationally the investment treaties have led to promote the role of arbitration system as an international instrument for resolving the investment disputes.[6] This fact is could be evidence of that arbitration system is considered one of the main pieces of legislation that has a significant influence on foreign investment.[7] Moreover, most of the Omani's bilateral investment treaties are included arbitration as method for investment disputes settlement.[8] Thus, for all previous factors , properly there is need to review the Omani legal system on investor-state arbitration (relevant domestic legislation and international commitments of Oman in this regard) to determine whether it meets new international trends and standards in relation to investor-state arbitration. In other words, it may be useful for Oman to consider an appropriate reform to its investment arbitration regime in order to meet its goal with regard to attracting additional foreign investments. Furthermore, this momentum, regard the improvement of investment climate in Oman, could be formed an opportunity to review the Omani regime on investor-state arbitration.

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[4] This governmental body was abolished, and its roles and responsibilities were transferred to the Ministry of Trade, Industrial, and Investment Promotion according toRoyal Decree 97/2020 Amending the Name of the Ministry of Commerce and Industry to the Ministry of Commerce, Industry, and Investment Promotion, Determining Its Competences, and Adopting Its Organisational Structure

[5] M. Sornarajah, *The international law on foreign investment* (3rd edn, Cambridge University Press 2010) 102

[6] Ibid 253

[7] Tim R. Samples, 'Winning and Losing in Investor–State Dispute Settlement' (2019) 56 American Business Law Journal 115

[8] Moosa Salim Jabir Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection', University of Leeds 2016) 109

Consequently, if Omani system on investment arbitration is modified it will be a natural response to the manner in which Oman wishes to orientate its approach to the economic field. In addition, it will be evolved in response to the changing economic situation in Oman and the new trends in the international investment law and international investment arbitration area. However, it may be that one of the best ways to improve and reform the arbitration system in Oman is by evaluating and comparing it with advanced systems which specialize in investor - state arbitration as a mechanism for international investment dispute settlement and, therefore, the sultanate of Oman can adopt an internationally advanced standard, trend and practice.

1.2 Arbitration system under Oman Vison 2040

This section will explore the Oman Vision 2040. In particular, it will focus on arbitration and how the Vision approaches this system within wider context of the legislative, Judicial and oversight system.

Oman uses comprehensive development plans which cover different sectors of the economy, and these plans are based on a series of five-years plans, the first plan was adopted in 1976.[9] However, in 1996 the government start to follow more professional approach and adopted a national vision as a long-term national action plan. The first vision was 'Oman Vision 2020' and the current is 'Oman Vision 2040'.

In 2013, the late Sultan appointed His Highness Haitham Bin Tarik, Minister of Heritage and Culture as chair of the supreme committee responsible for drawing up Vison 2040.[10] Three sectoral committees emerged from the supreme committee: (i)people and society; (ii)economy and development; (iii) governance and institutional performance. Those committees were composed of representatives from government bodies, Majlis Oman (parliament), private sector, civil society, citizens-experts, scholars and specialists.[11] In addition

[9] See section 3.1.4

[10] See *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html*, 2020) 4 February 2021

[11] See *Oman Vision 2040 - Vision Decument* (Oman government) 16

the supreme committee received support from UNCTAD in preparation for some aspects of the Vision.[12]

After a series of forums across the country, a two-day national conference was held in Muscat in January 2019 to present and review the document prior to its ultimate publication. [13] In January 2019, the committee issued a preliminary document.

However, within this context, what is very significant is that subsequently, the chair of the main committee became the Sultan of Oman in January 2020. This dramatic development has generated positive impetus to 'Oman Vision 2040'. His Majesty Sultan Haitham has a deep and detailed knowledge of the Vision as he supervised its preparation when he was the minister. Today, as the Sultan, he will continue to oversee the mission of implementing the vision.

His late Majesty said the Vison is intended to be "a guide and key reference for planning activities in the next two decades"[14]. In general, "Vision 2040 defined the national priorities to be achieved through parallel work streams, with the aim of promoting Oman's position in the different fields over the next two decades. The vision equally outlined the strategic directions, goals and key policies to translate ambitions into action plans underpinned by clear milestones and timelines and progressing against a set of local and international indicators to measure and evaluate the performance in a transparent manner"[15].

In particular, as part of the vision, there were two fundamental national priorities that relate to the topic of this thesis, they are: "the Private Sector, Investment, and International Cooperation" and "Legislative, Judicial and Oversight System".

With regard to investment, the Sultanate seeks to foster investment partnerships between the Omani private sector and the international business community due to its unique location adjacent to international trade routes. This might be achieved by attracting high-quality foreign direct investments that help the Sultanate become an international trading hub.[16] The

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[12] Mukhisa Kituyi, *Meeting with the Supreme Committee for Vision 2040 - UNCTAD's Science, Technology and Innovation Policy Review in Oman* (UNCTAD-Statement from the Office of the Secretary General 10 November 2014) at https://unctad.org./fr/node/2545

[13] See *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 31*

[14] See *Oman Vision 2040 - Vision Document 7*

[15] Ibid 14

[16] Ibid 34

ambitious goal is to raise the FDI Net Inflow percentage of GDP to 7 % by 2030 and 10 % by 2040.[17]

As regards the national priority of Legislative, Judicial and Oversight System, the vision emphasizes that national, economic, and judicial legislation responsive to changing requirements and trends are essential to achieving economic and social growth in Omani society. However, this legislative system should be supplemented by a sophisticated and adaptable judicial system that follows international best practices in justice and arbitration and ensures that justice is delivered quickly. It is suggested that such a sophisticated legislative and judicial system will promote the Sultanate as one of the top countries in the world for rule of law and alternative dispute resolution (ADR). Indeed, it is believed that mechanism for settling investment disputes is among core investment policy issues that underpin efforts to create a quality investment environment for all.[18]

In this regard, the vision stresses the crucial correlation between foreign investment on one hand, and advanced and transparent legislative, judicial and oversight system on another hand. The provision of a developed governance framework will positively and directly impact the Sultanate's economy both locally and internationally. It is believed that strengthening the fundamentals of governance will bring about: boosting investors' confidence, improving Oman's ranking in numerous international indicators related to investment, stimulating economic development and contributing to attract foreign investment to various economic sector.[19]

Therefore, it is possible to conclude two points; first, Oman believes that the central instrument for empowering economic development and support its strategic goal to become an international trade hub is foreign investment. The second point is that Oman's approach to boost its position as a promising destination for foreign investment is linked to, in addition to other instruments, advanced methods for the settlement of investment disputes. The key among those methods is arbitration. Due to this fact, Oman's vision tends to promote the arbitration system within the wider context of the justice system.

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[17] Ibid 35
[18] OECD, *Policy Framework for Investment, 2015 Edition* (OECD Publishing 2015) 24
[19] See *Oman Vision 2040 - Vision Decument 40*

However, as S. Thomsen suggests, the policy framework for investment is "a tool not a magic wand"[20]. Therefore, the question is: what measures or steps already taken by Oman or what measures need to be taken by Oman to improve and reform the arbitration system within the context of its Vision's objective of improving the Legislative, Judicial and Oversight System. This research will try to answer that question. Mainly, however, the research will focus on investment arbitration that is usually employed to resolve investor-state disputes.

1.3 Background Knowledge

Due to the fact that this research, as other academic papers, will be built upon existing knowledge from which it will draw its arguments, it is important to briefly outline some key literature and scholarly works related to the research topic which is investor-state arbitration. Consequently, ultimately it will be possible to understand and specify a principal issue which will be espoused by this thesis.

Recent studies bear no in-depth mention of the subject of investor-state arbitration and the close link between the arbitration system and the economy in the Sultanate of Oman or their mutual influence. Instead, some most recent studies have generally mentioned investment arbitration in Oman. Al-Siyabi, Mohamed Khalfan Ali has analysed the development of arbitration system in Oman with focus on the recognition and enforcement of foreign award and has highlighted the need for reform some issues in the current arbitration system in order to gain the confidence of the foreign businesses.[21] However, it is possible to say that efficiently remedy such matters can be much possible and more effective by derived practical solutions from internationally developed practices. The arbitration system as an international method for investment disputes settlement is commonly considered one of the requirements of the successful investment environment; and in this regard, AlAzri, Moosa has examined a current foreign investment protection system and arbitration as part of this system in Oman. However, he suggested that an improved legal protection system will play a fundamental role that makes Oman an attractive international destination for foreign investments.[22]

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[20] Stephen Thomsen, 'The Policy Framework for Investment: What it is, why it exists, how it been used and what's new' in Patrick Love (ed), *Debate the Issues:*
Investment (OECD Publishing 2016) 15

[21] Al-Siyabi, 'A legal analysis of the development of arbitration in oman with special reference to the enforcement of international arbitral awards , in particular see 248-279

[22] Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection , in particular see 102-124

At the reginal level, Abdullah Alenezi has evaluated the issue of recognition and enforcement of foreign arbitral award under the relevant laws in the GCC countries and relevant international and reginal conventions. He has emphasized the significance of the enforcement of arbitral award which is considered the vital stage in arbitration process. However, in respect of this matter, he believed that in the GCC states there is a "terminology problem" related to the determination of the nature of the arbitral award, whether it is foreign or international and as a result, this has negatively affected the process of enforcement.[23]

The provisions which are governing the recognition and enforcement of foreign arbitral awards in Oman are various. At domestic level there is Omani law on civil and commercial procedure. Whilst, at international level, there are New York convention of 1958 on the recognition and enforcement of foreign arbitral awards, and Washington convention of 1965 on settlement of investment disputes between states and nationals of other states, which Oman is signatory to them.[24]

On the other hand, at international level , there are some research and there are some studies on arbitration that mention arbitration of investment disputes and are primarily focused on the arbitration of investment agreements e.g. UNCTAD Series on Issues in International Investment Agreements. [25] These studies shed light on the obstacles encountered in international investment and the misunderstanding of concepts related to international arbitration of investment agreements in host countries.

In related to economic aspect, Wang notes the economic significance of the arbitration system and its impact on economic development in host countries as being one of the most important elements appealing to investors for the settlement of potential disputes.[26] In the same way, some have indicated that a considerable importance of foreign investment which brings benefits to investors and other beneficiaries in both developing countries and even developed countries.[27]

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[23] Abdullah Alenezi, 'An analytical study of recognition and enforcement of foreign arbitral awards in the gcc states', ProQuest Dissertations Publishing 2010) 43

[24] Ibid 25

[25] S. A. Alexandrov, 'International Investment Agreements: Key Issues (Volume I) By Karl P. Sauvant and Jorg Weber (eds.) United Nations Conference on Trade and Development, 2004' (2005) 20 ICSID Review 647

[26] Margaret Wang, 'Are alternative dispute resolution methods superior to litigation in resolving disputes in international commerce?' (2000) 16 Arbitration international 189

[27] Dugan; and others, *Investor-state arbitration 4*

In terms of the definition of investment arbitration and distinction between this late and commercial arbitration,[28] Stephan W. Schill has defined the term of investment treaty arbitration as "arbitration between foreign investors and host states about rights and obligations arising under international investment treaties" and he has argued that there are differences between commercial arbitration and investment treaty arbitration in some key issues. Unlike commercial arbitration, investment arbitration performs a public function, and its impact does not just affect parties to proceedings (investor and state) but goes beyond them.[29] Therefore, although international trade and international investment regimes are connected, their specific rules & dispute settlement forums are quite separate.

Sornarajah has defined the term of foreign investment as "foreign investment involves the transfer of tangible or intangible assets from one country to another for purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets"[30]

The primary instruments provide for international investment arbitration are bilateral and multilateral investment treaties and Foreign Investment Laws in host states.[31] In addition, individual investment contract between investor and host state is considered one of the reasons of investment arbitration.[32] The larger number of the investment arbitrations which come from the courses just mentioned are conducted under the (ICSID) Convention which was established to provide this kind of arbitration.[33]

To look at this topic by other lens and refer to important aspect within it, it could be said that international investment law is considered one of the most vibrant elements in the field of the international law. As a result of this fact, there has been a significant increase in the number of investment dispute which have solved by investor-state arbitration.[34] To emphasize this fact,

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[28] The differences between investment arbitration and commercial arbitration well be explored in further details in next chapter.

[29] Stephan W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 Leiden Journal of International Law 401-402

[30] Sornarajah, *The international law on foreign investment 7*

[31] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International investment arbitration : substantive principles* (Oxford international arbitration series, Oxford University Press 2007) 4-5

[32] Taylor St. John, *The rise of investor-state arbitration* (First edn, Oxford University Press 2018) 20

[33] Rudolf Dolzer and Christoph H. Schreuer, *Principles of international investment law* (Oxford University Press 2012) 417

[34] Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales, *The foundations of international investment law* (First edn, Oxford University Press 2014) 12-13

Sergio Puig believed that "without investor-state arbitration, investment law obligations would be more elusive"[35].

Moreover ,Some authors have recognized that international investment law, as the others branches of the international law, it is consisting from various sources which their mutual interaction is continually creating the rules of international investment law.[36] Some scholars pointed out that the most important sources of international investment law are the ICSID Convention; bilateral and multilateral investment treaties; customary international law; general principles of law; unilateral statements and case law.[37] From this ,it can be said that arbitrates or arbitral tribunals are playing fundamental role in the domain of international investment law. They do so by interpreted the bilateral and multilateral investment treaties in order to make their decision on investment disputes. Eventually, this will lead to create and develop principles which could be contributed to "the construction of norms of international law"[38].

Therefore, upon the fact just mentioned, it is possibly to say that the investor-state arbitration system is largely linked to international investment law. They need each other to do their function effectively.

Since the statistics normally bring the clarity to research and could led to the potential facts, it might be useful that mention some interest numbers and percentages related to investor-state arbitration system. For instance: as of 2017, more than (3300) international investment agreements were signed and (96%) of them provide for investor-state dispute settlement (ISDS) to resolve foreign investment disputes.[39] In general, they contain provisions which are aiming to protect and attract foreign investment.[40] According to the UNCTAD's Investment Trends Monitor, more much interesting is that globally, foreign direct investment in 2019 amounted to $1.39 trillion.[41] All of these figures may indicate the growing significance of

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[35] Sergio Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration', *The Foundations of International Investment Law* (Oxford University Press 2014) 256

[36] Tarcisio Gazzini and Eric De Brabandere, *International investment law. the sources of rights and obligations* (1 edn, Brill 2012) 363

[37] Douglas, Pauwelyn and Viñuales, *The foundations of international investment law 213-216* Dolzer and Schreuer, *Principles of international investment law 12-19*

[38] Sornarajah, *The international law on foreign investment 93*

[39] Samples, 'Winning and Losing in Investor–State Dispute Settlement' 120

[40] Surya P. Subedi, *International investment law : reconciling policy and principle* (Third edn, Hart Publishing 2016) 107

[41] , 'Investment Trends Monitor' (*United Nations Conference on Trade and Developmen(UNCTD),* 2020) <https://unctad.org/en/PublicationsLibrary/diaeiainf2020d1_en.pdf> accessed 2 September 2020

investment arbitration and the vital role it plays in the international economic order. From other angle, those numbers cane be formed evidence of the pressing need for appropriate and to some extent trusted method to be used to resolve any dispute could arise. Arguably, in this regard, the investor-state arbitration could be an effective method in the international investment law order, at least in the present.

Christopher F. Dugan and others have emphasized the growing role of investment arbitration in the international economic order 'The subject of investor-state arbitration lies at the cutting edge of international law and dispute resolution and promises to play an increasingly important role in the development of the global economic system'[42].

However, on the other hand, there are some concerns and controversy which have been arisen questions regarding the legitimacy of the investor-state dispute settlement system (ISDS) and its impact on sovereignty of states.

Tim R. Samples has employed a different method to investigate those concerns. He used set of data from participating countries concerning outcomes (costs and benefits) of (ISDS) in order to analyse and evaluate these issues. Among his study's observations is that there is correlation between outcomes of (ISDS) and the economic capacity of participating countries. Nevertheless, he believed that there is a legitimacy crisis facing the (ISDS) system due to the impact of its negative outcomes for states. Consequently, a better understanding for distribution of outcomes of investor-state arbitration could be provided better understating for some problems which have faced the (ISDS) and the potential choices of remedy.[43]

Likewise, Gebhard Bücheler has shed light on the criticism of the investor- state arbitration which has embodied in its failure to find a balance between, on the one hand, the rights of the foreign investors and, on the other hand, the interests of the host state. Nevertheless, he believed that as in any legal system, investment arbitration is supposed to be created to deal with such conflict of interests. However, he has suggested that "Proportionality is a tool to resolve conflicts between competing rights and interests".[44]

Similarly, some authors stated that there are some issues have arisen from practices of investor-state arbitration in international investment order. These issues have caused a

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[42]Dugan; and others, *Investor-state arbitration 2-3*
[43] Samples, 'Winning and Losing in Investor–State Dispute Settlement' 168-169
[44] Gebhard Bücheler, *Proportionality in investor-state arbitration* (First edn, Oxford University Press 2015) 28

backlash against investment arbitration. Among, those issues are legitimacy and transparency. However, those authors believed that the new EU model of investor-state arbitration may provide broader public control of the arbitral processes through by which it could be possible to remedy some aspects of matters of legitimacy and transparency.[45] The EU system on investor-state dispute settlement is considered a new effort to address the current concerns related to the (ISDS) mechanism.[46] Therefore, regardless of some issues that still need substantial reforms[47], the EU model is considered the most recent and developed model in the field of international investment law. It could be relied on this new system in order to improve the traditional investor-state arbitration. This would be by promoting the foreign investment and at the same time creating balance between the needs for foreign investment as factor for economic development and public interests in states.

Also, in this regard, the United Nations Commission on International Trade Law(UNCITRAL) has initiated to adopt convention on Transparency in Treaty-based Investor-State Arbitration which is providing procedural framework to promote the transparency in investment arbitration.[48] In same context, some authors have believed that " For the present , investment arbitration go on unabated, but the entire subject is facing a tectonic shift in the refinement of both procedural rules and in attempts to address more substantive concerns"[49].

In conclusion, it can be side that in spite of some concerns about international investment arbitration system as have been shown above, this system still provides benefits for both of its parties (host state and investor). In addition to other advantages, for host state, it enhances its position as an attractive destination for foreign investment. Whereas, for investor, the investment arbitration offers a sufficient method to resolving an investment dispute.[50] However, the EU model of Investment Court System (ICS) gives realistic options for addressing the concerns raised by the current investor-state arbitration system.

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[45] Thomas Dietz, Marius Dotzauer and Edward S. Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26 Review of International Political Economy 750-751

[46] Subedi, *International investment law : reconciling policy and principle 255-256*

[47] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 751

[48] Subedi, *International investment law : reconciling policy and principle 260*

[49] Jean Ho, Mārtiņš Paparinskis and C. L. Lim, *International investment law and arbitration : commentary, awards and other materials* (Cambridge University Press 2018) 479

[50] Dolzer and Schreuer, *Principles of international investment law 236*

1.4 Rationale and importance of the thesis

As it has been mentioned above, there is no studies specifically and directly have been searched the issues of investment arbitration in Sultanate of Oman under its international legal obligations or domestic legal framework. The absence of such studies about this subject, to some extent, reveals a gap need to be bridged, therefore this study will try to do so by shed light on the investment arbitration system in Oman. It seems that, the new situation in Oman in terms of economic policy and the new developments in area of international investment law and investment arbitration give legal researchers the opportunity and the challenges at same time to investigate this subject.

This is a shortcoming that constitutes a strong incentive to examine the issue of investor-state arbitration in Oman. Also, the importance link between this system and attracting foreign capital, which is one of the considerable Oman's economic policies goals, will be focused on.

Therefore, researcher will try to illustrate and identify the potential areas for reforms and suggest the alternative modifications. It is intended that this topic's investigation and analysis will contribute to the existing body of knowledge, or indeed re-interpret the existing knowledge about the topic. In addition, as the comparison between ICSID arbitration and the EU Investment Court System (ICS) will be established in this study, this research will be innovative.

1.5 Research question

The question of this thesis is whether the legal framework governing investor-state arbitration in Oman, as the primary legal procedural mechanism emphasising the protection of foreign investors' rights, conforms to international standards in this regard and thus contributes to the objective of making Oman an attractive state for foreign direct investment.

1.6 Outline of the thesis

To address the research question, this thesis will be divided as follows: Chapter tow contextualise the thesis by examining the concept of investor-state arbitration and the factors influencing its dimensions. Moreover, this chapter will illustrate the relationship between

investor-state arbitration and international investment law. The third chapter will examine the provisions of several national legislation that govern arbitration in Oman. In order to better understand the context in which these laws are applied, this chapter will also provide an outline of Oman's legal system and other pertinent themes.

The fourth chapter will investigate the international legal framework that governs investor-state arbitration in Oman. This framework consists of international and regional conventions in addition to bilateral investment agreements. In addition, this chapter examines Oman's experience in the realm of international investment arbitration and practice of competence authorities in this regard. The fifth chapter will explore the EU Investment Court System (ICS) as a possible new paradigm for investor-state dispute resolution. This will be accomplished by comparing ICS and ICSID arbitration. Finally, chapter six will provide for finding and general conclusion.

1.7 The research objectives and aims

The research objectives and aims can be stated as follow:

1.7.1 The research objectives

The undertaken research has following key objectives:

- Analysing and assessing the national legal framework governing investor-state arbitration in Oman.
- Exploring and assessing the legislative and organizational challenges that are seen to hinder investor-state arbitration practice in Oman.
- Investigating the investor-state arbitration cases in which Oman is involved.
- Analysing and comparing international legislative texts governing investor-state arbitration process in Oman.

1.7.2 The research aims

This research aims at:

- Evaluating the effectiveness of Oman's legal framework governing the investor-state arbitration system.
- Formulating recommendations for policy makers and law makers in Oman to understand and address some issues involved in the investment arbitration.

1.8 Research methodology

This research will be based massively on an analytical method. Thus, the domestic and international texts on investor-state arbitration in Oman will be interpreted and analysed. This method will be applied to seek comprehensively understanding of the prospective problematic issues in the Omani system and potential areas of reform.

A comparative method helps one system to benefit from another system in terms of its approach which is applied to remedy some problematic issues. Thus, to evaluate the new approach of the EU on investor-state disputes resolution, the comparison between the ICSID arbitration and the EU Investment Court System (ICS) will be set up. The reasons for choosing the EU system as a comparator in this research are that: The now EU's system on investment arbitration is an advanced system. This system specializes in international investment law area as a mechanism for international investment dispute settlement. It has suggested remedy for some problematic matters that have faced the investment arbitration over recent years.[51] This new European system represents a serious attempt toward reform the international investment arbitration.[52] In the same regard, some authors have described the EU system on investment arbitration "could at least in principle be the next stage of evolution for investment dispute settlement"[53]. Thus, any a serious attempt to improve Oman's international obligations on investment arbitration should be in the light of that stage of evolution of the latter.

The study will be drowning on appropriate books, journals articles, case law and other international and domestic materials which will assist the research into this issue.

[51] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 767-768
[52] Subedi, *International investment law : reconciling policy and principle 287*
[53] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 504*

Chapter 2 Analysis of the Concept and Nature of Investor-state Arbitration and its Relationship with an International Investment Law

> "As with the platy- pus, the investment treaty system may come to be seen as *sui generis*: something that defines its own category"[54]

2.1 Introduction

This chapter will explore the nature, characteristics, and terminological aspect of investor-state arbitration. The thin line or layer between investment and commercial arbitration sometimes leads to vagueness about the difference between the two. Therefore, this chapter explores these differences, and seeks to clarify the respective positions to provide a full understanding of investment arbitration in section one. Subsequently, Section two will focus on definition of investor-state arbitration and the elements that play role to define its range. Since the notion of investment arbitration now constitutes its own area of Investment International Law; section three illustrates the nature of relationship between the origin (international investment law) and the organ (investment arbitration).

2.2 The Differences Between Commercial Arbitration and Investor-state Arbitration

This section will illustrate differences between commercial and investor-state arbitration. Explanations of this differences will be useful to briefly define the content of Commercial and investor-state arbitration and mechanisms involve resolving disputes. The purpose of this exploration will be to assist in recognising the concept and nature of Investor-state arbitration, and more importantly, to help to define the parameters of this thesis.

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[54] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 The American journal of international law 94

Investor-state arbitration and commercial arbitration are fundamentally different in many ways,[55] but both systems share some similarities.[56] The similarity between the two systems has led "many to see them as two sides of same coin"[57]. However, at this stage it is appropriate to explore the differences rather than the similarities. Such an exploration requires two points to be established; the commercial arbitration emerged first in order to resolve commercial disputes, and as consequence of the shortcoming of commercial arbitration to deal effectively with the investment disputes between a sovereign state and a foreign investor, investor-state arbitration was created. [58] Secondly, investor-state arbitration has drawn "heavily on that of commercial arbitration"[59]. In this context, some investment arbitration utilises arbitration rules originally created for international commercial arbitration. Moss has described this operation as transplantation. Arbitration rules, formulated for commercial arbitration, were transplanted into the field of investment arbitration. That operation has resulted in the perception that these two systems are same.[60] Furthermore, investment arbitration relies on same enforcement mechanisms designed for, and developed in, commercial arbitration domain.[61]

Regarding the emergence of investor-state arbitration, *the Convention on the Settlement of Investment Disputes Between States and Nationals of Other State(investor) 1965* was the first multilateral convention that explicitly allowed the use of international arbitration as method for resolving investor-state disputes.[62] However, one may ask why the commercial arbitration system was considered inadequate for resolving the investor -state disputes? Briefly, the

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[55] Dugan; and others, *Investor-state arbitration 117*; Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' (2014) 28 Arbitration International 578

[56] José E. Alvarez, 'Is investor-state arbitration 'public'?' (2016) 7 Journal of international dispute settlement 540

[57] Roberts Anthea, 'Divergence Between Investment and Commercial Arbitration' (2012) 106 Proceedings of the Annual Meeting (American Society of International Law) 298; Pieter Parmentier, 'International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules' SSRN Electronic Journal <http://hull.summon.serialssolutions.com> 2; Alvarez, 'Is investor-state arbitration 'public'?' 534

[58] Jeswald W. Salacuse, *The law of investment treaties* (Oxford University Press 2010) 372; Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' 577

[59] David Gaukrodger; and Kathryn Gordon, *Investor-State Dispute Settlement :A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment 2012) 10; See also Parmentier, 'International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules' 1

[60] Giuditta Cordero Moss *Commercial Arbitration and Investment Arbitration: Fertile Soil For False Friends?* (Oxford ; New York : Oxford University Press 2009) 791

[61] Alvarez, 'Is investor-state arbitration 'public'?' 535

[62] Gus. Van Harten, *Investment treaty arbitration and public law* (Oxford University Press 2007) 55; Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' 578

answer is that there was a theoretical obstacle insofar as the positivist school of legal thought believed that a foreign investor could not be a party to dispute before an international arbitral tribunal.[63] According to this school, international law regulated "relations between sovereign states alone"[64] and, therefore, should only apply to these relations. Thus, since a foreign investor would not have a legal personality as state, the investor would not be eligible to call on the existing international mechanism of -international arbitration- to settle a dispute with a host state.

This is an important definition and consequently it is useful to understand the main differences between commercial arbitration and investment arbitration, through the lens of the parties concerned; the sources; the subject matter and legal framework and the applicable law.

2.2.1 Parties Involved

Investment arbitration, as its name indicates, strives to resolve disputes arising from relations between a state and an investor who is defined as a private party. Commercial arbitration is the adjudicated process that arises from a commercial relationship between private parties.[65] This means that, both parties are equal in terms of their status. The question of status is important because in commercial arbitration both parties enjoy an equal status, whereas in investment arbitration one of the parties is private(investor) and other is public (i.e., a host state). However, it is worth noting that a state can be party to commercial contract when it acts in its private capacity, for example, state can enter into any commercial contractual relationship (e.g., contracts for goods) as any ordinary citizen or private person.[66] Thus, any prospective dispute arising from such a commercial relationship could be resolve through commercial arbitration. However, when a state acts in its sovereign or regulatory capacity any disputes arising from this relationship may be subject to investment arbitration.

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[63] Salacuse, *The law of investment treaties 372 para 3*
[64] Ibid 372 para 3
[65] Margaret L. Moses, *The principles and practice of international commercial arbitration* (Third edition. edn, Cambridge University Press 2017) 261
[66] Anthea, 'Divergence Between Investment and Commercial Arbitration' 298; Collins, *An introduction to international investment law 154*

2.2.2 Sources and Subject Matter

As stated previously the main grounds for investment arbitration arise from bilateral and multilateral Investment treaties; investment contract between state and investor; national law on investment in the host state or investment authorisation which a host state may confer on an investor. Commercial arbitration in contrast to investment arbitration, arises from a commercial contractual relationship between the parties.

whilst foreign investment and its protection are normally the hub of disputes brought before international investment arbitration, trade transactions are the core of commercial arbitration.[67]

2.2.3 Legal Framework and Applicable Law (substantive law)[68]

Thousands of investment treaties have played a significant role in the establishment of investor-state arbitration.[69] In the same line, these investment treaties are governed by international public law such as the *Vienna Convention on the Law of Treaties*.[70] Therefore, and following the previous point, generally the principles of public international law[71], investment treaties and its interpretations and other relevant international conventions[72] are applied in investment arbitration. From this point of view, it is often believed that the fundamental role of investment arbitration is to examines if whether a state has violated the standards and principles of international law.[73] Consequently, the application of international law together with involvement of public interests and regulatory powers- as it will be mentioned below- create a public dimension to investment arbitration.

However, in exceptional circumstances, the domestic law of a host state may apply to some cases of investment arbitration. For instance, an investment contract between an investor and

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[67] Moses, *The principles and practice of international commercial arbitration 250*
[68] Concerning procedures, as has been mentioned previously in this section, the arbitration procedural rules which purposely was established to employed in commercial arbitration is now using in investment arbitration proceeding
[69] Alvarez, 'Is investor-state arbitration 'public'?' 536
[70] Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' 50
[71] For instance: Fair and Equitable Treatment, National Treatment, Most Favoured Nation (MFN)
[72] Such as ICSID Convention.
[73] See Gaukrodger; and Gordon, *Investor-State Dispute Settlement :A Scoping Paper for the Investment Policy Community 10*

a host state may implicate that the national law of host state will be applied to any potential disputes.[74] But even in this case the principles of international law will still underpin any arrangements. This is since often an investor will establish his claim on the grounds that the errant state has breach its obligations under investment treaty.[75]

By contrast, in commercial arbitration, the contractual obligations and substantive law which has been agreed by the contracting parties will be applied. Furthermore, and regarding the application of international law in areas of commercial arbitration, the only a main relevant international convention is New York Convention 1958. This convention governs the recognition and enforcement of awards of the latter kind of arbitration.[76]

2.2.4 Involvement of Public Interests

Unlike commercial arbitration, investment arbitration often involves public interests such as the protection of the environment.[77] Subsequently, the outcomes of investment arbitration, inevitably, will affect the population of the home state as it is playing representative role.[78] In the same context, Van Harten has stated that "investment arbitration is unlike other form of international arbitration use to resolve regulatory disputes" [79]. This is because, normally, an investor claims that the host state has damaged his/her investment by practising its regulatory powers. However, disputes in commercial arbitration may also, but rarely and indirectly, implicate public issues, which mean that its outcomes could affect the people of state.[80]

These points illustrate the substantial divergences between both types of arbitration, but by no means covers all the divergent aspects.[81] This is because question of differences between commercial and investment arbitration is a side matter in this research and has been

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[74] Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' 580
[75] Moss *Commercial Arbitration and Investment Arbitration: Fertile Soil For False Friends? 384*
[76] Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' 579
[77] Moss *Commercial Arbitration and Investment Arbitration: Fertile Soil For False Friends? 793*
[78] Ibid 793
[79] Van Harten, *Investment treaty arbitration and public law 44*
[80] Alvarez, 'Is investor-state arbitration 'public'?' 540
[81] About these differences in general see :Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System'; Parmentier, 'International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules'; Moss *Commercial Arbitration and Investment Arbitration: Fertile Soil For False Friends*;Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*'; Alvarez, 'Is investor-state arbitration 'public'?'

mentioned only insofar as it was necessary to distinguish the term of this research from other similar systems.

Consequently, it can be said that investor-state arbitration cannot be completely categorized either under public law or under a private law. It has created a distinct niche for itself and as it involves elements of both public law area and private law area. This mixed nature has led Alvarez to state that "ISDS is best viewed as hybrid between public and private"[82].In the same context, some point of similarity between international investment and commercial arbitration can be viewed as a substantial nature for any legal systems and vice versa. Naturally and inevitably each legal system is influenced by other legal systems and this a mutual impact will necessarily lead to some similarity.

As it has been cleared, in the domain of international business, arbitration system has started to deal with the international commercial dispute. Subsequently, new system (Investor-State Arbitration) has grown from commercial arbitration to deal with international investment disputes between a foreign investor and a host state. Therefore, next section will be devoted to defining the concept of this new-born system.

[82] Alvarez, 'Is investor-state arbitration 'public'?' 534. In this regard see also :Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 31*; Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' 94

2.3 The Concept of Investor-state Arbitration

Arbitration is one of the legal methods available for use to parties seeking an international dispute settlement. It is used to settle a various type of international disputes.[83] For instance, arbitration can be conducted to resolve inter-state disputes, investor-state disputes, or disputes between private parties. However, this research focuses on the kind of arbitration used to settle the investment disputes between members of the international community(state) on one hand, and the nationals of the other states (investor) on the other hand. This type of arbitration is referred to as investor-state arbitration, investment arbitration, investment treaty arbitration (the treaties as ground to do investment arbitration) and sometime, but rarely, mixed arbitration.[84] The term 'mixed arbitration' refers to mixed and different parties to arbitration (public-private) in which they cannot be counterpart for each other in terms of their legal position in the normal situation.[85] Possibly, this term was used to differentiate between three kinds of arbitration. First, inter-state arbitration resolves the disputes between states. Second, a commercial arbitration adjudicates disputes arising from relationship between parties to a commercial contract.[86] Finally, investment arbitration which is particularly addressing disputes between a private party (investor) and public party(state). Consequently, it is important to reemphasize that this research will focus on investment arbitration. It is a legal means for settlement of international investment disputes which have arisen from an investment relationship between a foreign investor and host state.

The literature written to define investment arbitration or investor-state arbitration contains many definitions. Therefore, it is useful at this stage to explore some definitions and their meanings and to additionally explore reasons or sources for international investment arbitration. In addition, it is important to identify principal actors or parties in investment arbitration, which their mutual interaction have helped to shape the contemporary international investment arbitration system. Finally, term 'investment' which is represent

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[83] John Merrills, 'The Means of disputes Settlement' in Malcolm D. Evans (ed), *International Law* (Fifth edition. edn, Oxford University Press 2018) 553; Salacuse, *The law of investment treaties 362*

[84] Anders Henriksen, *International law* (Oxford University Press 2017) 246; John Greenwood ; Collier and A. V. Lowe, *The settlement of disputes in international law : institutions and procedures* (Oxford University Pres 1999) 59

[85] Van Harten, *Investment treaty arbitration and public law 45*

[86] As it been explained over the previous section of this chapter, Commercial arbitration could be either between private parties or private party and public authority

subject matter of investor-state arbitration and among a key element defined the scope of application of international investment treaties and agreements will be explained.

2.3.1 Definition of Investor-state Arbitration

Above all, it is worth to mention that defining investor-state arbitration, not solely because it is an introductory issue in many studies, but it is also useful to define the variance between investment arbitration and commercial arbitration. The differentiation between these types of arbitration, help to set parameters of this research.[87]

Arbitration is a key concept in this research, consequently its meaning as both a broad and a general concept in the domain of methods of resolution the disputes is important. Jeswald W. Salacuse has illustrated arbitration as follow

> Arbitration is an ancient dispute settlement method whereby the disputants agree to submit their dispute to a third party (the arbitrators or arbitrator) for a decision according to agreed norms and procedures and to carry out the decision of that third party. the arbitration process is based on agreement by the parties and the authority of the arbitrator is founded on that agreement. In addition to its traditional role as means to resolve state conflict, arbitration has also become an important means for resolving international commercial disputes between private parties and for the settlement of investor-state conflicts.[88]

Apparently, based on this analysis, the concept of arbitration is an ancient and old-established phenomenon. However, it is fair to say that as a concept, it is constantly developing and adopting to the changing needs of business and society. Thus, the nature of arbitration adapts and changes as a logical response to the growth and development of the international business activities[89] and the development of economic or political relations and interests of the parties. In this regard, it can be said that investor-state arbitration is now one of the most important developments arbitration systems and one of its most recent adaptations devoted to deal with conflict between private parties (foreign investor) and host states.

The investor-state arbitration term has defined as “a form of dispute settlement that allows foreign investors the opportunity to seek compensation for damages or discriminatory

[87] This issue been discussed within section one of this chapter
[88] Salacuse, *The law of investment treaties 369*
[89] Ibid

practices, most of which arise out of breaches of treaty obligations by the governments of host countries"[90].

This definition helps clarify the terms of research as specialising in the field of international investment law; whilst referring to the parties, domain, subject, and source for investment arbitration.

Stephan W. Schill has defined the term of investment treaty arbitration as "arbitration between foreign investors and host states about rights and obligations arising under international investment treaties"[91].

It is evident that this definition has exclusively focused on the angle of investment treaties as it is viewed as the principal ground of investor-state arbitration.[92] However the ground for investor-state arbitration is varied, and Schill's definition a single ground that breaches of treaty obligations is open to question. In fact, investment arbitration can be conducted due to breach of investment contract between investor and home state.[93]

David Collins, in his approach to study international investment law and investment arbitration as a principal means for internationally settling investment disputes between investors and host states, has stated that

> arbitration is a procedure whereby both sides to a dispute agree to let a designated third party, the arbitrator, or the arbitral tribunal, decide the outcome of a legal dispute. The decision will be legally binding and as such it is quite different from mediation or diplomatic dispute resolution, both of which are commonly used in the international context.[94]

Consequently, based on those definitions above, it can be said that the fundamental characteristics of the investment arbitration system are: first the system grants the private investors the right to directly sue the host states without need for request from their home states.[95] Moreover, under the investment treaty or domestic law on foreign capital , investor

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[90] See *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2 edn, Oup Oxford 2018)

[91] Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator'

[92] The grounds or sources for investor-state will be explored in more detail throughout next sections.

[93] See upcoming section of Principal sources or grounds for investor-state arbitration.

[94] Collins, *An introduction to international investment law 218*

[95] Duy Vu, 'Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration' (2019) 47 European Journal of Law and Economics ; Maria Nicole Cleis, *The independence and impartiality of ICSID arbitrators*, vol 8 (Nijhoff international investment law series, Brill Nijhoff 2017). In the past the positivist school of legal thought has espoused the theory which calls

can bring his claim before international arbitral tribunal against host state even if there is no contractual relation between them.[96] Second, in contrast, this system requires that states should waive their immunity and to be willing to take part in proceedings in which one party would be a private investor.[97] Thirdly, the parties, themselves define an applicable substantive and procedural law that is to be applied once dispute arise. In addition, they set up the arbitral tribunal which would be called upon to decide a dispute and both sides agree in advance to be bound by the decision of the tribunal.[98]

Investor-state arbitration system is of crucial importance in the area of the international investment, and one of its most remarkable developments has been the rapid growth of this system.[99] This is because investor-state arbitration has come to represent substantial procedure through which the creation and enhancement of a positive investment climate is eased,[100] and which offers the prospect of fundamental protection for international investments. Without doubt, there are other tools which effectively participate in performing the same function. These tools are: Bilateral treaties, Multilateral agreements (the investment arbitration as means for dispute settlement arising out of the treaties is mostly included in them) and investment insurance schemes.[101]

International investment law is one of the branches of public international law, which recently became one of the most active and dynamic part in the field of international law. This -dynamism- and phenomenal growth led David Collins to describe it as" a semiautonomous discipline within international law"[102]. The role of international investment law "deals with the laws governing the commercial activities of multinational enterprises that are undertaken in

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to that: the arbitration as method for settlement of commercial disputes between privet parties cannot apply to investor-state disputes due to that international law must be governed the relations between states solely. Therefore, according to this theory, any dispute between state and individual cannot subject to arbitration under international law. Thus, this disputes between sovereign state and individual or juridical person should be subject only to the domestic law and court of host state. About this theory see :Salacuse, *The law of investment treaties 372*

[96] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 5*

[97] Monde Marshall, 'Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation' (2017) 17 Pepperdine Dispute Resolution Law Journal 233

[98] Merrills, 'The Means of disputes Settlement'

[99] Salacuse, *The law of investment treaties 388*

[100] Gerhard Loibl, 'International law' in Malcolm D. Evans (ed), (3rd ed. edn, Oxford University Press 2010) 743-744

[101] Surya P Subedi, 'International Investment Law' in Malcolm D. Evans (ed), *International law* (Fifth edition. edn, Oxford University Press 2018) 717;Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 21

[102] Collins, *An introduction to international investment law 15*

foreign states"[103]. Principally, it consists of international laws (investment treaties) which governing and related to Foreign Direct Investment.[104]

However, based on the previous explanation, one of the pressing questions is the 'location' of investor-state arbitration in a broad field of international investment law. Arguably investor-state arbitration is the most vibrant and lively part within the domain of international investment law, and has acquired

> a new status in international law-it has transformed from its origins as a rather obscure, private dispute settlement mechanism to a high-profile forum for the resolution of complex claims. It often has a significant public dimension because of the legal consequences of regulations pursued in the interest of society at large.[105]

Generally, investment arbitration is considered - especially under the Convention on the settlement of Investment Disputes between State and Nationals of other State (ICSID)[106]- the main international method and the most crucial mechanisms for investor-state dispute settlement (ISDS).[107]

Because of the massive significance of investment arbitration related to the wider scope of investment and potential investors in particular, David has pointed out that although there are some controversial aspects related to international investor-state arbitration system,

> ….it is no overstatement to claim that the greatest advantage in international investment law to investors is access to neutral international dispute settlement. This procedure offsets one of the most significant risks involved in investing abroad- ineffective access to justice through the legal system of the host state. [108]

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[103] Ibid 15
[104] Ibid 16
[105] Ibid 18
[106] Convention on the Settlement of Investment Disputes Between State and Nationals of Other State 18.03.1965, was came into force on 14.10.1966 (Washington convention). Pursuant to article (1) of this convention the International Centre of Settlement of Investment Disputes Between State and National of Other State was established (ICSID) for full details see: https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf;most of the BITs provide for (ICSID) arbitration ,see:Dugan; and others, *Investor-state arbitration 52*
[107] Cleis, *The independence and impartiality of ICSID arbitrators*;Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials*.
[108] Collins, *An introduction to international investment law*

However, on the other hand, the system of investment arbitration has faced some criticism for different reasons which have led to call for amendment and development of this system.[109] Controversially, some of these problems are a lake of transparency and an inconsistent decision-making.[110] Furthermore, investor-state arbitration has potential negative consequences for both states and investors.[111] Some of these negative effects is a high cost of investor-investor arbitration which is borne by both host state and investor. Also, other example for the negative consequences for investor-state arbitration is that it may causes damage in the international relationship between host state and investor home state.[112] However, these critical perspectives will be dealt with later in this chapter, but it is suffice for now to say that, as with any other developing system, the application of the method of investor-state arbitration will reveal and highlight specific issues or challenges in certain aspects of the overall process. Therefore, criticism of this system without provide for constrictive suggestions is not an ideal solution. Rather any challenges within this system need to be analysed in view of the latest developments in a global economic order. Accordingly, it will be possible to suggest the sensible developed solutions which help to overcome any difficulties face this system. From a logical point of view and even historical perspective, whilst there are potential foreign investors wishing to become involved in related international economic activities, the need for a system of investment arbitration will continue. Although this can be regarded as a dynamic process, nevertheless constructive criticism is a scholarly and effective way to interrogate the many problems which face investment arbitration. It may be possible to create a whole methodology to improve the current system. For example, the EU approach of an Investment Court System is innovative, provide a new perspective. In chapter five, this system will be investigated in detail.

The Omni law on arbitration in civil and commercial disputes (Royal Decree No.47/97) defines arbitration in general as method for dispute resolution agreed to by parties of their own volition. Article 1 states that

> "Without prejudice to the provisions stipulated in the international treaties operative to the Sultanate, the provisions of this law shall be applicable to any arbitration between persons under public or private law, irrespective of the

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[109] Marshall, 'Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation';Subedi, *International investment law : reconciling policy and principle 14*;Moses, *The principles and practice of international commercial arbitration 260*

[110] Marshall, 'Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation' 233

[111] Salacuse, *The law of investment treaties 388*

[112] Ibid 389

> nature of legal relationship on which the dispute is based, provided the arbitration takes place in the Sultanate or in case of international commercial arbitration taking place abroad, provided the parties to it have agreed to submit themselves to the jurisdiction of the provisions of this law"[113]

As can be seen the Omani law has adopted a comprehensive definition. This because arbitration law has legislated to be applied on domestic and international commercial arbitration. In this regard, one may ask that whether the current Omani law on arbitration apply to investor-state arbitration? in other words, in case any a potential dispute between Oman and a foreign investor, can this law be applied to it? As this chapter is specified for the concept of term of investor-state arbitration, this question will be examined in detail in the next chapters.

Overall, from all above, it can be said that the definition of 'investor-state arbitration' appears to be unstable and changeable in the domain of international investment law. This could be due to the distinct perspective by which different commentators and scholars look at this concept, or even could be due to diversity and development of investment relationships. Furthermore, the national law on arbitration is supposed to be adopted the definition which comply with national investment policies of states and their international obligations. Nevertheless, arguably difference of opinions about the definition of investment arbitration is a healthy phenomenon as it helps form the underlying jurisprudence of the subject and helps to form a more flexible and enlightened approach to the subject.

Also, upon all above, it can be stated that the investor-state arbitration has taken middle position between interstate arbitration and arbitration between private parties (commercial arbitration). That position has led Alvarez to describe it as hybrid system.[114]

To clarify the investor-state arbitration position, however, the grounds of investor-state arbitration must be defined.

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[113]The Omani Law of Arbitration in Civil and Commercial Disputes,the English version of this law is translated by Aceris Law LLc .See : www.international-arbitration-attorney.com

[114] Alvarez, 'Is investor-state arbitration 'public'?' 540

2.3.2 Principal Sources for Investor-state Arbitration (the key methods of state consent to investor-state arbitration)

The methods available to investment arbitration are numerous[115]. Those method essentially depend on state's consent to investor-state arbitration regarding prospective disputes with investors.[116] Therefore, it can be stated that the state's consent to investor -state arbitration represents and forms the backbone of that system. Arguably, this can be justified as follows, an investor's consent to investment arbitration is mostly given as a response to or acceptance of a state's offer for arbitration of investment disputes.[117] Thus, typically an investor's consent depends on state consent to initiate a claim. Accordingly, the consent of both state and investor will form the basis and source of the jurisdiction of the arbitration tribunal.

States may be offered their consent to international investment arbitration in several ways. First, the investment contract between investor and host state is one of those ways.[118] The investment contract between an investor and a host state is considered one of the oldest methods [119] through which state consents to the investor-state arbitration. In this instance of investment arbitration, as in commercial arbitration, the parties' agreement to investment arbitration could take two forms.[120] It could exist as a normal provision in an investment contract (arbitration clause) by which any disputes that arises under that contract must be submitted to arbitral process.[121] The other form comes after the emergence of dispute where the parties agreed to submit a certain conflict to arbitration. This late form is "usually called a submission agreement"[122].

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[115] Collins, *An introduction to international investment law 222-224*;Dugan; and others, *Investor-state arbitration 50*;Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 94-97*;Van Harten, *Investment treaty arbitration and public law 99-100*;Moses, *The principles and practice of international commercial arbitration 247*

[116] Van Harten, *Investment treaty arbitration and public law 99*

[117] Ibid 100

[118] It is important to note that, on the other hand state can be acting in a private capacity not in a public capacity. Put differently, state can be contracted as private party in any commercial relationship which is less likely to involve matters of public concern or interests of third parties. States do so not to provide public services or to pursue public interests, but they do so to achieve private interest as any private party. Thus, in such case, international commercial arbitration may use to settle any potential disputes between contracting parties. To read more about this point see ibid 58-68

[119] Sornarajah, *The international law on foreign investment 276*; see also Dugan; and others, *Investor-state arbitration 225*

[120] Salacuse, *The law of investment treaties 370*

[121] Moses, *The principles and practice of international commercial arbitration 248*

[122] Salacuse, *The law of investment treaties 370*

Prior to the emergence of investment treaties in 1959, the multinational corporations had established the investor-state arbitration system through the investment contracts between these corporations and the host states.[123] In this sense, corporations would negotiate with states to convince them included their consent to arbitration in such contracts. Thus, any a prospective conflict could arise from investment contract would be resolved before international investment tribunal. However, investor-state arbitration under the investment contracts continues, but numerically it now falls below investment arbitration based on a state's consent that expressed through the investment treaties as it will be illustrated later.[124] The well-known examples of such contracts are oil and gas exploration and production contracts (concessions), public utilities, and infrastructure contracts.[125]

It becomes clear that investment arbitration which is based on the investment contract is often more predictable and manageable because it based on a pre-existing contractual relationship. [126] This characteristic is absence or at least less likely to exist in the case of investment treaty and legislation-based arbitration as it would be clarified shortly. Investor-state arbitration which is conducted pursuant to an investment contract is usually called investment contract arbitration or contract-based arbitration.[127]

Secondly, another area which draws on the mechanics of investment arbitration arises from investment treaties between home states and host states.[128] Recent years have witnessed a constant growth in the number of investment treaties.[129] According to *United Nation Conference on Trade and Development (UNCTD),* globally there are currently more than 3000 investment treaties.[130] The greater number of these treaties have contained provisions refer to this system to be employed to resolve the potential dispute.[131] Due to this fact , investment treaties are considered the most common source contains the state's consent to investor-state

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[123] Sornarajah, *The international law on foreign investment 276-277*
[124] Ibid 276-277
[125] Dolzer and Schreuer, *Principles of international investment law 79-80*
[126] Van Harten, *Investment treaty arbitration and public law 62*
[127] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 94*;Van Harten, *Investment treaty arbitration and public law 63*
[128] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles*;Moses, *The principles and practice of international commercial arbitration 248*
[129] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 26*
[130]UNCTAD, 'International Investment Agreements Navigator' (*United Nation Conference on Trade and Development, Investment Policy Hub* <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 4 December 2020
[131] Zhang Xi, 'Consent to arbitration in international investment' (*China Business Law Journal,* 12 December 2018) <https://law.asia/consent-to-arbitration-in-international-investment> accessed 4 December 2020; Dolzer and Schreuer, *Principles of international investment law 257*

arbitration.[132] The investment treaties phenomenon has resulted in an increased of investment treaty arbitration cases[133], compared with investment contract arbitration.[134]

Generally, in terms of parties, these treaties have been divided into two types: (i) *Bilateral Investment Treaties (BITs)* which is treaty between two sovereign countries. One example of this type is *Free Trade Agreement between Sultanate of Oman and the USA*.[135] (ii) Other type is Treaties *with Investment provisions* (TIPs). The *North American Free Trade Agreement between the USA, Canada, and Mexico*[136] is one example of this type.

Investment treaties are providing, amongst other methods, for investment arbitration to be used to solve any potential disputes between the parties. In this way investment arbitration has been shaped towards a highbred system[137] what is called treaty-based investment arbitration or investment treaty arbitration to distinguish it from investment contract arbitration arising from investment contract.[138] Under this procedure an investor can bring his claim even in the case of lack of contractual relation between the investor and host state.[139] In this way the host state is obligated to consent to investor-state arbitration, put differently, the host state is committed by pre-dispute consent to enter into investment arbitration process in the circumstances of a dispute arising. In this case an investment dispute may be brought immediately by an investor before international arbitration tribunal without need for a new mutual agreement of arbitration or need for arbitration clause in contract. Moreover, the state's consent to investment arbitration which is existing in investment treaty is typically general. Therefore, any future disputes can be brought by any potential investor from home state, providing their home state is party to investment treaty, and resolved by arbitration. By contrast, the consent to investment arbitration that exists in an investment contract is limited to the subject of the contract.[140]

This characteristic of state's consent to investment arbitration which is contained in investment treaty ,appears to have led, to the idea of "arbitration without privity" in the

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[132] Xi, 'Consent to arbitration in international investment'
[133] Sornarajah, *The international law on foreign investment 218*
[134] Dugan; and others, *Investor-state arbitration 220*
[135] Oman-United State Free Trade Agreement (FTA)
[136] North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA)
[137] See section 2.2
[138] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 94-95*
[139] Ibid 94
[140] Van Harten, *Investment treaty arbitration and public law 62-63*

domain of international investment arbitration.[141] In accordance with this idea, as it been explained above , an investor can submit his claim to international investment arbitration even in the case of an absence of a contractual submission between the investor and host state.[142] As mentioned previously ,this is because host state has expressed in advance their consent to arbitration in an investment treaty arranged with the home state of the investor. Thus, pursuant to that point, the investment treaty is assumed to be a wider and more relevant procedure for investor-state arbitration compared with an investment contract.

Additionally, the national laws or other pieces of legislation which cover and regulate foreign investment in host states and provide protection for investors and their investments, may form the base for investment disputes to be submitted to investor-state arbitration.[143] National laws refers to all domestic laws enacted by a host state that collectively form the domestic legal framework which influence foreign investment.[144] Those domestic laws or national laws form the base from which to submit an investment dispute to investment arbitration, as often they may contain the process of dispute resolution by arbitration offered by the host state.[145]

For instance, article 17 of The Foreign Capital Investment Law has stated that

> "Omani courts shall have the competence to examine any dispute arising between the investment project and others, and the cases of investment projects shall have urgency status when examined by these courts. It is permitted to resolve differences and disputes by arbitration"[146].

The offer of arbitration is often one of the elements which a host state may use to attract, promote and to control foreign direct investment[147] in its territory in a way consistent with its economic policy. Article 17 will be revisited in the next chapter.

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[141] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 86*
[142] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 5*
[143] Moses, *The principles and practice of international commercial arbitration 259*
[144] Collins, *An introduction to international investment law 69*;McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 52*
[145] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 94*
[146] The Foreign Capital Investment Law. Royal Decree No (50/2019)
[147] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 52*

Finally, the other instrument by which consent to investment arbitration can be derived is "Investment Authorisation or approval"[148]. Such authorisation may contain the investor's right to bring any relevant disputes before an international tribunal. The idea is that when investors apply for authorisation to invest in a host state, their application could contain a dispute settlement clause making references to investor-state arbitration. Therefore, if state do approve of these investment applications this would be meant that it implicitly consents to arbitrate any dispute that could arise in respect to that investment.[149]

However, at first glance it could be understand that this method for state's consent seems to be like investment contract just explained. However, some literatures examine such form of state's consent under direct investment agreement or contract. They state that investment authorisation and investment contract as resources for investor-state arbitration are different in terms of the negotiation. While investment contract is negotiable, the investment authorisation subjects to the codified and constant administrative process from competent authority in host state. [150]

Thus, and to summarise, the consent of host state, or even consent of the investor in the case of investment contract, to revert to investor-state arbitration, as a mean of resolving investment disputes, mostly lies in one of those avenues just explored. However, undoubtedly the issue of consent to investment arbitration is governed by applicable laws which is normally specified by parties to conflict. Usually, these laws stipulate that the consent of disputing parties to bring their dispute before an international investment tribunal must be in writing.[151] This is an issue to which will be researched in more details later in this thesis.

Therefore, once the consent becomes available, there are two ways for Investment arbitration to be conducted. Typically, it could implement under the auspices of a distinguished institution

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[148] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials,110*

[149] *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40 , decision on jursdiction 24 February 2014 , see paras 11-13 and 232

[150] Dolzer and Schreuer, *Principles of international investment law 254*; Xi, 'Consent to arbitration in international investment'

[151] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 95*

which is supposed to be competent to conduct arbitral process[152], but occasionally it is performed by ad hoc which is exclusively created and purposely appointed to do so.[153]

In this regard, it may be useful to note that disputes which have arisen between states and investors are unpredictable. Thus, these disputes cannot be counted and contained in advance in one of investment arbitration sources which have been mentioned above. The disputes appear in various contexts and are diverse.[154] For instance these disputes may be created because of the promulgation of new environmental regulations which causes increasing costs to the investor's enterprise. They also may arise even for a simple reason. For instance, because of "the simple refusal of host state authorities to grant a visa to a foreign technician needed by an investment project".[155] However, regardless of the contexts or forms of dispute which may lead to investor-state arbitration, once the parties' consent is established and the relationship between them is set out in one of the aforementioned sources then the investment arbitration process can be launched.

In attempting to provide a clear understanding about the concept of an investor-state arbitration, it is important to briefly indicate the main actors in international investment arbitration system. Consequently, it is beneficial to investigate the identities of the parties involved in the system of investment arbitration, as they play a crucial role in its emergence, existence, practise, and evolution.

2.3.3 Principal Parties to Investor-state Arbitration

As the name of this type of arbitration indicates, the essential actors or parties to investor-state arbitration are the investor and the state. However, the terms investor and state must be interpreted and explained explicitly. This is done to precisely determine which state entities and investors fall under or within the scope of those terms, and hence qualify to be parties to investor-state arbitration. Ultimately this process will contribute to establishing the investment

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[152] For instance, the well-known in present time is International Centre for Settlement of Investment Disputes (ICSID). As of April 12 ,2019, 163 states had signed the convention of (ICSID), of which 154 states had deposited their instruments of ratification with the (ICSID)Secretariat, See , ' International Centre for Settlement of Investment Disputes (ICSID)' <https://icsid.worldbank.org/en/> accessed On 9 March 2020

[153] Dugan; and others, *Investor-state arbitration 52*;R.Doak Bishop, James Crawford and W.Michael Reisman, *Foreign investment disputes : cases, materials, and commentary* (Kluwer Law International 2005) 11

[154] Salacuse, *The law of investment treaties 354*

[155] Ibid 354

arbitration barriers in terms of parties and jurisdiction.[156] Moreover, as the state which is party to this process of arbitration also represents the interests of its citizens, it is more likely that any award resulting from this system of adjudication could affect the citizens of state and other stakeholders who are not party to the relationships between the disputing parties.[157]

However, at the present time this is a subsidiary issue, and therefore will not be researched extensively.

2.3.3.1 The Investor

The investor is a crucial participant in investor-state arbitration. Indeed, the system of investor-state arbitration was designed to protect foreign investment interests by providing access to impartial international dispute settlement.[158] Salacuse has divided the types of investors, based on the possessor, into four categories. Those categories are private investors, state investors, international organizations, and mixed enterprises.[159]

However, the definition of the term 'investor' would be depended on the state's policy regarding foreign investment and its approach to achieving its economic goals. A state may utilise the definition of a foreign investor to determine the scope and control of foreign investment in its territory.[160]

Mostly, the two main instruments by which a contracting state could define the term of investor are national law on foreign investment and investment treaties. For instance, article 1 (h) of Omani law on foreign capital investment has defined a foreign investor as follows: "Every natural or legal non-Omani person who establishes an investment project in the Sultanate".[161] Based on this definition, it can be understood that Sultanate of Oman has embraced a broad approach to the definition of the 'foreign investor'. Its goal has been to involve as much foreign capital as feasible in a way that is consistent with its economic development strategy.

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[156] Moses, *The principles and practice of international commercial arbitration 248-250*
[157] Collins, *An introduction to international investment law 227*;Dugan; and others, *Investor-state arbitration 167*
[158] Collins, *An introduction to international investment law 214*
[159] Salacuse, *The law of investment treaties 23*
[160] Collins, *An introduction to international investment law 74*
[161] The Foreign Capital Investment Law Promulgated by Royal Decree 50/2019

On the other hand, the current trend in investment treaties is to define the term of investor extensively[162] to cover "all sorts of commercial entities including SOEs foreign nationals or a private enterprise of a foreign state that has engaged in commercial activity in territory of another state".[163] In this regard, article 10.27 of investment chapter of Oman-United States Free Trade Agreement (FTA) states that

> investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.[164]

It seems that a previous definition is drawn upon from the economic policies in both countries. The USA is a capital exporting state and, by this wide definition, as many U.S investors as possible would be protected under the Oman-US FTA. On the other hand, same definition works with the Oman's economic policy as Oman is a capital importing state and wishes to attract as many U.S investors as possible to establish investment in Oman. In addition, the investors from both contracting states are entitled to benefit from the advantages of that agreement providing that they have sufficient links to those states. Thus, only in this case, can they bring any future disputes to be settled by invest-state arbitration.

In this regard some investment treaties refer to national law on nationality to be consulted to determine whether an investor qualifies for protection under those treaties.[165] In the same context, the principles of customary international law might impact the determination of investor.[166]

In addition to the above, there are Denial of Benefits provisions[167] and Performance Requirements[168] which are included in investment treaties, investment chapters in free trade agreements or in domestic laws on foreign investment. Those elements could play a role in determining and controlling the definition of an investor in the field of international

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[162] Dugan; and others, *Investor-state arbitration 304*
[163] Collins, *An introduction to international investment law 4*
[164] Oman-United State Free Trade Agreement (FTA)
[165] Dugan; and others, *Investor-state arbitration 296*
[166] Salacuse, *The law of investment treaties 37*;Dugan; and others, *Investor-state arbitration 292*
[167] Those provisions allow a party state to have the right to denay the protection of the investment treaties to investors who do not have an actual business activity in the home state.See Collins, *An introduction to international investment law 87*
[168] They refer to set of conditions that are imposed by host state on foreing investor in order for him to be able to invest in this state.See ibid 89

investment arbitration. This because of that these elements are contributing to pinpoint the investors who will be able to use mean of investor-state arbitration to protect his interests against home state.

2.3.3.2 The Host state

The other party to investor-state arbitration is the sovereign state where the investor's activities are conducted.[169] Ordinarily, the host state is the respondent party to arbitral proceedings.[170]

In this context, article (1) 25 of ICSID convention, which regulates the jurisdiction of ICSID centre over investment disputes [171], has stipulated that investment disputes to be eligible to subject to centre's jurisdiction, must be between a contracting state and national of another contracting state:

> 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, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Based on a previous article of ICSID Convention, a state or any of its entities must be party to investment arbitration. Moreover, the state should not act in a private capacity[172], otherwise the arbitration will typically fall under commercial arbitration and, therefore, cannot be adjudicated under investor-state arbitration system.[173] Indeed, involving the foreign investor in this system of adjudication against a sovereign state is a key attribute which make its exceptional nature and differentiation it from other relevant systems such inter-state arbitration as well as commercial arbitration.[174]

Obviously, safeguard a foreign investment movement is the aim behind creation of investor-state arbitration system. Thus, as such, and since investment disputes are other a fundamental

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[169] Salacuse, *The law of investment treaties 38*
[170] Van Harten, *Investment treaty arbitration and public law 57*
[171] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 56*;Salacuse, *The law of investment treaties 379*
[172] Van Harten, *Investment treaty arbitration and public law 62*
[173] Ibid 56
[174] Ibid 9

factor which differentiates investment arbitration from commercial arbitration, it is useful at this stage to briefly illustrate the terms of foreign investment.

2.3.4 Foreign Investment as Subject Matter of Investor-state Arbitration

The keystone in international investment arbitration is foreign investment. This system of investment arbitration is a last crucial recourse foreign investor can turn to protect their investments against host state. In this context, definition of investment is key to determinate the scope of this protection and the jurisdiction of an arbitral tribunal. Thus, this section explores the meaning of investment in general, and under Omani system in particular; it will also begin to compare other international practices. This will help to establish better understanding of the differences between investment arbitration and commercial arbitration and serve purpose of understanding of the parameters of investor-state arbitration concept.

Though term 'investment' represents one of two main criteria (alongside investor) for a dispute to be qualify for investment arbitration,[175] there is still no consensus on definition of investment.[176] This situation has led to "divergent of definitional approaches"[177]. Probably, this is due to that investment forms are inherently evolving.[178]

Nonetheless, in view of the failed international attempts[179] to develop a multinational agreement on international investment,[180] there has been an effort to define the term investment. For instance, there was an attempt to provide a comprehensive definition[181] in the proposed *Multinational Investment Agreement*.[182] This agreement was an attempt by *The*

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[175] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 210*

[176] Collins, *An introduction to international investment law 74*

[177] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 210*

[178] OECD, 'Definition of Investor and Investment in International Investment Agreements', (OECD Publishing 2008)

[179] The reason behind its failure is conflat of interests between developed and developing countries in this area of law.See Sornarajah, *The international law on foreign investment 236*; Subedi, *International investment law : reconciling policy and principle 282*

[180] About these attempts see :Subedi, *International investment law : reconciling policy and principle 35-73*

[181] OECD, 'Definition of Investor and Investment in International Investment Agreements' 48

[182] This agreement was adopted by *The Organisation for Economic Co-operation and Development (OECD)* and the negotiations on this agreement were taken place between 1995-1998. Its proposed objective was to "provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures". See OECD, 'Draft of Multinational Investment Agreement ,documents

Organisation for Economic Co-operation and Development (OECD) to provide an international framework for international investment, but this did not culminate in success. However, the draft agreement adopted a broad definition of investment to cover all types of recognized and evolving investments to guarantee protection for all forms of foreign investment from contracting parties.[183]

Generally, foreign investment can be classified into three essential categories: *Foreign Direct Investment* (FDI), *foreign portfolio investment* (FPI) and *indirect investment*.[184]

As a result of the evolution of the global economic order, the definition of what constitutes foreign investment has evolved over time.[185] Under customary international law, the meaning of investment was referred to FDI which took the form of tangible property .[186] Thus, only this category of the foreign investment enjoyed the protection of customary international law.[187] This is due to perception that tangible forms of FDI existed physically in a host state, and so there was a need to defend against any potential injury or damage from a host state's government.[188] Presently, a clear example for this would be the establishment or purchasing of an enterprise in a host state.[189] However, this form of foreign investment is required to be directly controlled and manged, or at least have the effective participation in the management of the enterprise, by the foreign investor.[190] To this end foreign investors must have sufficient voting shares in the enterprise in the host state.[191] According to the International Monetary Fund, these voting shares should be 10 per cent or more.[192] It is believed that such a

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from the negotiations' (*The Organisation for Economic Co-operation and Development (OECD),* <http://www.oecd.org/daf/mai/> accessed 23 October 2020;Subedi, *International investment law : reconciling policy and principle 57*

[183] OECD, 'Draft of Multinational Investment Agreement ,documents from the negotiations'

[184] K.V.S.K.Nathan, The ICSID Convention: The Law of the International Center for Sttlement of Investment Disputes 111(Juris Publishing 2000) Cited in :Dugan; and others, *Investor-state arbitration 1*

[185] UNCTAD, *Scope and definition : UNCTAD series on issues in international investment agreements II* (United Nations 2011) 7

[186] M. Sornarajah, *The international law on foreign investment* (2nd edn, Cambridge University Press 2004) 8; UNCTAD, *Scope and definition : UNCTAD series on issues in international investment agreements II 8*

[187] Dugan; and others, *Investor-state arbitration 248*

[188] Ibid 294

[189] Salacuse, *The law of investment treaties 21*

[190] Collins, *An introduction to international investment law 3*

[191] Ibid 3

[192] , 'Glossary of Selected Financial Terms and Definitions' (*International Monetry Fund* 31 October 2009) <https://www.imf.org/external/np/exr/glossary/showterm.asp#F> accessed 27 October 2020

percentage of shares in an enterprise will allow the investor the ability to participate in control and management .[193]

Progressively, the modern investment protection instruments (e.g., investment treaties) have extended the definition of investment to cover two other categories of foreign investment.[194] The *foreign portfolio investment* (FPI) "includes publicly traded securities …"[195]. Some believe that this type of foreign investment should be protected by international investment law since, like FDI, the entrepreneur takes a risk by investing in a foreign country.[196] On the other hand , Sornarajah believes that the risk involved in FPI is not as high as that involved in FDI.[197] Therefore, it should not be protected unless precisely included in the definition of foreign investment in a treaty.[198] However, he adds that, in this case, the FPI should refer to the shares in an enterprise which has been established in a host state to enjoyed protection of international investment law.[199] Regarding the impact of conclusion this form in definition of investment in many investment treaties, Subedi states that this has resulted in potentially expanding the protection of investment treaties to various entities and various economic transactions.[200]

According to the International Monetary Fund, if the foreign investor has less than 10 per cent of the shares in an enterprise in a host state, it would be classified as portfolio investment in the form of shareholdings.[201] It is believed that less than 10 per cent is not sufficient to justify participation in the control of the investment.[202] Accordingly, based on this standard, portfolio investment would be classified as FDI if the percentage reached 10 or up and vice versa. Moreover, the securities, under international investment law, can be classified under both FDI and FPI as this would be depended on the percentage of shares owned by a foreign investor.[203]

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[193] Salacuse, *The law of investment treaties 22*; Maitena Duce, 'Definitions of Foreign Direct Investment (FDI): a methodological note' (2003) 3
[194] Sornarajah, *The international law on foreign investment 11*;Dugan; and others, *Investor-state arbitration 1*
[195] Dugan; and others, *Investor-state arbitration 1*
[196] Sornarajah, *The international law on foreign investment 8*
[197] Ibid 227
[198] Ibid 9
[199] Ibid 9
[200] Subedi, *International investment law : reconciling policy and principle 83*
[201] Duce, 'Definitions of Foreign Direct Investment (FDI): a methodological note' 3
[202] Ibid 3
[203] UNCTAD, *Scope and definition : UNCTAD series on issues in international investment agreements II 116*

The third category of foreign investment which has been included within the meaning of investment is *an indirect investment* such as *intellectual* property or *a technical assistance* agreement.[204] Due to the expansion of technology and employment of these technological innovations in the production processes around the world; producers of technology endeavoured to protect their patents and associated rights against a potential violation.[205] Consequently, such rights have been included in the scope of the investment definition in investment treaties.

Based on the preceding analysis, it can be stated that foreign portfolio and indirect investment appear to be frequently connected with the presence of foreign direct investment, and vice versa. Such interconnection has necessitated the need to include all these foreign investment forms in the definition of foreign investment in investment treaties. Moreover, it is evident that, under current investment treaties and free trade agreements, all of the aforementioned categories frequently fall under the concept of foreign investment and, thus, are protected by both customary international law and international investment law.[206]

However, defining 'investment' can be partially achieved by drawing from different instruments: national law on investment, an applicable investment treaty and the arbitral tribunal.

The national law which governs foreign investment has a remarkable impact generally on foreign investment and particularly on the definition of term 'investment'.[207] Typically, this legislation controls, among other things, the investment activities to which a foreign investor may get access and the requirements for establishing a foreign investment project. In doing so, it determines the scope of the foreign investment and, consequently, the scope of the disputes that an investor may bring before an investment arbitral tribunal. In fact, states use their domestic law to restrict their international commitments under investment treaties by defining foreign investment to a great part domestically.[208]

However, a state's domestic legal framework on foreign investment should comply with its international obligations in same domain, namely investment treaties. Any gap or

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[204] Dugan; and others, *Investor-state arbitration 2*; Sornarajah, *The international law on foreign investment 11*
[205] UNCTAD, *Scope and definition : UNCTAD series on issues in international investment agreements II 8*
[206] Subedi, *International investment law : reconciling policy and principle 82*; Sornarajah, *The international law on foreign investment 11*
[207] Collins, *An introduction to international investment law 69*
[208] Ibid 74

contradiction between these two levels gives negative singe to foreign investors, resulting in a potential investor not wishing to do business with such a state.

In Oman, The Foreign capital Investment Law No. (50/2019) was enacted to govern different aspects of foreign investment. Article 1 of this law has defined foreign investment and other related terms as follow:

Article 1-f defined the term of foreign investment as "Using direct foreign capital invested to create, expand, develop, finance, manage, or own an investment project".
Article 1-g defined term of investment project as "Any economic activity established in the Sultanate by foreign investor individually, or in partnership with another foreigner or Omani".
Article 1-i defined term of Invested foreign capital as "All types of assets included in an investment project regardless of type, and which have a financial value, whether monetary, in kind, or intangible". To derive the meaning of "Foreign investment" all the previous definitions shall be read together.

Further, article 10 states that

> It is permitted by a decision of the Council of Ministers - based on a recommendation by the minister- to grant an investment project established for strategic projects contributing to achieving the development of the activities of public utilities and infrastructure, or new or renewable energy, roads, transportation, or ports a single approval for establishing, operating, and managing the investment project, including construction and manpower licences, and this approval shall be effective on its own without the need to undertake any other procedure.

This article draws illustrates that major and strategic projects in Oman still rely on foreign investment. Often Such investment projects numerously contribute to the development of domestic economy of the host state.[209] These two reasons could be the explanation for exceptions and flexibility granted for such projects pursuant to this article. In same context, article 14 has laid down that "The list of activities that are prohibited to be undertaken by foreign investment shall be issued by a decision of the minister". From this it can be understood that generally all types of activities are available for foreign investment unless they have been exceptionally listed as a prohibited activity (negative list). Whoever, this list

[209] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 52*

contains "typically small-scale industrial activities"[210] such as Taxi operation centres, Rehabilitation centres, Translation, and interoperation services, etc.[211] The Omani government may have banned such activities on foreign investors because they are deemed insufficient to contribute to economic development in Oman through attracting foreign investment. Alternatively, it may be owing to their aim to restrict these activities to Omani citizens.

However, it can be side that to a significant extent this attitude (adopting a broad definition) reflects Oman's aim of attraction foreign capital and support this aim, whilst at the same time wishing to meet its international obligations in under its bilateral investment treaties (BITs). However, in case there are two different definition investment are provided in state's investment law and in its investment treaty the priority of application of these two definitions would be for treaty's definition. This conflict could perceive in event of investigation of state consent to investment arbitration by arbitral tribunal.[212]

Investment treaties have defined investment in a variety of ways.[213] However, David Collins has observed that the contemporary trend in investment treaties is the adoption of a broad definition for the term investment "with *indicative* lists rather than *definitive*"[214]. The reason for this is to cover as much foreign investment as possible and hence attract as many investments as possible.[215] Obviously, such a definition is useful for capital importing states. In turn, as such definition provide protection under investment treaties for as much of the investment activities as possible, it is also favourable for the capital exporting states.

In this respect, article 10.27 of in investment chapter of Oman-US FTA stats that

> …every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;6 (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to

[210] Curtis, *Executive Regulations of the Foreign Capital Investment Law* (Curtis, Mallet-Prevost, Colt & Mosle LLP 19 August 2020)
[211] , 'The New foreign Capital Investment Law in Oman ' (*The Advisory Excellence* 18 February 2020) <https://www.advisoryexcellence.com/the-new-foreign-capital-investment-law-in-oman/> accessed 30 October 2020
[212] Dugan; and others, *Investor-state arbitration 256*
[213] Ibid 254
[214] Collins, *An introduction to international investment law 4*
[215] Ibid 4

> domestic law;7 8 and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges..

Following from this, under Oman-US FTA the forms of investment which an investor can enter and then enjoy protection under this agreement are various. As Collins has stated,[216] this article starts by using open phrases such as "every kind of asset" which provide a wide protection umbrella to cover most foreign investment established by both parties' investors, and then this article provides non-exhaustive list of investments (direct investment forms, portfolio investment and intellectual property rights). Further, as has been mentioned, this wide definition services both the USA as capital exporting state and Oman as capital importing state.

In the same way, article 8.1 of Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one part, and the European Union and its Member States, on the other part[217], has defined the term of investment as

> …. every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt instruments of an enterprise; (d) a loan to an enterprise; (e) any other kind of interest in an enterprise; (f) an interest arising from: (i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources, (ii) a turnkey, construction, production or revenue-sharing contract; or (iii) other similar contracts; (g) intellectual property rights; (h) other moveable property, tangible or intangible, or immovable property and related rights; (i) claims to money or claims to performance under a contract.

This definition represents the postion of the EU as a resoure for most of foreign investment around the world.[218] Thus, it is logiacl that the EU try to adopt such a wide definition. This is in order to guarantee that as many of EU's investors would be eligible to benefit from protection under this agreement.

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[216] Ibid 75

[217] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member State, of the other part [2016]OJ L 11

[218] Yves Mersch and others, 'The new challenges raised by investment arbitration for the EU legal order' (*The European Central Bank,* 2019) <https://www.ecb.europa.eu/pub/research/legal-working-papers/html/index.en.html> accessed 18 October 2020

Both of the aforementioned agreements appear to share at least two characteristics, which constitute a general tendency in most recent investment treaties.[219]

Firstly, both agreements have chosen to embarce a "broad asset-bassed definition of investment with an illustrative list of investment forms"[220]. Salacuse believed that investment treaties employ such a wide definition in order to meet the fact that globaly forms of investment are constantly and rapidly evolving. Thus, a plain definition would be covered any prospective new types of investmentes.[221] Nonetheless, the CETA has reltively limited investment definition, with a last section of article 8.1 excluding some commercial activities.

> ….For greater certainty, claims to money does not include: (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party. (b) the domestic financing of such contracts; or (c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b).

One could argue that this CETA's approach would preclude potential commercial disputes from being regarded as investment disputes under this agreement.

Secondly, definition of investment in both agreements included substantive criteria through which it is possible to recognise forms of activities that can benefit from protection of these agreements. These substantive frames are: (i) a commitment of capital or other resources;(ii) the expectation of gain or profit; (iii) the assumption of risk and a certain duration (just in CETA). Salacuse, believes that states often adopt such characteristics to only attract the long-term investment activities which the latter substantive criteria apply to it. Host States believe that long-term investment activities would contributes to their economic development more than short-term transactions.[222]

Additionally, the arbitral tribunals play a significant role in establishing the definition of investment. It could do this jurisdictionally to designate its jurisdictional scope.[223] The idea is that, for instance, if the respondent to an investment arbitration challenge that the disputes does not fall under a tribunal's jurisdiction. The respondent considers this objection on the

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[219] Abut this see:Salacuse, *The law of investment treaties-167*
[220] Ibid 160
[221] Ibid 161
[222] Ibid 164
[223] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 210*

grounds that the dispute brought by the investor cannot be considered related to investment activities. In other terms, the dispute falls out of investment treaty scope. Therefore, in this event, the arbitral tribunal will be compelled to examine the respondent's allegation about whether the dispute is related to investment or not.

However, it is thought that such a situation mostly could happen under the ICSID convention. This is since the ICSID Convention has not defined the term investment and it has left this role for disputing parties.[224] According to a Report of the Executive Directors which has suggested the draft of the ICSID Convention "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).[225]

But what if the disputing parties do not agree about this issue? From a practical point of view the tribunal would do this function. However, this situation has led to affording significant powers to tribunal to decide whether the investment qualifies for protection. Consequently, the arbitral tribunal may go beyond the agreed remit of its duties in defining investment in investment treaties. The popular decision regarding this can be found in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco.* which was arbitrated under ICSID. [226] In this instance, to determine its jurisdiction, the Turbinal examined the dispute against the so-called *Salini list* to determine whether it involved an investment transaction. The arbitral tribunal decided that a transaction to qualify as investment under the ICSID Convention must meets list of objective criteria. This list includes contributions; certain duration of performance of contract; a participation in the risks of the transaction and the contribution to the economic development of the host state of the investment. Based on this, tribunal has decided that:

> the contract concluded between ADM and the Italian companies constitutes an investment pursuant to Articles 1 and 8 of the Bilateral Treaty concluded between the Kingdom of Morocco and Italy on July 18, 1990, as well as Article 25 of the Washington Convention[227]

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[224] See: Dugan; and others, *Investor-state arbitration 256-258*
[225] The World Bank, *Report of the Executive Directors of the World Bank on Settlement of Investment Disputes*) 36 para 27
[226] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* ICSID Case No ARB/00/4 paras 43-58
[227] Ibid para 58

The previous demonstration about term of investor-state arbitration could be helpful to define the boundaries of this research and to distinguish it from other related terms in the sphere of international dispute settlement. However, since investor-state arbitration system activates in area of international investment law, the relationship between the former and latter will be illustrated through next section.

2.4 Analysis of the Inter-relationship Between Investor-state Arbitration and International Investment Law (mutual influence)

To provide a reasonable analysis about the concept and nature of investor-state arbitration, there is need to explore the status and role of the investment arbitration system in the area of international investment law. This relationship will be investigated from two angles. The first explores the historical purpose behind the creation of investor-state arbitration within the remit of international investment law. Exploring this historical evolution may help to create a better understanding of mutual influence between the two parts. Secondly, important consideration must be given to how investor-state arbitration may affect international investment law.

2.4.1 The Historical Evolution of Investor-state Arbitration in the Area of International Investment Law

In an historical context there appears to be a 'parallel' evolution of investment arbitration and international investment law; consequently, it is fair to explore the nature of their historical connection. Bearing in mind the context of this evolution it seems appropriate to concisely look at three historical stages.

2.4.1.1 Colonial Stage

The first historical stage can be traced back to the nineteenth century, the so-call "Colonial Era"[228]. Through this period, aliens, including investors, were protected by compliance with principle of minimum standard of treatment under customary international law.

However, the United States of America and European countries held view that their nationals abroad, including investors, deserved treatment that must not be less than the internationally

[228] See for example : Kenneth J. Vandevelde, 'A brief history of international investment agreements' (2005) 12 UC Davis journal of international law & policy

recognized standard.[229] This view believed that the standards prevailing in host state could be lower than the norms of international law.[230] This position was represented by the *Hull* doctrine which was a reference to *Cordell Hull* the US Secretary of State at the time.[231]

At the same time, there was opposition from some developing countries in South America against the idea of an international minimum standard.[232] The prevailing South American view believed that aliens in their territories should receive treatment as those of their own nationals under domestic law and should not be better than its own nationals (equality principle).[233] These states thought that the minimum standard of treatment promoted by 'Colonial powers' could be used to interfere in their internal affairs[234] at a time when these host states wanted to "assure their full sovereignty over foreign economic actors in their territory"[235] This position was represented by *Calvo* doctrine which alluded to Carlos Calvo who was an Argentine jurist and foreign minister.[236]

During that period, the main vehicle to impose the protection of foreign investment was diplomacy[237] or military intervention.[238] However, Vandevelde has stated that protection of the foreign investment under customary international law was ineffective due to absence of agreement about principle of minimum standard.[239]

The early twentieth century witnessed the use of international inter-state arbitration as a primary mechanism which began to replace military intervention in the protected of foreign investment abroad.[240] This arbitration process employed customary international law to adjudicate disputes about foreign investment. However, to a certain extent, inter-state arbitration was not entirely satisfactory for foreign investors as they still need to exhaust the

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[229] Wolfgang Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' (2017) 42 The Yale journal of international law 5; Salacuse, *The law of investment treaties 47*
[230] Salacuse, *The law of investment treaties 47*
[231] Subedi, *International investment law : reconciling policy and principle 32*
[232] Malebakeng A. Forere, 'The New Developments in International Investment Law: A need for Multilateral Investment Treaty?' (2018) 21 Potchefstroom electronic law journal 3
[233] Salacuse, *The law of investment treaties 47*
[234] Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review - Foreign Investment Law Journal 1
[235] Salacuse, *The law of investment treaties 48*
[236] Subedi, *International investment law : reconciling policy and principle 29*
[237] Vandevelde, 'A brief history of international investment agreements' 161
[238] Salacuse, *The law of investment treaties 50*
[239] Vandevelde, 'A brief history of international investment agreements' 159
[240] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 5;Ahmad Ali Ghouri, 'The evolution of bilateral investment treaties, investment treaty arbitration and international investment law' (2011) 14 International arbitration law review 8; McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 4*

local remedies in a host state. Moreover, investors facing an investment dispute with a host state began to petition their own states to act as an advocate on their behalf in what was largely a private investment disputes with a host state.[241]

To summarise, aliens, including investors, in foreign countries were protected by the enforcement of the principle of minimum standard of treatment of aliens which was mainly under auspices of western nations.[242] Chiefly diplomacy and, as last choice, force was used by these nations to impose this standard of treatment. Thus, investors were unable to directly make a claim against the government of host state, even in inter-state arbitration, rather, they relied on their home countries to do so.[243] This situation led to another historical stage in the evolution of international investment law and the system of investor-state arbitration.

2.4.1.2 Post Colonialisation Stage

The second half of twentieth century witnessed significant expropriation of foreign investments in many developing countries following their independence, arising from fears that the dominance of former colonial powers could return under the guise of foreign investment.[244] Arguably, expropriation of foreign investments stemmed from the desire of developing countries to control their natural resources and economic orders.[245] In the same context, the United Nations General Assembly, in response to a request from developing nations, also supported and promoted this new approach.[246] However, this new approach clashed with the interest of traditional foreign investors and their governments regarding protection of their investments. Alongside this conflict between the interests of capital-exporting countries and capital-importing countries, the international regime of foreign investment was thought to be defective for various reasons. One of these reasons was its shortcoming insofar as it did not contain an effective legal method to enforce protection of foreign investment.[247] Additionally, the use of force to protect a foreign investment had become illegal under United Nation Charter which was adopted at the end of the second world

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[241] Vandevelde, 'A brief history of international investment agreements' 165
[242] Salacuse, *The law of investment treaties 48*
[243] Vandevelde, 'A brief history of international investment agreements' 160
[244] Ibid 166
[245] Salacuse, *The law of investment treaties 68-70*;Forere, 'The New Developments in International Investment Law: A need for Multilateral Investment Treaty?' 3
[246] Salacuse, *The law of investment treaties 69*; Forere, 'The New Developments in International Investment Law: A need for Multilateral Investment Treaty?' 3
[247] Salacuse, *The law of investment treaties 137*

war.[248] Moreover, international customary law did not cover some new issues related foreign investment such as monetary transfers.[249]

Therefore, to resolve this conflict and strike balance between competing interest [250]; and to provide efficient protection for the rights of foreign investments, two important developments took place.[251] First, the process of codifying foreign investment was begun by the formulation of investment treaties between home and host states. These treaties aimed at promoting foreign investment by guaranteeing the level of protection for the rights of foreign investors and provided them with access to international investment arbitration.[252] In other words this meant that the host state agreed to limit their sovereignty by allowing private investors sue them on the ground of international investment agreements. In this way the protection of foreign investment would essentially be subject to a new international investment law (which fundamentally is drawn from investment treaties).[253] In this regard, the first bilateral investment treaty was concluded in 1959 between Germany and Pakistan.[254]

Anther remarkable development in this context was the establishment of a Centre for Settlement of Investment Disputes between States and Nationals of Other States in 1965 under ICSID Convention.[255] This meant that unlike the situation under the customary international law during the former historical phase , by virtue of this Convention establishing the Centre for the settlement of investment disputes between states and the nationals of other states, investors were empowered to take their complaint directly against a host state to the investment tribunal which would be constituted under provisions of this convention.[256] They would not need their home countries' espousal or co-operation to do this. Thus, investment disputes between a private investor and a host state would be settled legally not politically and both a host state and home state would be able to continue their relationship

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[248] Vandevelde, 'A brief history of international investment agreements' 169
[249] Salacuse, *The law of investment treaties 76*
[250] Nitish Monebhurrun, 'The (mis)use of development in international investment law: understanding the jurist's limits to work with development issues' (2017) 10 Law and development review (Berkeley, Calif) 451
[251] Salacuse, *The law of investment treaties 76-77*
[252] Vandevelde, 'A brief history of international investment agreements' 171; Salacuse, *The law of investment treaties 1*; Subedi, *International investment law : reconciling policy and principle 105*
[253] Salacuse, *The law of investment treaties 4*
[254] Jason Webb Yackee, 'Conceptual difficulties in the empirical study of bilateral investment treaties' (2008) 33 Brooklyn journal of international law 428
[255] Washington convention of 1965 on settlement of investment disputes between states and nationals of other states
[256] Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 477

away from such disputes.[257] The Convention, alongside the investment treaties, achieved the objective that depoliticized investment disputes.[258] However, this objective might being achieved to some extent but ICSID arbitration has attracted criticism that it tends to be biased in favour of the foreign investor and western states which could represent the politicization of the law contrary to the mentioned objectives .[259] This matter will be examined later in this thesis in more detail.

In addition, some effort was made to codify international investment issues multilaterally and bindingly, but these efforts were not successful. One of these efforts was exemplified in the work undertaken by *The Organisation for Economic Co-operation and Development (OECD)*[260] to create an international investment agreement. This Organisation has made three attempts in 1962, 1967and 1995 respectively, to create international instrument to organise the foraging investment matters.[261] The latest effort was that the OECD endeavoured to conclude a Multilateral Agreement on Investment (MAI).[262]

Thus, it can be stated that during this historical stage, international investment law began to carve out a niche within the realm of international law. Furthermore, this period saw the official start of both international investment law and an investor-state arbitration system. The ICSID convention and the inclusion of investor-state arbitration clauses in investment treaties fostered the establishment and development of the latter system.[263]

2.4.1.3 The Contemporary Position

More recently, international investment law is chiefly based on Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs)which include investment Chapters. According to the *United Nation Conference on Trade and Development (UNCTD),* globally there are currently

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[257] Vandevelde, 'A brief history of international investment agreements' 175; August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 Asia Pacific law review 24

[258] Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' 4

[259] Subedi, *International investment law : reconciling policy and principle 49,51*; Robin Broad, 'Corporate bias in the world bank group's international centre for settlement of investment disputes: A case study of a global mining corporation suing El Salvador' (2015) 36 University of Pennsylvania journal of international law 10; Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' 4-5; Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 73*

[260] See: section 2.3.4 within this chapter.

[261] Subedi, *International investment law : reconciling policy and principle 57-60*

[262]OECD, 'Draft of Multinational Investment Agreement ,documents from the negotiations'

[263] Subedi, *International investment law : reconciling policy and principle 10*

more than 3000 investment treaties and treaties with Investment Provisions.[264] However, the vast majority of these treaties contain provisions with reference to the investor-state arbitration system that can be employed in the event of a disputes between foreign investors and the host states.[265] This fact has resulted in an increase of investor-state arbitration cases. According to the International Investment Agreements - Issues Notes published by *(UNCTD)*, as of 1 January 2020 the total number of known ISDS cases pursuant to international investment agreements (IIAs) had reached 1,023.[266] To a large extent, these statistics are a strong indicator of the interconnection between both investor-state arbitration and international investment law. In other words, each system depends on the other for its existence and effectiveness.[267] This can be demonstrated in the case of a breach of the obligation under investment treaties, or even an investment contract, where investor-state arbitration would be last recourse to tackle this breach.

However, on the other hand, investor-state arbitration in its current form has been subject of criticism for many reasons.[268] This situation has resulted in the call for multilateral convention on international investment dispute settlement [269] including reform of investor-state arbitration in which the EU has taken a leading role.

An analysis of the development of international investment law and investor-state arbitration demonstrates that it was originally based on customary international law concerned with the protection of foreigners abroad.[270] Subsequently, investment agreements have shaped international investment law and created a new adjudicatory device that is investor-state arbitration. Currently, investor-state arbitration serves as a legal tool to guarantee respect for the provisions and principles of international investment law, regardless of the criticism that it has attracted. Arguably current and future developments in this area of international law will

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[264] UNCTAD, 'International Investment Agreements Navigator' 6 November 2020

[265] Xi, 'Consent to arbitration in international investment' 6 November 2020; Yackee, 'Conceptual difficulties in the empirical study of bilateral investment treaties' 405; Subedi, *International investment law : reconciling policy and principle 105*

[266] UNCTD, 'International Investment Agreements - Issues Notes' (*United Nations Conference on Trade and Development(UNCTD),* 1 January 2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> accessed 6 January 2020

[267] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 7

[268] See: section two of this chapter.

[269] Forere, 'The New Developments in International Investment Law: A need for Multilateral Investment Treaty?' 4

[270] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 5;Salacuse, *The law of investment treaties 46*

fundamentally depended on the interplay between the international investment law and its principal component that is investor-state arbitration.

It seems appropriate at this stage therefore to move on to consider how investor-state arbitration affects the international investment law.

2.4.2 Impact of Investor-state Arbitration on International Investment Law

The relationship between international investment law and the system of Investor-state arbitration can be characterise as influential one. It is thought that the investment arbitration system, especially ICSID arbitration, has changed international investment law.[271] The impact of the one on the other has taken place through different channels, which include investment disputes themselves brought against host states before the international turbinal and together with their outcomes. The interpretative function of the international investment tribunal and, in addition, arbitral awards contribute to establishing scope of norms of investment law.

2.4.2.1 Investment Disputes and Its Outcomes

As has been explained, at the second half of twentieth century many countries started to conclude investment agreements containing investor-state arbitration clauses. Thus, for the first time, these clauses allowed private investors to litigate against a host state by means of direct access of an international tribunal.

However, it is reasonable to suggest that some countries have not yet been experienced the political and economic implications of such agreements and its investor-state arbitration clause.[272] But some of the factors arising from investment disputes and the associated agreements provide empirical evidence of a full understanding of the implications of agreeing to investor-state arbitration clause.[273] Based on these factors, states directly involved on in such disputes and, to lesser extent, states that have not yet experienced investment claims but merely know about these disputes and their implications, seek to adjust their investment agreement components.

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[271] J. Pauwelyn, 'At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' <http://hull.summon.serialssolutions.com> 395-396
[272] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 11
[273] Ibid 11

Firstly, it is reasonable to argue that once investment claims start to increase and the arbitral awards mainly go against host states, states may seek to re-evaluate their investment agreements models. This re-evolution may be to avoid as many claims as possible, or at least, to reduce the numbers and negative impact of them.[274] In this regard, it is believed that parties to investment treaties who face investment disputes with foreign investor are more likely to renegotiate their treaties, having been able to precisely recognize the consequences of their investment treaties obligations through these disputes.[275] For instance, it thought that the outcomes of investment claims have affected host states' regulatory powers. Accordingly, this has resulted in the redesign of some investment agreements or the termination of agreements in order to conserve sovereign rights.[276] In addition, this has driven some countries to withdraw from ICSID such as Bolivia as well as Ecuador.[277]

However, and to see these circumstances in perspective, renegotiation of investment agreements may be the normal consequence of the interaction between investor-state arbitration jurisprudence and parties of investment agreements. Rationally, countries that look forward to amending their investment agreements would draw on the latest developments in the area of international investment law that have been produced by arbitral tribunals.[278] In the same way, it is thought that the withdrawal of some countries from ICSID Convention was the result of an internal politics situation rather than a fundamental opposition to investor-state arbitration.[279]

An example of the impact of investment claims on provisions contained in investment agreements can be seen in Canada's reaction to numbers of investment disputes that led Canadian government to renegotiation some of its existing investment treaties in order to safeguard its social and economic policy objectives.[280] In the same way, as result of investment

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[274] Salacuse, *The law of investment treaties 138,349-350*; Subedi, *International investment law : reconciling policy and principle 8*

[275] Yoram Z. Haftel and Alexander Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' (2017) 13 Review of International Organizations 27

[276] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 12

[277] Subedi, *International investment law : reconciling policy and principle 10-14*; Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 73*

[278] Charles N. Brower and Stephen W. Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium: International Judges' (2008) 9 Chi J Int'l L 496

[279] Brower and Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 496

[280] Haftel and Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' 30

claim that the US has faced; it adopted new model for its Bilateral investment treaties in 2004.[281]

Secondly, "a general increase in ISDS activity promotes learning across the system"[282]. As such, to a lesser degree, it is possible that there is a derived benefit for countries not directly involved in investor-state claims, through observing and learning from the results of investment claims and the legal and economic implications arising from them.[283] These countries may wish to renegotiate their investment agreements in order to avoid any potential pitfalls, and therefore this inevitably lead to re-shape the landscape of international investment law. In this regard, Sornarajah has suggested that "Both the Argentine cases as well as the many arbitrations brought against other Latin American states resulted in widespread concern over investor–state arbitration in Latin America"[284]. Therefore, it can be assumed that, at least, policies related to foreign investment in some countries in Latin America could influence by such momentum about investor-state arbitration.

2.4.2.2 Interpretation of International Investment Agreements

The arbitral tribunals are instrumental in forming international investment law through their interpretation of investment treaty provisions.[285] Regarding the sources of international investment law, article (38) of the Statute of the International Court of Justice states that the main sources of international law are international conventions, international custom and general principles and Judicial decisions.[286]

Following from this, the primary "building block"[287] of international investment law is the investment agreements.[288] Salacuse believes that these agreements are largely "contributing to the creation of an international investment framework…."[289]. However, these agreements,

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[281] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 41
[282] Haftel and Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' 30
[283] Ibid 30-31
[284] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 402
[285] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 72*
[286] Statute of the International Court of Justice 1945
[287] Salacuse, *The law of investment treaties 6*
[288] Collins, *An introduction to international investment law 28*; Haftel and Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' 26;Dolzer and Schreuer, *Principles of international investment law 28*
[289] Salacuse, *The law of investment treaties 138*

in case of investment disputes between investors and host states, need to be enforced, and the appropriate contemporary legal manner to do so is through the means of investor-state arbitration. Therefore, investor-state arbitration could impact on international investment law when applied it to resolve the disputes through exercise of an interpretative function, because the terms of some treaties are ambiguous.[290] This factor has significant consequence. Although the interpretation of investment treaty provisions is conducted in accordance with an international legal framework-the Vienna Convention on the Law of Treaties-some countries refuse to accept interpretations provided by arbitral tribunals, particularly when they appear to be against the respondent state. This may prompt those countries to revise their treaties in order to avoid any undesirable interpretations by arbitral tribunals.

Furthermore, Subedi suggests that some arbitral tribunals do not consider "the host state's right to regulate" when interpreting investment treaties.[291] Moreover, decisions of arbitrators related to interpretation cannot be challenged.[292] Thus, this situation has resulted in some countries renegotiating their international agreements related to foreign investment, in order to avoid any interpretation's outcome that were not intended by them. In this regard, Subedi argues that the role of arbitrators is supposed to be "confined to interpreting and declaring the law rather than making or rewriting it" and he believes that the absence of an agreed international convention codifying the issues of foreign investment has led to this interpretation dilemma.[293]

Therefore, it can be argued that the actual reason for the debate about the way that investment agreements' content is application or interpretation not the principle of investor-state arbitration itself. It seems that the real reason is "due to the typically large indeterminacy of international investment agreements" and the absence of agreed international instrument that regulates the field of international investment.[294] Therefore, the focus should be on the creation of a binding international integrated system to regulate international foreign investment aspects including investor-state arbitration. In addition, investment agreements written in a clear language could contribute to limit the interpretation

[290] Subedi, *International investment law : reconciling policy and principle 14*; Salacuse, *The law of investment treaties 139*
[291] Subedi, *International investment law : reconciling policy and principle 9*
[292] Ibid 14
[293] Ibid 167
[294] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 756

process.[295] Hopefully, such solutions are just some of the objectives that would provide guidance to the investor-state system and facilitate its adjudicatory function.[296]

2.4.2.3 Case law of Investor-state Arbitration

Even though arbitral awards have been criticised for their inconsistency, Sornarajah believes that arbitral awards "provide evidence of possible norms which could be used for the construction of norms of international law"[297]. Investor- state arbitration awards contribute to the creation of a body of case law which can be considered as complementary aspect of investment law as it tackles potentially difficult issues.[298] Despite the fact that there is no system of a binding precedent in the area of investment arbitration , parties and arbitrators frequently use the previous arbitral decisions in subsequent cases.[299] For instance, the arbitral award in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* that has assigned the criteria[300] to be used for the definition of an investment is widely referenced in subsequent arbitral awards in the process of deciding the dispute, whether the dispute at the hand related to investment transaction or not.[301] Moreover, the principles arising from case law of investment arbitration could act as guideline for some countries in the area of investment agreements.[302] The principles established in these cases can be taken into account when drafting new agreements or when renegotiation existing agreements takes place, and it is therefore possible to avoid undesirable consequences in potential future disputes.[303] Ultimately, such a process would contribute to and have benefits for the re-constitution of international investment law.

This brief analysis has demonstrated that there are various avenues through which investor-state arbitration could affect international investment law, and one can argue that to large extent there is correlation between investor-state arbitration and international investment law. On the one hand, international investment law is the main source for investor-state

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[295] Ibid 765
[296] Subedi, *International investment law : reconciling policy and principle 246*
[297] Sornarajah, *The international law on foreign investment 87*
[298] Collins, *An introduction to international investment law 30*
[299] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 12; Dolzer and Schreuer, *Principles of international investment law 19*
[300] About these criteria see section 2.3.4
[301] Monebhurrun, 'The (mis)use of development in international investment law: understanding the jurist's limits to work with development issues' 458
[302] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 13
[303] Brower and Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 475

arbitration. There are many investment treaties and free trade agreements contained investor-state arbitration as mechanism for the investment disputes settlement. [304] For instance, both NAFTA[305] and Energy Charter treaty (1994)[306] provide for investor-state arbitration as means to resolve any prospective investment dispute between investors from any contracting parties and other contracting parties.[307] In the same context, the ICSID Convention is devoted to resolving investor-state disputes. This Convention provides a procedural means for protection of the foreign investment and can been seen as an appropriate vehicle for building a substantive principle of investment protection and, therefore, for promoting investment arbitration system.[308]

It is equally fair to say that in return, the investor-state arbitration plays a crucial role in developing international investment law through the application and interpretation provisions of investment treaties.[309] Arbitral turbinals do these two functions to set the scope of its jurisdiction or even to decide the disputes.[310]

However, on the other hand, investor-state arbitration has caused a backlash against international investment law. This system has caused controversy within the ambit of investment law, as it has attracted criticism.[311] Some of the reasons behind this criticism are inconsistencies in arbitral awards, lack of impartiality of arbitrators and lack appellate mechanism to review arbitral awards.[312] Moreover, it is believed that the investor-state arbitration system is undermining a country's capacity to regulate its public interests.[313] As many countries see investor-state arbitration as vehicle use to deprive them of the practice of domestic regulatory powers. The criticism of investor-state arbitration in general and its negative effect on state's regulatory powers in particular will be investigated in greater detail latter the coming chapters.

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[304] Sornarajah, *The international law on foreign investment 305*
[305] North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA).This agreement has been replaced by new one in 1 Jouly 2020
[306] Energy Charter treaty (1994) , this Charter provides framwork for energy cooperation between group of countries , for more information see : https://www.energy charter.oge
[307] Sornarajah, *The international law on foreign investment 80*
[308] Ibid 80,87
[309] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 4
[310] Sornarajah, *The international law on foreign investment 277*
[311] Subedi, *International investment law : reconciling policy and principle 9*; Brower and Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 4
[312] Subedi, *International investment law : reconciling policy and principle 9*
[313] Alschner, 'The impact of investment arbitration on investment treaty design: myth versus reality' 7

It may be argued that in order to comprehend the ramifications and repercussions of any system, it must first be implemented. Its use would result in a comprehensive comprehension of its ramifications and results. Possibly, the identical idea applies to investor-state arbitration. The results of this system have allowed for a comprehensive comprehension of its consequences for contracting parties to investment agreements and disputing parties to investor-state arbitration. Consequently, the 'unknown factors' relevant to investor-state arbitration have resulted in amendments to some investment agreements already in force in order to take account of some of the latest outcomes; and in order to reflect new developments and trends created through investor-state arbitration system. As in any legal national system, the interplay between judiciary and legislature inevitably lead to such consequence. When the legislature chooses to amend the law, such amendments often reflect the prevailing jurisprudence determined by judiciary.[314]

Therefore, it can be said that investor-state arbitration can be considered, in addition to its specific adjudication role, as tool to develop and improve the international investment law.

[314] Brower and Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 496

Chapter 3 Analytical Overview on National Legal Framework on Investor-state Arbitration in Oman

> "We will direct the government, with all its sectors, to implement a more efficient system of management which places, on top of its priorities, financial balance, economic diversification, the sustainability of the national economy, besides developing all relevant laws and regulations ..."[315]

Firstly, it is important to state that in any country, laws, and policy in relation to investor-state arbitration are essential. Such laws and policy can be seen as a marketing strategy for a state which seek to persuade foreign investors that it meets the necessary criteria in terms of protection foreign investments and therefore is a country worthy of selection by potential investors.

The broader contexts in which the system of investor-state arbitration exists clearly has an impact, therefore, an understanding of context will ease the process of analysis of component parts of investor-state arbitration system in Oman. Consequently, the first section will provide an overview on the sultanate of Oman with special reference to the political, economic, and judicial aspects.

Following section will carefully analyse the development of investment arbitration system in Oman. This analysis will be undertaken by exploring Oman's domestic framework on investment arbitration and will seek to provide a clear overview of the legal framework appertaining to investment arbitration in Oman and its contribution to attracting of direct foreign investment.

Finally, section three will provide briefly review on Oman Commercial Arbitration Centre as One of the national arrangements related to arbitration system.

3.1 Overview of the Sultanate of Oman

Any discussion appertaining to the legal framework of investment arbitration in Oman should being by understanding the contexts in which the framework is set. This understanding allows for a better and smoother analysis.

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[315] , 'His Majesty Sultan Haitham Bin Tarik's Royal Speech on 23.02.2020' (*Oman News Agancy (ONA),* 2020) <https://omannews.gov.om> accessed 09 December 2020

3.1.1 A glance at Historical Context

The Sultanate of Oman has long history and is situated within the Arab peninsula on the east coast of Indian ocean. It is one of the oldest states in the area. Archaeologically the first human presence in Oman dates back 5000 years.[316] The backbone of the Omani social system has been the 'tribe' which had played a remarkable role in the history of state.[317] However, to some extent this influence has started to disappear in favour of an 'institutional' system.[318]

Oman has participated in a variety of international and regional activities and is regarded as one of the region's most influential actors in terms of economics, politics, and security. One of the factors that play crucial role in the formation of Oman's civilised identity[319] and had qualified it to became one of the influential powers in the area, is a geographical location.[320] Oman is located in the northeast of the Arabian Peninsula, close to the sea routes of international trade. A long coastline helps it to be open to other cultures, civilizations and peoples in Asia and Africa in particular. Moreover, Oman was a key maritime power "with overseas dominions…"[321]. In addition, Oman's location facilitated it to conduct trade and exchange commercial interests with others and as such, the Sultanate became one of the prosperous trading and maritime centres in the Indian Ocean. Oman created long and strong ties with different powers such as India, China, Persia, and Mesopotamia.[322] This long history of interaction with other nations has led to Oman being described as a 'Cosmopolitan nation'.[323]

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[316] Abdullah Salim Hamed Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy', Hull : University of Hull, 2004. 2004) 111
[317] John Peterson, *Oman's insurgencies: the Sultanate's struggle for supremacy* (Saqi 2007) 21; Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 138; Marc Valeri, *Oman: politics and society in the Qaboos state* (C. Hurst in association with CERI/Sciences PO 2009) 13
[318] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 139
[319] Jeremy Jones and Nicholas Peter Ridout, *Oman, culture and diplomacy* (Edinburgh University Press 2012) 19
[320] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 147
[321] Francis Owtram, *A Modern history of Oman: formation of the state since 1920* (I B Tauris 2004) 203
[322] Ahmed Sulaiman Saleh Al-Maimani, 'An institutional development policy framework for growth in the non-hydrocarbon sectors of Oman : a systems approach', [Great Britain] : University of Hull, 2015. 2015) 325
[323] Jones and Ridout, *Oman, culture and diplomacy 19*

By 1832 the Sultan of Oman moved his court to Zanzibar extending Oman's control over the East African littoral including Zanzibar.[324] However, before this move Oman had been progressively developing a stronger commercial and political presence in that area,[325] and Subsequently, it controlled a massive area which covered the "whole north-western edge of the Indian Ocean from north Mozambique to Cape Guardafui, including ports of access to central Africa, from Dhofar to the Trucial Cost, and from Bander Abbas to Baluchistan"[326] .

Oman signed a treaty of friendship and commerce with some of the great powers, for example, Oman signed treaties of friendship and commerce with British (the English East India Company) in 1646 [327] and with the United States in 1833.[328] These historical facts provided another strand in respect to Oman's influential role in the Indian Ocean and East Africa and its geographical advantages.[329]

Generally speaking, it could be said that Oman's unique maritime location has played a fundamental role in the formation of its commercial, political and cultural relationship.

However, despite this a rich history Oman remained 'backward' particularly in social, political, and economic aspects up to the 1970s,[330] the year which mark transformative moment in the modern history of Oman.[331]

For the purpose of this thesis, and to avoid any irrelevant historical contexts, this section will focus on recent Omani history from 1970 to the present. This period witnessed critical changes and substantial developments in all aspects of life and politics. This was due to a strong desire that Oman adapt to a modern and a changing world by adopt a balanced approach.

The first daunting task was to secure internal unity among all parts of Omani society, and in order to do so, the late Sultan, Qaboos bin Said Al Said, decided to involve different Omani parties, or influencers, and representatives of Omani regions, in the government. The ministry

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[324] Peterson, *Oman's insurgencies: the Sultanate's struggle for supremacy 21*
[325] Jones and Ridout, *Oman, culture and diplomacy 111*; Owtram, *A Modern history of Oman: formation of the state since 1920 44-45*; Gamal Hussein, *Oman - The Islamic Democratic Tradition* (2006) 105
[326] Valeri, *Oman: politics and society in the Qaboos state 18*
[327] The second important treaty between Oman and the English East India Compony was signed in 1798 See Owtram, *A Modern history of Oman: formation of the state since 1920 34-35*
[328] , 'History ' (*Foreign Ministry of Oman* 2021) <https://fm.gov.om/about-oman/state/history/> accessed 07 April 2021
[329] Valeri, *Oman: politics and society in the Qaboos state 18*
[330] See Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 12; Valeri, *Oman: politics and society in the Qaboos state 3*
[331] See Alastair Hirst, 'Contemporary Mercantile Jurisdiction in Oman' (1992) 7 Arab LQ 3

council (cabinet) was drawn from members of the royal family, the commercial class, and tribal allies. This was in order to guarantee stability and to prevent any a possible internal opposition. It was also believed that this move would give a positive impression to the international community and give an indication of the direction the new Sultan wished to take.[332] Moreover, and in order to bring about a united Sultanate, Sultan Qaboos had to end the rebellion in South of Oman. This conflict had started in the 1960's during the reign of the previous Sultan, but, and largely due to the measures implemented by Sultan Qaboos, by 1975 the communist uprising in the South had been defeated.[333]

With the end of the problems in the South of Oman, the country began to focus on development issues and building the administrative institutions of state, and the government structure into a modern state.[334] The Law of Organization of State Administration was published in 1975 and defined the structure and mission of the state institutions.[335] The first five-year development plan (1976-1980) was issued, and areas such as infrastructure, public services health and education received much attention. This forward-looking movement was accompanied by the use of natural resources such oil and gas, a matter which will receive more attention later. The Oil and Gas sector received a vast amount of foreign investment for two main reasons. Firstly, Oman was not able by itself, to develop this vital sector. Secondly, Oman was in urgent need of an income from this sector in order to start its overall development strategy.[336]

Internationally, Sultan Qaboos strived to break with the age-old isolation of his country.[337] This effort led to get Oman engaged in various international, regional, and bilateral relationships.[338] Moreover, Oman began to attract foreign Investment particularly in the field of natural resources.[339]

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[332] See Calvin H. Allen and W. Lynn Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996* (Frank Cass 2000) 34-43; Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 14

[333] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 137; Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 47*

[334] Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 47*

[335] Ibid 39 .This law has replaced with new system (royal decree No 75/2020)

[336] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 150-155

[337] Valeri, *Oman: politics and society in the Qaboos state 3*; Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 181*

[338] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 14

[339] Ibid 201

Today, Oman enjoys security and political stability and maintains good and friendly relationships with almost all countries around the world.[340] This unique position has led Oman to achieve a score of "zero terrorism" for the eighth successive time in the Global Terrorism Index in the World 2020 which is carved from 163 countries according to *Institute for Economics and Peace*.[341] Also, Oman was ranked 68 out of 163 countries In the Global Peace Index 2020.[342] Given this and other factors Oman is a trusted peace partner and mediator with most International parties and the United Nations.[343] For instance, recently Oman was a peace mediator between Iran and the west regarding Iranian nuclear program.[344]

Based upon these facts and the international indicators, it is fair to ask why Oman's strong international image, is not reflected positively on its share of foreign investment inflows? Arguably modern Oman should be a great beneficiary of its 'continuous'[345] and long commercial past together with its distinguished political ties around the world. It is fair to say that it is surprising given its status in the world, that the Sultanate does not attract more foreign investment through which its economic development and improvement could take place.

3.1.2 Political Structure

According to article 5 of the Basic Statute of Oman, which was promulgated by virtue of Royal Decrees No 6/2021 (the constitution)[346] The system of governance is Sultani.[347] Therefore, Oman is a constitutional monarchy. According to article 49 from Basic Statue, the Sultan is sovereign authority. Simultaneously, he discharges other two functions which are The Prime Minister and Ministry of Defence.

The Sultan is president of the Executive Authority as he Presides over the Council of Ministers (Cabinet). In accordance with royal decree No 111/2020 the council of Ministers consists of the

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[340] Hani Albasoos and Musallam Maashani, 'Oman's diplomacy strategy: Maneuvering tools to face regional challenges' (2020) 9 International Journal of Research in Business and Social Science 153
[341] , 'Global Peace Index2020' (*Institute for Economics and Peace* 2020) <https://www.economicsandpeace.org/research/> accessed 07 April 2021
[342] Ibid 07 April 2021
[343] Albasoos and Maashani, 'Oman's diplomacy strategy: Maneuvering tools to face regional challenges' 161
[344] Ibid 161
[345] Jones and Ridout, *Oman, culture and diplomacy 13*
[346] This new basic statute was promulgated to replace the first written basic statute in Oman by royal decree No 101/96.
[347] This term serves as an adjective for the name/position of Sultan, which means Royal

Sultan as Prime minister, his two Deputies and 24 Ministers.[348] The Council of Ministers responsible for implementation the general policies of state.[349] However, it is possible to create other bodies when necessary, to deal with specific issues and assist the government.[350] The Sultan could establish specialised bodies under the umbrella of the Council of Ministries by virtue of Royal Decrees unless their establishing Decrees state otherwise.[351] One clear example is the Tender Board.[352] This Board was established to handle government projects and requests for projects from civil services ministries and other government agencies. The core function of the Tender Board is to organize the government tendering process.[353]

According to chapter 6 of the Basic Statute concerning follow-up and control of government performance, there are two instruments use to fulfil this role. The first is a committee that is concerned with follow-up and assessment the performance of Ministers, Undersecretaries and other heads and members of boards of directors of the bodies and the public institutions and other units of the state's administrative apparatus, and their heads or chief executives. The second body reviewing government performance is Apparatus of Financial and Administrative Oversight (*State Audit Institution*). This body conduct an audit of the financial, legal and administrative performance of the state's administrative apparatus.[354]

When it comes to the Legislative body, it must be noted that in the past Oman had its own model of democracy [355] by which its culture, traditions and values were reflected.[356] In the beginning of modern Oman, 1975 saw the introduction of which call the Sultani tour as part of the concept of "open parliament or informal democracy". The late Sultan visited cities

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[348] Royal Decree 111/2020 Forming the Council of Ministers
[349] Articl 51 of The Basic Statute of the State 6/2021
[350] Under the administration of the late Sultan (Qaboos), one of these councils was the council of development, financial affairs, and economic planning. However, Allen and Rigsbee argued that the mandates of such councils frequently overlapped with those of other ministries. See Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 40*
[351] Aricle 63 of The Basic Statute of the State 6/2021
[352] Tander Law No 36/2008
[353] See 'Overview of Tender Board (the Tender Board -Sultanate of Oman) ' <https://etendering.tenderboard.gov.om/> accessed 11 May 2021
[354] See, 'State Audit Institution: Role and responsibilities' (*State Audit Institution-Sultanate of Oman,* <https://www.sai.gov.om> accessed 2 April 2021
[355] In Islam and Arabic world term of al-shura refers to democracy. It can be stated that the essence of both terms is same (engagement of public in the management of state) but the mechanisms, practises, dimensions and roots are different.
[356] Hussein, *Oman - The Islamic Democratic Tradition 3 and 7*; Valeri, *Oman: politics and society in the Qaboos state-50*

(wilayas) around Oman with ministers and officials to meet people, listen to their needs and was able to order the setting up of infrastructure projects.[357]

However, the modern practice of democracy in Oman has brought together Omani traditional ways and international modern ways.[358] This hybrid practice was represented in sequential stages.

An initial practice of representative participation in public affairs can be traced back to 1973. *A municipal Council* was formed in some cities and towns (*wilayas)* with appointed members.[359] However, the first serious initiative of engaging civil society to work with government at the national level was in 1979. This was through the foundation of *the Council of Agriculture, Fisheries and Industry*. This council's role was to give recommendation on defined topics and projects.[360] A second significant step came when the *State Consultative Council* was created in 1981 which also was composed of appointed members.[361] This council was tasked to give its views and advice on economic and social development issues. A third stage in the engagement of civil society in the decision-making process, regardless of the level of their participation, was in the creation of the of Al-Shura council (*Majlis al-Shura) in 1991.* The new consultative council was composed of appointed members, each member representing a city or town (*wilaya*). Later in 1994, the membership of this council was expanded to include more.[362] The major step was in 1996 in which the Council of Oman (*Majlis Oman)* - a parliament- was created consisting of two chambers.[363] Elections were introduced giving Omani people the opportunity to elect members directly to one of the chambers.

The Majlis Oman- Oman's Parliament- consists of two chambers.[364] The first chamber of the council of Oman is al-Shura council (*Majlis al-Shura).* All members of this chamber are directly elected by universal franchise. The second chamber is the Council of State (*Majlis al-Dawla*) which consists of members appointed by the Sultan. The structure is a loose reflection of the British Parliament with a directly elected House of Commons and an appointed House of Lords.

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[357] Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 47-48*; Valeri, *Oman: politics and society in the Qaboos state 174*
[358] Valeri, *Oman: politics and society in the Qaboos state 159*
[359] Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 46*
[360] Valeri, *Oman: politics and society in the Qaboos state 159*, Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 48*
[361] Valeri, *Oman: politics and society in the Qaboos state 160*
[362] See Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 48-58*
[363] Al-Harthy, 'The political change in Oman from 1970 : transition towards democracy 208-209
[364] For detailed information and deep analysis See Valeri, *Oman: politics and society in the Qaboos state-171*

By virtue of article 72 of the Basic Statute, the role of Council of Oman is to approve or amend Draft Laws, discussion of draft development plans and the Annual Budget of the State and propose draft laws.[365] However, the Sultan may promulgate Royal Decrees that have the force of law in two situations. The first, would be between the sessions of Majlis Oman, and the second would be while Council of Al Shura is dissolved, and the sessions of Council of State are suspended (article 73). Though, when it comes to reality, the Sultan overuses these two exceptions in a manner that undermine the Council of Oman's role. This situation could constitute a problem since it allows the Sultan to send no legislative acts to the Council and thus to issue contentious laws without adequately discussing them.[366] Since the Sultan can Promulgate laws, the competences of council of Oman (*Majlis Oman)* appears to be unclear.

In terms of the topic of this thesis, it can be argued that the contemporary working mechanisms of the legislative and executive authorities might affect the quality of the legal framework in Oman. This circumstance could be caused some concerns for the multinational companies as it could affect their business. Advanced and clear legislative approach will enhance the international image of Oman as investment destination and consequently would advance long-term investor trust.

3.1.3 The Judiciary (judicial bodies)

The main gate of justice and a principal pillar in any society is the judiciary. The Judiciary is the ultimate body to which adversaries would bring their disputes. In terms of arbitration, the judicial system is the most important factor for the success of arbitration in a society because it is the gateway for arbitration to join and thrive in every state.[367]

The Judicial authority in Oman is a guarantor of the rights and freedom of the citizens and residents alike, and of the supremacy of law. However, because the rule of law is critical to any state and bearing in mind that the theme of this thesis is investor-state arbitration, and the resulting arbitral awards would be enforced through the domestic courts, a brief survey of the

[365] The Basic Statute of the State 6/2021 which replaced the first wrriten Basic Statute in Oman that was promulgate in 1996

[366] Basmah Mubarak Al Kiyumi, 'The Omani Constitution: Critical Analysis', The University of Manchester, Manchester, UK 2012) 152; Hussain Sulaiman Alsalmi, 'Oman's Basic Statute and Human Rights: Protections and Restrictions: With a Focus on Nationality, Shura, and Freedom of Association', University of Manchester 2012) 81

[367] Al Tamimi & Company, *Enforcement of Foreign Arbitration Awards in the Middle East* (SyndiGate Media Inc 2014)

judicial system in Oman is essential with emphasis on the competent court that would deal with the investment arbitral awards.

The first organization of judiciary in Oman was in1920 when the government established the commercial and civil courts in Muscat.[368] Later, the judicial system was developed through successive stages until it reached its present contemporary shape.

The remarkable milestone in the modern Omani judicial and courts system occurred in 1999 when the judicial landscape was reshaped. The new law of Judicial Authority No 90/99 was issued under which the Omani Judiciary became unified under one umbrella.[369] Moreover, it represented a crucial step 'towards achieving the harmonisation of courts and defining their hierarchy and jurisdiction' [370]. According to this law, the judicial system in Oman consists of two types of courts each having a different jurisdiction. There are ordinary courts and specialised courts.

3.1.3.1 Common Court System (the ordinary courts)

According to article 77 of the Basic statue "The judiciary shall be independent, its authority shall be exercised by the courts in their different types and hierarchies, and their judgements shall be rendered in accordance with the Law". Based on this article and according to the Judicial Authority law 90/99 (which was amended by royal decree No. 14/2001) there is a common court system.[371]

Pursuant to article 8 of Judicial Authority law, Common Courts have comprehensive jurisdiction over different cases such as civil, commercial, criminal, administrative[372] cases, and arbitration requests. The only exception is circumstances where the law excludes a specific type of cases, and it is referred to another court with special jurisdiction rather than the

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[368] Zuwaina Al-maani, 'Oman's Judiciary System' <https://www.researchgate.net/publication/313920170_Oman's_Judiciary_System> accessed 9 April 2021; H Almahfudi, *The Criminal Justice System in the Sultanate of Oman* (2004) cited inSaif author Al-Rawahi, 'The right of access to a lawyer in Oman : the need for reform : critical and analytical study of the relevant provisions of the Omani Penal Procedures Code 1999', [Great Britain] : University of Aberdeen, 2012. 2012) 93

[369] , 'Oman: Recent Developments' (2000) 15 Arab law quarterly 112

[370] Ibid 112

[371] Judicial Authority law 90/99 which organizs common court system in Oman and states its jurisdiction

[372] Royal Decree 35/2022 regarding the Governance of the Administration of Judicial Affairs.This sort of case was previously within the jurisdiction of the administrative court as a specialised court, however as part of the reorganisation of Oman's judiciary affairs, this court was incorporated into the Common Courts System (i.e., as administrative circuit within the ordinary courts).

Common Courts. Thus, as a general rule the common courts have general jurisdiction over every type of dispute (including applications for arbitration) unless otherwise provided by law.[373] However, this system can be described as multi-level system as it includes three tiers of courts.[374]

At a lower level is the Court of First Instance which consist of one judge (single circuit) or three (triple circuit). This court is competent to rule in certain kinds of disputes such as patent, intellectual property, and insurance disputes.[375] The Court of First Instance in where disputes are initially filed and where which a preliminary verdict is issued.[376] Presently, there are 44 courts of First Instance throughout Oman.[377]

At a middle level there exists the Court of Appeal used as a second resort for disputing parties. The raison d'etre of this court is to review the decision of the Court of First Instance. However, parties cannot resort to this courts unless the value of lawsuit (which has ruled by first instance court) exceed specified amount of money as it is stated in article 36 of Civil and commercial procedures law. The Appeal Court is considered a way to remedy any mistakes in judgments made by the Court of First Instance.[378] Currently, there are 13 Courts of Appeal in the main Omani cities.[379]

At the pinnacle of the system is the Supreme Court. It is a single court based in Muscat. This court works as the final Court for all kinds of Courts within the judicial system. It is competent to rule on jurisdictional conflict between common courts and other specialized courts.[380] Furthermore, according to the Civil and Commercial Procedures law 29/2002 [381] and the Judicial Authority law 90/99 [382], the Supreme Court judicially has three main purposes. Firstly, to review any judgment that contradicts an earlier enforceable judgment between the same adversaries.[383] Secondly, adjudication of appeals filed before it against the appeal court's judgments if these judgments were based on a violation of the law or a mistake in its

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[373] Artical 8 of Judicial Authority law 90/99
[374] Inc The PRS Group, *Political Risk Yearbook: Oman Country Report*, 2020) 3; articl 1 of Judicial Authority law 90/99
[375] Article 36 of Civil and commercial procedures law 29/2002
[376] Al-maani, 'Oman's Judiciary System' 2
[377] , *Book of Oman 2020* (Ministry of Information in Oman 2020) 138
[378] Al-maani, 'Oman's Judiciary System' 2
[379] , *Book of Oman 2020 139*
[380] Articl 10 of Judicial Authority law 90/99
[381] Articles 239,240,241 of Civil and commercial procedures law 29/2002
[382] Artical 11 of Judicial Authority law 90/99
[383] , 'Oman: Recent Developments' 113

application or interpretation, or if there was annulment in the judgment or annulment in procedures resulted in affecting the judgments.[384] Lastly, it has a constitutional element as it is competent to rule on the extent to which laws and regulations comply with the Basic Law of the State and its provisions. Article 11 of the Judicial Authority law 90/99 states the mechanism for formulation the commission within the Supreme Court to conduct this competency. However, it is really disappointed that at the time of writing, this commission did not play its constitutional role and the reasons for this is still unclear.[385]

3.1.3.2 Specialized Courts (court with special jurisdiction)

Based on article 83 of the Basic Statute, the Military Court has jurisdiction over crimes committed by the members of the Omani armed and security forces. [386]

In addition to this specialised judicial body, there is a Public Prosecution Authority. According to Article 86 of the Basic Statute, Public Prosecution is a judicial body which investigates and pursues criminal cases on behalf of society.

The comprehensive umbrella for the judicial authority is High Judicial Council. Its role is stated in article 82 of the Basic statute and is to oversee the proper functioning of the judicial authority, to formulate the general policy of the Judiciary and to guarantee its independence and development. This Council is headed by His Majesty the Sultan.[387]

Theoretically, it can be claimed that the structure of judiciary in Oman is advanced insofar as its independence is guaranteed by the law and there is a consistency of the application and interpretation of the law.[388] Moreover, it provides a clear course of justice and thus ensures the protection of the rights and freedoms of citizens and residents. It is therefore fair to suppose that this sophisticated and contemporary approach to judicial adjudication serves to

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[384] , *Book of Oman 2020 136*

[385] Al-maani, 'Oman's Judiciary System' 4; Al Kiyumi, 'The Omani Constitution: Critical Analysis 147; Emilia Justyna Powell and Ilana Rothkopf, 'Constitutional Courts and Rule of Law in Islamic Law States: A Comparative Study', 72 <http://jcl-mena.org/assets/submissions/4.Constitutional-Courts-and-Rule-of-Law-in-Islamic-Law-States-Comparative-Study.pdf>

[386] the Military Judiciary Law 110/2011

[387] Article 1 of the Royal Decree 35/2022 regarding the Governance of the Administration of Judicial Affairs

[388] See 'Oman: Recent Developments' 113

offer potential safeguards to investors and to attract foreign investment in particular.[389] Nevertheless Russell has argued that

> a judiciary cannot be powerful unless it enjoys a high level of institutional independence, and its individual members are free from internal as well as external direction of their decision making. But the price to be paid for such power is close and continuous public scrutiny and contentious debate of what judges do as well as increasing demands that their selection, promotion, education, and discipline be subject to more open and representative processes.[390]

Hence, the judiciary in Oman needs more practical steps in order to enjoy a complete independence. It is thought that some of main factors that seem to constitute the judicial independence are not exist. The Sultan is head of High Judicial Council which is in charge of drafting general judicial policy.[391] In addition, the Sultan appoints judges and has the power to commute sentences or grant pardons.[392] Such situation, some way or another, would affect the autonomy of judiciary.

Further, there remains the issue of Constitutional Court to ensure that laws and regulations comply with the Basic Law of the State and its provisions. The other possibility in this regard is to activate a constitutional function of a Commission within Supreme Court as noted in article 10 of Judicial Authority law 90/99. A constitutional Court or similar body would guarantee the protection of rights and freedoms established in Basic law and enforce the concept of the rule of law.[393] Moreover, as the Sultan is the prime minster and head of High Judicial Council he has legislative authority, a situation which may lead to concerns regarding the separation between powers. It may well be that there is no evidence that supports potential overlap or

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[389] Ibid 114

[390] Peter H. Russell, 'Judicial Independence in Comparative Perspective ' in Russell Peter H and David M.O'Brien (eds), *Judicial Independence in the Age of Democracy : critical perspectives from around the world* (the Universty Press of Virginia 2001) 307

[391] Alsalmi, 'Oman's Basic Statute and Human Rights: Protections and Restrictions: With a Focus on Nationality, Shura, and Freedom of Association 82

[392] See *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 12 May 2021*

[393] Al Kiyumi, 'The Omani Constitution: Critical Analysis 117,118

influence,[394] nevertheless the principle of the rule of law and the separation of powers must been seen to be the rule rather than the exception within the Sultanate.[395]

The real question is whether such reforms and minor disputes over procedure could affect foreign investment in Oman positively. In general, it is reasonable to suppose that such reforms would strengthen the legal environment in Oman in a way which complies with international standards and avoids negative publicity. This in itself may go some way to meeting potential investors expectations. In line with this philosophy, Subedi believes that integrated and transparent national legal system which complies with international legal standards would decrease the likelihood that the home state to be exposed to international investment arbitration.[396] In particular, regarding the system of investor-state, it can be argued that any potential foreign investors want to make sure that generally Omani legal system is up to international standers. Thus, they would be assured that any related issues to potential investor-state disputes would go smoothly through a reliable legal system.

A competent Court in Oman that foreign investors should head to in order to get support regarding to investor-state arbitration issues would be survey in next section.

3.1.3.3 Court has Jurisdiction over International Investment Arbitration

Generally speaking, similar to other countries in Middle East and North of Africa, the issues of international investment arbitration in Oman are governed by provisions contained in various sources. These sources consist of the domestic legal framework, regional treaties, and international instruments.[397] One example of regional treaty is the Riyadh Convention on Judicial Cooperation between States of the Arab League 1983. The main international instruments related to arbitration are The New York Convention on the Recognition and

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[394] , 'Arab Political Systems: Baseline Information and Reforms – Oman 2008' (*Carnegie Endowment,* 2008) 6 <www.carnegieendowment.org/arabpoliticalsystems> accessed 14 April 2021; , *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 14 Aprial 2021*

[395] , *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 12*Rashid H. S. Al Junaibi, 'Comparative Study Between the Omani and the British Legal Systems in Terms of Judicial Independence and Separation of Powers' (2020) 6 European Journal of Interdisciplinary Studies 59

[396] Subedi, *International investment law : reconciling policy and principle 267,268*

[397] Gordon Blanke and Soraya Corm-Bakhos, 'The enforcement of international commercial and investment arbitration awards in the MENA region' (2017) 83 Arbitration (London, England) 2

Enforcement of Foreign Arbitral Awards 1958 and the ICSID Convention by which International Centre for the Settlement of Investment Disputes (ICSID) was established.

In Oman specified courts have jurisdiction over arbitration matters that entail judicial intervention irrespective of the type of arbitration, whether domestic or international and irrespective of the international convention that applies whether the New York or ICSID convention.[398] Therefore, determination of competent court to enforcement of investment arbitral awards requires some thought.

Most of the general arbitration matters that necessitate judicial intervention rely on article 9 of Law of Arbitration in Civil and Commercial Disputes No.47/97 which stipulates

> The court originally having jurisdiction according to the Law of the Judiciary shall be competent to settle all arbitration matters referred by this Law to the Omani judiciary. In international commercial arbitration, whether held in Oman or abroad, the Muscat Court of Appeals shall have jurisdiction in this respect.

Following from this article, it is clear that Omani legislator distinguish between domestic arbitration and international arbitration which parties to it have agreed to submit themselves to the jurisdiction of the provisions of this Law. While in cases of domestic arbitration the competent court is the court originally having jurisdiction according to the Law of the Judiciary 90/99. Therefore, the competent court dealing with matters of arbitration is the Court of First Instance which has jurisdiction over the disputes (subject-matter of arbitration) in the absence of an arbitration agreement. On the other hand, if the arbitration dispute is international[399] than the Muscat Court of Appeals would be competent to issues of such arbitration whether held in Oman or abroad. It is believed that Omani law gives the Court of Appeal jurisdiction over international arbitration largely because the Court of Appeal is said to have more experience in these matters.[400] Moreover, international arbitration needs special treatment because of its significance to the Omani economy.[401]

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[398] Nathalie Najjar, *Arbitration and international trade in the Arab countries*, vol 13 (Brill Nijhoff 2018) 1008 and 1012

[399] The Four criterions under which the arbitration can be considered international accordance to Omani arbitration Law 47/97 are set out in article 3 of this law.

[400] Amel Kamel Abdallah, 'Arbitration in Oman' in Gordon Blanke (ed), *Arbitration in the MENA* (1st edn, JURIS 2016) 13; Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 192

[401] Abdallah, 'Arbitration in Oman' 14

However, in respect to a suit to annul arbitral award filed by a losing party the Muscat Court of Appeal would have jurisdiction as to whether the arbitration was domestic or international.[402] Whilst, the enforcement applications for an arbitral awards are submitted to President of the competent Court of First Instance or any of the judges appointed by him whether the arbitration is domestic or international.[403] However, if this application is rejected, then the refusal order can be appealed before the originally competent court in case of domestic arbitration or before Muscat Court Appeal in cases of international arbitration.[404]

Above analysis is about the domestic arbitration or international arbitration which chooses to the Omani law of arbitration to be applied whether conduct inside or outside of Oman.

However, there is a further issue concerning a foreign arbitral award which parties wish to enforce in Oman under international treaties namely ICSID or New York convention, and the question of which court would enjoy the competence to hear such issue? Further to articles 352 and 353 of Civil and commercial procedures law 29/2002, the request for recognition and enforcement of foreign arbitral awards should be made to the Court of First Instance (triple circuit) in the area where the award is to be enforced . However, since these procedures require the treatment of foreign arbitral awards like foreign judicial decisions, this would mean that foreign arbitral awards would subject to lengthy and unnecessary procedures.[405] In fact, parties recourse to the arbitration system in order to avoid such a situation when they could face complicated processes, and therefore the foreign arbitral awards should be easier to enforce than a foreign court verdict. Later in this chapter, this topic will be examined in greater depth.

Overall, previous survey has showed that in respect to enforcement of arbitral awards , Omani law distinguishes between internatinal arbitral awards which are conducted under Omani arbitration law, and foreign arbitral awards issued in foreign country and under the auspices of foreign law.While the enforcement request of international arbitral awards must be submitted to the Muscat Court Appeal, the enforcment of foreign arbitral award must be submitted to the Court of First Instance(triple circuit). Moreover, enforcment of international arbitral award is subject to provisons of the Arbitration Law in civil and commercial Disputes

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[402] Article 54/2 of Omani arbitration law 47/97.
[403] Article 56 of Omani arbitration law 47/97.
[404] Article 58/3 of Omani arbitration law 47/97
[405] Brower Charles N and Sharpe Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 American Journal of International Law 649

47/97. Nevertheless, procedures for enforcement of foreign arbitral awards is contained in the Code of Civil and Commercial Procedures 29/2002.

Therefore, it is fair to state that there is a need to pay more attention to this issue as a potential area for reform. However, for now, it is sufficient to say that such differentiation has no clear justification and would not serve the goal of facilitating or promoting the legal environment for arbitration in Oman. This is due to the fact that legal framework for the enforcement of arbitrale awards seems unduly complicated and might create additional burdens for the wining party. Therefore, from a practical point of view, it seems that in interest of a clear policy on arbitrtaion, all provisions govern recognition and enforcement of all types of arbitral awards should take place under arbitration law.[406] This suggestion is made for two reasons; there is no logical rational for such differentiation between domestic, international, and foreign arbitral awards, and in all cases foreign arbitral awards should subject to New York convention or ICSID convention which Oman is a party to and therefore should not be goverend by the Code of Civil and Commercial Procedures 29/2002 as to the foreign sentences .

Also, in order to tackle these complications , a central judicial body should be establised to deal with the matters of domestic , international and foreign arbitration in Oman. As alternative, a specialised court with trained judges could be establised to deal with these issues. Such steps would have benificial consequences in Oman by speeding up and supporting the arbitration process and boosting the reputation of Oman as arbitration-friendly country. The "…. experience has shown that assigning all major cases involving inter- national arbitration to a single court can foster the development of greater expertise and help ensure a reciprocally supportive relationship between national courts and international arbitral tribunals".[407] For example, in Hong Kong, a request to enforce or revoke an international arbitration award is sent to the judge responsible for the " Constructors and Arbitration list ".[408] Secondly, such step could lead to the establishment of consistency of case law which

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[406] Mary B. Ayad, 'Towards a Truly Harmonised International Commercial and Investment Arbitration Law Code (HICIALC): Enforcing MENA-Foreign Investor Arbitrations via a Single Regulatory Framework: A New Map for a New Landscape' (2010) 7 Macquarie J Bus L 285. For example some Arabic laws have adopted one a set of rules to govern recognition and enforcement of both international and foreign arbitral awards rather than subjet them to the same rules relating to the foreign judgments, see Najjar, *Arbitration and international trade in the Arab countries 1175-1195*

[407] Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 649

[408] See Neil Kaplan, 'Arbitration in Asia Developments and Crises' (2002) 19 Journal of international arbitration 163,166cited in Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 649

would provide a clear vision for both arbitration practitioners and judges regardin arbitration issues . Thirdly, this creative development would reduce the burden on the judiciary as more disputing parties would prefare to seek a settlement through the arbitrtaion which would be conducted under the support from specialized court . Fourthly, the role of this suggested court would complement and enhance the role of the Oman Commercial Arbitration Centre [409] as there would be central specialized judicial body to provide support for the centre whenever the need arises.

3.1.4 Economic System

With reference to article 14 of the Basic Statute, one of the remarkable economic principles guiding the policy of the State in the economic field is its encouragement of potential investment and its works toward providing the necessary guarantees and facilities in this regard. Arising from this principle, it can be understood that one of the pillars of the Omani economy is investment.

In same regard, the Oman Vision 2040 has pointed out that one of the key national priorities and objectives over the next 20 years is to attract more high-quality foreign direct investment to contribute to national economic development.[410] Such a priority should constitute guide for improvement of a national legal framework which is fundamental to ensure the flow and protection of foreign investments in the Sultanate. Part of this improved legal climate is investment arbitration which represents a principal international legal means of protecting foreign capital and to boost its role in the development of a global economy.

Therefore, as foreign investment is associated with the national economy, it is important to highlight the structure of Oman's economy and its share of global foreign investment inflows.

The economic and developmental aspect in Oman is based on a series of five-year plans.[411] The first five-year plan was adopted by the government in 1976. By 1996 government adopted a national vision as a long-term national action plan (Oman Vision2020 and later Oman Vision

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[409] Royal Decree No. 26/2018 on Establishing Oman Commercial Arbitration Centre

[410] , *Oman Vision 2040 - Vision Decument 35*

[411] Tahir Al Kindi, 'Economic development and reform of skill formation in relation to VET : the case of Sultanate of Oman', [Great Britain] : Cardiff University, 2007. 2007) 75; Al-Maimani, 'An institutional development policy framework for growth in the non-hydrocarbon sectors of Oman : a systems approach 16

2040). The soul of these two visions is economic diversification and one of the fundamental instruments to diversify the economy is foreign investment.[412]

The major source of national income is Oil and the Gas (hydrocarbon sector).[413] The Central Bank of Oman's Annual Report for the year2019 indicated that the oil and gas revenues accounted about 76.2 percent of the total government's revenues in 2019.[414] The rest of the revenues come from non-hydrocarbon sector which included sub-sectors such as transport and logistics fisheries, agriculture, mining & quarrying, manufacturing and tourism.[415] From this it can be supposed that economy in Oman will be at the mercy of oil prices fluctuations.[416] Indeed, Oman faces mounting economic pressure due to the decrees in international oil prices . Simultaneously, this situation has led to an increase in public debt which is projected to reach USD 56.37 billion by the end of 2021.[417]

Oman's economy is a free market-based economy.[418] The currency can be transferred freely. Moreover, the government introduced and improved some relevant laws in order to ensure a free market such as "protecting competition and preventing monopoly law" which was enacted for first time in 2014. In addition, the government has initiated some laws to encourage and to facilities foreign investment and to provide incentives and guarantees for investors.[419] A clear example of such laws is the Foreign Capital Investment Law 50/2019 which allow for 100% foreign ownership.[420]

In the same regard, Oman's Government has established strategic Free Zones with sophisticated and integrated infrastructures and services such Special Economic Zone at Duqm and Free Zones at Salalah and Sohar.[421] These Zones are linked with ports around the country which are considered among the most developed ports in the region and they are connected

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[412] , *Oman Vision 2040 - Vision Decument 17*
[413] Philipp Eudelle and Ashin Shrestha, 'Foreign Direct Investment and Economic Growth: The Cases of Singapore and Oman' (2017) 8 Global policy 402
[414] , *The Annual Report of the Cntral Bank of Oman (CBO)*, 2019) 29
[415] Ibid 19
[416] See Yahya Rabia Nasser Al-Nahdi, 'Barriers to Omanisation : analysis and policy recommendations', [Great Britain] : University of Huddersfield, 2016. 2016) 51
[417] , 'A Guide to State's General Budget for Fiscal Year 2021 .Oman ' (*Ministry of Finance* 2020) 14 <https://mof.gov.om/Portals/1/documents/Financial-reports/The-state-budget/2021/2021(Eng).pdf> accessed 25 April 2021
[418] Al-Nahdi, 'Barriers to Omanisation : analysis and policy recommendations 51
[419] , *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 19*; , *World Investment Report 2020 (UNCTAD)*) 100
[420] , *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 21*
[421] , *Book of Oman 2020 336*

with 86 ports in 40 countries.[422] The road network in Oman reached 40.000 kms by the end of 2019.[423] This infrastructure together with advanced legal framework is key for Oman to become a favourite and attractive destination for global foreign capital.

In respect to foreign direct investment in Oman, the World Investment Report 2020 which is issued by United Nations Conference on Trade and Development (UNCTAD), has indicted that total foreign direct investment inflows to Oman in 2019 reached USD 3125 billion.[424] Whereas, the data from National Centre for Statistics and Information (NCSI) demonstrated that the total volume of foreign direct investment in Oman for the third quarter of 2020 crossed USD 38 billion. The main share of foreign direct investment in Oman come from the United Kingdom as its investments touched USD 20 billion. [425]

From this analysis it can be seen that the decreased in oil prices and its fluctuations is the main motivation for Oman to seek to adopted policies that aim at attracting foreign investment. These policies will ultimately contribute to diversification in sources of national income and not just relay on the energy sector.[426] Therefore, one of the remarkable drivers of economic diversification is a foreign capital. However, it is more likely that foreign capital will be attracted if the concerned legal framework is reviewed and improved. In particular, the investor-state arbitration system in Oman needs to be reviewed and looked at with the likelihood of improvement and there should be an exploration of alternatives in this regard. Undeniably, other efforts in other aspects, such as infrastructure, facilities and foreign investment incentives are not less important, but the legal framework is still the key element of attractive investment environment in any country that would attract interest of foreign direct investment and create a first positive impression about that country.

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[422] , *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html 8*; , 'Oman -Country Commercial Guides - Transportation & Logistics' (*the International Trade Administration-US,* <https://www.trade.gov/country-commercial-guides/oman-transportation-logistics> accessed 23 April 2021

[423] , 'Quantum leap in transport infrastructure' *Oman daily Observer* (Oman <https://www.omanobserver.om/quantum-leap-in-transport-infrastructure/> 23 April 2021

[424] , *World Investment Report 2020 (UNCTAD) 240*

[425] , 'Investment Volume - Foreign Direct Investment (FDI) in Oman ' (*the National Centre for Statistics and Information (NCSI) Oman* <https://www.ncsi.gov.om/> accessed 23 April 2021

[426] Issa Al Shabibi 'Planning for entrepreneurialism in a rentier state economy : entrepreneurship education for economic diversification in Oman', [Great Britain] : Cardiff University, 2020. 2020) 42-43

3.2 The National Legal Framework Governing Investor-state Arbitration

To establish a clear and comprehensive overview of the Oman national framework on investor-state arbitration, this section will examine two areas; the first is a general analysis of the nature of the legal system in Oman and the second more specific analysis concerns the legal provisions applied to investor-state arbitration.

3.2.1 Analysis of Oman Legal Regime (nature and sources)

Understanding any legal system requires understanding of its broader context, in other words the national legal regime within which it functions. Therefore, examining the Omani legal framework on investor-state arbitration entails a concise analysis of the Omani legal regime with a particular focus on closely related matter regarding the arbitration system in the Middle East region of which Oman is a part.

Sharia is the main basis for the laws in Oman as the case in the rest of Gulf Cooperation Council states and most of other Muslim countries around the world.[427] According to article 2 of the Basic Statute, Islamic Sharia is the basis for legislation.[428] Thus, and by virtue of this article, legislation in Oman must be based on the Sharia Law. However, in the reality, the situation is different; Oman has adopted laws contrary to Sharia as required by modern global transaction. This is particularly true of the business and investment sector. For instance, article 80 commercial law 55/1990 allows for interest in the banking sector, although accruing interest is contrary to Islamic law.

It could be interpreted that this contradiction is evidence of the process of balancing -within the legal system- the issues of Oman national identity whose main component is the religion of Islam, with the requirements of modern life. Ibrahim argues that as a matter of course, many Arab states have included similar clauses (Sharia is the basis for legislation) in their constitutions as a way of secular states dealing with their Islamic roots without upsetting the

[427] Mutasim Ahmad Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' (2017) 20 Journal of legal, ethical and regulatory issues 15

[428] The following section will try to explore the term of Sharia in more detail.

public.[429] In Oman the case is same , given that the centrality of Islam in Omanis' lives, no constitution would have been approved if it did not locate itself within an Islamic context and acknowledge Islam as a vital component of Omani society.[430] Siegfried suggests that the word (basis) rather than (source) is used in the Omani Basic Law for Sharia's function in further legislation.[431] Therefore, according to this interpretation, the legislature would emphasize Islamic identity in the laws that directly deal with social and cultural aspects of Omani life. At the same time, the legislature would be able to adopt a piece of legislation that 'accords' with modern global trends, particularly in the economic and trade field.

Hill in his analysis of the Commercial legal system of the Sultanate illustrated that Oman has three fundamental parallel and interconnected origins of law. The fundamental source is Islamic law, the second is statuary systems of law which are expressed in Royal Decrees and Ministerial decisions, and the third is private international law as applied to Commercial and financial matters.[432]

Thus, it is possible to say that Oman adopts a Mixed legal system.[433] Islamic law governs personal matters such as marriage, divorce and inheritance. Simultaneously, Oman has relied on other legal global standers to generate secular laws, particularly in the economic and trade aspects.[434] As a result of globalization[435] and interdependence of world interests, in the recent past and currently Oman , as other GCC states, is influenced by different prevailing International western legal traditions, namely, civil and common law.[436] These legal traditions have found their way to the Omani legal system through two routes : the historical interaction

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[429] Ibrahim Abu Lughod, 'Retreat from the secular path?: Islamic dilemmas of Arab politics' (1966) 28 The review of politics 469,470

[430] Al Kiyumi, 'The Omani Constitution: Critical Analysis 107

[431] Nikolaus Siegfried, 'Legislation and Legitimation in Oman : The Basic Law ' (2000) 7 Islamic law and society 373

[432] Thomas W. Hill, 'The Commercial Legal System of the Sultanate of Oman' (1983) 17 The International lawyer 507

[433] Junaibi, 'Comparative Study Between the Omani and the British Legal Systems in Terms of Judicial Independence and Separation of Powers' 59; , 'Investment Climate Statements: Oman' (*The U.S Department of State* 2021) <https://www.state.gov/reports/2021-investment-climate-statements/oman/> accessed 29 September 2021

[434] Siegfried, 'Legislation and Legitimation in Oman : The Basic Law ' 360

[435] Junaibi, 'Comparative Study Between the Omani and the British Legal Systems in Terms of Judicial Independence and Separation of Powers' 62

[436] Leon G. R. Spoliansky, 'Modern Business Law in the Sultanate of Oman' (1979) 13 The International lawyer 101; Thomas E. Valentine, 'How are GCC legal systems viewed by Canadian courts?' (*Norton Rose Fulbright,* June 2017) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/5351f04e/how-are-gcc-legal-systems-viewed-by-canadian-courts> accessed 1 June 2021

between Oman, Britain and France on the one hand [437], and through the internal modernization process of Omani laws.[438] Ismail suggests that Egypt was greatly influenced by French legal culture as it relied on the French Napoleonic Code to codify its civil law. As a result, the civil law tradition was shared by Egypt to most Arabic countries, which codified their laws in accordance with the Egyptian experience.[439]

Hill has suggested that common law has influenced the Omani legal system, as seen in the banking sector practices. He stated that the common law "...is implicit in the practices of the banking community which has resort to Common Law principles in equity but augments them with a more comprehensive set of guidelines and procedures".[440] Nevertheless, it is noteworthy that even though the Oman national legal system has partially been influenced by common law tradition [441], Oman has civil law jurisdiction which clearly apparent from its court practices. Thus, it should be noted that legal precedents are not a formal source for the rules, rather they provide valuable evidence for potential judicial interpretation and practice once they are in place.[442] These are facts which can be taken into account by foreign investors who wish to establish or operate investment projects in Oman. To put it another way, potential investors should not totally rely on the precedents in the Omani legal system to understand the legal framework related to investor-state arbitration.

The modernization and codification of laws in Oman was started with the advent of the Oman modern renaissance in 1970. From early on, Oman realized that to catch up and interact with the developed world and to get benefits from international trade , it had to create and develop its national legal framework in the way that met its needs and the expectations of international companies alike .[443] The process of legal modernization accompanied the exploitation of natural resources and other economic, social and political developments.[444]

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[437] Junaibi, 'Comparative Study Between the Omani and the British Legal Systems in Terms of Judicial Independence and Separation of Powers' 62,63

[438] Al-Siyabi, 'A legal analysis of the development of arbitration in oman with special reference to the enforcement of international arbitral awards 104,105

[439] See Mohamed A. M. Ismail, *International investment arbitration: lessons from developments in the MENA region* (Routledge 2016) 1-3

[440] Hill, 'The Commercial Legal System of the Sultanate of Oman' 509

[441] Spoliansky, 'Modern Business Law in the Sultanate of Oman' 101

[442] Al-Rawahi, 'The right of access to a lawyer in Oman : the need for reform : critical and analytical study of the relevant provisions of the Omani Penal Procedures Code 1999 97; Henrietta Newton Martin, 'What Oman legal system needs today' June 29, 2014) <https://www.linkedin.com/pulse/20140629144025-66699887-what-oman-legal-system-needs-today> accessed Accssed on 27 May 2021

[443] Spoliansky, 'Modern Business Law in the Sultanate of Oman' 101

[444] Hirst, 'Contemporary Mercantile Jurisdiction in Oman' 3

Thus, the developments in different life aspects in Oman inevitably entailed established a comprehensive modern legal structure.[445]

In this regard it can be noted that from the beginning, significant attention was paid to creating an enabling a commercial environment for international trade, which would contribute to the comprehensive development of the country. Through the 1970's, many laws concerning business and commerce were enacted. For instance, Banking Law, Commercial Companies Law, Commercial Register Law, Foreign Business and Investment Law and Commercial Agency Law were issued.[446] In the same context, and in order to further enhance the international trade in Oman, the Committee for the Settlement of Commercial Disputes was established to hear the issues arising under the Commercial Companies Law. Subsequently, this committee was replaced by an arbitration board in 1981.[447] The evolution of arbitration law in Oman will be explored in more detail later.

However, the turning point in the path to modernizing the national legal system is the promulgation of the Basic Statute of State (constitution) in 1996, which reshaped the legal scene in Oman. As mentioned in the last section, based on the Basic statue, many laws were replaced or amended, and many others were issued to implement its provisions. The Law of Arbitration in Civil and Commercial Disputes 47/1997 were among the first laws which promulgated based on the Basic Statute.

Currently, there are two types of legislation. The first are laws that are issued by royal decrees after they completed their legislative process (primary legislation). According to the law of Majlis Oman 7/2021, the suggested law proposals must be referred by the Council of Ministries (Cabinet) to the Council of Oman(parliament) to provide its opinion and suggestions.[448] Finally, these laws are sent to His Majesty the Sultan to issue them in form of royal decrees. However, practically some legislations have issued through the ordinary annual sessions of the Oman Council without been subjected to the due legislative process.[449] The second type of legislation consist of regulations issued by an executive body or ministry to

[445] Hill, 'The Commercial Legal System of the Sultanate of Oman' 534
[446] See ibid 512-519
[447] Spoliansky, 'Modern Business Law in the Sultanate of Oman' 103; Hill, 'The Commercial Legal System of the Sultanate of Oman' 520
[448] Artical 47 of the Law of Majlis Oman 7/2021
[449] One key example of those laws is Royal Decree 42/2021 on Granting Government Land which has sparked opposition in the country

provide the implementing rules for some laws (secondary legislation).[450] Some Decrees or laws contain provisions empowering relevant authorities to issue such regulations.[451] For example, Article II of the Royal Decree NO. 50/2019, by which the Foreign Capital investment law was promulgated, entrusted the Ministry of Commerce, industry and investment promotion with issuing executive regulations for that law.

In this context, it is worth to pointing out two related issues: firstly, further to article 96 of the Basic Statue, these two types of legislation shall conform to the Basic Statue as supreme law. However, as stated in the previous section, no judicial body has jurisdiction over this matter to assert conformity between the Basic Statute and the lower rank legislation. Such issues need to be taken into consideration by the legislature, as discussed in the previous section.[452] Secondly, it has been argued that whereas these two types of legislation have been issued in the *Official Gazette of the Sultanate of Oman* since 1973, the most notable feature of the Omani legal system is its simplicity and ease of access.[453] However, it can be argued that since the most privileged international business language is English, and most foreign investors come from non-Arabic countries, the set of legal provisions in various laws that concern foreign investment including investor-state arbitration in Oman, should be authoritatively translated to English and other global languages of investment exporting countries, and should be compiled in one book on the websites of the relevant authorities. Such a minor, but practical, regulating step would provide foreign investors with a clear vision of Oman's legal and business environment and provide ease of access. For instance, OECD has recommended such position in Its Policy Framework for Investment in order to 'enhance clarity and identify and eliminate Inconsistency' in concerning primary and secondary regulations.[454] This issue will be revisited and discussed later within this chapter.

Since Sharia is the basis for legislation in Oman, it is essential to look at the issue of Islamic law and its potential influence on the practice of investment arbitration.

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[450] Al-Rawahi, 'The right of access to a lawyer in Oman : the need for reform : critical and analytical study of the relevant provisions of the Omani Penal Procedures Code 1999 76

[451] J. H. A. McHugo, 'The practice of law by foreign lawyers in the Sultanate of Oman' (1985) 7 Michigan yearbook of international legal studies 91

[452] See section 3.1.3

[453] McHugo, 'The practice of law by foreign lawyers in the Sultanate of Oman' 91,92

[454] See OECD, ''Investment Policy' in Policy Framework for Investment: A Review of Good Practices', (OECD 2008) 14-15; OECD, *Policy Framework for Investment, 2015 Edition 24*

3.2.1.1 Islamic Law and Its potential Impact on the Practice of Arbitration

This section will try briefly to answer the question of whether the *Islamic law (Sharia)* hinders the practice and development of the concept of international arbitration in Oman. As Oman is part of wider Islamic region namely the Middle East, and to provide a logical answer-it is necessary to analyse the question in the wider context of the Middle East region.

Islamic law governs Muslim life in accordance with a collection of revelations provided to the Prophet Mohammed by Allah (God).[455] The main four sources of Islamic law are the *Qur'an* and the *Sunna* as primary sources, while secondary sources include the *Ijma* (Consensus) and *Qiyas* (analogy).[456] One of the three main legal systems governing the world, along with civil law and common law, is Islamic law.[457]

Arbitration as general concept is deeply rooted in Islamic culture and practise.[458] Moreover, arbitration and mediation are regarded as superior conflict resolution methods in Islamic jurisprudence to conventional judicial litigation, especially in commercial disputes.[459]

In this context, the controversial issue is whether the Sharia law represents an obstacle to international arbitration development in Middle Eastern countries.

On the one hand, some have suggested that Sharia represents the main obstacle to accepting the modern practices of international arbitration, specifically when it comes to recognition and

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[455] Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' (2001) 13 Pace international law review 16

[456] See Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loy LA Int'l & Comp L Rev 583-589; Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 16

[457] Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 3

[458] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia', 445 <https://digitalcommons.law.scu.edu/scujil/vol13/iss2/5/>; Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' 4; Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 23

[459] See Salah Al-Hejailan, 'Mediation as a Means for Amicable Settlement of Disputes in Arab Countries' (Conference on Mediation , Geneva- Switzerland , March 29,1996) at :<https://www.wipo.int/amc/en/events/conferences/1996/hejailan.html>

enforcement of foreign arbitral awards.[460] Steven Finizio and Christopher Howitt noted that the position of Sharia law, which can impact upon all aspects of arbitrations, is still confused in GCC states.[461] In general, such a view is prevalent amongst Western nations' scholars as they believe that Sharia is an unsophisticated and defective legal system.[462] Often such attitudes arose in international arbitration related to oil concession agreements disputes.[463] However, such a viewpoint about Islamic law might have partially resulted from the stereotypes surrounding the Islamic religion.[464]

On the other hand, with regard to Islamic law as a general concept, Makdisi has gone furfur by suggesting that the Islamic legal system was much superior to England's primitive legal system before the birth of the common law.[465] Therefore, Islamic law enjoys some levels of sophistication to be used in today's matters but still need many improvements in a lot of its aspects to benefit from the prevailing sophisticated international legal system. In the case of international arbitration, some have stated that factor which make the concept of international arbitration unwelcome in Arabic countries is not Sharia law as it been thought;[466] and Kutty illustrates that there is no intrinsic opposition to the international commercial arbitration in the case of Islamic nations. However, there are several points of contention and concern.[467]

Alqudah believes that "Sharia is not as incompatible with modern arbitration law as some have suggested and is not the most important factor in GCC countries' failure to reform their arbitration laws"[468]. He also points out that the main reason for such resistance of

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[460] Steven Finizio ; Christopher Howitt, 'When international arbitration meets Sharia' <https://iclg.com/cdr/arbitration-and-adr/when-international-arbitration-meets-sharia> accessed in 7 May 2021; Kutty, 'The Shari'a Factor in International Commercial Arbitration' 568

[461] Howitt, 'When international arbitration meets Sharia'

[462] John Strawson,Encountering Islamic Law, in Critical Legal Conference 9-12(New College eds.,1993) cited in in Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 57; also see Kutty, 'The Shari'a Factor in International Commercial Arbitration' 568

[463] Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 643

[464] Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 8; Almas Khan, 'The Interaction between Shariah and International Law in Arbitration' (2006) 6 Chicago Journal of International Law 801

[465] John A. Makdisi, 'The Islamic origins of the common law' (1999) 77 North Carolina law review 1731

[466] Kutty, 'The Shari'a Factor in International Commercial Arbitration' 621; Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' 4

[467] Kutty, 'The Shari'a Factor in International Commercial Arbitration' 622

[468] Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' 4

international arbitration practices or at least behind delay in acceptance these practises is a series of hotly disputed arbitration cases between international companies and governments of some Arabic countries, particularly in the field of oil concession in GCC states. Those arbitration cases resulted in the spread of distrust in international arbitration amongst GCC and other Arabic countries.[469] This state of distrust is still an influence in the courts approach to enforcement of foreign arbitral wards in some GCC countries.[470]

Similarly, Abdul Hamid El-Ahdab believes that the Sharia system is not the hindrance to the practice of modern arbitration in Arabic countries as they have adopted modern arbitration laws.[471] He thought the real problem behind some attempts to resist international arbitration in some of those countries was "the biased attitude of the European centres of arbitration and the inner circle of arbitrators towards the so-called developing countries and in particular the Arab countries"[472].

However, regardless of this controversial point, "Islamic states are no longer reluctant players on the global arbitration stage"[473]. Some progressive developments have taken place in Middle Eastern nations with respect to international arbitration.[474] Some of those countries have modernizes their arbitration laws, based on the UNCITRAL Model on International Commercial Arbitration of 1985.[475] Recently, Saudi Arabia, for instance, has adopted new arbitration law which is mostly based on UNCITRAL Model Law.[476] Also, many of those countries have acceded to international conventions related to arbitration such as the New York and the ICSID conventions.[477] Moreover, although some of them have still not entered into force, there are many regional treaties concerning arbitration between countries in that

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[469] Ibid 13
[470] Ibid 14
[471] Letter from Abdul Hamid El-Ahdab to Faisl Kutty (June 12,2006) cited in Kutty, 'The Shari'a Factor in International Commercial Arbitration' 621-622
[472] Letter from Abdul Hamid El-Ahdab to Faisl Kutty (June 12,2006) cited in ibid 622
[473] Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 655
[474] See ibid 646
[475] See Abdel Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Wolters Kluwer Law International 2011); Lafi Daradkeh, 'Commercial Arbitration under Investment Treaties and Contracts: Its Importance and Danger in the Arab World' (2013) 27 Arab law quarterly 395; Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 650
[476] See Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia'
[477] Ayad, 'Towards a Truly Harmonised International Commercial and Investment Arbitration Law Code (HICIALC): Enforcing MENA-Foreign Investor Arbitrations via a Single Regulatory Framework: A New Map for a New Landscape' 286; See also El-Ahdab, *Arbitration with the Arab Countries* ; Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 643

area such as the Convention on the Settlement of Disputes Arab Investment of 2001.[478] Furthermore, there are bilateral investment treaties which allow for investment arbitration which were concluded by Middle Eastern nations.[479] In addition, many domestic and regional arbitration centres were established in the area.[480] For instance there is the Gulf Co-operation Council's Commercial Arbitration Centre (GCAC)[481] and domestically there is Oman Commercial Arbitration Centre.[482] As a progressive and supportive step for the arbitration environment, other countries in the region such Qatar and EUA(Dubai) have established independent jurisdictions that apply common law rules within their International Financial centres.[483]

This is only a brief outline of the status of the legal infrastructure of international arbitration in the Middle East, nevertheless, the debate regarding the extent of Islamic law's negative impact on international arbitration is a continuing debate.

In fact, approached from different angle, the legal framework of many Middle Eastern countries incorporates *Sharia* principles.[484] But, the real issue is whether or not Islamic Law by itself constitutes obstacle to an improvement of the legal environment for international arbitration in the Middle Easter countries or other Islamic nations. To partially answer this question, as a general rule Islamic law recognizes arbitration as means of disputes resolution.

Moreover, using comparative approach, the issue of Banking interest is open to interpretation. Under the Islamic Law the banking interest on capital is not allowed, but such interest is permitted under the related laws in all Islamic countries[485] , because there is a strong correlation between banking interest and today's international commercial transitions.[486] In

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[478] Daradkeh, 'Commercial Arbitration under Investment Treaties and Contracts: Its Importance and Danger in the Arab World' 400,401

[479] For instance, Oman -United State Free Trade Agreement (FTA) under which investor-state arbitration case was adjudicated by ICSID centre as it will be explained latter.

[480] Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 653,654

[481] Howitt, 'When international arbitration meets Sharia'

[482] , 'Arbitration Law in Oman – Recent Developments' (*CMS Law-Now^{tm},* 10 May 2021) <https://www.cms-lawnow.com/ealerts/2021/05/> accessed 28 September 2021

[483] Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' 1.In respect to Dubia, the arbitration institute in Dubia Financial Centre(London Court of International Arbitration) has bolished in favour of Dubia International Arbitration Centre which has been replaced with it. See 'DIAC takes it all: the integration of Dubai's arbitration institutions' (*CMS Law-Now^{TM},* 23 September 2021) <https://www.cms-lawnow.com/ealerts/2021/09/> accessed 28 September 2021

[484] Kutty, 'The Shari'a Factor in International Commercial Arbitration' 568

[485] Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 46

[486] Ibid 22

the same context, for example in Oman[487], Islamic Sharia principles are the first source of rules for the Omani Civil Law.[488] However, concepts of Islamic Sharia Rules are a second source of rules in Trade Law. Custom is the primary source for the Trade Law.[489] Thus, looking at arbitration from a similar perspective, it is clear that arbitration is an important factor in economic development which is already permitted under the Islamic law. Perhaps the real realpolitik existing in many countries of the Middle East is that there is a separation between commercial law and the Islamic law.[490] As such, there is nothing to prevent the same step from being followed in relation to arbitration laws in those countries.

Further, historical evidence for the acceptance and practice of international arbitration in the Middle East and in GCC in particular, can be found in the kingdom of Bahrain. The Kingdom of Bahrain was the centre of international arbitration before London and Paris. In the early 1900s European traders made use of the commercial arbitration centre located in Bahrain.[491]

Thus, the real challenge for international arbitration rests not with the principles of Islamic law as generally thought, rather the possible cause behind the resistance to international arbitration, in some Islamic nations, may be attributed to factors other than Islamic law. Perhaps the first barrier is the prevailing belief that the international arbitration centres are biased against developing countries, and international arbitration just serves the interests of western entities.[492] Such opposition might be associated with the era of colonialism, as most of the area was under western occupation, and this might have led to a resistance to foreign investment ,and the associated international arbitration system which could been seen as another face of colonialism.[493] This negative attitude is similar to some of the Latin America countries' attitudes which have caused some of those countries to withdraw form ICSID convention.[494] Thus, the real challenge for international arbitration practices in Middle Eastern countries are not Islamic law principles; instead, they might be political and historical ones.[495].

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[487] See Abdallah, 'Arbitration in Oman' 9
[488] Article 2 of Civil Law No. 29/2013
[489] Article 5 of Trade Law No. 55/90
[490] Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' 21
[491] Hassan Ali Radhi, 'State Courts and Arbitration in the Gulf Cooperation Council (GCC) Countries' (1992) 57 ICC Int'l Ct Arb Bull. Cited in Kutty, 'The Shari'a Factor in International Commercial Arbitration' 590
[492] Joseph T. McLaughlin, 'Arbitration and Developing Countries International Commercial Arbitration' (1979) 13 Int'l L 231; Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 645
[493] McLaughlin, 'Arbitration and Developing Countries International Commercial Arbitration' 213
[494] This attuite is associated with investor-state arbitration, not commercial arbitration.
[495] See Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 645

The second potential factor is connected to the improper interpretation and application of the legal framework of arbitration in the counters of region. Most Arab countries have enacted arbitration laws based on the UNCITRAL Model on International Commercial Arbitration of 1985 which was drafted by expertise representing cultures and legal traditions from around the world, including common, civil, and Islamic law.[496] Some Arab countries have adopted this principle with some modifications. This is without doubt of vital importance to the promotion of arbitration practice of arbitration, yet what matters most in any legal process is its implementation. Therefore, laws need to be applied and interpreted in a way that enhances international arbitration, and simultaneously, complies with relevant international conventions.[497] The third factor is that inexperience and a lack of understanding of the international arbitration by the judicial systems in the area could constitute challenge to arbitration to be promoted as alternative resolution means.[498]

Turning to the attitude of law and judiciary in Oman regarding the arbitration system as a means of international and domestic dispute resolution, arguably it is positive and supportive. There are two pieces of evidence to support such an argument.

First, when Oman embarked on the enactment and modernization of its national legislation in the 1970s, the Committee for the Settlement of Commercial Disputes was established to hear issues arising under the Commercial Companies Law. Subsequently, this committee was replaced by an arbitration board in 1981. It can be held that the movement was to keep the commercial and business sector issues far from the Sharia court and to adjudicate the related disputes according to the new secular laws which were against Sharia Law. Hill has suggested that Islamic law is primarily applied through a Sharia court system, while it is also found to a lesser extent in secular commercial tribunals in Oman.[499]

Secondly, evidence suggests that there is a willingness on behalf of the judicial body (the Authority for the Settlement of Commercial Disputes) to support international arbitration and its outcomes. [500] Spoliansky stated that even though the Disputes Committee is made up of government officials and members of the Omani business community, it has given verdicts

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[496] Ibid 650
[497] Reyadh Mohamed Seyadi, 'Understanding the jurisprudence of the Arab Gulf States national courts on the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2017) 2017 International Review of Law 9,10
[498] Company, *Enforcement of Foreign Arbitration Awards in the Middle East*
[499] Hill, 'The Commercial Legal System of the Sultanate of Oman' 507
[500] Through next section more details will be provided about this authority

favouring foreign businesses against the government and leading members of the local community.[501] In this context, Lane and Morton, in their analysis of an arbitration case between a UK company (the claimant) and an Omani company (the respondent) before the International Chamber of Commerce in 1981[502], pointed out that

> It is a widely held belief that it is impossible to enforce the award of a foreign arbitrator or arbitral tribunal in Oman, unless both the procedural and substantive law applied in the arbitration were those of Sharia..... However, it is now clear that arbitration clauses specifying arbitration outside Oman (e.g., the standard ICC arbitration clause) and arbitration awards obtained in a foreign forum may be enforced in Oman[503]

To conclude and from the above analysis, it is fair to say that *Islamic law* in Oman, at an early stage, did not constitute an obstacle to the practice of international arbitration nor the enforcement of its awards, rather it is clear that both the law and judiciary were willing to facilitate its process.

3.2.2 The National Laws Governing Investor-state Arbitration

The national legal framework on investment arbitration could be considered one factor in reflecting Omani policy toward foreign investment and investment arbitration. The legal provisions that regulate arbitration in general and investor-state arbitration, in particular, can be found in various pieces of legislation. This section will shed light on these legislations and assess some of their provisions.

3.2.2.1 The Basic Statute of the State (Constitution) No.6/2021

As explained previously in this chapter, the Basic Statute is considered a reference for all laws and regulations, as they shall comply with its provisions and principles as supreme law.[504] However, this sub-section will focus briefly on the essential features of the Basic Statute regarding foreign capital investment in Oman.

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[501] Spoliansky, 'Modern Business Law in the Sultanate of Oman' 116
[502] About the details of this case see Sigvard Jarvin, 'Enforcement of an arbitration award in Oman' (1985) 13 International business lawyer 471-472
[503] Terence Lane and William Morton, 'Enforcing a Foreign Arbitration Award in Oman' (1985) 4 33
[504] See section 3.2.1

It is believed that constitutional norms have a recurring role before, during, and after investment arbitration, from treaty approval through to awards execution.[505] The principles of constitutional law may be employed in the investment arbitration proceedings by the arbitral investment tribunal in order to assess the concept of some standards of treatment. For example, determining whether the standard of fair and equitable treatment has been violated by denial of constitutional due process.[506]

In the same context, Boisson Chazournes points out that "The recourse to constitutional law by an advocate (or an arbitral tribunal) may permit substantiation of the content and scope of the fair and equitable treatment standard and better identification the fundamental rights directly in linkage with the fair and equitable treatment standard"[507]. Furthermore, where certain fundamental rights are established in constitutional law but not in applicable treaties or customary law, constitutional law may help bridge the legal gaps.[508]

In general, the Basic Statute anchors the principle of the rule of law. The supremacy of law leads to the promotion of rights and freedoms and enshrines the justice and equality in the state. It is safe to say that the prevalence of this principle would grant society and business a high level of stability as they know that their right and freedoms will be respected and protected. Thus, the rule of law establishes the basis for commitment to protection of the foreign investors' rights under the international and national legal framework which regulate the foreign investment area. Moreover, the Basic Statute anchors the fundamental rights guaranteed to all by law.[509] It is thought that democracy and the rule of law can help to attract FDI because they can better protect foreign investors' assets from expropriation by the host government.[510]

However, and in a practical sense, applying the principle of the supremacy of the rule of law and guaranteeing fundamental rights necessitates judicial and parliamentary review of

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[505] Laurence Boisson de Chazournes and Brian McGarry, 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15;2014; The journal of world investment & trade 862
[506] Ibid 865,877
[507] Laurence Boisson Chazournes, 'Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law', *Van den Berg, AJ Arbitration Advocacy in Changing Times* (Austin [Texas] : Wolters Kluwer Law & Business 2011) 319
[508] Ibid 318
[509] Chapter three of the Basic Statue
[510]Quan Li, Erica Owen and Austin Mitchell, 'Why do democracies attract more or less foreign direct investment? A metaregression analysis' (2018) 62 International studies quarterly 494

government conduct. Inevitably, such mission entails judicial and legislative authorities enjoying complete independence.[511]

The important role that Basic Statute plays in relation to investor-state arbitration can be seen through the following perspectives.

Firstly, the Basic Statute emphasizes and enshrines the place of international and bilateral agreements within the national legal system. Article 89 of the Basic Statute reads "The application of this Basic Statute shall not prejudice treaties and agreements the Sultanate has entered into with other countries, international institutions and organisations". Whereas article 97 stipulates that "No authority in the State shall issue regulations, decisions, or directives that contradict the provisions of the Laws and decrees in force, or international treaties and agreements which are part of the Law of the Country".

Accordingly, it can be said that international conventions related to investment arbitration and multilateral or bilateral investment treaties contain investment arbitration as a method of disputes resolution that Oman has acceded to are considered an integral part of national law, and obligatory for all within Omani territories.[512] Thus, all national laws related to foreign investment and investment arbitration should be designed to be consistent with Oman's obligations under the appropriate corpus of conventions and treaties. Moreover, under these two articles, all competent executive authorities and the judiciary are obliged to consider relevant international instruments when dealing with investor-state arbitration matters. An example of these matter is the recognition and enforcement of foreign arbitral awards, as well as the substantive rights of foreign investment under bilateral investment treaties. These two issues will be discussed in more details later.

Secondly, the Basic Statue classifies investment as one of the state's economic principles which direct the economic policy.[513] Article 14 states that the state encourages the investment and supports the process with necessary guarantees and facilities. In fact, this article clearly reflects Oman's policy towards the "investment" and recognises its essential role in Oman's economy. In this context, it can be argued that encouraging investment might be required to

[511] See sections 3.1.2 and 3.1.3

[512] See Ismail, *International investment arbitration: lessons from developments in the MENA region 23, 90*

[513] It is worth to state that previous Basic Statute No 101/1996, which has been replaced by the current Statute, did not refer to 'investment' within the state's economic principles.

provide an advanced legal environment for investor-state arbitration as one of the well-recognised dispute settlement methods.

Thirdly, the Basic Statue underlines some of the importance substantive standards of treatment related to foreign investment which have been established in the realm of international customary law and international investment law.[514] The same standards have been re-emphasized by the Foreign Capital Investment Law 50/2019.

Article 14 of the Basic Statue provides important provisions related to foreign investment: private ownership is safeguarded. In addition, expropriation is illegal unless it serves the public interest, in which case expropriation will be accompanied by reasonable recompense. Furthermore, confiscation of property is prohibited except in the case of a judicial decision. In this regard, it has been stated that in practice, Oman compensates for any expropriations it makes, though the country has been known to pay compensation in increments. This is true of domestic legislation as well as bilateral investment treaty regimes.[515]

Within the same context, article 42 emphasizes that foreigners legitimately present in the Sultanate are entitled to protection for themselves and their properties. In return, foreigners are expected to uphold the Societal principles, traditions, and sentiments.

In fact, both articles represent the principle of full protection and security which is embodied in investment treaties. These principles will be revisited in more detail in the next chapter.

It is therefore fair to state that the Basic Statute introduces a supportive framework for investment arbitration in Oman. However, the functionality of this theoretical framework depends on legislation implementing it.

[514] Jarrod Hepburn, 'Domestic Investment Statutes In International Law' (2018) 112 The American journal of international law 658; Valentina Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39 Denver journal of international law and policy 67 80

[515] See 'Investment Treaty Arbitration: Oman' (*Global Arbitration Review,* 2021) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/oman> accessed 11 November 2021

3.2.2.2 Law of Arbitration in Civil and Commercial Disputes No. 47/1997

Oman's commitment to arbitration as legal mechanism of settling disputes, especially in commercial matters, started early; this is clear from development and evolution of the laws governing arbitration.

Briefly, the development can be illustrated as follows[516]: First, Law No.79/1981 established a Board for the Settlement of Commercial Disputes under which the board had jurisdiction over the application for arbitration in commercial disputes. Secondly Law No. 32/1984 established rules for the hearing of lawsuits and arbitration and its amendments. The legislators incorporated a set of procedural rules to organize and govern the arbitration disputes before the Board for the Settlement of Commercial Disputes. Finally, the Law of Arbitration in Civil and Commercial Disputes No. 47/1997 together with its amendments completed the approach of the Omani government to this issue.

Oman was among the first GCC states that enacted a modern arbitration law mainly based on the UNCITRAL Model Law on International Commercial Arbitration of 1985[517], and this established a means of disputes resolution compatible with international standards.

However, in 2006 the UNCITRAL Law witnessed some amendments, aimed at modernising, and supporting international arbitration based on the output of its applications worldwide since being established in 1985. Particularly, these amendments recognized the need for provisions in the Model Law to conform to current practices in international trade. They also looked at modern means of contracting with regard to the form of arbitration agreement and the

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[516] About the evlution of arbitration laws in Oman see : Najjar, *Arbitration and international trade in the Arab countries 51*; Abdallah, 'Arbitration in Oman' 5-6; El-Ahdab, *Arbitration with the Arab Countries , chapter 11 para 19-24*

[517] Charles N and Jeremy K, 'International Arbitration and the Islamic World: The Third Phase' 650; Alqudah, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' 1; Ismail, *International investment arbitration: lessons from developments in the MENA region 8*; Najjar, *Arbitration and international trade in the Arab countries 61*

granting of interim measures.[518] Oman has not yet modernized its version of arbitration law in the light of the UNCITRAL Law amendments of 2006.[519]

Therefore, Oman should consider the importance of modernizing its domestic arbitration law in light of these new amendments. Were it to do so, it would positively reflect that Oman's determination to keep pace with international practices and send a positive message to the international global investment community. Additionally, it would improve the arbitration environment in Oman as an alternative to litigation.

In summary, Omani Law on arbitration provides for: the arbitration agreement to be in writing, including the incorporation by reference of arbitration rules set out in another document (articles 10,12); the arbitration clause's autonomy(article 23); a wide measure of party autonomy as to procedure, forum, place and language (articles 15,25,28,29); and a default twelve-month period for the rendering of the award which is extendable by the tribunal for a further six months(article 45); for the tribunal's power to rule on its own jurisdiction, and for challenges on jurisdictional grounds to be raised at the outset or otherwise be deemed waived(article 22); for the tribunal's ability to make decisions based on just and fair principles(article 39); for majority awards; for award annulment(article 40); and, finally, for award recognition and enforcement(articles 55-58).[520]

However, in particular, the essential feature of this law is its application scope. Article 1 of the law states that

> Without prejudice to the provisions stipulated in the international treaties operative in the Sultanate, the provisions of this Law shall be applicable to any arbitration between persons under public or private law, irrespective of the nature of legal relationship on which the dispute is based, provided the arbitration takes place in the Sultanate or in case of international commercial arbitration taking place abroad, provided the parties to it have agreed to submit themselves to the jurisdiction of the provisions of this Law.

[518] See 'UNCITRAL Model Law on International Commercial Arbitration (1985)' (*United Nations Commission On International Trade Law(UNISTRAL),* <https://uncitral.un.org/en/texts/arbitration> accessed 12 October 2021

[519] Najjar, *Arbitration and international trade in the Arab countries 62*

[520] Alastair Hirst, 'The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman' (2014) 1 BCDR International Arbitration Review 62

Therefore, this law would apply to two types of arbitration- domestic and international commercial arbitration. Moreover, the law would be applied to the second type under the condition that the parties have nominated Omani law to be applied to the arbitration.

Thus, the only circumstances when this law would be applicable to the international investor-state arbitration between the Omani government and foreign investors is when both parties agree to apply it on their arbitration. However, in this case, Omani law would govern the procedural aspects of the arbitration, as it does not offer substantive rules to be applied to the subject matter of the dispute.

Regarding the importance of Oman's arbitration law, to the wider issue of the environment of confidence for investment in Oman, Najjar states that Oman was one of the first countries in the area to update its arbitration laws. The growth of international trade in the region, the importance of trade with European countries and the United States, and the large number of arbitration cases in the West involving an Arab party, have encouraged Oman and other countries in the region to embrace some forward thinking. Furthermore, arbitration appears to be crucial in fostering foreign investment at a time when globalisation of commerce is firmly entrenched.[521] Thus, in conjunction with the adoption of new arbitration laws and the membership and ratification of regional and international treaties, the majority of Arab nations have implemented legislation promoting and encouraging foreign investment.[522]

Thus, it becomes clear that arbitration law connects to the national law governing outward investment in any country. It is safe to say that Omani arbitration law is an essential tool to attract foreign investments. This law contributes to achieving two fundamental goals. First, it legalizes arbitration as a method of disputes resolution as an alternative to the domestic judiciary that foreign investors can use to resolve any disputes that could arise relating to their business. The second, this law is in the interest of Oman's international trade and investment and highlight Oman as an attractive and competitive destination for international investment and trade. Consequently, Oman's advanced legal framework in respect of arbitration prove an attractive proposition for potential investors.

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[521] Najjar, *Arbitration and international trade in the Arab countries 60*
[522] Ibid 119

3.2.2.3 The Civil and Commercial Procedures law 29/2002

As been seen, according to article 1 of Omani arbitration law, both *domestic and international arbitral awards* -provided that the parties to it have agreed to submit themselves to the jurisdiction of the provisions of this Law-should be recognized and enforced under the provisions of this law.

On the other hand, the Civil and Commercial Procedures law also applies to foreign arbitral awards with respect of recognition and enforcement. Articles 352 and 353 of this code governs the final stage of international investor-state arbitration upon which depends for its effectiveness, namely recognition and enforcement of foreign arbitral awards in Omani territories.

Article 352 states that sentences and orders made in a foreign country may be granted leave to be enforced in the Sultanate of Oman on the same conditions that the concerned country enforces the sentences and orders issued in the Sultanate. Whereas article 353 brings the foreign arbitral awards under the same umbrella of foreign rulings as it provides that foreign arbitral awards are enforced in the same way that foreign sentences and orders are enforced in Oman.

However, articles 89, 97 of the Basic Statute[523],article 355 of Procedures law and article 1 of the arbitration law[524] emphasise the principle of the supremacy of convention law as part of Omani legal system. Therefore, the provisions of international and regional conventions or bilateral investment treaties to which Oman has acceded are applicable in regarding to recognize and enforce foreign arbitral awards.[525]

Therefore, some caution is appropriate because although the Civil and Commercial Procedures law 29/2002 set out certain procedures to be applied to foreign arbitral awards, Oman is a signatory to 1958 New York and 1965 ICSID Conventions , which contain substantive provisions concerning enforceability, consequently the domestic provisions as set out in the two articles they have just explored do not apply to the enforceability of both commercial or

[523] See section 3.2.2.1
[524] See section 3.2.2.2
[525] Hirst, 'The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman' 62

investment foreign arbitral award if sought to be enforced in Oman.[526] In other words, the Omani judges should apply the provisions and conditions contained in the New York and ICSID conventions to examine the application for recognition and enforcement of foreign arbitral awards,[527] only the procedural provisions of articles 352 and 353 would be applied to the application. These include the method (i.e., lawsuit) to be followed by the wining party to apply for recognition and enforcement and the competent court to examine the application.[528]

Moreover, usually in their BITs, states have also made clear that they will adhere to investment arbitration awards. [529] This means that according to BITs which Oman has concluded with many countries worldwide[530], Oman is under an obligation to facilitate the recognition and enforcement of investment arbitration awards. For instance, article 10.25.5 of the Oman-U. S Free Trade Agreement provides that "…. a disputing party shall abide by and comply with an award without delay."

Most of the investment arbitration awards are rendered under the ICSID Convention,[531] therefore there is an important point worth illustrating. The ICSID Convention differentiates between two types of its awards and each one has different treatment.[532] Article 54 (1) of ICSID provides that

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. …

Therefore, there is a pecuniary (i.e., monetary award). This type of award enjoys the full support from the ICSID Convention and is to be recognized and enforced directly in the contracting states.[533] The second type of ICSID awards is non-pecuniary award.[534] This award

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[526] About the enforcment of foreign arbitral awards in Oman within New York Convention's framwork see Said Bin Saad Al Shahry, 'Enforcement of Arbitral Awards in the Sultanate of Oman' (2014) 1 BCDR International Arbitration Review

[527] Articles 53-55 of ICSID Convention and III-VI of New York Convention.

[528] The court has jurisdiction over recognition and enforcement of foreign arbitral award has been discussed in section 3.1.3.3

[529] Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with Investment Awards' <https://go.exlibris.link/xXZQZDK6> 5

[530] The investment treaties between Oman and other countries will be analysed through next chapter.

[531] Dolzer and Schreuer, *Principles of international investment law 241*

[532] Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID arbitration* (Kluwer Law International 2004) 105-106

[533] , *COURSE ON DISPUTE SETTLEMENT - Module 2.9. ICSID: Binding Force and Enforcement* (United Nations Conference Trade Development (UNCTAD) 10 Mar 2003) 13-14

[534] Such awards might encomass performance obligations concerning employment and managment matters or application of taxation. See Reed, Paulsson and Blackaby, *Guide to ICSID arbitration 106*

grants direct and automatic recognition -*but not direct enforcement*- as the case with a pecuniary award.[535] Therefore the enforcement provisions in ICSID Convention would not apply to the ICSID's non-pecuniary awards. Instead, such an award would be enforced under the New York Convention and Omani procedural Law.

Thus, focusing on the international investor- state arbitration as the core of this thesis, it becomes clear that the procedure contained in Civil and Commercial Procedures law governs the procedural aspect of an application for the enforcement of investment foreign arbitral awards in Oman, whereas the New York or ICSID provisions-*Ceteris paribus*-would regulate conditions under which an award would be enforced in in Oman as a contracting state to these Conventions.

Nevertheless, the enforceability of foreign arbitral awards resulting from investment arbitration is not always as straightforward as it can appear from the previous analysis. Three scenarios for investment foreign arbitral awards and the legal provisions governing its enforcement in Oman may be envisaged.

Firstly, as stated previously, in cases where the investor-state arbitration is conducted under the umbrella of the ICSID Centre, the provisions of the ICSID Convention and procedural rules of Omani procedure law would apply.

Secondly, it can be envisaged the situation in which investor-state arbitration is conducted under the auspices of the ICSID Centre. But the disputed parties agree to choose Omani arbitration law as the applicable procedural law. In such an event, the provisions of the ICSID convention and the procedural rules of arbitration law would apply.

Finally, some disputed parties could choose to take their case to any other international arbitration institution-such as International Chamber of Commerce- rather than the ICSID Centre. In other words, if there is an investor-state investment dispute, the parties can agree to be arbitrated before an international institution different from the ICSID Centre. In this situation, the enforcement of arbitral awards resulting from this arbitration would be subject

[535] , *COURSE ON DISPUTE SETTLEMENT - Module 2.9. ICSID: Binding Force and Enforcement 12*; Dolzer and Schreuer, *Principles of international investment law 310*

to substantive provisions of the New York Convention and procedural provisions in Omani procedural law.[536]

Since it becomes clear that the domestic laws in Oman only regulate the procedural framework of the application for *the enforcement of investment arbitration awards*, it is necessary to shed light on the two main issues within this framework.

The first issue is one already discussed regarding the competent court which has jurisdiction over the enforcement application.[537]

The second issue is the legal form or method to be followed by the winning party in applying for recognition and enforcement before a competent judicial body. There are no rules of procedure specifically governing the enforcement of foreign investment arbitral awards (ICSID awards) in Oman. This being so, theatrically, as has it been explained, it could presume that the only provisions that govern the procedure aspect to enforce the foreign investment arbitral awards are articles 352 and 353 of the Civil and Commercial Procedures law 29/2002.

According to article 352, the application should be made in the form of a suit (as an ordinary case/ a normal legal action) to the first instance court where the award will be executed. A panel of three judges decides the request like in any other case. However, as it has been explained, the merits of the foreign arbitral award seeking to be enforced in Oman should not be subjected to any review, and therefore there is no apparent justification for choosing the form of a suit .[538] Thus, this situation could be seen as a procedural obstacle to investment arbitration because it contradicts Article 54(1) of ICSID Convention which provides that "each contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". This being so, the procedural method for enforcement of foreign arbitral awards -with regard to the pecuniary obligations imposed by the award- results from investment arbitration should be through the same procedural way through which national court judgments are usually enforced. According to article 340 of the Civil and Commercial Procedures law 29/2002, the enforcement of domestic judgments should

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[536] Blanke and Corm-Bakhos, 'The enforcement of international commercial and investment arbitration awards in the MENA region' 7; Gaillard and Mitrev Penusliski, 'State Compliance with Investment Awards' 5; Dolzer and Schreuer, *Principles of international investment law 310*

[537] See section 3.1.3.3

[538] About this method see Alenezi, 'An analytical study of recognition and enforcement of foreign arbitral awards in the gcc states 108

be done through a request applying to the enforcement judge in the court of the area where it will be enforced. Such procedural arrangements are consistent with Oman's international obligation under the ICSID Convention.

However, this question must not be left to interpretation by the competence courts but must be clearly and directly stated by the legislator in the relevant law. Subsequently, this is an area of investment arbitration which is a potential area for reform within a broader framework in this regard.

To sum up, it can be argued that the proliferation and distribution of procedural rules governing foreign arbitral awards, regardless of whether the awards stem from international commercial or investment arbitration, could be a problematical and could negatively affect the whole legal framework that governs arbitration. The enforcement of arbitral awards is the fundamental stage in the arbitration process, therefore if there is no clarity in the legal rules applicable to this stage, the whole system could be at risk of collapsing.

In order to resolve such a dilemma, the creation of one set of rules under one piece of law regulating the matters of investment arbitration and commercial arbitration, including the enforceability of local, international and foreign arbitral awards seems to be the obvious way forward, with additional possibility of dedicating specific piece of legislation for questions of international investment arbitration. The ICSID and New York Conventions have to be taken into consideration in implementing such suggestions.

Practically, such a step would simplify identifying rules and provisions applicable to enforcement all types of arbitral awards, particular those related to international investment and trade. Accordingly, implementing such proposals could contribute to reducing obstacles to the arbitration method of disputes resolution and keep it away from the complexities and misinterpretation. In particular, it would simplify the recognition and enforcement stage process. Additionally, in general, adopting such a proposal may have the effect of promoting a national legal framework on investment arbitration and accordingly boost Oman's international reputation as an arbitration-friendly jurisdiction.

In practical and extant terms , England enacted the Arbitration (international Investment Disputes) Act 1966.[539] This Act is dedicated to implements into England the ICSID Convention

[539] About this law see : Julian D. M. Lew, 'The Recognition and Enforcement of Arbitration Awards in England' (1976) 10 The International lawyer 425 436-437; Nasser Al-Adba, 'The limitation of state

that regulates the process of settlement of investment disputes between states and foreign nationals.[540] Section 2 (1) of this law provides that "Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court …"[541].

3.2.2.4 The Foreign Capital Investment Law 50/2019

This piece of national legislation on foreign investment forms one of the potential sources of state's consent to international investor-state arbitration. However, it is first important to explore the importance of this law-sometime hidden- concerning investor-state arbitration.

3.2.2.4.1 The Importance of National Investment Law

Salacuse has stated that most developing countries have enacted their own foreign investment laws to attract, control and regulate foreign investment within their territories.[542] Similarly , Ismail points out that the major goals of MENA national investment laws are to attract foreign investors and increase FDI in various economic sectors by ensuring a minimum level of protection.[543] Potesta points out, developing countries want to open their economies to foreign capital frequently enact domestic laws (typically a foreign investment law or investment code) that provide foreign investors with certain levels of protection.[544]

Nevertheless, it can be argued that investment laws are an abstract theoretical legal framework. The effectiveness of those laws in encouraging foreign investment would depend on how they are applied in practice by government bodies in the host states. In addition, the measure of effectiveness of those laws would inevitably be determined through the impact of other relevant laws such as *Income Tax Law* which is related to the incentive of tax exemption

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sovereignty in hosting foreign investments and the role of investor-state arbitration to rebalance the investment relationship', University of Manchester 2014) 232

[540] As it is stated in the introducction of Arbitration (international Investment Disputes) Act 1966

[541] See section 2 (1) in 'Arbitration (international Investment Disputes) Act 1966' <https://www.legislation.gov.uk/ukpga/1966/41/section/2> accessed November 2021

[542] Salacuse, *The law of investment treaties 191-192*

[543] Ismail, *International investment arbitration: lessons from developments in the MENA region 86*

[544] M. Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 Arbitration international 149

and *Law on Expropriation for Public Interest,* all of which should be consistent with aims and provisions of investment law.

Jarrod contends that despite their originating in domestic law, foreign investment laws can be characterised as unilateral acts in international law-that is, obligations that take effect on the international plane and are assumed unilaterally by states.[545] He continues to contend that a unilateral act characterization extends to the substantive protection offered by foreign investment laws.[546] It might follow therefore that under that characterisation, breaching the provisions of national investment laws by the host states could lead to a foreign investor taking action against a state. [547]

Therefore, violation of any of the substantive rights (guarantees that have been granted to investors) under foreign investment law could be the subject matter of investment arbitration proceedings. For example, Farag observes that some investor-state arbitrations filed against Egypt, were based on the violation of a set of guarantees and incentives granted to investors under Egyptian law on foreign investment.[548]

Thus, foreign investment law is a double-edged sword; investment law can attract foreign investment, but having achieved its goal of investment, the host state could find itself subject to international investment arbitration if the investor claims that state has breached its own investment law provisions.

Also, in this context, it is worth mentioning that usually, investment treaties require that foreign investment must be made in accordance national investment law.[549] Accordingly, arbitral tribunals will rely on the national investment law of the host state to assess whether the disputed investment was established in accordance with domestic law. As a result, if the tribunal finds that the dispute related to investment contravened the respective law of the host state, the tribunal will reject its jurisdiction over the dispute. For instance, the tribunal in Desert Line[550] Projects LLC v. Republic of Yemen[551] emphasized that breaches the condition of

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[545] Hepburn, 'Domestic Investment Statutes In International Law' 659
[546] Ibid 660
[547] Ibid 659
[548] Sabah Ahmd Farag, '"International arbitration in investment disputes" case study of Egypt' (2020) ahead-of-print Review of economics & political science : REPS 18
[549]Rahim Moloo and Alex Khachaturian, 'The compliance with the law requirement in international investment law' (2011) 34 Fordham international law journal 1477-1478
[550] The Desert Line is a limited liability construction company organized under the laws of the Sultanate of Oman
[551] *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No ARB/05/17) para 104

"in accordance with the provisions" in Oman- Yamen BIT should result in "excluding investments made in breach of fundamental principles of the host State's law, e.g., by fraudulent misrepresentations or the dissimulation of true ownership". Thus, foreign investors who have disputes with the host states can take their disputes to international investment arbitration and enjoy the protection of an investment treaty, but they must first establish that their investments were in accordance with the provisions of national investment law.

In the contemporary world, states may express their willingness to have disputes with foreign investors resolved through international arbitration and have embodied such a procedure in their own national laws in order to attract foreign investment.[552] Najjar suggests that most Arab countries, including Oman, have enshrined arbitration in their foreign investment law because they have recognised its value as an instrument for attracting investors.[553]

However, in the other hand, some argue that "governments incorporate arbitration into their domestic laws because doing so was labelled 'international best practice' by specialist units at the World Bank"[554]. According to this argument, arbitration is more likely to be included in the national law of countries that get support from the World Bank's Foreign Investment Advisory Service.[555] While governments may aspire for more investment, the research suggests that granting investors access to investment arbitration does not always result in more investment.[556]

Nevertheless, it can be argued that states are free to develop investment legislation that suits their needs and investment policy and allows arbitration in investment disputes as an incentive to potential foreign investment. However, the effectiveness of arbitration in domestic law as feature which enhances the attractiveness of foreign investment will depend on the degree to which the state fulfils its obligations to the foreign investors and state's experience of dealing with foreign investment issues.

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[552] Guiguo Wang, 'Consent in investor-state arbitration: A critical analysis' (2014) 13 Chinese journal of international law (Boulder, Colo) 345

[553] Najjar, *Arbitration and international trade in the Arab countries 121*

[554] Tarald Laudal Berge and Taylor St John, 'Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws' (2020) Review of international political economy : RIPE 2

[555] Ibid 1

[556] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press USA - OSO 2017) 158-166; Makane Moïse Mbengue, 'Consent to Arbitration Through National Investment Legislation' Investment Treaty News <https://www.iisd.org/itn/en/2012/07/19/consent-to-arbitration-through-national-investment-legislation/>

Interestingly, it is noteworthy that BITs have essentially reduced the significant of domestic legislation as the preferred legal vehicle for the protection of foreign investment.[557] Nevertheless, domestic laws guaranteeing international arbitration as method for resolving investment disputes remain.

Due to its desire to attract more foreign investment, Oman has improved its regulatory framework related to this field and introduced the Foreign Capital Investment Law 50/2019 replacing the earlier Foreign Capital Investment Law 102/1994. The new law took four years to develop with the help of World Bank .[558] It is believed that the new law is a significant legislative change that will boost inbound investment into the Sultanate.[559] The key objective of this law is to encourage foreign investments in Oman by an creating attractive environment for them through many guarantees and incentives.[560] It is believed that , increasing the foreign investment projects will help Oman achieve aims such as job creation, reduction in burden of public spending and empower new infrastructure projects to proceed expeditiously.[561] The new law has potential in terms of eliminating minimum share capital requirements and foreign ownership restrictions on Omani companies. For example, the new law in accordance with article 6, ended the previous law's RO 150,000 (approximately $390,000) minimum share capital requirement. It also removed the 70 percent foreign ownership limit on Omani companies, allowing for 100 percent foreign investor-owned companies.[562] Similar to the provisions of investment treaties [563], the new law provides investors with substantive standards of treatment, such as national and most-favoured-nation treatment (article 18), protection from nationalisation and expropriation with a fair compensation(articles 23 and 24), protection from arbitrary and discrimination measures (article 25), and the freedom to carry out all transfers of the capital(article 26).[564] Furthermore the law includes incentives for

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[557] Najjar, *Arbitration and international trade in the Arab countries 121*; Wang, 'Consent in investor-state arbitration: A critical analysis' 346; Solveiga Paleviciene, 'Consent to Arbitration and the Legacy of the Spp V. Egypt Case' (2014) 7 Baltic journal of law & politics 151

[558] See Curtis, *New Foreign Capital Investment Law* (Curtis, Mallet-Prevost, Colt & Mosle LLP 12 Augast 2019); , 'Investment Treaty Arbitration: Oman'

[559] See *World Investment Report 2020 (UNCTAD) 100*

[560] Jeremy Pooley and Salim Al Harthi, 'A New Dawn for Foreign Direct Investment in Oman' (January 2021) The MENA Business Law Review-Special Edition: Foreign Investment Law

[561] Ibid

[562] See 'Investment Climate Statements: Oman' (*The U.S. Department of State,* 2020) <https://www.state.gov/reports/2020-investment-climate-statements/oman/> accessed 25 October 2021

[563] Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' 150; Hepburn, 'Domestic Investment Statutes In International Law' 658

[564] The next chapter about the investment treaties will explore these standers of treatment with more details.

foreign investment projects such as tax and customs duties exemption(articles 20,21,22) and allocation of land to the projects by granting them either a long-term lease of a usufruct (article 19). In addition, there are special incentives provide for major and strategic foreign investment projects (article 10) and foreign investment projects which established in Less developed regions of Oman (article 18).

Overall, the offer of investment arbitration contained in this law (article 17) is probably a crucial factor.

3.2.2.4.2 Consent to Investor-state Arbitration Through National Investment Law

With regard to investor-state arbitration, as has been mentioned in the previous chapter, Omani law on foreign capital investment provides for the investor to resort to arbitration to resolve disputes with the others regarding its investment.[565] The Foreign Capital Investment law (article 17) stipulates that

> Omani courts shall have the competence to examine any dispute arising between the investment project and others, and the cases of investment projects shall have urgency status when examined by these courts. It is permitted to resolve differences and disputes by arbitration.

Article 17 refers to two methods for the settlement of investment disputes, (I) judicial proceeding in the courts as a rule and (II) arbitration method as an exception to this rule.

Therefore, the Omani courts have jurisdiction over all disputes arising between investment project and the others. Moreover, since those drafting the legislation used the expression "any dispute", every administrative (in respect to administrative contract or administrative decision)[566] and all commercial disputes arising between the investment project and others shall be settled by Omani courts. It therefore follows that in the event of an investment project disputes; the ordinary courts would be competent to examine the relevance of a civil and commercial disputes. Also, these courts would have jurisdiction over the disputes related to the administrative contract between the government and foreign investors or administrative decisions concerning the foreign investment projects.

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[565] See section 2.3.2

[566] Amel Abdallah, 'A critical analysis of foreign capital investment law in Oman' (2015) 16 The journal of world investment & trade 525

Further, in all circumstances, the cases of foreign investment will have urgency status when examined by the competent courts. Always providing that investment disputes can be examined by the courts as a matter of urgency, potential investors would be confident that their disputes with others would be speedily addressed through the court. Additionally, granting foreign investment cases a status of urgency can be seen as an attempt to encourage foreign investors to submit their disputes to the national judiciary by providing them with a fast and flexible national litigation system. Normally, foreign investors prefer to resort to arbitration because it is speedy and flexible, but the simplification of litigation procedure will make Omani domestic courts an attractive proposition. In this regard, Oman issued Litigation Procedures Simplification Law No. 125/2020, to streamline and speed up litigation for certain disputes, including commercial disputes of foreign investment projects established under the foreign capital investment law.[567] According to article 10 of that law, the competent court must rule on these disputes within 30 days from the date of transmission of statement of claim to that court. However, this period may be extended with an extension period not exceeding 4 months.

However, as an exceptional way, it is permitted for the parties to disputes related to foreign investment to recourse to arbitration to resolve their disputes.

There is something of an issue with the vagueness in the technical wording of article 17 concerning method of arbitration, and this may raise two questions:

The first is whether the word “others” in the article include governmental entities? To resolve this technical vagueness, it may be useful to review article 1 of the Arbitration Law in Civil and Commercial Disputes which states “…the provisions of this Law shall be applicable to any arbitration between persons under public or private law, irrespective of the nature of legal relationship on which the dispute is based…”. Under this article, and in order to resolve any disputes arising from administrative contracts with foreign investors, public persons can be parties to arbitration agreements. In addition, article 6 (bis) of the Administrative Court’s Law [568] has asserted the validity of an arbitral agreement between governmental entities and private persons.[569] Moreover, within the Foreign Capital Investment law, there is no restriction on governmental entities to enter into an arbitration agreement with foreign investors.

[567] Article 1 of Litigation Procedures Simplification Law 125/2020
[568] Royal Decree No .91/99 regarding establishment of the Administrative Court and issue its law
[569] Amel Kamel Abdallah, 'Arbitration in Administrative Disputes in Oman' (2014) SSRN Electronic Journal

Therefore, based on the previous reasoning, it can be said that the word “others” refers to both public and natural persons.

The second issue arising from the vagueness in the technical wording of article 17 is whether the offer of arbitration amounts to be binding on the Oman government or is there a need for further action?

Arbitration, whether investor-state or commercial arbitration, by its very nature as agreement, requires consent of both parties.[570] With this in mind, once the investor accepts the host state’s offer as contained in its internal investment legislation, an arbitration agreement is established, by default, and the arbitration process is initiated. Simply, the acceptance of the state offer by a foreign investor initiates the fullback position of arbitration proceedings.[571]

Unlike the state’s consent to arbitration included in an investment treaty which is specific to particular investors from a named country ; state consent to arbitration as set out in investment law, extends to all foreign investment from different economic sectors in that country.[572] Consequently, any state that wants to include arbitration in its investment law as mean of disputes resolution should take into consideration all the implications of such a decision would have, and use clear language in order that the intention of state can be understood by potential investor. Adopting an open offer for investment arbitration or using unclear language to express consent to this system could lead to a possibility of increasing the international arbitration case against a state.

Mbengue points out that when it comes to consent to arbitration, national investment regulations draw on a different form of language and specify varying levels of engagement. In this context, he observes that the provisions of national investment laws can be categorized into four main patterns.[573] The first is characterised by the fact that the state laws do not include any provision vis a vis arbitration. Typically, this type of law refers to domestic courts as the only means to settle investment disputes. The second pattern is the state laws that allow for investment arbitration when an investment treaty or investment contract referred

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[570] Wang, 'Consent in investor-state arbitration: A critical analysis' 335; Konstanze von Papp, 'Biting the Bullet or Redefining 'Consent' in Investor-State Arbitration? Pre-Arbitration Requirements After BG Group v Argentina' (2015) 16;2015; The journal of world investment & trade 696

[571] Christoph H. Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford handbook of international investment law* (Oxford University Press 2008) 831

[572] Ismail, *International investment arbitration: lessons from developments in the MENA region 86*

[573] About these categories see Mbengue, 'Consent to Arbitration Through National Investment Legislation'; Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' 156-159; Schreuer, 'Consent to Arbitration' 833-834

to; otherwise, the domestic court has jurisdiction over investment disputes. The third category is state laws that do not give strict consent to arbitration. Rather, they refer, among other methods, to recourse to arbitration to settle foreign investment disputes. These laws could require a subsequent agreement between the host state and foreign investors to obtain the host state's consent to arbitration. The final pattern is that national investment legislation "embody a clear-cut unilateral offer to arbitrate"[574].

Based on the above categorization of national investment law, it appears that Oman falls in the third pattern, because the second part of Article 17 refers to arbitration as a permitted method to be utilized to settle the investment disputes. However, Article 17 stipulates there has to be an agreement between the Oman government and foreign investors to allow for a recourse to investment arbitration. Thus, it can be said that according to Article 17 Oman's consent to investment arbitration is imperfect. For it to be perfect it would require subsequent approval by a competent authority. This approval could take three forms.[575] Firstly, inserting arbitral clause in the original contract between the investor and the appropriate governmental entity. It could take the shape of a post- conflict agreement between those parties to arbitrate their dispute (a submission agreement). The investment authorization granted to foreign investor by the competent authority could include an arbitral clause to provide for investor-state arbitration.[576]

Mbengue suggests that state could utilizes a conditional consent aimed at allowing it "to exercise a margin of discretion in deciding on whether or not to submit themselves to investment arbitration. Because of these characteristics, the 'optional arbitration pattern' constitutes a sort of safety valve for those states that do not want to make standing unilateral offers to arbitrate while preserving the option to subject themselves to arbitration under some circumstances"[577]. In addition, it can be argued conditional consent by a state may provide a degree of flexibility for the foreign investor to negotiate and agree with the host state about the components of the arbitration such as the forum, the rules of arbitration, and an applicable substantive law.

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[574] Mbengue, 'Consent to Arbitration Through National Investment Legislation'
[575] About these forms see section 2.3.2
[576] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 110*
[577] Mbengue, 'Consent to Arbitration Through National Investment Legislation'; also about the same justification see Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' 157

The use of unambiguous wording is a crucial factor in this discussion, because irrespective of the aim of the host state, using unclear wording could lead to an interpretation process by the international arbitral tribunal under ICSID arbitration, which could result in undesirable endings.[578] The investor could argue that domestic investment law of host state includes a standing offer for arbitration and therefore take the dispute with the host state to international investment arbitration. In this case, the formulation of any state article containing reference to arbitration procedures could be subjected to interpretation process by the arbitral tribunal who would ultimately decide whether it had jurisdiction over the dispute or not.[579]

As an example of unclear national provision laws referring to investment arbitration that has resulted in an unexpected and undesirable end, it is worth referring to the case of SPP *v. Egypt* [580] which was the first case brought before ICSID based on a provision of domestic law.[581] In this case the claimant based on an arbitral claim on article 8 of Law No. 43 of 1974 which provided that

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No 90 of 1971, where such Convention applies

In return, Egypt alleged that article 8 does not suffice to establish Egypt's consent to ICSID jurisdiction and further action from the state is required. The tribunal determined that nothing in the legislation required an additional ad hoc manifestation of consent to ICSID jurisdiction.

This case demonstrates the importance of using clear language in drafting internal investment law concerning the state's consent to investment arbitration. Clear legal text in this case would spare the need for an international tribunal to interpret what was meant by the provisions in

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[578] About interpertation of state's consent to investment arbitrtion see : Paleviciene, 'Consent to Arbitration and the Legacy of the Spp V. Egypt Case'; Wang, 'Consent in investor-state arbitration: A critical analysis'; Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws'

[579] Mbengue, 'Consent to Arbitration Through National Investment Legislation'

[580] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* ICSID Case No ARB/84/3, Decision on Jurisdiction, 27 April 1985, at paras : 71-73 , 89-101

[581] Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' 159

the law. For example, language that says "*as may be mutually agreed by the parties"* [582] *; "the parties may agree to settle investment disputes through arbitration"*[583] *or* other similar express could be firmly indicating that state consent to arbitration requires agreement.

It is therefore safe to say that the Omani legislation vis a vis, article 17 of The Foreign Capital Investment Law, has adopted a clear and a reasonable attitude in respect to Omani government's consent to investor-state arbitration. It is permitted for foreign investors who are in dispute with the government, to resolve their disputes by arbitration, provided they obtain government consent to do so.

A similar approach to that of Oman can be found in some countries of region. For example, Qatar- article 16 of Law on Regulating Non-Qatari Capital Investment in the Economic Activity No.1/2019- has allowed for Non-Qatari Investors to agree to settle any dispute between them and others through arbitration.[584] Similarly, the United Arab Emirates- article 12 of Federal Law on Foreign Direct Investment No. 19/2018- states that disputes that may arise from the Foreign Direct Investment Project may be settled by all alternative means of dispute settlement.[585]

Therefore, in this context, it can be argued that the Oman's attitude to investment arbitration in its investment law may be considered as a balanced, recognising the arbitration system as one of the means to settle investment disputes provided consent of parties to it. Arguably, this approach may grant the foreign investors a degree of flexibility to negotiate the arbitration agreement in terms of the forum and rules rather than impose limited choices. Hence, within context of its national investment law, Oman appears to be an arbitration-friendly state.

Nonetheless, it is believed that the more transparent wording regarding the state's consent to arbitration in its foreign investment law would provide the foreign investor with a clearer position of the host state toward investment arbitration in its domestic law. At the same time, an unambiguous expression would protect the state from exposure to international investment arbitration, which could result in unwanted legal effects.[586] Consequently,

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[582] Ibid 157
[583] Schreuer, 'Consent to Arbitration' 833
[584] See 'Investment Laws Navigator-Qatar Investment Law' (*United Nations Conference on Trade and Development(UNCTD),* <https://investmentpolicy.unctad.org/investment-laws/laws/314/law-no-1-of-2019> accessed 3 November 2021
[585] See 'Investment Laws Navigator-the United Arab Emirates Investment Law' (*United Nations Conference on Trade and Development(UNCTD),* <https://investmentpolicy.unctad.org/investment-laws/laws/320/federal-law-regarding-foreign-direct-investment> accessed 3 November 2021
[586] Mbengue, 'Consent to Arbitration Through National Investment Legislation'

unequivocal wording concerning the consent of the Oman government to investment arbitration may be beneficial in providing legal certainty for both host states and foreign investors.

The establishment of the Oman Commercial Arbitration Centre is one of the measures adopted to realise Oman vision 2040 (national development plan) as part of the national framework for investment dispute resolution. The section that follows will discuss the relevance of this institution and its potential effect on the investment climate.

3.3 Oman Commercial Arbitration Centre (OAC)

As one of the domestic arrangements that support the arbitration and investment climate environment in Oman, it is essential to provide a brief summary of a long-awaited step recently taken by the government in establishing the Oman Commercial Arbitration Centre (OAC) and evaluating its significance for foreign investment. This centre is a step in the right direction and is designed to improve Oman's local and international business environment. It stems out from Oman's 2040 vision with the strategic objective of encouraging new investments in Oman.[587]

The Oman Commercial Arbitration Centre was established by Royal Decree No. 26/2018. According to that decree, the centre is a subordinate entity of the Oman Chamber of Commerce and Industry. However, it has legal personality and enjoys financial and administrative independence.[588] Regulations appertaining to the Centre were issued by the decision of Chairman of Oman Chamber of Commerce and Industry No. 37/2019. According to article 4(1) of that decision, the three critical services that the Centre provides are arbitration, mediation, and conciliation. In November 2020, the Chairman of the Board of Directors of the Centre issued Decision No. 8/2020 regarding the Centre's Arbitration Rules. The Centre has adopted a set of rules that is believed to be up to date and consistent with international developments and standards in the field of international arbitration.[589]

Al-Azri, Moosa CEO of the Centre believes that in response to the demands of the business environment, countries around the world are racing to develop alternative methods of

[587] See 'Oman Commercial Arbitration Centre (OAC)' <https://omanarbitration.om/> accessed 22 November 2021
[588] Article 1 of Royal Decree No. 26/2018 on Establishing Oman Commercial Arbitration Centre
[589] See 'Oman Commercial Arbitration Centre (OAC)'

resolving trade disputes. Based on that fact, the Sultanate has established its own arbitration centre to provide an attractive environment for investment.[590] In fact, the new domestic arbitral centre is in line with the Foreign Capital Investment Law 50/2019 which is the authorisation for foreign investors to resolve their disputes with others through means of arbitration.

In general terms, the centre could support foreign investment and improve business environment through following avenues:

The Centre is considered a central facility for international companies, as it will provide them with the institutional arbitration services that they usually request because this means of adjudication saves time and efforts.[591] Therefore, the Centre represents an alternative means for the business community to resolve its disputes away from state courts. This new arbitral institution will facilitate the process of arbitrating foreign investors' contractual disputes whether with their domestic business partners or public entities. According to Weiwen, it is vital for foreign investors in the host state to have access to domestic arbitral institutions that can successfully resolve contractual disputes. He suggests that having domestic arbitral institution in host states play a positive role in attraction and boosting foreign investment.[592]

Moreover, the Centre might represent means for Oman government to avoid international arbitration of its disputes with foreign investment under its bilateral investment treaties. UNCTAD suggests that for host states strong alternative dispute resolution (ADR) mechanisms can be effective means to avoid international arbitration of disputes.[593]

Also, the new Centre will further prompt private adjudication in Oman. The Arbitration Law was issued in 1997, but there was no formal institution to undertake arbitration service. The only choice for the parties wish to settle their disputes was ad hoc arbitration.[594] In these cases, contracting parties looking for institutional arbitration were forced to use regional arbitration bodies like the Dubai International Financial Centre or G.C.C Commercial

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[590] Ibid
[591] See 'New headquarters of Oman Commercial Arbitration Centre opens' *Oman Daily Observer* (Oman <https://www.omanobserver.om/article/1108636/oman/new-headquarters-of-oman-commercial-arbitration-centre-opens>
[592] Weiwen Yin, 'Domestic arbitral institutions and foreign direct investment' (2021) 21 International relations of the Asia-Pacific 401- 402
[593] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development* (UNCTAD 2015) 60
[594] Abdallah, 'Arbitration in Oman' 7

Arbitration Centre.[595] This was not only costly for the parties but also logistically complex.[596] Abdallah observes that the lack of an arbitration centre in Oman was inconsistent with the governmental desire to encourage international trade and foreign investment.[597] However, with the new institution, this can be changed as the construction of an arbitration system has gained more momentum.[598] Additionally, it is thought that the centre will seeks to reduce the burdens placed on judicial authorities and streamline the arbitration procedures in the Sultanate.[599] Certainly, these developments will reflect positively on the investment environment.

Nevertheless, it can be argued that it is too early to assess the impact of the Centre in the arbitration environment because it is a new institution and has not had much experience yet.

To conduct its role efficiently, the Centre will need to have ties with the most advanced international arbitration institutions to benefit from their experiences. Such arrangement will help the Centre to create momentum and become a trusted choice for the disputing parties. Additionally, the arbitration fees charged by the Centre should be affordable for foreign investors and in general lower than fees charged by regional arbitration institution. Moreover, the Centre will require reasonable support from the Omani judiciary through three stages of arbitration process: arbitration agreement, arbitration proceedings and particularly the stage of enforcement of an arbitral award.

An effective strategy to promote the newly established centre in the area of foreign investment, is to include it in Oman's bilateral investment treaties as a optional forum for international investors to resolve their disputes. In this regard for example Egypt systematically included the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in its bilateral investment treaties as a possible forum. Another example is Malaysia as it listed the Kuala Lumpur Regional Centre for Arbitration (KLRCA) as a forum to settle disputes.[600] As more critical example, Oman has listed GCC Commercial Arbitration Centre as

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[595] Ibid 43
[596] See 'Arbitration Law in Oman – Recent Developments'
[597] Abdallah, 'Arbitration in Oman' 42
[598] , 'Arbitration Law in Oman – Recent Developments'
[599] Hamad Al-Sharji, the Board Chairman of the Cente in 'New headquarters of Oman Commercial Arbitration Centre opens'
[600] Alexis Nohen, Joachim Pohl and Kekeletso Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, 2012) 21

available choice to foreign investor in its bilateral investment treaty with Belgium-Luxembourg Economic Union.[601]

[601] Article 12.2.C of Agreement between Oman and Belgium-Luxembourg Economic Union for the Promotion and Protection of Investments 2008

Chapter 4 Analytical Overview of International Legal Framework Governing Investor-state Arbitration in Oman

4.1 Introduction

There is an international framework for investment arbitration in addition to the national framework. National investment laws, it is argued, are insufficient to protect foreign investors. The method of resolving disputes also depends, more broadly and practically, on the applicable treaty law for investments: bilateral investment treaties or multilateral international treaties.[602]

To promote its position as a friendly destination for foreign investment the Sultanate has entered many international conventions. Among these conventions are those which have been created to deal with international investment and commercial disputes settlements. The most important convention in this regard which is related to the topic of this thesis (investment arbitration) is *the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)* which will be referred to as ICSID Convention. It works as international facility to settle disputes between foreign investors and the states hosting their investment. The second is *the New York convention of 1985 on recognition and enforcement of foreign arbitral awards* which is mainly dedicated to support international commercial arbitration.

Accordingly, section two will provide an overview of these two conventions alongside regional treaties related to investment arbitration. However, more attention will be paid to ICSID Convention as it is at the heart of international investor-state arbitration system. Moreover, within this section, the importance of these Conventions for the environment of arbitration in Oman and how they could highlight Oman as a promising place for international investments will be illustrated.

In the same context Oman has acceded to many bilateral investment treaties which have included investor-state arbitration as a mean of settling prospective investor- state disputes. Therefore, section three will give analytical overview about these treaties.

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[602] Najjar, *Arbitration and international trade in the Arab countries 121*

Normally, the practice and application of any system will reveal its quality and validity and whether there are weaknesses that need to be tackled. Therefore, section four will review some of the investor-state disputes Oman has been party to with the objective of assessing the need to improve legal framework of investment arbitration; considering the related policies and reviewing the role that should be played by government in attracting foreign direct investment particularly from a legal perspective.

4.2 Analysis of the International and Regional Conventions on Arbitration to which Oman has Acceded.

4.2.1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention)

This section will focus on the Sultanate's accession to ICSID Convention and the impact of this convention on investment climate in Oman. In addition, the section will shed light on the ICSID convention and its significant in the sphere of foreign direct investment.

4.2.1.1 The Sultanate's Accession to ICSID Convention and the Impact of this Convention on Oman Investment Claimant

According to Bashmill, for the host country, the most crucial advantage of being party to the ICSID Convention is improving the overall investment climate. Thus, by providing arbitration opportunities, host countries improve their prospects for investment. Through its dispute resolution mechanism, the ICSID Convention contributes to a global improvement in the process of FDI and economic growth in developing countries.[603] It is thought that foreign investors may anticipate that government membership in international organisations such as the WTO or the ICSID Convention will assist governments in establishing international credibility in the field of international investments.[604]

[603] H. Bashmill, 'Foreign Investment Disputes Settlement under ICSID and the Protection of FDI' (2016) 21 Journal of Internet Banking and Commerce 7

[604] Vu, 'Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration' 295

Najjar, has explained the accession of Oman and some of Arab countries to ICSID Conventions is because the effectiveness of the process established by the ICSID Convention for resolving investment disputes, as well as the guarantees provided by it. Furthermore, these governments' adherence to the Convention imposes no obligation on them to submit to ICSID arbitration. Additionally, the convention's accession dispels questions about a highly contentious subject in Arab arbitration practise: the arbitrability of cases between states or public law entities and private foreign entities.[605] Moreover, the ICSID Convention is believed to provide a safeguard for the expansion of Foreign Direct Investment (FDI) by private foreign entities from the developed world to Arab countries.[606]

Thus, it can be argued that Oman was aiming from its accession to ICSID Convention to enhance its international position as reliable country for international investments.

The Sultanate ratified the ICSID Convention in 1995 [607], and on August 23, 1995, the Convention entered into force.[608] Upon that, the ICSID Convention became an integral part of the Omani legal system governing investor-state arbitration upon such ratification. Thus, if the Oman government provides consent to ICSID jurisdiction in its investment treaties or contracts, it will be obliged to solve investment disputes under ICSID arbitration.

The Sultanate's ratification of the ICSID convention satisfied foreign investors by allowing them to resolve disputes with the Omani government through international arbitration.[609] Oman's membership in ICSID, which is a specialised and workable system for resolving investor-state disputes, provides an additional layer of protection for foreign investors in the Sultanate. As individual foreign investors will be able to act against Oman at international level under Omani investment treaties or contracts.[610] The majority of Oman's bilateral investment treaties include ICSID as a possible forum for resolving potential investment disputes with foreign investors.[611] This has resulted in the Oman government's involvement in several investor-state arbitration cases before ICSID. Section four of this chapter will analyse these cases.

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[605] Najjar, *Arbitration and international trade in the Arab countries 159-160*
[606] Ismail, *International investment arbitration: lessons from developments in the MENA region 115*
[607] Royal Decree No. 33/1995 on Ratification of the ICSID Convention 1965
[608] ICSID, 'Database of ICSID Member States-Oman ' <https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details> accessed 7 March 2022
[609] Abdallah, 'Arbitration in Administrative Disputes in Oman'
[610] Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 125
[611] As it would be demonstrated later within this chapter, section three

However, it must be acknowledged that not just foreign investors in Oman have benefited from the protection provided under ICSID Convention, but also outward investments (Oman investors investing abroad aboard) have sought protection under the Convention. There has been, at least two investment cases filed by Omani investors before ICSID.

4.2.1.2 Overview on the Convention and its Imprtanc in the Field of Foreign Direct Investment(FDI)

The international Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also called the ICSID Convention or the Washington Convention, was adopted by the World Bank on 18 March 1965. The Convention entered into force on 14 October 1966, 30 days after the signature and ratification of 20 states (article 68.2).[612] According to the database of member states in ICSID website, by 2021 there were 164 signatory and contracting states.[613] Indeed, it can be suggested that this massive number of signatory and contracting states is a strong indicator of importance of this convention in the world of foreign investment.

The ICSID Convention is still the only international /governmental arrangement that is devoted exclusively to the settlement of international investment disputes between foreign investors and their host states.[614] It is the only successful international convention in the field of foreign investment. Nevertheless, it merely provides a procedural framework for settling investor-state disputes, primarily through arbitration under many investment treaties and investment contracts.[615] This, given that the efforts to adopt a multilateral convention containing substantive principles of investment protection[616] were met with failure.[617] However, interestingly the ICSID Convention has influential role in the construction of substantive norms

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[612] See 'Overview on ICSID Convention' (*The International Centre for Settlement of Investment Disputes* <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview> accessed 9 February 2022; Christoph H. Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2001) 4

[613] See 'Database of ICSID Member States' (*International Centre for Settlement of Investment Disputes,* <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 9 February 2022

[614] Dolzer and Schreuer, *Principles of international investment law 238*

[615] M. Sornarajah, *The international law on foreign investment* (Fifth edn, Cambridge University Press 2021) 104; also see Collins, *An introduction to international investment law 234*

[616] About these efforts see ,for example, Subedi, *International investment law : reconciling policy and principle 35-77*

[617] See section 2.4.1

of international investment law.[618] Sornarajah claims that "clearly, the technique adopted by the developed states and the World Bank, which was instrumental in bringing about this Convention, was that, if procedural means for protection were created, then recourse to these procedural means of protection through arbitration would enable the building of substantive principles of investment protection"[619].

Indeed, the inclusion of the ICSID dispute resolution mechanism in the majority of bilateral and multilateral investment treaties demonstrates the importance of a common forum for international investment disputes.[620] Similarly, given the volume of cases arising from alleged violations of investment treaty provisions, Sornarajah claims that ICSID arbitration is the most popular form of investment arbitration.[621] In the same regard, the ICSID database shows that ICSID arbitration, under the Convention or Additional Facility, is the most common option featured in international Investment Agreements (IIAs), and is included in over 90% of all known treaties.[622] . Moreover, about 70% of all known investor-state disputes cases administrated under ICSID Convention.[623] Thus, all these statistical facts demonstrate how the ICSID Convention is a critical international instrument in the field of foreign investments.

As its expressed in the preamble, the Convention was elaborated to meet the need for international cooperation for economic development, and the role of private international investment therein by fostering a favourable investment environment.[624] Under the Convention, the International Centre for Settlement of Investment Disputes was established to be the practical vehicle to meet that need.[625] According to article 1.2 of the Convention the main purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. In this regard, Shihata has stated that one of the international organizations and arrangements[626] been established under the umbral of the World Bank to stimulate across border investments is

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[618] Sornarajah, *The international law on foreign investment 111,112 ; also see section 2.4.2*
[619] Ibid 104
[620] Bashmill, 'Foreign Investment Disputes Settlement under ICSID and the Protection of FDI' 4
[621] Sornarajah, *The international law on foreign investment 370*
[622] ICSID, *Special Features and Benefits of ICSID Membership* (ICSID publications , 5 April 2021) on<https:icsid.worldbank.org>accessed on 14 Fubruary 2022
[623] Ibidon< https://icsid.worldbank.org> accessed on 14 February 2022
[624] Dolzer and Schreuer, *Principles of international investment law 238*; Salacuse, *The law of investment treaties 93*
[625] ICSID Convention, article 1
[626] Ibrahim F. I. Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' (1986) 1 The American University Journal of international law and policy 98

ICSID Convention.[627] Alongside with ICSID, the World Bank has established other agencies which are closely important for the purposes of International investment such as the Multilateral Investment Guarantee Agency (MIGA) to provide guarantees against non-commercial risks faced by investors operating in host states, and International Finance Corporation (IFC) to provide financial support for foreign investment projects in host states.[628] However, the ICSID is the only organization within the World Bank's framework which specialises in settling international investor-state disputes.

Therefore, it can be said that the Convention has come to promote international investment and enabled it to play its role in global economic development. It is doing so through providing the legal means to settle the potential international investment disputes between foreign investors and their hosting states.[629]

However, it must be acknowledged that the Convention is important not just for foreign investors but even for host states. This is because it provides investors with legal protection and host states with the increased possibility of increasing their share of foreign direct investment, as investors will be more willing to invest in states that are party to the Convention.[630] Bashmill suggests that ICSID Convention has created a mutually trusting climate between the investor and the host country.[631] He continues by arguing that the ICSID Convention, with its dispute resolution mechanism, is improving the global process of FDI and developing countries economic progress.[632] In the same way, Sornarajah states that the ICSID Convention intended to create a structure that balances the interests of both foreign investors and host states.[633] Also, in this context, the case law has emphasised the fact that the ICSID Convention is not just significant for investors but also for host states. The tribunal in *Amco v. Indonesia* has stated that

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[627] Ibid 97-98
[628] For more Details see Collins, *An introduction to international investment law 45-49*
[629] Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 4-5*
[630] Bashmill, 'Foreign Investment Disputes Settlement under ICSID and the Protection of FDI' 4; Collins, *An introduction to international investment law 234*
[631] Bashmill, 'Foreign Investment Disputes Settlement under ICSID and the Protection of FDI' 4
[632] Ibid 7
[633] Sornarajah, *The international law on foreign investment 300*

> Thus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.[634]

Generally speaking, the jurisdiction of ICSID Convention required two main conditions (article 25). The first is the existence of investment disputes of a legal nature between a state party to the Convention and a national of another contracting state.[635] Another condition is that the both parties to the dispute must have consented to ICSID Convention's jurisdiction.[636] Thus, being a state party to ICISD Convention does not automatically confer jurisdiction over investor-state disputes. To establish ICSID Jurisdiction, consent is required. However, the ICSID's Convention's jurisdiction has been expanded in terms of parties, thanks to its new Facility regulations, which allow claims to be filed even if only one party has a link to ICSID (either the host state has ratified ICSID, or the investor comes from a state which has done so).[637]

4.2.1.2.1 ICSID features

The ICSID Convention contains some of the key supportive features which make it an ideal international arrangement for the investor-state arbitration.[638]

First, the ICSID Convention provides a system of dispute resolution that is solely dedicated to investor-state investment disputes (article 1.1). Based on that fact, it can be argued that the idea of specialization has enabled the ICSID to develop a deep wealth of experiences in the area of international investor-state arbitration. Therefore, this has led to creation of trust in the ICSID Convention by all parties as a specialized, experienced, and fully equipped international platform to settle investment disputes. Sornarajah points out that arbitration under the ICSID Convention is distinct from ad hoc or private arbitral organisations, but they're

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[634] *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No ARB/81/1,Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 400 , cited in Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 5*

[635] About the definition of *investment* under ICSID (article 25) and its parameters see section 2.3

[636] Dolzer and Schreuer, *Principles of international investment law 238*; for more details about the condtions and scope of ICSID's jurisdaction see Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 94-252*

[637] Collins, *An introduction to international investment law 234*

[638] For more detailes about these features see Dolzer and Schreuer, *Principles of international investment law 238-239*; Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 104-106

often confused. He continues to emphasize that ICSID is a specialised institution charged with resolving investment disputes; unlike other arbitral tribunals, it is governed by an international agreement. It has the legal standing of an international organisation, whereas other arbitral tribunals are either private bodies created by individual sovereigns or by the immediate parties to a dispute, as in ad hoc tribunals.[639]

Secondly, the Convention provides a fool proof framework for preventing a recalcitrant party from sabotaging the process. This means that the non-cooperation of a party does not threaten ICSID proceedings. Thus, if one of the parties does not act, the proceedings will not be stalled. For example, arbitrators who are not chosen by the parties will be chosen by the centre (article 38)[640]; a party's failure to submit memorials or attend hearings will not halt the procedures (article 45)[641]; Once both parties give their consent to ICSID arbitration, neither parties can unilaterally withdraw the consent (article 25.1).[642]

Thirdly, the Convention provides foreign investors with direct access to international remedies without the need to depend on their home states.[643] As it been explained previously,[644] the situation was different under customary international law. The aggrieved investors could not seek international remedy directly by themselves instead they have to rely on their governments to get diplomatic protection.[645] Davide suggests that, the ICSID Convention filled a gap that had existed in international law by allowing private parties to pursue claims against states for violations of international obligations.[646] Within the same context, from a political point of view, the Convention plays a role in depoliticising the investment relationship between a foreign investor and a host state. It is argued that the ICSID Convention was established to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties concerned and attempts in particular to

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[639] Sornarajah, *The international law on foreign investment 299*
[640] Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 487-489*
[641] Ibid 694-696
[642] Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 105
[643]Subedi, *International investment law : reconciling policy and principle 121 ;* ; Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 102
[644] See section 2.4.1
[645] Subedi, *International investment law : reconciling policy and principle 122*
[646] Collins, *An introduction to international investment law 233*

"depoliticize" the settlement of investment disputes.[647] The dispute settlement process is depoliticised and subjected to objective legal criteria. In turn, the host state obtains the assurance that it will not be exposed to an international claim by the investor's home state and home state will not need to adopt its investor's claim.[648] Thus, both host and home states will be able to continue their political relationship far from investment disputes and necessarily this has resulted in the stability of international relations in general. In addition, the depoliticization of investment disputes should be led to foster a climate of mutual trust between governments and foreign investors that encourages the flow of resources to developing countries.[649]

The other most important feature that account for the effectiveness of ICSID Convention in resolution of investment disputes is protect ICSID proceedings from judicial intervention.[650] Unless the parties agree differently, consent to ICSID arbitration is deemed to be exclusive of all other remedies under the ICSID Convention (article 26). It is possible to state that, such safeguard should promote the ICSID Convention's effectiveness and, therefore, foster parties' confidence in ICSID system as means of investment dispute resolution.

Lastly, perhaps the most essential aspect that characterizes the ICSID Convention and makes it more preferable for the foreign investors over the other institutional arbitration is its private mechanism for review and enforceability of arbitral awards. It is believed that this insulation from interference is perhaps the greatest procedural advantage of an ICSID arbitration compared to other disputes settlement system in international investment law.[651] The awards of the ICSID Conventions are binding and final and are not subject to review except under the strict conditions stipulated in the Convention itself (articles 49-52). According to article 54, all states signatories to the Convention accept the awards as final, and the financial obligations deriving from them are to be enforced in the same way as final judgments of local courts in all

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[647] Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' 4; Sergio Puig, 'Recasting ICSID's legitimacy debate: towards a goal-based empirical agenda' (2013) 36 Fordham international law journal 485-487

[648] Schreuer, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States-399*

[649] Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 103

[650] Collins, *An introduction to international investment law 49*; Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 105

[651] Collins, *An introduction to international investment law 240*; Dohyun Kim, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment-based system' (2011) 86 New York University law review (1950) 244

contracting states. However, in case the state involved is refusing to comply with an ICSID award that would deprive it of credibility in the international business community. Thus, it is not likely that states, especially those aims at attracting foreign investments, would risk their reputation. In the same context "Compliance with ICSID awards is facilitated by the strong institutional link of the Centre to the World Bank. Most States will find it unwise to jeopardize their good standing with the Bank through noncompliance with an ICSID award"[652]. As a World Bank branch, ICSID might use the denial of World Bank assistance as a sanction for failing to enforce its awards.[653] Moreover, a state taking such an attitude of state could expose itself to litigation before *International Court of Justice* by another concerned contracting state.[654] Non-compliance would also lead to a revival of the right to diplomatic protection by the investor's State of nationality.[655] Thus, it can be stated that rational reasons to which have just referred, represent safeguards for foreign investors against non-compliance from the host states.

Sornarajah, on the other hand, claims that because non-ICSID tribunal rulings are enforceable under the New York Convention on the Enforcement of International Arbitral Awards, the system has a strong compliance mechanism, which makes it appealing to foreign investors. He adds that "sovereign immunity no longer poses a problem to enforcement, as the contract would readily be regarded as a commercial contract, despite the fact that it may have many sovereign features".[656] However, it can be argued that the enforcement mechanism under ICSID Convention is still more effective compared to New York Convention's mechanism for the reasons been demonstrated above.

4.2.1.2.2 Criticisms of ICSID

Although ICSID's popularity as a form for the resolution of international investor-state disputes and its pivotal role in the area of foreign direct investment and international investment law, it has been criticized for different reasons. These criticisms against ICSID arbitration and

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[652] Christoph. H Schreuer, 'The World Bank/ICSID Dispute Settlement Procedures, in: Settlement of Disputes in Tax Treaty Law' (2002) Lang/Züger, eds 581
[653] Collins, *An introduction to international investment law 49-50*
[654] Shihata, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' 105
[655] Schreuer, 'The World Bank/ICSID Dispute Settlement Procedures, in: Settlement of Disputes in Tax Treaty Law' 581
[656] Sornarajah, *The international law on foreign investment 372*

investor-state arbitration in general, have been mentioned in previous pages. However, this section aims at exploring some of the main criticisms a little further.

One of the main attacks on ICSID is a lack of transparency in ICSID arbitration. This complaint stems from the fact that public access to ICSID arbitration sessions is still restricted. The ICSID tribunals' deliberations are usually private and confidential. Because of the public interest issues involved in many conflicts, there has been a growing need for transparency in the settlement of investor-state disputes. In turn, however, this disadvantage, i.e., the confidentially of ICSID arbitration, is considered an advantage for both parties of ICSID arbitration, namely investors and host state.[657] Confidentiality is one of the critical advantages of ICSID arbitration, where there is often negative publicity associated with conventional litigation, which can affect a company's value or a state's international reputation.[658] Another fact is that the ICSID Convention makes no mention of secrecy. As a result, parties must seek secrecy, which the majority of them do on a regular basis.[659] Thus, it is clear that there is conflict of interest between the parties of ICSID arbitration and other stakeholders in this regard.

On the other hand, however, there are some developments related to the question of transparency which may be worth mentioning. In 2006, the ICSID Arbitration Rules[660] were amended to allow non-dispute parties to intervene and attend hearings in arbitration proceedings, provided that the non-disputing party has a significant interest in the

Proceeding. It is thought that the new rules encourage the disclosure of ICSID awards and helped to address some of concerns related to the question of transparency.[661] While the proceedings themselves are usually closed to the public, many ICSID awards and other procedural and jurisdictional decisions are now made available on the ICSID website with both parties' consent. Moreover, the 2022 amendments provides that the parties are deemed to consent to publication if no written objection is made within 60 days after dispatch of the

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[657] Collins, *An introduction to international investment law 238*
[658] David Collins, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013) 187
[659] Collins, *An introduction to international investment law 238*
[660] 2006 amendments included Arbitrtion Rules No 6,32,37,39,41,48. See ICSID, 'Amendments to the ICSID Rules and Regulations' 5 April 2006) <https://icsid.worldbank.org/news-and-events/news-releases/amendments-icsid-rules-and-regulations> accessed 28 February 2022
[661] Gloria Maria Alvarez and others, 'A response to the criticism against ISDS by EFILA' (2016) 33 Journal of international arbitration 5; Susan D. Franck, 'The ICSID effect? Considering potential variations in arbitration awards' (2011) 51 Virginia journal of international law 842

award.[662] However, it may be claimed that the publication of arbitral awards and other arbitral decisions is still largely contingent on the consent of the disputing parties. The next chapter will provide more details about this issue.

Secondly, ICSID arbitration has been attacked, given the absence of an appellate mechanism. The ability to appeal a legal interpretation to a higher authority is often regarded as a necessary component of a fair and well-functioning legal system.[663] Also, D. Kim argues that it is vital for ICSID to establish a system with official substantive review powers in order to increase the legitimacy of ICSID arbitral rulings and encourage the future development of coherent international investment law.[664] It is thought that an appellate mechanism within the investment arbitration system will lead to fundamental advantages, including Consistency and coherence of jurisprudence in the system, which , in turn, will create predictability and enhance the legitimacy of the system investment arbitration. Another possible advantage is rectification of legal errors and possibly serious errors of fact.[665]

Under ICSID Convention, the only way for the ICSID awards to be reviewed is annulment. However, annulment is only possible for very specific grounds. According to article 52 of the convention these grounds as follows: (I) the Tribunal was not properly constituted;(II) the Tribunal has manifestly exceeded its powers;(III) there was corruption on the part of a member of the Tribunal; (IV) there has been a serious departure from a fundamental rule of procedure; or (V)the award has failed to state the reasons on which it is based.[666] Nonetheless, the ICSID's annulment been attacked as it not allows for substantive review.[667]

Nevertheless, non-existence of an appellate degree within ICSID arbitration system, on the other hand, is believed to be a major procedural advantage of the ICISD system since it delivers finality, which reduces the timeframes and costs associated with protracted disputes going

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[662] Andrew Cannon, 'ICSID Member States Approve Amended 2022 Arbitration Rules' *Mondaq business briefing* (<https://go.exlibris.link/nX9kYwdC>

[663] Collins, *An introduction to international investment law 239*; David A. Gantz, 'An appellate mechanism for review of arbitral decisions in investor-state disputes: prospects and challenges' (2006) 39 Vanderbilt journal of transnational law 54

[664] Kim, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment-based system' 242

[665] Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview ' (2006) 11-12

[666] For more detailes about these grounds see Kim, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment-based system'

[667] Ibid 247

through multiple layers of adjudication.[668] Indeed, since the founding of ICSID, there have been only a few requests for annulment in comparison to the overall number of cases.[669]

Thirdly, another concern regarding ICSID arbitration is that it limits host state's sovereignty over its internal affairs. In other word the ICSID arbitration constrains a state's ability to regulate its public interests in favour of the foreign investor. It must be noted that certain criticisms of investor-state arbitration, such as infringement on state sovereignty and interference with a state's regulatory function, are applicable to all types of investor-state arbitration conducting under ICSID and non-ICSID arbitrations.[670]

However, it is thought that these adverse effects on host state regulatory powers are caused by international investment tribunals of ICSID arbitration or other types of investor-state arbitration. These tribunals "started according a meaning to certain provisions in the treaties that differed significantly in scope and breadth from what the states had originally intended them to mean. The view was that by being creative and adopting an expansive approach to treaty interpretation, these tribunals were encroaching upon the policy space of states."[671]

However, based on the previous claim, it is clear that interference with state sovereignty occurs as a result of a BITs or other investment treaty, not as a result of arbitral proceedings.[672] The protection standers in BITs typically drafted in very vague and broad terms.[673] In the same regard some have suggested that it is not arbitral tribunals' expansive and creative interpretations that expand the field of investment arbitration, but rather the deliberately broad wording of IIAs that establishes boundaries for arbitral tribunals. States recognise that by expanding the scope of investor and investment protection, they can increase their chances of attracting FDI.[674] Accordingly, a direct and a true factor that causes this dilemma is the fact that investment treaties vary in their drafting for the substantive principles of investment protection (fair and equitable treatment, direct expropriation, etc.).

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[668] Collins, *An introduction to international investment law 239*
[669] Ibid 240
[670] Diana Marie Wick, 'The Counter-productivity of ICSID Denunciation and Proposals for Change', ProQuest Dissertations Publishing 2011) 39
[671] Subedi, *International investment law : reconciling policy and principle 10*
[672] Wick, 'The Counter-productivity of ICSID Denunciation and Proposals for Change 40
[673] Subedi, *International investment law : reconciling policy and principle 14*
[674] Alvarez and others, 'A response to the criticism against ISDS by EFILA' 2

The question of the host state ‘s regulatory power or public interests within the field of international investor-state arbitration will be revisited and explored in further detail in this chapter later.

Fourthly, as seen from pervious arguments, the question of interfering with a state's regulatory capacity is strongly related to the issue of the interpretation of treaties. Indeed, ICSID arbitration has also been criticized because of an expansive interpretative approach of substantive protection standards adopted by an arbitral tribunal. The variation of interpretive approach leads to inconsistency in arbitral awards. However, to address this criticism, some have suggested that due to the broad substantive protection afforded investors by wide net of BITs, arbitral tribunals have sought to employ techniques of restrictive, expansive, and neutral interpretation that are well-known in the international public law sphere.[675] According to Subedi, the absence of global multilateral international treaties has led to such situation, as international arbitral tribunals interpret foreign investment rules differently.[676] Thus, without a multilateral investment treaty to regulate the entire body of investment law, some divergences in treaty interpretations are an inevitable result of the system.[677] Moreover, some have pointed out that a permanent or semi-permanent appellate body may be considered a viable solution to achieve consistency of arbitral awards. Nonetheless, such proposal raises some concerns regarding the length, costs and complexity of proceedings which could prove detrimental for parties with limited resources.[678]

Lastly, one of the fears concerning ICSID is the arbitrators' lack of independence and impartiality.[679] Due to the small number of arbitrators available to resolve investment disputes, conflicts of interest have naturally arisen.[680] In response to this claim, it has been suggested that the ICSID Convention incorporates measures (at the parties' disposal) that envision challenge procedures and are designed to avert arbitrators' partiality and prejudice.[681] Article 14.1 stipulates that ‘Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who

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[675] Ibid 2
[676] Subedi, *International investment law : reconciling policy and principle 241-244*
[677] Alvarez and others, 'A response to the criticism against ISDS by EFILA' 4
[678] Justine Touzet and Marine Vienot de Vaublanc, *The Investor-State Dispute Settlement System: The Road To Overcoming Criticism* (Kluwer Arbitration Blog, 6 August 2018)
[679] Subedi, *International investment law : reconciling policy and principle 14*; Alvarez and others, 'A response to the criticism against ISDS by EFILA' 6
[680] Federica Cristani, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' (8/2014) 13 The law and practice of international courts and tribunals 154
[681] Alvarez and others, 'A response to the criticism against ISDS by EFILA' 6

may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators'. According to article 57 of the Convention, arbitrator may be disqualified if he or she lacks the qualities required by article 14.1. However, it is claimed that because the decision on disqualification is made by the other members of the same tribunal (article 58), this may result in a more restrictive application of the rules in question in order to protect the self-interest of individuals belonging to the same procedural category.[682]

In practice, in *Caratube v. Kazakhstan* case the claimant has proposed the disqualification of one of the arbitrators as he lacked independence and impartiality, and the arbitrator was disqualified for that reason.[683]

As can be seen from an earlier analysis, the ICSID convention and its arbitration jurisprudence has revealed some concerns. Accordingly, these concerns need to be considered through improvement of some aspects of ICSID. However, this is not to suggest that the ICSID system of arbitration has not played a vital role in international investment law. In fact, as explored in chapter two, ICSID arbitration case law has worked as a vehicle for developing and shaping the landscape of international investment law to make it more vibrant. Arguably it is quite normal for a system to evaluate its own practice in order to test its effectiveness and, consider how it could be improved.

The ICSID arbitration system may need improvement to be able to keep up with global economic transitions and the legitimate interests of all stakeholders involved in that system (states, investors and non-governmental societies). As Franck states 'We are in a time of global economic transitions, where the integrity of international institutions - particularly the World Bank - is of vital importance. Now is the time for institutions such as ICSID to minimize concerns about legitimacy and maximize opportunities for equality'[684].

According to Al Azri, it is not yet clear whether Omani policymakers share similar concerns about the ICSID mechanism. However, in the light of a previous presentation, it is debatable whether Oman should seek out different legal arrangements at the international level, outside

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[682] Cristani, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' 159; Chiara Giorgetti, 'Challenges of Arbitrators in International Disputes: Two Tribunals Reject the "Appearance of Bias"' (6 June 2012) 16 The American Society of International Law

[683] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No ARB/13/13) Decision on the Proposal for Disqualification of Arbitrator Bruno Boesch (March 20, 2014)

[684] Franck, 'The ICSID effect? Considering potential variations in arbitration awards' 914

of the ICSID Convention, to reform its investment arbitration system in a way that strikes a balance between foreign investors' interests and Oman's public policy. Oman is concerned about attracting investment, but this must not be at the price of the public good.

Answering this question may require conducting comparison between ICSID and the latest pattern of resolving investment disputes (Investment Court System) that has been adopted by EU in investment chapters, as part of the European Free Trade Agreements (FTAs) such as EU-Canada and EU-Singapore agreements. The reason to choose the EU model of investor-state disputes resolution as a comparator to investor-state arbitration under ICSID, is that EU pattern was based on the concerns brought forward against ICSID arbitration analysed above. The EU pattern was created to overcome these concerns.[685] It is suggested that there are various proposals to modify the present arbitration system, including the Investment Court model, which the EU suggested in its free trade agreements with Canada and Vietnam. This concept is expected to address some of the shortcomings of ad hoc arbitration, such as the lack of permanent judges or an appeal tribunal. It is, however, in the testing stage, and its success is highly dependent on the backing of non-EU countries.[686]

The next chapter will be devoted to looking at this issue.

4.2.2 The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

The Sultanate joined the New York Convention in 1998.[687] Oman is required by this Convention to give effect to private agreements for the resolution of disputes (Article II). Additionally, Oman must recognise and enforce foreign arbitral awards made in another contracting state (Article III). Oman ratified the Convention without making the two reservations of "reciprocity" and "commerciality."[688] This means that the Convention applies to any arbitral foreign award in Oman, regardless of whether the seat of arbitration is a party to the Convention or not, and regardless of whether the dispute arose out of a commercial relationship or not, under Omani

[685] August Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' in Armand de Mestral (ed), *Second Thoughts* (Investor State Arbitration between Developed Democracies, McGill-Queen's University Press 2017) 339-340
[686] Allen and Rigsbee, *Oman under Qaboos: from coup to constitution, 1970-1996 316*
[687] Royal Decree No. 36/1998 on Ratification of the New York Convention 1958
[688] See 'Member States of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 8 March 2022

law. Al Siyabi believes that Oman's admission to the Convention brought an end to a lengthy period of uncertainty regarding the likelihood of international arbitral awards being enforced in Oman.[689]

Generally, this Convention plays a considerable role in the area of international Trade and investment. It does so because it guarantees smooth and safe recognition and enforcement of foreign awards resulting from arbitration of international commercial disputes. In particular, this Convention is critical to the success of the arbitral process in the Arab countries and, as a result, to the growth of foreign direct investment in various economic sectors.[690] By March 2022 the number of States Parties was 169.[691]

Initially, the New York Convention was designed to deal only with international commercial arbitration because arbitral awards against state parties simply could not have occurred at that time.[692] Subsequently, the Convention became the logical mechanism for enforcing non-ICSID investment arbitral awards in foreign investment disputes. While the ICSID Convention contains the machinery for enforcing ICSID awards, non-ICSID investment awards made by arbitral institutions or ad hoc tribunals will have to rely on the New York Convention, the only other international convention that provides for the enforcement of arbitral awards.[693]

There may be situations where international investor-state arbitration could not be conducted under ICSID Convention.[694] (I) As demonstrated in the last chapter, the enforcement of non-pecuniary obligations of ICSID award has to be subjected to the New York Convention.[695] (II) Additionally, there is circumstances under which a host state or/and a home state of an investor is not a party to ICSID Convention, as in the situation with India which is not party to ICSID Convention for example. In such case the parties would have to resort to one of the international institutions of arbitration or ad hoc tribunal to arbitrate their investment dispute.[696] Also, there is a situation when both the host state and the investor's home state are

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[689] Al-Siyabi, 'A legal analysis of the development of arbitration in oman with special reference to the enforcement of international arbitral awards 281

[690] Ismail, *International investment arbitration: lessons from developments in the MENA region 52*

[691] See 'Member States of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' accessed 8 March 2022

[692] M. Sornarajah, *The settlement of foreign investment disputes* (Kluwer Law International 2000) 309

[693] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 449 ;* Sornarajah, *The settlement of foreign investment disputes 309*

[694] See Piero Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' <https://www.lawinsider.com/contracts/4RT61Ci9OqG> 3

[695] See section 3.2.2.3

[696] Wick, 'The Counter-productivity of ICSID Denunciation and Proposals for Change 70-71

parties to the ICSID convention, but disputing parties choose to conduct the arbitration process before international arbitral institutions or ad hoc tribunals whenever such choice is available for them in investment treaty or contract. For instance, although Oman and US are both contracting states to ICSID Convention, Oman -United State Free Trade Agreement (FTA) has granted a claimant the freedom to choose the forum of arbitration:

> Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules; or (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.[697]

In all of above-mentioned situations the enforcement of non-ICSID foreign investment arbitral awards will be subject to the New York Convention.[698]

Therefore, in the Sultanate, the New York Convention would apply to foreign investment arbitral awards which are rendered in one of above-mentioned events. As such, this Convention is still very important for foreign investors in Oman. Since Oman provides for investor-state arbitration to be conducted under non-ICSID arbitration forum in its investment treaties, there is a possibility for the New York Convention to be applied to investment arbitral awards that arise from this type of arbitration.

However, as stated in the previous chapter, the domestic legal provisions regulating the procedure of recognition and enforcement of foreign arbitral awards under this convention seem vague and scattered between more than one law. These provisions are contained in the Civil and Commercial Procedures Law No.29/2002 and Law of Arbitration in Civil and Commercial Disputes No. 47/1997. Thus, Oman needs to modernize and simplify legal provisions concerning enforcement of foreign arbitral awards resulting from international non-ICSID investment arbitration. The practical suggestions for reforms to modernize and simplify the relevant legal provisions and the question of competent court have explained in the previous chapter.[699] It is thought that Oman's international commitments cannot function in

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[697] Article 10.14.3 of Oman-United State Free Trade Agreement (FTA)
[698] Moses, *The principles and practice of international commercial arbitration 239*
[699] See sections 3.1.3 and 3.2.2

isolation and will be ineffective at protecting foreign investment unless they are supplemented by an adequate national legal system and practice.[700]

Another issue that is presumed to be analysed here is the Omani judiciary's practice vis a vis the recognition and enforcement of foreign ICSID and non-ICSID investment arbitral awards under concerned international conventions. However, it is impossible to conduct such analysis since there is no known application for recognition and enforcement of these types of decisions that has so far been placed before the Omani judiciary.[701]

4.2.3 Regional investment conventions related to investor-state arbitration

The Sultanate has ratified some regional conventions which provide investor-state arbitration for settling investment disputes. Thus, this section will briefly highlight the significant regional investment treaties that Oman is a signatory, and which involve obligations to investment arbitration under these agreements.

The regional conventions on investment play a supportive role in promoting and protecting investments within the borders of a specific region. Throughout the growth of international investment law, regional investment agreements were developed with the objective of promoting and protecting investments between countries within a geographical area.[702] Arab states formed regional international investment treaties within that framework. In 1980, the *Unified Agreement for Arab Capital Investment in Arab States* was concluded. Oman ratified this agreement in 1994.[703]

The agreement regulates intra-Arab investments and attempts to promote the free flow of Arab money within Arab states.[704] Economically, however, one of the key objectives of this arrangement was to encourage citizens of wealthier Arab countries to invest in the region's poorer countries.[705] This agreement provides for ad hoc investor-state arbitration as optional

[700] Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 125
[701] See 'Investment Treaty Arbitration: Oman' 17 April 2022
[702] Salacuse, *The law of investment treaties 97*
[703] Royal decree No. 29/1994 on Ratification of Unified Agreement for Arab Capital Investment in Arab States
[704] Nassib G. Ziade, 'Arbitration under MENA regional investment treaties' (2017) 83 Arbitration (London, England) 48
[705] Salacuse, *The law of investment treaties 97*

means to settle investment disputes.[706] However, despite that fact, the member states' investors, in the majority of cases, have resorted to international investor-state arbitration such as ICSID arbitration to settle their disputes with Arab host states under bilateral investment treaties. For example, although bilateral investment treaty between Oman and Yemen offers for *Unified Agreement for Arab Capital Investment in Arab States* among other alternatives to settle investor-state disputes, the Omani investor in the case of *Desert Lines vs Yemen* has chosen to take the dispute to ICSID.[707] The reason behind investor's choice could be that the *Unified Agreement* in its first version[708] does not provide high standards of protection to the Arab investors as the situation with most of bilateral and regional investment treaties.[709] Also, it can be added that there could be investor concern regarding the Yemen government's compliance with arbitration request under the *Unified Agreement* . Moreover, there could be concern about the possibility of later enforcement of the arbitral award against host states as there is no decisive mechanism for enforcement included in the Unified Agreement. Thus, Omani investor in that case preferred to resort to ICSID arbitration to dispel these concerns.

In general, there could also be fears among investors regarding political interference in the arbitration process that could be contacted accordance to this agreement. For example, Najjar states that in the investor-state arbitration between Libyan State and Kuwaiti investor which conducted under this convention, the circumstances surrounding the establishment of the arbitral tribunal under the auspices of the Arab League Secretary-General, whose political and official positions against the Libyan State and its then-leader, Colonel Kaddafi, were well-known, raised some doubts, particularly in light of the substantial sums awarded against the Libyan State in the aftermath of the political turmoil.[710] Moreover, Khattar claims that in practice, this agreement is rarely used as an investment claim instrument due to (i) the uncertainty regarding the existence of an agreement to arbitrate in the first place and (ii) the agreement's strict application requirements for Arab capital.[711]

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[706] Articles 25 and 26 see l 'Unified Agreement for Arab Capital Investment in Arab States' (*Investment Policy Hub-UNCTAD* 1980) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download> accessed 13 March 2022

[707] Ziade, 'Arbitration under MENA regional investment treaties' 49

[708] The agreemnet underwent substantial amendment in 2013. In this amendment, the standards of protection were enhanced see ibid 50

[709] Salacuse, *The law of investment treaties 97*

[710] Najjar, *Arbitration and international trade in the Arab countries 176*

[711] Mayssa Khattar, *Recent Investor-State Arbitration Trends in the Middle East* (Kluwer Arbitration Blog 2019)

There are no known investment disputes involving Oman and conducted in accordance with this Convention.

The second significant regional investment treaty that Oman is party to is *the 1981 Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States(OIC)*.[712] This agreement has reawakened interest, particularly in light of the increase in investment in Arab and Islamic countries and the growing importance of alternative dispute resolution mechanisms.[713] Among other mechanisms, this agreement offers for investor-state arbitration.[714] It is intended to provide adequate protection for capital invested in Member States and to grant these investments preferential treatment.[715] However, it is believed that a recurring issue that creates a stalemate when arbitrating investment disputes under this Agreement is the Secretary-General of the *Organization of the Islamic Conference* 's failure to fulfil its role as appointing authority when parties cannot agree on the appointment of a tribunal; frustrating claimants' efforts to resolve disputes through arbitration.[716]

However, the last years have witnessed an increasing number of investment cases based on this agreement.[717] For example, at the time of writing, *Qatar Airways*, as Qatar's national airline, has initiated four international investment arbitration proceedings against the United Arab Emirates, the Kingdoms of Saudi Arabia and Bahrain, and the Arab Republic of Egypt. All of these investment arbitration claims were brought under the OIC Investment Agreement; the Arab Investment Agreement; and the Qatar-Egypt bilateral investment treaty. All these cases are Pending.[718]

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[712] Royal decree No.121/1994 on Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States

[713] Najjar, *Arbitration and international trade in the Arab countries 176,177*

[714] Articles 16 and 17 see 'Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States.' 1981) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download> accessed 13 March 2022

[715] Najjar, *Arbitration and international trade in the Arab countries 177*

[716] Khattar, *Recent Investor-State Arbitration Trends in the Middle East*

[717] Michael Farchakh, *The Arab Investment Court and Intra-Arab BITs: a Potential New Frontier?* (29 December 2020)

[718] About the details of these cases see UNCTAD, 'Investment Dispute Settlement Navigator-Qatar ' <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/171/qatar> accessed 16 March 2022

One investment case was filed against Oman based on this agreement: *Bin Sulaiman v. Oman*.[719] That case was filed in *the Permanent Court of Arbitration*, and the selected arbitration rules are UNCITRAL rules. However, the case is still pending.[720]

The third important regional investment treaty which Oman is party to is the *2001 Unified Economic Agreement between the Countries of the GCC* which came under the umbral of *The Cooperation Council for the Arab States of the Gulf (GCC)*. As its preamble states, this agreement seeks to achieve advanced stages of economic integration. Articles 3 and 5 of this agreement contains some investment provisions (transparency and stability of the investment climate, steps towards harmonisation of investment regulations, national treatment for all GCC natural and legal citizens).[721] Moreover, the agreement offers for arbitration as means to solve any disputes could rise regarding non-implementation of the provisions of this Agreement or enabled resolutions taken to implement those provisions. [722]

However, two arguments can be made with regard to arbitration under this agreement. First, while the agreement contains some standards of protection of investment in GCC Countries, it does not use an explicit language with regard to mechanisms of investor-state dispute settlement as the situation with most of investment treaties. In other words, it refers to arbitration as a method of solving claims brought by any GCC citizen or official entity regarding non-implementation of the provisions of this agreement, but it is not clear whether the arbitration mechanisms cover investment disputes between GCC states' citizens as investors and official entities of host state. This uncertainty is due to that the agreement only provides for institutional arbitration under the auspices of the GCC Commercial Arbitration Centre based on the parties' consent.[723] But the GCC Commercial Arbitration Centre's Constitution limits its jurisdiction as to this agreement to *commercial disputes* arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for implementation thereof, if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre. Hence, what can be understood is that the only type of disputes that can be arbitrated under the agreement is *commercial*

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[719] *Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman* PCA Case No 2017-32 (Permanent Court of Arbitration)
[720] UNCTAD, 'Investment Dispute Settlement Navigator - Oman - Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman (PCA Case No. 2017-32)' <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/159/oman> accessed 15 March 2022
[721] OECD, *The MENA-OECD Investment Programme -Assessing Investment Policies of Member Countries of the Gulf Cooperation Council*, 2011) 52
[722] Article 27.1 of The Economic Agreement Between the GCC States
[723] Article 27.2 of ibid

disputes. Nevertheless, this also impose another question: do the terms of *commercial disputes* cover investor-state disputes also? Bashayrah claims that since the agreement contains investment protection standards, the commercial disputes should include investment disputes.[724] Thus, there is considerable uncertainty in this regard. The agreement was supposed to be straightforward and clearer about this point to provide GCC's investors with clear vison in respect to protection of their investment in GCC States.

The second point is that since the agreement does not contain GCC countries' consent to investor-state arbitration, the states' official entities should, after the dispute has arisen, provide the investor with their consent to be able to take the disputes to the GCC Commercial Arbitration Centre. Article 27.2 of GCC Agreement states that

> If the Secretariat General could not settle a claim amicably, it shall be referred, with the consent of the two parties, to the GCC Commercial Arbitration Centre to hear the dispute according to its Charter. Should the two parties not agree to refer the dispute to arbitration, or should the dispute be beyond the competence of the Centre, it shall be referred to the judicial body set forth in Paragraph 3 of this Article.

Based on the above, it can be argued that the GCC State's consent to arbitration under the GCC Agreement is more restrictive compared with the consent of these states in their Bilateral Investment Treaties with non-GCC States. The consent to arbitration in the GCC Agreement is conditional on further action from the state after the dispute has arisen. In contrast, in Bilateral Investment Treaties, the GCC States provide foreign investors with open consent to arbitration. As can be seen, foreign investors in GCC states have a preferential advantage over investors from GCC states who operating in other GCC countries in this aspect. Thus, much work from GCC states remains to be done in this area.

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[724] Muhammad Hussein Bashayrah, *Dispute esolution in accordance with the mechanism of the commercial arbitration center of the gcc countries* (1 edn, The GCC Commercial Arbitration Centre 2015- in Arabic) 90

4.3 Analysis of the Bilateral Investment Treaties to which Oman is A party

While the preceding section analysed the multilateral conventions relating to investor-state arbitration, which Oman is a party to, this section will explore the bilateral investment treaties (BITs) to which Oman is also a signatory[725], as another essential part of the international legal framework regulating investor-state arbitration in Oman. These international instruments include, inter alia, the definition of investment and investor (scope of the treaty), the substantive rights (protection standards), and the legal way for settling prospective disputes regarding these rights. However, since the scope of investment treaties has been explored in chapter two, this section will not deal with it.

This section will commence by providing an overview of Oman's BITs. Later, it will continue to analyse the substantive protection available to foreign investors through Oman's BITs and the processes for resolving investor-state disputes contained in Oman's BITs. Finally, the issue of a host state's public policy under the BITs will be discussed.

4.3.1 Overview of Oman's BITs

4.3.1.1 Do Bilateral Investment Treaties (BITs) Support Oman's Objective of Attracting Foreign Direct Investment (FDI)

In general terms, the emergence of BITs as a critical instrument of foreign investment protection is a relatively recent development.[726] As discussed in Chapter 2, BITs can be considered to a large extent the successor of diplomatic protection and customary law principles. After the Second World War states actively explored ways to boost the inflow of foreign capital while also conserving it, assuring long-term economic development.[727] Simply put, the purpose of BITs is to promote and protect mutual investment in the territory of

[725] In addition to bilateral investment treaties, Oman has a Free Trade Agreement with the United States that includes investment provisions. However, the former agreement will be referred to as BIT for the purposes of this section.
[726] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 57*
[727] Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International lawyer 656-657

contracting states.[728] The BITs contain a set of standards of protection available to foreign investors and provide them with access to international investor-state arbitration as a substantive incentive and form of protection.[729] Nonetheless, the ultimate purpose is that the protection given by BITs for foreign investment would help signatory countries progress economically.[730]

On the other hand, BITs acquire legal relevance because they serve as the foundation for international investment law alongside of other sources. International tribunals apply the provisions of BITs in resolving investor-state disputes through arbitration.[731] Thus, in terms of the international legal framework for foreign investment, the ICSID convention provides the procedural framework, while Bilateral investment treaties provide the substantive framework.

However, the association between concluding BITs and increased FDI flows is controversial. On the one hand, some have contended that there is no compelling evidence that BITs will enable contracting states to attract additional international investment. Subedi argues that despite the fact that most developing countries have signed BITs in the last few decades, there is little evidence that doing so stimulates FDI.[732] Similarly Mann and von Moltke state that "There is no recognizable relationship between international investment agreements and investment flows. Some countries that are party to no international investment agreements IIAs receive significant international investment and many countries that are party to numerous IIAs receive almost none"[733]. This is presumably true because investment comes only part due to the legal framework, but also due to a variety of other important issues as has been explained in chapter two of this these.[734]

On the other hand, it is claimed that the most of states seem to believe that BITs are an important tool for attracting and protect inward capital.[735] This, in particular, is due to the non-existence of multilateral agreement on investment and insufficiency of international

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[728] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 58*
[729] Subedi, *International investment law : reconciling policy and principle 110*
[730] Collins, *An introduction to international investment law 35*
[731] Subedi, *International investment law : reconciling policy and principle 109-110*
[732] Ibid 107
[733] Howard Mann and Konrad von Moltke, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (International Institute for Sustainable Development 2005) 4
[734] See chapter two section 2.4.1
[735] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 84*

customary law achieve the protection of a foreign investment.[736] Even though the cracks caused by states withdrawing from investment treaty regime, the emergence of newer generation investment treaties shows that "more states prefer to advance with more detailed vision of investment protection through BITs than to turn back the clock to diplomatic, or retreat into the familiar province of domestic law"[737].

Additionally, it is worth noting that initially, BITs were signed between exporting capital and developing governments, but it became customary to sign BITs between two developed or developing countries.[738] An example of BIT between developing countries is the BIT between Oman and Morocco (2001). An example of an investment agreement between two exporting-capital countries is the Australia-United States FTA (2004). This is evidence that the BITs are crucial international instrument for both developing and developed countries to regulate international investments. In the same regard, *International Investment Agreements Navigator-UNCTAD* shows that during (2020-2021) roughly 36 international investment agreements were signed.[739] This may serve as evidence of the continuing importance of BITs in the FDI industry.

Thus, it is reasonable to assume that globally BITs are of essential importance in regulating foreign investment. They will probably continue to have the same degree of significance at least until a multilateral instrument organising FDI emerges.[740]

Considering Oman's policy in this regard, one of its primary international legal instruments for establishing itself as a globally desirable investment destination is its investment treaties.[741] Ismail states that to ensure a safe environment for international investors and to boost FDI, Oman, like other Arab countries, has signed a slew of bilateral investment treaties.[742] These

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[736] Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' 660; Subedi, *International investment law : reconciling policy and principle 107*; Andrew Paul Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (Kluwer Law International 2009) 41

[737] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 80*

[738] Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' 658-657

[739] See UNCTAD, 'International Investment Agreements Navigator-UNCTAD' (*United Nation-UNCTAD* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 24 March 2022

[740] Regarding the efforts to reach a multilateral agreement on FDI, see section 2.4.1 of this thesis

[741] Wolfgang Alschner, Dmitriy Skougarevskiy and Mengyi Wang, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' (2017) 2016 International Review of Law 6-7

[742] Ismail, *International investment arbitration: lessons from developments in the MENA region 84*

treaties come in the form of bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment provisions.

Thus, Oman's BITs can be regarded as a persuading and marketing mechanism for overseas investment. Salacuse asserts that international investment treaties have become, and will continue to be, critical components of international corporations' assessment of political risk in any country.[743] Indeed, BITs are seen as "admission tickets to international investment markets"[744]. The conclusion of the BIT conveys to prospective investors a message that the country is a reasonably safe environment to conduct business.[745]

According to the latest Trade Policy Review Report by the Secretariat of the World Trade Organization (WTO), as part of its investment regime, Oman continues to conclude a bilateral investment treaties.[746] The newest BIT that Oman concluded is with Hungary in 2022.[747] Also, in this regard, Al Azri states that the Omani government is eager to ratify international trade and investment agreements in order to integrate the Omani economy into global commerce as part of its efforts to diversify its economy.[748]

At the regional context, it is thought that the GCC member nations adopt an international investment policy that balances the interests of capital importers and capital exporters. On the capital acquisition front, the GCC states want to attract foreign direct investment (FDI) in order to allow economic diversification away from hydrocarbons. On the capital export front, GCC states invest abroad to diversify their revenue streams, most notably through sovereign wealth funds. GCC states pursue this dual capital target using a variety of instruments such as bilateral investment treaties.[749] As to Oman, the figures in the World Investment Report 2021 shows that Oman's overall outflows in 2020 were predicted to be almost 1255 million USD.[750] Accordingly, Oman will also be able to ensure the protection of Oman's direct investment overseas through its BITs in respect to these investments.

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[743] Salacuse, *The law of investment treaties 4*
[744] Dolzer and Schreuer, *Principles of international investment law 14*
[745] Collins, *An introduction to international investment law 38*
[746] See *World Trade Organization Trade Policy Review Report by the Secretariat-Oman WT/TPR/S/418*, 13 October 2021) 32-33
[747] Royal Decree NO. 11/2022 Ratifying the BIT Btween Oman nad Hungary
[748] Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 66
[749] Alschner, Skougarevskiy and Wang, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' 5-6
[750] See *World Investment Report 2021 (UNCTAD)*)

However, this policy of concluding investment treaties with more protective trends has also led to expose the GCC countries to international investment claims by foreign investors.[751] As such, these investment treaties are akin to a double-edged sword. Indeed, as Salacuse mentions, “The international investment treaties are not just expressions of good will but are also binding instruments of international law that impose enforceable legal obligations on host country governments”[752]. In fact, all of the known arbitration cases Oman has been a party to have been based on BITs between Oman and the investors' states except one case was based on OIC Investment Agreement (1981). The Oman-investor arbitration cases will be discussed in next section.

4.3.1.2 Statistical Overview of Oman BITs

Between 1979 and 2022, Oman's government signed 40 BITs worldwide.[753] While the first Omani BIT was with Germany in 1979, the latest BIT was with Hungary in 2022. However, there are currently 37 BITs, the remainder having been terminated and some of them have been replaced with new treaties. Only 29 of these 37 BITs have come into force, and the rest have not been ratified.[754] Indeed, Oman's rate of ratification of BITs is believed to be high in comparison to the rest of the GCC countries. It has been observed that the GCC nations have a significant tendency to conclude investment treaties with partners but not to complete the domestic ratification instruments.[755] For instance, by 2011, just 24.5% of Qatar’s signed treaties and 40% of Kuwait’s signed treaties have entered into force. [756]

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[751] Alschner, Skougarevskiy and Wang, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' 12

[752] Salacuse, *The law of investment treaties 4*

[753] These BITs are given below in chronological order: Oman-Germany (1979), Oman-Egypt (1985), Oman-Netherlands (1987), Oman-Tunisia (1991), Oman-Italy (1993),Oman-France (1994),Oman-China (1995),Oman-Sweden (1995),Oman-United Kingdom (1995),Oman-India(1997), Oman-Finland(1997),Oman-Pakistan(1997) Oman-Egypt (1998), Oman-Brunei Darussalam(1998), Oman-Yemen(1998),Oman-Sudan(1999),Oman-Algeria (2000), Oman-Austria (2001), Oman-Morocco(2001), Oman-Iran(2001),Oman-Ukraine(2002),Oman-Korea (2003), Oman-Croatia (2004),Oman-Belarus(2004),Oman - Switzerland (2004),Oman-Syrian Arab Republic (2005), Oman-US (2006), Oman-Lebanon(2006), Oman-Bulgaria(2007), Oman - Turkey (2007), Jordan - Oman (2007),Oman-Germany(2007),Oman - Singapore(2007), Oman-BLEU (Belgium-Luxembourg Economic Union)(2008), Oman-Netherlands (2009), Oman -Uzbekistan(2009),Oman - Viet Nam (2011),Oman -United Republic of Tanzania (2012),Japan-Oman (2015), Oman-Hungary(2022).

[754] See UNCTAD, 'International Investment Agreements Navigator-Oman's Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions ' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/159/oman> accessed 25 March 2022

[755] OECD, *The MENA-OECD Investment Programme -Assessing Investment Policies of Member Countries of the Gulf Cooperation Council 56*

[756] Ibid 56

However, the above statistical facts permit several significant analytical observations.

To begin with, Oman has engaged in an investment treaty-making process at the bilateral level in an early stage. Oman inked its first early BIT with Germany in 1979.[757] This might be interpreted as a recognition of the critical nature of foreign investment and Oman's need for foreign capital, notably in the infrastructure and oil and gas industries. An additional possible explanation is that this BIT was partially the outcome of Germany's efforts to establish its own BITs programme to protect its companies' foreign investments. Germany signed the first BIT with Pakistan in 1959.[758] Interestingly, the 1979 Oman-Germany (BIT) referred to international investment arbitration (ad hoc or ICSID) as a mechanism for resolving investment disputes, despite the fact that Oman did not become a party to the ICSID Convention until 1995.[759] This though surely the procedural standards in ICSID could still apply even if Oman was not a party to the Convention if it has agreed to that in a BIT. Similarly, a reference to international investment arbitration (ICSID or ad hoc accordance with UNISTRAL Rules) was made in 2022 Oman-Hungary (BIT).[760] In this way, one can argue that Oman has shown a willingness to stick with investor-state arbitration from the beginning, and it appears that it will do so in the future as well.

Anther insight is that roughly more than two thirds of Oman’s BITs were concluded during the period from 1997 to 2009. To a large extent, this may have been the result of the Omani government's economic liberalisation policies and openness to global investment. Among of the key pillars of *Oman Vision 2020* drawn up in 1996 was "economic liberalism," which adhered to the principles of open markets and free trade with the goal of increasing Oman's economic integration into the global economy. One approach to implement of that policy was by concluding BITs.[761] However, as previously stated, it appears that Oman will continue to sign more BITs as tools for implementing its investment policy, at least in the near future. This is due to the fact that one of the essential objectives of national vision (*Oman Vision 2040*) is to encourage high-quality foreign direct investments to fulfil a growing global demand and assist

[757] This BIT was terminated and replaced with a new one in 2007
[758] Newcombe and Paradell, *Law and practice of investment treaties: standards of treatment 42*; Dolzer and Schreuer, *Principles of international investment law 6*
[759] Article 10 of the Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments 1979
[760] Article 10 of the Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022
[761] Khamis Saif Hamood Al-Jabry, 'Multilateral versus bilateral trade : policy choices in Oman', University of Durham 2009) 2; K. Mellahi and others, 'Motives for foreign direct investment in Oman' (2003) 45 Thunderbird International Business Review 5-6

the Sultanate in establishing itself as an international trading hub.[762] In this context, Oman ratified its latest BIT with Hungary in 2022.

Finally, in terms of geographical distribution, it is worth noting that: (I) more than a third (14 BITs) of Oman's BITs have been concluded with European countries; (II) slightly less than two-thirds of Oman's BITs have been concluded with Southeast Asia, and the Middle East and North Africa (MENA); and (III) the remainder has been divided between the United States, Finland, Australia, Uzbekistan, and Tanzania. Thus, it is not surprising that the majority of FDI in Oman comes from nations with which Oman has signed BITs. As an example, more than 70% of FDI in 2018 came from nations that are signatories to Oman's BITs namely United Kingdom, United States, Netherlands, India, and Switzerland.[763]

Nonetheless, in this context, it can be stated that in the forthcoming stages, Oman must place a greater emphasis on concluding new BITs with home states of investors specialising in important industries and sectors identified in Oman Vision2040 as determinants of development. UNCTAD advises that it is critical to prioritize the most important home nations of international investors in areas critical to the country's development strategy and where foreign participation is needed.[764] However, on the other hand, it is argued that Oman should also prioritise establishing BITs with countries that are important destinations for Omani direct investment overseas.[765] In this regard , sovereign wealth funds have emerged into substantial instruments for income diversification in GCC governments, with large foreign ownership shares.[766] However, the outward investments that need to be covered by BITs are FDI, not portfolio investment, because of the considerations previously explained.[767]

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[762] See *Oman Vision 2040 - Vision Decument 34*
[763] National Center for Statistics and Information, *The Fourteenth Bulletin on the Foreign Investment Statistcs in Sultanate of Oman*, 2020)
[764] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 76*
[765] Observer Web Team, 'Oman Supports Mutual Protection of Investments Agreements ' *Oman Observer* (Oman <https://www.omanobserver.om/article/1102827/business/economy/oman-supports-mutual-protection-of-investment-agreements>
[766] Alschner, Skougarevskiy and Wang, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' 19
[767] See section 2.3.4

4.3.1.3 The pattern of BITs and related procedures of the treaty-making process

In general , as for the pattern of BITs, it is assumed that all BITs worldwide include relatively identical wording namely most BITs follow certain patterns and contain similar provisions.[768] Generally speaking, most BITs fall into three categories: scope, substantive protection, and dispute resolution.[769] Indeed, several traditional capital-exporting and capital-importing countries have established Model BITs that serve as a roadmap for the types of provisions that these countries aim to include in their negotiated BITs. For instance, in terms of developed countries Model BITs, there is the US Model BIT, which serves as a guide for potential negotiating parties regarding the types of duties they will be required to fulfil when pursuing investment treaties with this country. Another example is Norway's 2007 Model BIT, which explicitly acknowledges sustainability objectives and the importance of incorporating *Corporate Social Responsibility* concepts as interpretive guides for its wording.[770]

These Models are frequently revised to reflect changes in the attitude to foreign investment as a result of case law developments and domestic and global economic trends.[771] By way of example, the US and Canada's experience as respondents in NAFTA investment arbitration has prompted both governments to develop new Model BITs that define the scope and meaning of investment obligations(standard of treatment) and address numerous issues relating to investor-state arbitration.[772] In fact, NAFTA has been renegotiated as the US-Mexico-Canada Agreement in 2020, and its investment chapter reflects three nations' experience with investor-state arbitration.[773]

Indeed, as already mentioned, these examples highlight the role of the investor-state arbitration system in reshaping BITs around the world.[774] Thus, it can be argued that even if all

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[768] Subedi, *International investment law : reconciling policy and principle 108*; Collins, *An introduction to international investment law 37*; Dolzer and Schreuer, *Principles of international investment law 13*
[769] Collins, *An introduction to international investment law 37*; Subedi, *International investment law : reconciling policy and principle 108-109*; Newcombe and Paradell, *Law and practice of investment treaties: standards of treatment 65*
[770] Collins, *An introduction to international investment law 39*
[771] Ibid 37-39
[772] Newcombe and Paradell, *Law and practice of investment treaties: standards of treatment 61*
[773] Sornarajah, *The international law on foreign investment 214*
[774] See chapter 2

BITs have essentially identical text, each country's BITs may need to be revised in light of that country's experience in investor-state arbitration and in light of its economic policy.

The model BIT might be produced explicitly by the state and made publicly available, or it could be more informal for internal use by the state.[775] In the case of Oman, there is a specific Model BIT that has been utilised as a starting point in negotiations with other potential contracting states. However, this Model is not available to the public.

According to Collins, few developing countries have issued Model Agreements, possibly because they believe that their bargaining power is insufficient to demand any provisions as a starting point.[776] However, even if Oman's bargaining strength is insufficient to demand any conditions as a starting point, one may argue that Oman can develop its Model BIT as a road map or guideline for its delegation to negotiate BITs. The Model BIT is supposed to assist states in drafting text that is compatible with their current obligations and overall investment strategy.[777]

Empirical study in respect of GCC BITs demonstrates that the GCC countries' BITs contain more outstanding protection clauses than the worldwide average. In other words, the GCC states' agreements contain extensive investment protection obligations that are only rarely accompanied by qualifications or exceptions.[778] Nonetheless, they overlook two crucial factors when doing so: (I) The policy flexibility that other countries with comparable levels of investment protection have built into their agreements. In other words, they do not hold space in their BITs to protect public policy interests that could be affected by foreign investment activities. (II) Detailing investor-state disputes settlement system. The GCC countries have done little to clarify the investor-state dispute settlement system included in their BITs. It is thought that, by not observing these aspects, GCC countries are now faced by two conflicting consequences: the BITs are effective tools for protecting GCC capital abroad, but they also expose GCC countries to considerable investment claims as hosts to international investors.[779]

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[775] Kristi How and Emily Choo, 'Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective' in Mark Mangan; and Noah Rubins QC (eds), *The Guide to Investment Treaty Protection and Enforcement* (Global Arbitrtion Review(GAR) 2022) 7
[776] Collins, *An introduction to international investment law 39*
[777] How and Choo, 'Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective' 7
[778] Alschner, Skougarevskiy and Wang, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' 2
[779] Ibid 14

Thus, the Omani government needs to develop a Model BIT that takes these two considerations into account.

As for administrative and legal procedures related to treaty-making process, Article 49 of the Basic Statue states that one of the Sultan's functions is signing international conventions and treaties and promulgating decrees ratifying the same.[780]

Lorenzo points out that while parliamentary approval is required in many countries, several constitutions around the world allow the cabinet (executive authority) to ratify treaties with little or no parliamentary involvement.[781] However, Lorenzo maintains that bolstering democratic control of the foreign investment regime is vital for the regime's legitimacy and development.[782]

In this regard, the Majlis Oman (legislative authority/parliament) lacks the necessary authority in this area; instead, it serves as a consultative body. As a result, the government is not required by law to consider Majlis Al Shura view. Article 54 of the Law of Majlis Oman states:

> draft economic and social agreements that the Government intends to conclude or accede to shall be referred to Majlis Al Shura for consideration and to present the findings reached on the same to the Council of Ministers to take what it deems appropriate.[783]

As seen in the preceding article, the wording "…to take what it deems appropriate…" means that the Majlis Al Shura's review is nonbinding on the government when it comes to signing BITs with foreign states.

Thus, it is possible to claim that the Majlis Oman's role in the area under discussion is marginal. As such is critical for Oman to strengthen the Majlis' supervision role in relation to BITs. This Majlis represents the people's interests and aspirations, therefor it has to have a power to scrutinise the BITs which, one way or another, affect people's interests in Oman. Indeed, the relevance of Majlis Oman's participation in the treaty-making process stems from the fact that investor-state arbitration establishes a unique forum for international scrutiny of public action,

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[780] Article 49 states that "His Majesty the Sultan discharges the following functions: (….) Signing international conventions and treaties according to the provisions of the Law or authorising their signature and promulgating Decrees ratifying the same"
[781] Lorenzo Cotula, 'Democracy and International Investment Law' (2017) 30 Leiden journal of international law 366-367
[782] Ibid 380-381
[783] Official translation

and international investment law has begun to intersect with a broader range of policy issues.[784]

The Ministry of Economy establishes a team of negotiators. This team is comprised of representatives from the Foreign Ministry, the Economy Ministry, the Ministry of Commerce, Industry, and Investment Promotion, the Ministry of Justice and Legal Affairs, and the Oman Investment Authority. This team's role is to negotiate the BITs that Oman tends to enter.

Al-Jabry states that in the negotiation of the Oman-United States Free Trade Agreement (FTA), one of the obstacles that weakened the position of Omani negotiating teams was a lack of negotiating skills, experience, and legal knowledge among Omani negotiators.[785] This example demonstrates how it is critical to adopt the appropriate arrangements in respect to preparation for conclusion of BITs.

Therefore, some practical considerations can be made in this regard which policymakers may have to consider: (I) it is believed that continued collaboration with various competent authorities within the sultanate is necessary to obtain their opinion on the agreement's provisions.[786] Such an approach would aid in ensuring that all levels of government are aware of any obligations and in highlighting any potential contradictions between those commitments and domestic legislation.[787] (II) It is also critical to learn from the investor-state arbitration cases that Oman has been involved in. These cases serve as a practical test for Oman's BITs, revealing aspects of the BITs system that require improvement. The most recent trends in international foreign investment, as well as the global and domestic economies, must also be considered. Moreover, the policymaker may have to follow cutting-edge trends to develop design of BITs in way that maximise their benefits while minimising their negative consequences. Both developed and developing countries are pursuing a trend toward refining and modernising the structure and content of investment treaties, including by increasing the clarity of core provisions such as the definition of investment, fair and equitable treatment, and rules for resolving investor-state disputes.[788] (III) It is critical to equip policymakers with updated Model BITs, reports, preparatory studies, and research on international investment law, including the international regime of BITs and related topics, on a regular basis. Such arrangements would enable them to participate more efficiently in the treaty-making process.

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[784] Cotula, 'Democracy and International Investment Law' 380
[785] Al-Jabry, 'Multilateral versus bilateral trade : policy choices in Oman 295-296
[786] Team, 'Oman Supports Mutual Protection of Investments Agreements '
[787] OECD, *Policy Framework for Investment, 2015 Edition 28*
[788] Ibid 28

In addition, to improve negotiating skills, legal and economic awareness, and other associated talents required for BIT negotiation, the team of negotiators must undergo specialised training.

4.3.2 Substantive Protections (protection standards) Provide for Foreign Investment in Oman BITs

It is believed that treaty arbitration claims brought by investors often alleged breaches of core treaty protection standards.[789] In bilateral investment treaties, there are a range of norms of treatment. These include a fair and equitable standard of treatment, full protection and security, most-favoured-nation, national treatment standard of treatment, and guarantee against expropriation.[790] However, over time these standards of protection were articulated by arbitral tribunals interpreting the various treaty obligations within the framework of investor-state arbitration.[791]

Therefore, since a violation of these substantive standards results in the institution of investment arbitration against the state, this section will briefly discuss the meaning of these standards.

4.3.2.1 Fair and Equitable Treatment (FET)

Despite the fact that this standard is regularly invoked in investment disputes, it is widely regarded as the most difficult to define of the standards usually found in BITs.[792] As a result, this standard has been labelled as nebulous.[793] The uncertainty surrounding FET is believed to be caused by the fact that in international investment law, the terms "fairness" and "equity" do not imply a defined set of legal prescriptions and allow for a large degree of subjective opinion.[794]

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[789] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 71*; Sornarajah, *The international law on foreign investment 416*
[790] Sornarajah, *The international law on foreign investment 244*; Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 58*
[791] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 58*
[792] Collins, *An introduction to international investment law 125*
[793] Sornarajah, *The international law on foreign investment 438*
[794] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 83*

However, it is suggested that FET essentially refers to the manner in which the host state's laws are applied and less so the content of the laws themselves.[795]

According to the broad perspective, any discriminating step taken by the host state might be seen as violating the criterion of a fair and equitable standard. It has been employed in instances when there was a lack of clarity regarding laws or intentions. The more expansive language is that the standard is breached if the foreign investor has a legitimate expectation that isn't met by a host state. The rule's fundamental objective is to safeguard the legitimate expectations of the foreign investor.[796]

For example, *in Rumeli Telekom and Telsim Mobil Telekomunikasyon v. Kazakhstan,*[797] the investor singed investment contract with the government of Kazakhstan to create and explore the digital cellular radiotelephone connection of the GSM standard on the territory of the Republic of Kazakhstan. Under that contract the investor was granted tax concessions and other benefits. Subsequently that contact was terminated by the respondent. The investor alleged that the local partners exploited their political and personal ties with respondent to obtain from the *Investment Committee* the termination of the investment contract, denial of investor' right to challenge the termination, and its failure to grant investor adequate compensation. As result, the investor filed an action against the Kazakhstan government claiming a FET violation as a result of the elimination of tax concessions offered to induce the investors to locate in the host state. The investor claimed that the termination of investment contract was unreasonable, arbitrary, grossly unfair, unjust, idiosyncratic and violated the legitimate expectation of Claimants. The tribunal held that the concept "fair and equitable treatment" is not precisely defined, and therefore the precise scope of the standard is left to the determination of the tribunal. The tribunal decided that the termination of the investment contract by the Kazakhstan government which offering the possibility of renegotiation without prior suspension amounted to be arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations.

Oman BITs provide for FET standard. As way of example, Article 10.5 of Oman-United State Free Trade Agreement (FTA) (2009) provide that:

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[795] Collins, *An introduction to international investment law 125*; Subedi, *International investment law : reconciling policy and principle 90*
[796] Sornarajah, *The international law on foreign investment 439*
[797] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* ICSID Case No ARB/05/16 , Award, pages 1-3 and 154-162

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment (….). 2.For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" (…) do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;(…).

In the same context, Oman-Hungary BIT (2022) states:

> (…) 2. Each contracting party shall accord in its territory to investment of the other contracting party and to investor, with respect to their investment, fair and equitable treatment (….) 3. With respect to investments, the following measures or series of measures constitute a breach of the obligation of fair and equitable treatment: (a) denial of justice in criminal, civil or administrative proceedings;(b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; (c) manifest arbitrariness;(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) harassment, coercion or abuse of power. (…).[798]

It is noticeable that both articles provide for comprehensive definition of FET. However, the Oman-Hungary BIT provides for more comprehensive definition as it includes an exhaustive list of state obligations under FET. It is thought that such approach would assist states in reducing uncertainty under FET concerning their responsibilities and preserving their regulatory authority.[799] However, one could argue that some provisions in the preceding article provide for the arbitral tribunal discretion. For example, the term "manifest arbitrariness" would entail the tribunal determining whether the state's acts are arbitrary, and this could cover wide variety of government actions that allegedly affect foreign investment.

[798] Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022 Article 2 of

[799] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 83*

4.3.2.2 Full Protection and Security (FPS)

The principle of full protection and security is another standard to be found in Oman's BITs.

As with the FTE standard, the FPS definition and scope are contentious. According to Subedi, there is no widely accepted definition of this norm, and different parties have claimed varying amounts of protection under this concept.[800] It is stated that, at first glance, the traditional concept of full protection and security is vague and unsuitable for operational application.[801] However, the arbitral tribunals have gradually developed the understanding of FTE. The tribunal play role in the specificity of the particular wording of various treaty clauses allowing for FTE and in regard to the particular issues falling under this standard.[802]

General speaking, this principle obliged the host state to provide physical safety and security to the assets or property of foreign investors, which meant that the host state had to send police and/or military forces to defend the assets of investors that were at risk of damage.[803] The FPS norm requires that the host state has to exercised due diligence to protect the foreign investment from threats or attacks.[804] In other words, the host state has to take all possible measures to provide the foreign investment with the best protection as are reasonable under the circumstances. Accordingly, the protection under the FPS standard is not absolute, rather it is limited to requiring due diligence.[805] In this context, the tribunal in *Noble Ventures, Inc. v. Romania* held that the FPS standard is "not a strict standard, but one requiring due diligence to be exercised by the State".[806]

Most of Oman's BITs provide a guarantee of full protection and security to foreign investment. For instance, Article 10.5 of Oman-US FTA (2009) states that:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including (….) and full protection and security. 2.For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of (…) "full protection and security" do not require treatment in addition to or beyond that which is required

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[800] Subedi, *International investment law : reconciling policy and principle 90*
[801] Dolzer and Schreuer, *Principles of international investment law 160*
[802] Ibid 161
[803] Collins, *An introduction to international investment law 137*
[804] Newcombe and Paradell, *Law and practice of investment treaties: standards of treatment 307*
[805] Dolzer and Schreuer, *Principles of international investment law 161*; Subedi, *International investment law : reconciling policy and principle 90-91*
[806] *Noble Ventures, Inc. v. Romania* ICSID Case No ARB/01/11, 12 October 2005,page 105

> by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (…); (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

As can be seen, this article, ties the standard of FPS to customary international law. As such, it is clear that the FPS standard outlined in this article applies only to physical violation, not to legal infringement (i.e., regulatory actions taken by the host state that disrupt the legal stability surrounding the investor's business). This is due to the fact that the norm of FPS under customary international law reflects protection against physical injury to the investor, or damage or destruction of foreign-owned property.[807] In this context, it is thought that making the FPS standard explicitly linked to customary international law, would help make the standard predictable and keep it from being interpreted in ways that could limit regulatory powers of host state.[808]

Another technical way to clarify the scope of FPS in BIT is making it clear that it only applies to "physical" security. For example, Oman-Hungary BIT (2022) has employed this technic as it states that "For greater certainty, full protection and security refers to the contracting party's obligation to provide the physical security of investors and investments"[809].

4.3.2.3 Most-Favoured-Nation (MFN)

The goal of this norm is to prohibit discrimination between comparable foreign investors of different nationalities.[810] Economically, the MFN standard is thought to be a critical tool for economic liberalisation in the sphere of investment. This is because the MFN principle binds investment treaties by ensuring that the parties to one treaty provide treatment no less favourable than the treatment, they provide under other treaties in areas covered by the clause.[811]

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[807] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 281*

[808] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 86*

[809] Article 2.4 of Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022

[810] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 82*; Salacuse, *The law of investment treaties 251*

[811] OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (2004) 2

The MFN standard is commonly believed to indicate that "an investor from a party to an agreement, or its investment, would be treated by the other party "no less favourably" with respect to a given subject-matter than an investor from any third country, or its investment"[812]. Thus, the MFN allows foreign investors to benefit from additional levels of protection that may be incorporated in investment treaties to which the host state is a party.[813]

However, it is important to note that many MFN clauses in investment treaties include particular restrictions and exceptions that preclude their applicability in certain areas.[814] Moreover, some international BITs limit the MFN commitment to post-establishment investments and do not apply to pre-establishment investments (i.e. the process of making investments).[815] An example of a treaty which provides for MFN treatment to establishment of investment and subsequent treatment of investment is article 10.4 of Oman-U.S FTA (2009) which reads as follows:

> Each Party shall accord to covered investments treatment no less favourabley than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Indeed, in treaty practice, the wording of MFN clauses differs greatly between international BITs.[816] As a result, arbitral tribunals have interpreted such treatment in a variety of inconsistent and unexpected ways. Thus, MFN treatment must be carefully considered, particularly in light of countries' developing networks of BITs including a variety of obligations and BITs including pre-establishment issues. UNCTAD suggests that one of practical ways to avoid misinterpretation is for BITs to expressly exclude dispute settlement concerns and duties arising from treaties with third parties from the scope of the MFN.[817]

Most of Oman's BITs contain the MFN Standard but with uniform picture. For example, Oman-Japan BIT (2015) states that

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[812] Ibid 2
[813] Salacuse, *The law of investment treaties 134*
[814] OECD, 'Most-Favoured-Nation Treatment in International Investment Law' 5
[815] Salacuse, *The law of investment treaties 251*
[816] OECD, 'Most-Favoured-Nation Treatment in International Investment Law' 16
[817] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 82-83*

> 1 - Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investment treatment no less favourable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities. Note: It is understood that the treatment referred to in paragraph (1) does not include treatment accorded to investors of a non-Contracting Party by provisions concerning the settlement of investment disputes, such as the mechanism set out in Article (15) , that is provided for in other international agreements between a Contracting Party and a non-Contracting Party.2 - The provisions of paragraph (1) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any existing or future free trade area, customs union, economic union, or other form of regional agreement, to which either of the Contracting Party is a party.[818]

By analysing this article, it can be noted that: this clause is restrictive, as it limits the scope of MFN by removing some rights from coverage. Under this article, the Omani and Japanese investors would not benefit from MFN standard if they wanted to use the settlement of investment disputes provisions contain in other BITs between Oman and a third country. This, for example, is contradictory to the Oman-Turkey BIT (2007), which does not exclude investor-state dispute settlement mechanisms from the MFN clause's coverage.[819]

Additionally, this article asserts that the MFN norm does not entitle investors in both nations to benefit from any treatment, preference or privilege resulting from any existing or future free trade area, customs union, economic union, or other form of regional agreement, to which either of the Contracting Party is a party.

4.3.2.4 National Treatment (NT)

While the Most-Favoured-Nation (MFN) standard provides equal treatment of international investors from various contracting states in the host state, the National Treatment (NT) standard ensures equal treatment of foreign and local investors.

Subedi points out that the purpose of NT standard is to address discrimination on the basis of the nationality of ownership of an investment,[820] by providing 'a level playing-field'[821] for

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[818] Article 4 of Agreement Between Oman and Japan for The Reciprical Promtion And Protection of Investment 2015

[819] Article 2.1,2 of Agreement between Oman and Turkey for the Promotion and Protection of Investments 2007

[820] Subedi, *International investment law : reconciling policy and principle 94*

[821] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 251*

foreign and local investors. According to this principle, foreign investors can thus compete on an equal footing with domestic investors, which should promote an overall healthy economy by putting a premium on the quality and price of goods and services rather than regulatory favouritism.[822] Thus, achieving equality between domestic and international investors in accordance with the NT standard may necessitate adjustments to existing laws and regulations that favour domestic firms.[823]

In terms of treaty practice, the treaties demonstrate a wide variety of formulations in expressing the NT norm. Some treaties require the NT to be applied during the two phases of foreign investment in the contracting state (i.e., pre-entry phase, which concerns the admission process and the post-establishment phase, which concerns the operation of foreign investment in contracting state). The Oman-U.S. FTA (2009) is an example of this type of treaty, as it states in its article 10.3 that:

> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (…)

Some treaties, on the other hand, limit the NT standard to investment only when it has been established in the host state. This latter technique enables the host state to safeguard its domestic investors in some areas by simply refusing to grant international investors the right of establishment.[824] by way of example, the Oman-Viet Nam BIT (2011) restrict the application of NT norm to the pre-establishment phase of investment. As such, unlike the American investors in the above example, the Vietnamese investors will not enjoy the NT advantages in the entry stage of their investments. Oman- Viet Nam BIT (2011) states:

> With respect to the use, management, conduct, operation. Expansion and sale or other disposition of investments, each Contracting Party shall, subject to its laws and regulations, accord to investors of the other Contracting Party and their investments in its territory, treatment no less favourable than that it accords, in

[822] Collins, *An introduction to international investment law 97*
[823] Salacuse, *The law of investment treaties 246*
[824] Ibid 246-247

> like situations, to its own investors or to investors of any third state and their investments and returns.[825]

Additionally, as part of their economic development policies, states may aim to provide preferential treatment to national investors/investments. To that end, several treaties exempt certain economic sectors and privileges in favour of their investors from the scope of the NT standard. Thus, the contracting state will be entitled to discriminate in these exceptions between domestic and foreign investors.[826] In this context the Oman-Tanzania BIT (2012) provides:

> (1) Each Contracting Party shall accord to the investments and returns by investors of the other Contracting Party a treatment which is no less favourable than that accorded to investments and returns made by its own investors (….), whichever is the more favourable to the investors. (….) (6) The provisions of paragraph (1) of this Article shall not oblige either Contracting Party to accord investors of the other Contracting Party the same treatment that it accords to its own investors with regard to ownership of lands and real estate and obtaining grants and soft loans.[827]

Generally, as to application of NT standard, the practical approach been employed by arbitral tribunal for assessing an accusation of NT norm violation by a host state's measures is a straightforward test of comparison with the most directly comparable local investor 'in like circumstances'.[828] This approach entails three analytical steps: the first is to identify a sample of domestic investors to compare with the claiming foreign investor. The second is to assess the relative treatment received by the two groups and determine whether the claimant received less favourable treatment than the comparator group of national investors. The final step is to determine whether the two are in like circumstances or whether factors justifying differential treatment exist.[829] For example in *Loewen V. United State* the tribunal decided that there was no violation of NT norm. The turbinal based its rule on that fact there was no comparator in like circumstances which could be used in order to undertake the comparison necessary to evaluate the allegation of violation of NT norm.[830]

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[825] Article 4.1 of Agreement between Oman and Viet Nam for the Promotion and Protection of Investments 2011
[826] Sornarajah, *The international law on foreign investment 246*
[827] Article 3.1,6 Agreement between Oman and Tanzania for the Promotion and Protection of Investments 2012
[828] McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 253*
[829] Salacuse, *The law of investment treaties 248*
[830] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ICSID Case No ARB(AF)/98/3 , Award (26 June 2003), para 139 and 140

4.3.2.5 Guarantees Against Expropriation without Compensation

Another substantive protection enshrined in BITs is guarantees against expropriation. Subedi defines the term of expropriation as' the taking of the assets of foreign companies or investors by a host state against the wishes or without the consent of the company or investor concerned'[831]. The expropriation action is the most severe form of interference that a host state can impose on a foreign investor because it results in the transfer of an investor's asset to the host government.[832]

Oman has emphasised and enshrined this norm of protection in its Basic Statute due to its critical nature.[833] In the event that a property is nationalised, Article 14 of the Basic Statute requires the Government of Oman to provide prompt and equitable compensation. However, it is thought that expropriation is unlikely due to Oman's interest in increased foreign investment and technology transfer.[834]

Indeed, the fact that expropriation is codified and regulated in constitutional law serves as a security for foreign investors. However, home states would like to emphasis the protection against expropriation in favour pf their investors in BITs with host states as upper layer of protection at international level. As result, Oman has enshrined this substantive protection in its BITs. For example, Oman- Germany BIT (2007) provides:

(…)(2) Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as "expropriation") in the territory of the other Contracting State except, in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known. (3) The compensation shall be paid without delay. It shall carry interest from the date of expropriation until the time of payment at a commercially reasonable interest rate, which is based on the relevant Euribor; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of

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[831] Subedi, *International investment law : reconciling policy and principle 150*
[832] Collins, *An introduction to international investment law 156*
[833] See section 3.2.2.1
[834] See '2021 Investment Climate Statements: Oman' (*United States Department of state* 2022) <https://www.state.gov/reports/2021-investment-climate-statements/oman/> accessed 17 April 2022

such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law according to the respective national legal system. (….)[835]

The main dimensions of the expropriation question can be identified through analysis of this article. These dimensions are the legality of expropriation, the form of expropriation, types of foreign assets that expropriation could brought against, and the compensation against expropriation.

According to the above article, Oman can expropriate foreign investment based on three conditions: (I)the expropriation is done in accordance with its applicable laws and through due process; (II) It is done for a public purpose and in a non-discriminatory manner; (III) against prompt, adequate and effective compensation. In principle the expropriation by a host state is lawful provided that it was based on certain conditions. It is a well-established fact in the doctrine of international investment law that the host state has the right and considered lawful to regulate and control property and economic resources located within its territory in order to further its economic, political, and other interests. Nonetheless, in return, the state must provide compensation to the property's owner.[836] An unlawful taking (confiscation)[837], on the other hand, creates an obligation to pay damages.[838]

The preceding article covers both direct and indirect forms of expropriation. There are two types of expropriation: (I)the host government directly seizing the investment through direct means such as an official decree.[839] (II)The second form occurs when the host government seizes the investment in an indirect manner. Mainly, the indirect expropriation could happen through individual administrative or legislative measure depriving the investor of the substantial benefits of the property.[840] Also, the indirect expropriation could take place through series of measures that cumulatively become so burdensome that the commercial operation in the hands of the foreign investor loses its practical value.[841] This is known as 'creeping expropriation'[842].

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[835] Article 4.2,3 of Agreement between Oman and Germany for the Promotion and Protection of Investments 2007
[836] Collins, *An introduction to international investment law 157*; Subedi, *International investment law : reconciling policy and principle 98*
[837] Subedi, *International investment law : reconciling policy and principle 152*
[838] Collins, *An introduction to international investment law 157*
[839] Subedi, *International investment law : reconciling policy and principle 99*
[840] Ibid 101
[841] Collins, *An introduction to international investment law 156*
[842] Dolzer and Schreuer, *Principles of international investment law 125*

In respect to types of foreign assets that expropriation could brought against includes tangible property, such as land or a factory, as well as intangible property, such as contractual rights and patents.[843]

In regard to the compensation against expropriation, the past article sets certain parameters or standards for compensation: (I) It should be prompt, adequate and effective compensation. (II) It shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known. Furthermore, the article establishes the terms under which the compensation must be paid: (I)The compensation shall be paid without delay. (II)It shall carry interest from the date of expropriation until the time of payment at a commercially reasonable interest rate, which is based on the relevant *Euribor.* (III) it shall be effectively realizable and freely transferable.

A violation of one of the aforementioned substantive protection principles might result in a dispute between a foreign investor and the host country. The next section will describe Oman BITs' provisions for resolving investor-state disputes.

4.3.3 Investor-State Dispute Settlement Mechanisms under Oman BITs

A key aspect of BIT is the provision of access for foreign investors to international investment tribunals for the adjudication of disputes between an investor and a host state.[844] Indeed, the dispute settlement provisions in BITs is of vital importance because the purpose of the BIT is to encourage investors to make long-term, substantial financial commitments on the basis of the treatment that the host state promise in the BIT. Moreover, Conflicts over BIT interpretation and application are always a possibility in international relations.[845] Thus, the potential foreign investor would ensure that the BIT has rules governing the Dispute Settlement Mechanisms that would enable him or her to access neutral dispute resolution mechanisms in the event of a conflict.

[843] Collins, *An introduction to international investment law 157*
[844] Subedi, *International investment law : reconciling policy and principle 121*
[845] Salacuse, *The law of investment treaties 353*

Investor-state dispute settlement provisions are embodied in most of Oman BITs, to allow foreign investors to seek redress for damages caused by the Omani government's alleged breaches of BITs' obligations.[846]

In general, clauses of dispute settlement in BITs often include a graded mechanism for resolving disputes, with the parties progressing from voluntary consultations/negotiations to binding arbitration.[847] For example, Oman-Belgium BIT (2008) provides that:

> 1-Any dispute concerning investment between one Contracting Party and an investor of the other Contracting Party shall, if possible, be settled amicably by negotiations between the two parties concerned. 2-If such a dispute cannot be settled within a period of three months from the date of receipt of request for settlement, the investor may submit the dispute to: a) The competent court of the Contracting Party in whose territory the investment has been made; or b) International arbitration…[848]

As can be seen, with most of Oman BITs, this article gradually introduces the investor to a variety of dispute resolution options. It begins with amicable resolution, followed by resolution through the competent domestic court, and finally, investor-state international arbitration.

Arguably, the most significant elements of investor-state dispute settlement clauses in BITs are its subject matter, amicable settlement and a cooling-off period, prior exhaustion of local remedies and fork- in-the road clause, an arbitral forum for dispute resolution and arbitration rules.

4.3.3.1 The scope (subject matter)of Investor-state Dispute Settlement Clauses

Concerning the scope of dispute settlement clauses in BITs, it is extremely typical in treaty practise for treaties to utilise the wording "any dispute" concerning investment or "any dispute in relation to an investment".[849] These phrases may be interpreted to include so-called contract claims, that is, claims arising out of contractual relationships between an investor and

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[846] OECD, *The MENA-OECD Investment Programme -Assessing Investment Policies of Member Countries of the Gulf Cooperation Council 59-60*

[847] Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' 8

[848] Article 12 of Agreement between Oman and Belgium-Luxembourg Economic Union for the Promotion and Protection of Investments 2008

[849] Nohen, Pohl and Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 16*

a host state.[850] Additionally, several treaties may limit the scope of investor-state dispute settlement to those originating from an alleged breach of the same treaty.[851]

In terms of Oman's practise in this regard, the majority of its BITs use the phrase "any dispute concerning an investment" to refer to the scope of dispute settlement clauses, albeit, with certain limitations at times.

In this regard Oman-US FTA (2009) uses a more cautious and clear approach as it chooses to list the matters to which the investor-state dispute settlement provisions apply. Article 10.15 of this agreement provides that

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A (about covered investment and protections), (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach (…)

As this article makes clear, two conditions must be met before an investor may bring his claim to international arbitration: (I) the host state has breached its obligations under the agreement by itself or investment contract between investor and a host state, or an investment authorisation that a host state issue in favour of investor; and (II) the host state's breach of the agreement's obligation has resulted in the claimant(investor)incurring loss or damage.

Contrary to the above approach, the Oman-Hungary BIT (2022) adopted a restricted approach, limiting the application of dispute resolution mechanisms to only claimed breaches of treaty obligations.[852]

However, the most restrictive approach concerning the scope of investor-state dispute settlement clauses in Oman BITs, can be found in Oman-China BIT (1995). This BIT limits the use of arbitration to specific issues, namely those concerning expropriations or the payment of compensation following an act of expropriation.[853]

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[850] Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' 9
[851] Mara Valenti, 'The scope of an investment treaty dispute resolution clause: It is not just a question of interpretation' (2013) 29 Arbitration international 246
[852] Article 10 of Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022
[853] Article 9.3 of Agreement between Oman and China for the Promotion and Protection of Investments 1995

Furthermore, a directness requirement under several Oman BITs helps clarify the scope of investor-state dispute settlement clauses, i.e., the dispute must have stemmed directly from the covered investment. Typically, an investment activity entails a variety of ancillary transactions. They include for example, financing, the lease of property, purchase of various goods. However, not all these transactions may consider as directly related to the investment covered by BIT.[854] For example, article 10.15.1 of Oman-U.S. FTA (2009) provides that "a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement". Another example is Oman-Viet Nam BIT (2011), its article 9.1 states that "Any legal dispute arising directly out of an investment…" According to these articles, directness is a necessary criterion for initiating an investment claim.

However, in some situations, the scope of dispute resolution will be determined by other provisions in the same BIT.

4.3.3.1.1 The MFN and Umbrella Provisions' Impact on the Scope of Investor-state Dispute Settlement Clause in BIT

There are two key provisions in any BIT that play a role in establishing the scope of investor-state dispute settlement.

The first is the Most-Favoured-Nation (MFN). As been explained previously, this standard of treatment means that an investor from a party to a treaty, or its investment, would be treated by the other party "no less favourably" with respect to a given subject-matter than an investor from any third country, or its investment.[855] Thus, an MFN standard contained in a treaty will extend the better treatment granted to a third state or its national as to investor-state dispute settlement to a beneficiary of the treaty, unless that treaty excludes dispute settlement from the applicability of MFN [856] For example, Oman-Japan BIT (2015) limits the scope of MFN by removing some rights from coverage. Under this article, the Omani and Japanese investors

[854] See Dolzer and Schreuer, *Principles of international investment law 246-248*
[855] Section 4.3.2.1
[856] Dolzer and Schreuer, *Principles of international investment law 270*

would not benefit from MFN standard to be able to use the settlement of investment disputes provisions contain in other BITs between Oman and third country.[857]

The second provision which may influence the scope of investor-state dispute settlement is the *umbrella clause.* This provision, which is found in several BITs, requires each Contracting State to observe all investment obligations made with investors from the other Contracting State.[858] In other words under the umbrella provision any breach of a normal contractual obligation between host state and foreign investor would be considered as breach of BIT's obligation. Thus, the umbrella provision will be elevating an ordinary breach of contract between foreign investor and a host state to the level of a treaty violation, since breach of the investment contract is also a breach of the umbrella clause in that treaty.[859]

In summary this provision expands the scope of the treaty by incorporating non-treaty obligations of the host State into the treaty.

As such, the umbrella provision in the BIT broadens the scope of investor-state dispute settlement to include not just violations of the BIT's obligation, but also violations of contract commitments. This means that the investor can now seek recourse for a breach of any investment contract between it and a Contracting State via international arbitration under the BIT.[860]

For example, if the foreign investor enters into a contract with the host state and this contract includes an article, refer to the domestic court to resolve any dispute that may arise from this contract; however, if this investor prefers that bring this dispute before international investment arbitration, would be able to do so by relying on umbrella provision in the BIT between his home state and host state where the investment been made.

In respect to Oman practice in this regard, some of its BITs has contained the umbrella provision. For example, article 5.3 of Oman-Japan BIT (2015) provides that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other contracting Party". Another example can be

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[857] See section 4.3.2.1

[858] Jarrod Wong, 'Umbrella clauses in bilateral investment treaties: of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes' (2006) 14 George Mason law review 138

[859]Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 372*

[860] Wong, 'Umbrella clauses in bilateral investment treaties: of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes' 139

found in article 10.3 of Oman-Korea BIT (2003) provides that "Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party".

Under these articles there is a possibility for the provision of dispute settlement to be extended to cover the disputes between Oman and a foreign investor related to a breach of contractual commitments.

Therefore, Oman has to give sensible consideration to the implications of umbrella provisions in its BITs. David points out that the umbrella provision expands the scope of investor-state dispute settlement considerably, often beyond that which was expected by treaty parties.[861]

4.3.3.2 Amicable Settlement and A cooling-off Period

As for amicable resolution, usually the BITs set a time restriction (specific period) for the disputing parties to conduct negotiations or consultations in order to find a possible amicable settlement. However, a cooling-off period is not same in all Oman BITs. For example, Oman-Austria BIT (2001) provides two months for disputing parties to reach a negotiated settlement.[862] The Oman-Singapore BIT (2007) stipulates period of four months for amicable settlement.[863] Also, in this regard, the Oman-Hungary BIT (2022) agrees six months for dispute to be settled by amicable means.[864] However, some Oman BITs do not refer to a specific cooling off period. For example, the Oman-Netherlands BIT (2009) refers to a reasonable lapse of time within which the parties should make effort to resolve their differences amicably.[865] Frequently, an investor is required to observe this waiting period regardless of whether the case is brought before domestic courts or an international arbitral tribunal.[866] However, as opposite to that, article 10.15 of Oman-US (FTA) provides that the cooling-off period is only required prior to use the international arbitration.

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[861] Collins, *An introduction to international investment law 145-146*
[862] Article 10 of Agreement between Oman and Austria for the Promotion and Protection of Investments 2001
[863] Article 9 of Agreement between Oman and Singapore for the Promotion and Protection of Investments 2007
[864] Article 10 of Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022
[865] Article 8.3 of Agreement between Oman and Netherlands for the Promotion and Protection of Investments 2009
[866] Nohen, Pohl and Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 17*

The waiting period provided for amicable settlement gives rise for the question of the legal nature of this period, is it procedural or jurisdictional? In other words, would a failure to comply with that requirement result in a determination of lack of jurisdiction?

There are two jurisprudential conflicting views regarding this issue: the first view suggests that the waiting period under the BIT is procedural in its nature, and thus the claimant may initiate the arbitration procedure or other alternative dispute resolution mechanism given under the BIT. For example, the tribunal in *Gauff v.Tanzania* regarding the six months period in the UK-Tanzania BIT, states that "this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible" [867] Conversely, the second view claims that the waiting period is of jurisdictional nature, and thus non-compliance with the waiting period would result in lack of jurisdiction of arbitral tribunal. For instance, the tribunal in *Murphy v. Ecuador* found that the six-month waiting period is a basic criterion that Claimant must meet compulsorily prior to submitting an ICSID arbitration request.[868]

However, one could argue that the first approach is more reasonable, as there is no realistic reason why the claimant should not bring his or her claim to arbitration following a failed attempt to amicably settle it. Dolzer and Schreuer argue that There is little point in refusing jurisdiction and returning the parties to the negotiations if they are clearly fruitless.[869]

However, the question that can be raised here is to which administrative body the foreign investor's request for settlement or notice of dispute should be directed.

The most dispute settlement provisions in Oman BITs do not mention the administrative body the foreign investor's request for settlement should be directed. They leave this practical point unclear. However, the Oman-U.S. FTA (2009) is the only one that describes this issue. Annex 10-C of the Chapter 10 of that agreement mentions that "Notices and other documents in disputes under Section B shall be served on Oman by delivery to: Director General of Organizations and Commercial Relations Ministry of Commerce and Industry…"

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[867] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* ICSID Case No ARB/05/22 ,Award on 24 July 2008,para 343

[868] *Murphy Exploration and Production Company International v. Republic of Ecuador* ICSID Case No ARB/08/4, Award on 15 December 2010 , para 149

[869] Dolzer and Schreuer, *Principles of international investment law 270*

Thus, can be stated that the dispute resolution provisions in Oman BITs should be sufficiently clear and unambiguous concerning such practical elements to avoid legal complications that can result from their lack.

In this respect, ICSID advises host state (the potential respondent state in investor-state arbitration) that internal procedures should be in place to ensure that any request for arbitration or dispute notice is directed to the appropriate officials who can address the dispute.[870] This matter will be revisited in next section.[871]

4.3.3.3 Prior Exhaustion of Local Remedies and Fork in the road Clause

To begin with, the exhaustion of local remedies is a fundamental principle of customary law which is related to the principle of sovereignty of a state. This is attributed to the fact that the state has the authority to adjudicate on actions that occur within its borders.[872] Originally, the rule of exhaustion of local remedies is applied both in diplomatic protection and in international human rights law.[873]

However, within the scope of international investment law, the exhaustion requirement, on the other hand, is rarely used in current BITs practice.[874] This attitude could be attributed to the reason that one of the goals of investor-state arbitration is to avoid using local courts. This is because domestic litigation in the host State's courts is sometimes perceived as lacking the objectivity that the investor seeks. Furthermore, domestic courts are frequently obligated to apply local law, even if that law falls short of the requirements set by international law.[875]

Nonetheless, regarding this issue, article 26 of 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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to

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[870] ICSID, *Practice Notes for Respondents in ICSID Arbitration* (ICSID 2015) 7-8
[871] See section 4.4
[872] Paul Peters, 'Exhaustion of Local Remedies: ignored in most bilateral investment treaties' (1997) 44 Netherlands international law review 242
[873] Matthew C. Porterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2016) Vol. 41 Yale Journal of International Law online 3
[874] Ibid
[875] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 The law and practice of international courts and tribunals 1

arbitration under this Convention". As such, it is possible for a host country to insist on the exhaustion of domestic remedies before agreeing to international arbitration.

Thus, the necessity to exhaust domestic remedies before resorting to international arbitration would be determined by the dispute resolution provisions of the applicable BIT. In this respect, certain BITs require the aggrieved foreign investor to seek redress in a domestic court prior to resorting to international arbitration. On the other hand, certain BITs provide an investor with the option of pursuing a local remedy or international arbitration.[876]

An Observation of Oman's approach in this regard indicates that Oman BITs language on exhaustion of local remedies is varied:

(I) Some BITs give investors a choice whether to use domestic remedies or international arbitration. For instance, this is the case with Oman- Singapore BIT (2007) which provides that "If the dispute cannot be thus resolved (…), then, unless the parties have otherwise agreed, it shall, upon the request of either party to the dispute, be submitted to: (a) The competent court of the Contracting Party in whose territory the investment has been made; or (b) International arbitration….". However, Oman-Iran BIT (2001) is more explicit on this issue as it provides that "In the event that such dispute cannot be settled as provided in paragraph 1 of this Article within six months from the date of the written application for settlement, the investor may submit at his choice the dispute for settlement to the national courts of the host Contracting Party, or to an ad hoc Arbitral tribunal under the arbitration rules of the UN Commission on International Trade Law (UNCITRAL)."[877] The phrase "at his choice," used in this text, clearly refers to the investor's ability to choose local court or arbitration .

It is worth noting, however, that certain Oman BITs exclude the word "*or*" from the sections governing the choice of domestic court or international arbitration. The presence of the word "or" indicates unequivocally that the investor has an option between domestic and international arbitration. However, if this term refers to non-exitance, it may give rise to interpretive dispute on whether the investor has the right to choose between domestic and international remedies or is compelled to use domestic remedies before resorting to international arbitration. Additionally, there is a contradiction between the Arabic and English

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[876] Collins, *An introduction to international investment law 224*; Subedi, *International investment law : reconciling policy and principle 120-121*

[877] Article 12.2 of Agreement between Oman and Iran for the Promotion and Protection of Investments 2001

versions of several BITs regarding the use of the word "*or*". For example, in the English copy of the Oman- Belarus BIT (2004), the word "or" is used, but not in the Arabic copy.[878]

Uncertain outcomes may result from such ambiguity in the wording of provisions on dispute resolution. Reinisch points out that the formulation of provisions for investor-state dispute settlement in BITs is critical because uncertainty in many of these provisions has led to conflicting interpretations and, as a result, undesirable outcomes by the host state.[879]

Thus, policymakers must devote the necessary attention to such a technical issue.

(II) some BITs are silent on the question of exhaustion of local remedies. Oman-Netherlands (2009) is a clear example of one of these BITs.[880] It and makes no mention of domestic judicial review as a method of resolving investment dispute. In this regard, Sornarajah argues that where the treaty is silent on this issue, it is imperative that it be interpreted in a manner that least derogates from the sovereignty of the parties to the treaty.[881] Because, as previously said, exhaustion of domestic remedies is the rule established by customary international law, and non-required exhaustion of domestic remedies in BIT is an exception on that rule.[882]

(III) A third approach on this issue can be found in the Oman-China BIT (1995) as it obliges disputing parties to use the local remedy through domestic court to resolve the investment disputes with host state. However, this BIT allows only for a dispute over the amount of compensation for expropriation to be settled through arbitration. This BIT provides that "…(2) If a dispute cannot be settled thorough negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the contracting party accepting the investment (3) If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal…."[883]. Similarly, this technique is proven in the Oman-Korea BIT (2003). This BIT stipulated that the disputing party must first seek resolution in a domestic court. However,

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[878] Article 9 of Agreement between Oman and Belarus for the Promotion and Protection of Investments 2004
[879] Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' 7
[880] Article 8 of Agreement between Oman and Netherlands for the Promotion and Protection of Investments 2009
[881] Sornarajah, *The international law on foreign investment 268*
[882] Subedi, *International investment law : reconciling policy and principle 163*
[883] Article 9.2,3 of Agreement between Oman and China for the Promotion and Protection of Investments 1995

if the disagreement cannot be resolved through that court within six months, the contesting party may seek international arbitration.[884]

Another issue within this section is whether the choice of remedy by the investor is final and exclusive. In other words, after an investor has chosen to resolve an investment dispute through domestic courts, will he or she be entitled to bring the same matter to international arbitration? This issue is so-call "fork-in-the road" clause.

This clause addresses the question of whether a single dispute can be presented to multiple fora, such as domestic and international, concurrently. This situation is sometimes referred to as parallel proceedings. However. this situation raises the problem that the same dispute could be submitted to two different bodies one after another. Such circumstances would arguably be unfair in that they would compel the state to defend itself twice.[885] Therefore, the clause of fork-in-the road comes to provide that the investor must choose between the litigation of its claims in the host state's domestic courts or through international arbitration and that the choice, once made is final.[886]

Most of Oman BITs use the fork-in-the road clause. For example, article 9.3 of Oman-Singapore (2007) states that "A dispute shall be submitted to only one forum", Article 10.4 of Oman-Hungary BIT (2022) provides that "Once a dispute has been submitted to one of the tribunals mentioned …., the investor shall have no right to submit the dispute to other settlement mechanism", and Article 7.3 of Oman-Tanzania Bit (2012) stipulate that "If an investor concerned with the dispute decides to submit the case to one of the authorities mentioned …… , then he shall have no right to submit it to any other authority".

As these instances demonstrate, under such a method, an investor could not take a dispute to international arbitration after taking it to local courts, and vice versa.[887] However, for this clause to work the disputes litigated in the domestic courts must be identical with the disputes brought before investment tribunals.[888]

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[884] Article 8.3 of Agreement between Oman and Korea for the Promotion and Protection of Investments 2003

[885] Collins, *An introduction to international investment law 225-226*

[886] Dolzer and Schreuer, *Principles of international investment law 267*

[887] Nohen, Pohl and Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 12*

[888] Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' 12

4.3.3.4 An arbitral Forum for Dispute Resolution and Arbitration Rules

Usually in the BITs practice, BITs' investor-state dispute settlement provisions refer to a particular arbitral forum for conducting arbitration proceedings.

In general, as for the most available arbitral forum in BITs, often dispute settlement provisions in BITs refer to ICSID arbitration.[889] In addition, some BITs also refer to non-ICSID arbitration such as ad hoc arbitration which usually utilize UNCITRAL rules, International Chamber of Commerce (ICC) or London Court of International Arbitration (LCIA). Also, some BITs refer to Reginal Arbitration Centres such as those in Frankfurt, Vienna, Cairo, Kuala Lumpur, and Hong Kong.[890] Furthermore, certain treaties require or permit the resolution of disputes by an ad hoc arbitral tribunal, the composition of which is specified in the individual BIT.[891]

As to Oman, most dispute settlement provisions in Oman BITs, grant the foreign investor the right to invoke arbitration against host state. In general, these provisions provide for the following arbitral forums: ICSID arbitration, arbitration under UNCITRAL rules, arbitration under the rules of the International Chamber of Commerce (ICC), ad hoc arbitration established in accordance with the BIT itself [892], Arab Investment Tribunal in accordance with the Unified Agreement for investment of Arab Capital[893] ,and GCC Commercia Arbitration Centre[894].

However, the vast majority of Oman BITs refers to ICSID arbitration and arbitration under UNCITRAL rules: almost twenty BITs refer to the bot arbitrations such as Oman-Finland (1997)[895], four BITs refer to ICSID as the only arbitral forum available, such as Oman-Sweden BIT (1995)[896] , three BITs refer to arbitration under UNCITRAL rules as the only forum available

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[889] Sornarajah, *The international law on foreign investment 264*; Salacuse, *The law of investment treaties 137*; Newcombe and Paradell, *Law and practice of investment treaties: standards of treatment 72-73*
[890] See Dolzer and Schreuer, *Principles of international investment law 241-244*; McLachlan, Shore and Weiniger, *International investment arbitration : substantive principles 52*; Nohen, Pohl and Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 20*
[891] Nohen, Pohl and Mashigo, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 20*
[892] For example, Article 8 of Agreement between Oman and Netherlands for the Promotion and Protection of Investments 2009
[893]For example, Article 12.2.C.I of Agreement between Oman and Belgium-Luxembourg Economic Union for the Promotion and Protection of Investments 2008
[894] For example, Article 12.2.C.II of ibid
[895] Article 8.2,3 of Agreement between Oman and Finland for the Promotion and Protection of Investments 1997
[896] Article 8.2 of Agreement between Oman and Sweden for the Promotion and Protection of Investments 1995

such as UK-Oman BIT (1995)[897]. Whereas the International Chamber of Commerce comes in a distant third.

Thus, as can be observed, the references to these arbitral forums in Oman BITs is not homogenous. For example, the majority gives the disputing party a choice between listed fora. Whereas some BITs only provide access to a single forum.

As it can be seen, most of the aforementioned substantive protection standards and the investor-state disputes settlement provisions intersect with the matter of regulatory power of host state to protect the public interests. The next section will explore the matter of regulatory power of a host state.

4.3.4 Regulatory power of Host State (Public policy or Regulatory authority)

The notion of regulatory power or public policy has been covered marginally within chapter two as one of the main characteristics of international investment arbitration, distinguishing it from international commercial arbitration. However, this section will broadly focus on this concept and its relevant applications within the realm of international investment arbitration system.

The government of Oman has voiced its worry about this matter and has demonstrated that one of the key challenges facing its investment agreements regime is creating the balance between the state and the investor in terms of rights and obligations. This is relevant because the old generation agreements do not provide the legal ground for the host country to impose regulatory measures on investors to protect public interest in areas such as health, security, environmental protection, and investment policies.[898]

Some of previous research which has studied the Omani legal system on arbitration, has solely focused on commercial arbitration. This attitude resulted in these studies looking at the matter of public policy within the context of commercial arbitration and merely from the angle of recognition and enforcement of arbitral awards, as one of the prospective reasons to refuse

[897] Article 7 of Agreement between Oman and United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments 1995

[898] See the Ministry of Economy-Oman, 'Challenges facing Agreements on The Encouragement and Reciprocal Protection of Investments' 23 .6.2021) <https://twitter.com/MOE_Oman> accessed 25 june 2021; also see Team, 'Oman Supports Mutual Protection of Investments Agreements '

enforcement of foreign arbitral awards by domestic courts.[899] This section will look at the concept of public policy from a different perspective.

The regulatory actions taken by the state to safeguard the public interest may result in investor-state disputes, as the foreign investor may claim that such measures violate the standards of protection. Additionally, this part will examine this idea in the context of the international legal framework that governs Oman's investor-state arbitration system. This approach is justified since this thesis focuses primarily on investor-state arbitration within the framework of ICSID as the key determinant of its scope. The ICSID arbitral awards are considered final, and therefore they are not subject to review by domestic courts of contracting states due to the fact that an ICSID awards are enforceable under the rules of the ICSID Convention.[900] That being so, ICSID awards, contrary to international commercial arbitral awards, will not face the matter of public policy in domestic courts as a ground for not enforcing them.[901]

4.3.4.1 Scoping Dimensions of the Issue

By their very nature, investment treaties and contracts raise public policy issues.[902] The factor of public policy constitutes the main reason for disputes between investor and host state within the international investor-state arbitration system.[903] It is believed that almost all investment conflicts are directly or indirectly related to the exercise of public authority by host state and have an impact on the public interest.[904] According to Subedi, many states have

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[899] For example see : Abdallah, 'Arbitration in Oman'; Ahmed M. Almutawa and Munir Maniruzzaman, 'Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC arbitration law:an empirical study' (2015) ; El-Ahdab, *Arbitration with the Arab Countries*;Mohamed Saud author Al-Enazi, 'Grounds for refusal of enforcement of foreign commercial arbitral awards in GCC states law', [Great Britain] : Brunel University, 2013. 2013); Alenezi, 'An analytical study of recognition and enforcement of foreign arbitral awards in the gcc states

[900] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 447*

[901] Khanapoj author Joemrith, 'Enforcing arbitral awards against sovereign states : the validity of sovereign immunity defence in investor-state arbitration', [Great Britain] : SOAS University of London. 2015) 140,141

[902] Ayad, 'Towards a Truly Harmonised International Commercial and Investment Arbitration Law Code (HICIALC): Enforcing MENA-Foreign Investor Arbitrations via a Single Regulatory Framework: A New Map for a New Landscape' 295; von Papp, 'Biting the Bullet or Redefining 'Consent' in Investor-State Arbitration? Pre-Arbitration Requirements After BG Group v Argentina' 698

[903] Prabhash Ranjan, 'India's international investment agreements and India's regulatory power as a host nation', [Great Britain] : King's College London (University of London) 2013) 15

[904] Arcuri and Francesco Montanaro, 'Justice for All ? Protecting The Public Interest in Investment Treaties' (2018) 59 Boston College law review 2804

argued before international investment tribunals that they have the right to regulate, and foreign investors should expect to be regulated by the host state. Of course, such regulatory power should be used in accordance with applicable laws and treaties.[905]

To go further it can be argued that, in fact, investor-state disputes usually represent the reaction of the investor to a state's regulatory decisions regardless of their legitimacy and whether they breach the substantive rights of the investor or not. Paradoxically, international investment law is supposed to pursue the protection of foreign investments and the promotion of general welfare through foreign direct investment. However, once the host state practices its regulatory powers to protect and promote this welfare, it is more likely to be exposed to international investment arbitration under the claim that it has breached the same law.

In this context, Salacuse states that public policy issues are frequently at the centre of investor-state conflicts.[906] This conflict demonstrates the two parties' contradictory interests; the foreign investor claims that the host state uses the public policy notion as excuse to abandon its obligations under international investment law. In return, the host state claims that it has the right to protect and regulate its public interests.[907]

The jurisprudence of investment arbitration has provided effort in the illustration of the public interest issue and the conflict of interest between the foreign investor and the host state. In the investment arbitration case: *Marvin Feldman v. Mexico*, the tribunal clearly and carefully stated that

> The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriator actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely

[905] Subedi, *International investment law : reconciling policy and principle 207*
[906] Salacuse, *The law of investment treaties 355*
[907] Ibid 355

> affected may seek compensation, and it is safe to say that customary international law recognizes this.[908]

As can be seen from this extract of the tribunal decision, adjudicating the conflict between the investor's rights so as not to damage his or her investment by the state's regulatory movement set against the right of the state to regulate and protect its public interest is a daunting and sensitive task. Interestingly, one of the factors which makes the task more difficult is that both rights are arguably legitimate.

In the same regard, it is believed that one of the significant points of criticism against Investor-state arbitration which has driven the EU Commission to propose an investment court system is related to the public interest. It is thought that, in its current form, the investor-state arbitration system has led to a "chilling effect" on legitimate regulation by sovereign states.[909] Also, it has been argued that for the same reason, inter alia, some South American countries have withdrawn from the international investment system.[910]

However, it is noteworthy that concerns that investor-state arbitration harms the host state's public policy arise not just among developing countries but also among developed countries. For instance, it is believed that under investment Chapter in NAFTA agreement, the private access to international investor-state arbitration granted to investors has resulted in unprecedented challenges to Mexican, Canadian and US regulatory measures. This sparked fears that these challenges would have a negative impact on state regulatory authority, as governments restricted or adjusted regulatory activities in an effort to prevent multi-million-dollar litigation in investor-state arbitration. [911]

In return, some have argued that it is not accurate to claim that investment treaties can cause a regulatory chill because they require host countries to compensate foreign investors for any adverse change in the host country's regulatory framework. They believe that the contrary is right, while investment treaties establish rights only for foreign investors, they do not remove the host state's regulatory authority. Instead, as arbitral jurisprudence demonstrates, neither the requirement of the standard of fair and equitable treatment nor the idea of indirect

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[908] *Marvin Roy Feldman Karpa v. United Mexican States* (award in 16/12/2002 , ICSID Case No. ARB(AF)/99/1)

[909] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 340; also see Vu, 'Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration' 316

[910] Christine Côté, 'A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment' 2014) 59

[911] Ibid 33

expropriation provides absolute rights for foreign investors. Rather, they compel the host state to give adequate regard to the need of protecting foreign investments when implementing actions that impact foreign investors by balancing the rights of foreign investors with conflicting private and public objectives.[912]

Also, in the same respect it has been asserted that "in fact, public interest is a notoriously difficult concept, which means that it is a concept that can be abused by a host state seeking to undermine the capacity of foreign firms to out-compete domestic equivalent".[913] Thus, host states can sometimes abuse its regulatory authority in a way that effect the foreign investor' legitimate interests.

4.3.4.2 The potential causes of the issue and the potential solutions to respond to it

The reasons that could give rise to conflict between the power of the host state to regulate its public interest and foreign investors interest are varied but interrelated. Subedi has looked at this issue from a wider perspective, i.e., within the scope of international law, where he suggests that the real challenges of this issue stem from the conflicting principles of international law and foreign investment law. While international law recognises the power of the host states to adopt regulatory measures, foreign investment law recognises the concept of regulatory measure which could be tantamount to indirect expropriation.[914] Also, he suggests that sometimes international law could give rise to the issue of public order of the host state. For example, the international environmental law introduces a new environmental obligation on host states. These obligations could force the state to take some regulatory measures to protect its environment. However, the foreign investors could challenge host state over such measures claiming that they been affected negatively by these measures. [915]

Collins has argued that the attempt to create a balance between opposing interests of an investor and a host state is possibly the most fundamental conflict in international investment law.[916] This conflict, in a large part, is due to the fact that the concept of public interest as a justifying norm is notoriously difficult to define.[917] Practically investment treaties tend not to

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[912] Brower and Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium: International Judges' 484
[913] Collins, *An introduction to international investment law 103*
[914] Subedi, *International investment law : reconciling policy and principle 197*
[915] Ibid 201,202
[916] Collins, *An introduction to international investment law 251*
[917] Ibid 251

define public policy's scope, which means that the host state has a broad area in which to regulate its public interest. Therefore, such concept needs to be defined or at least provide guideline and norms which would help to do so; otherwise, both investor and host state would construe this notion differently in favour of their own interest which would cause many disputes.[918]

Furthermore, the other potential reason for disputes regarding the public policy of host states concerns the vague language of the investment treaties, particularly vague provisions on the standard of treatment of foreign investors such as fair and equitable and the expropriation issues. This vagueness has led to conflict in the interpretation of international investment law by arbitral tribunals and, as a consequence, this situation has resulted in conflicting attitudes in determining the scope of public policy.[919]

Moreover, the institutional setting of international investment law for resolving conflicts between foreign investors and host countries is to blame for the public policy disagreement. The deficiency of this institutional setting has aggravated the problem of public interest of the host state as there is inconsistency in substantive and procedural rules of international investment law, as it consists of many bilateral and multilateral investment treaties. In addition, the absence of an appeals processes and a precedent-setting system within the investor-state arbitration system has caused this problem.[920] These elements (i.e., appellate mechanism, and the system of precedent) would help to provide great consistency in the jurisprudence about the issue of regulatory powers of the host state, which would eventually help achieve a great degree of agreement about it.[921]

Thus, the pressing question is how to achieve that balance between investment protection and the host state's right to regulate?

Within the UNCTAD's 2010 World Investment Forum (at the International Investment Agreements (IIA) Conference) participants discussed the importance of leaving room for

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[918] Ibid 252

[919] See Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' 403; Ranjan, 'India's international investment agreements and India's regulatory power as a host nation 21,22; Van Harten, *Investment treaty arbitration and public law 93,94*; Margaret Devaney, 'The remedies stage of the investment treaty arbitration process : a public interest perspective', [Great Britain] : Queen Mary, University of London 2015) 66

[920] Markus Wagner, 'Regulatory space in international trade law and international investment law' (2014) 36 University of Pennsylvania journal of international law 75

[921] Ibid 67,68

governments to regulate for the public good and to promote domestic development agendas. In return, Investors may demand compensation from governments for violations of the fair and equitable treatment criterion or indirect expropriation as a result of such policies, whether justified or not. Given to that states are progressively implementing measures to mitigate such risks and safeguard the public interest. The aim was to strike an acceptable balance between the rights and obligations of investors and host governments. To this end, attendees emphasised that states should carefully craft their Investment Agreements to ensure appropriate space for public policy areas. In this context, there are numerous tools that governments can use to address concerns that investment policies may unfavourably affect legitimate public interests. The removal of specific sectors or policies from an International Investment Agreement's liberalisation or pre-establishment pledges, as well as the inclusion of general (or issue-specific) exceptions, were among the alternatives proposed by the participants.[922]

As another option, UNCTAD suggestion to strike a balance between the exercise of the host state's regulatory authority and investment protection was that including the investment agreements clauses to improve investor-state dispute settlement or dispute prevention(reforming the investor-state dispute settlement system).[923] UNCTAD provides mechanisms to implement such an option as follows: qualifying the scope of consent given to ISDS, promoting the use of alternative dispute resolution (ADR)methods, increasing transparency of procedures, encouraging arbitral tribunals to consider standards of investor behaviour when settling investor-State disputes, limiting resort to ISDS and increasing the role of domestic judicial systems, providing for the possibility of counterclaims by states, or even refraining from offering investor-state arbitration as means for investment disputes.[924]

Further, as just mentioned above, investment agreements could reinforce a states' ability to regulate in the public interest by allowing exceptions for domestic regulatory measures that protect public health, the environment, public morals, or public order. This exception may help safeguard States from exposure to claims emerging from conflicts between foreign investor

[922] JAMES ZHAN, 'UNCTAD's 2010 World Investment Forum: High-level experts discuss investment policies for sustainable development' (*Investment Treaty News,* 16 December 2010) <http://www.iisd.org/itn/2010/12/16/unctads-2010-world-investment-forum-high-level-experts-discuss-investment-policies-for-sustainable-development> accessed 7 June 2021
[923] UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development 8,79*
[924] Ibid 84 , 106

interests and the promotion and protection of legitimate public-interest objectives.[925] Indeed, it can be argued that such an arrangement could cause an investor-state dispute in itself as to whether there is an exceptional situation that necessitates the adoption of regulatory measures, and whether the measures taken falls within the scope of the exceptional situation. For instance, foreign investors could claim that the host states have abused those exceptions.

In addition, the case law of investment arbitration has shown that the strategic technique to deal with the public interest dilemma is to strike balance between the dispute parties' interests (i.e., investor and state).[926] The jurisprudence of the international investment arbitration has developed some principles to achieve the process of balancing. For instance, the tribunal could utilize proportionality analysis, and within this principle, there are legitimate expectations of the investor and the purpose of governmental action. [927] In *Azurix Corp. v. Argentine Republic case*, the tribunal found that the principle of proportionality provides a useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation.[928] In *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay case* the tribunal stated that certain conditions must be met for a State's regulatory action not to be indirect expropriation. The action must be taken in good faith to protect public welfare, non-discriminatory, and proportionate.[929] Also, there is the necessity test which has developed in jurisprudence of international public law.[930] For instance, with regard to the Argentine's emergency financial measures taken under its Public Emergency and Foreign Exchange System Reform Law to address the financial crises in 2000s, the tribunal held that they provided valid grounds for its claim of immunity for treaty violations under the doctrine of necessity.[931]

However, such jurisprudential remedies for the issue of host state's regulatory powers would not always be sufficient and acceptable. As outlined above, that can be attributed to an

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[925] Ibid 103
[926] In this regard one clear example is *Marvin Roy Feldman Karpa v. United Mexican States*
[927] Wagner, 'Regulatory space in international trade law and international investment law' 54
[928] *Azurix Corp. v. Argentine Republic* ICSID Case No ARB/01/12 ,paras 311-312
[929] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* ICSID Case No ARB/10/7, para 305
[930] About these principles and its application by arbitral tribunals see Wagner, 'Regulatory space in international trade law and international investment law' 68-70
[931] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* ICSID Case No ARB/02/1,decision on liability of 3 October 2006,paras 238,240and 266

institutional setting deficiency in international investment law and its mechanism for disputes settlement.

Based on the previous analysis, it can be argued that the practical remedy for striking a balance between host state's public interest and foreign investor interest could be represented in two parallel initiatives: agreed international convention to regulate the foreign investment including designating of the substantive protection principles' indicative scope. Such multilateral instrument could help to facilitate the recognition of the public interest's parameters. Additionally, the EU proposal concerning an international investment court could help tackle some of the deficiencies in the current international investment arbitration system and may contribute to providing acceptable treatment for the current issue of the host state's regulatory powers. The proposed investment court with two degrees of adjudication and the creation of an international convention for regulating foreign investment may lead to a degree of stability, clarity, and consistency in international investment law, and this would reflect positively on the matter of regulatory powers. The next chapter will discuss the features of proposed investment court in greater detail.

4.4 Oman's Experience in the Field of International Investment Arbitration (Investment Treaty Arbitration)

According to the data available on ICSID and UNICTAD websites, Oman's government has been named as a party to six investor-state arbitration proceedings. With the exception of one case which was brought before the *Permanent Court of Arbitration* (PCA), all of these cases were brought before ICSID. The reason could be that foreign investors prefer ICSID over non-ICSID arbitration as it provides them with more safeguards about the enforceability of awards.

In four cases, Oman was the respondent state, but in two cases, it was the claimant's home state.[932]

The cases in which Oman was the respondent state are: (I) *Adel A Hamadi Al Tamimi v. Sultanate of Oman;* (II) *Samsung Engineering Co., Ltd. v. Sultanate of Oman;* (III) *Attila Doğan*

[932] More information about these cases can be obtained at UNCTAD, 'Investment Dispute Settlement Navigator' (*UNCTAD* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/159/oman> accessed 26 April 2022 ; also see 'Cases Database-ICSID ' <https://icsid.worldbank.org/cases/case-database> accessed 26 April 2022

Construction & Installation Co. Inc. v. Sultanate of Oman (IV) *Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman.*

On the other hand, the cases in which Oman was as the investor's home state are: (I) *Desert Line Projects LLC v. Republic of Yemen;*(II) *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria.* All of these cases were concluded. While the first case was decided in the favour of the Omani investor, the second one was decided in the favour of a home state.

This section, however, will focus exclusively on cases in which Oman was the respondent state, as this thesis examines the possibility of reforming Oman's investor-state arbitration system. Nonetheless, the difficulty was that not all of these cases' materials are accessible. Therefore, these cases will just be analysed in light of the sources of information available about them.

4.4.1 Adel A Hamadi Al Tamimi v. Sultanate of Oman

The importance of this case is embodied in the fact that it was the first international investor-state arbitration case brought before ICSID against the Sultanate. Therefore, it can be said that this case of arbitration gave policymakers in Oman the opportunity to test and assess national laws and policies and practices concerning foreign investment, and that it supplied the government with prospective areas for improvement.

One can also argue that *Al Tamimi* case represented the first opportunity for Oman to apply and assess its legal system governing investor-state arbitration (domestic laws and international obligations under its BITs and international convention particularly ICSID convention). In addition, the *Al Tamimi* case allowed policymakers to evaluate the efficacy of internal procedures put in place to handle investment disputes from the outset, as well as the clarity of these procedures for both officials and international investors.

Al Azri has argued that *Al Tamimi* case is special in that it raised and investigated Oman's conduct in serious foreign investment issues, such as expropriation, international minimum standards, and national treatment. Also, he has argued that *Al Tamimi* case raised awareness among policymakers in Oman of the need to reduce the vague areas in the foreign investment system and enhance its efficiency.[933] In the same respect Duy states that being hit by

[933] Al Azri, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection 120

arbitration claims provide countries with an opportunity to learn and re-evaluate their current policies.[934]

Considering the above reasons, it is crucial to present a brief description of this case.

4.4.1.1 The summary of the case's facts

The claimant in this arbitration case was *Mr Adel A Hamadi Al Tamimi*, a U.S national who was born in UEA.[935] Mr *Al Tamimi* established his claim on the Oman-U.S. FTA (2009).

These proceedings arose from the claimant's investment in the development and operation of a limestone quarry in the north of Oman. In 2006, the Claimant's investment was created through two Lease Agreements signed between, respectively, Al Tamimi's companies Emrock Aggregate & Mining LLC ("Emrock") and SFOH Limited ("SFOH"), and the Omani state-owned enterprise Oman Mining Company LLC ("OMCO"). In both lease agreements Emrock and SFOH agreed to comply with all environmental, mining and crushing requirements and all other laws of the Sultanate of Oman.[936]

In 2008, the OMCO decided to terminate the OMCO–Emrock lease agreement because of the failure by Emrock to comply with payment obligations. Also, in the same year the OMCO informed the Claimant that it regarded the OMCO–SFOH lease agreement as "null and void", as a result of the Claimant's failure to register SFOH in accordance with the laws of Oman.[937] In 2009, the Royal Oman Police arrested the Claimant at the request of MECA for allegedly conducting operations outside of his permitted boundaries, operating without the necessary permits, and removing material from the dry riverbed to the west of the *Jebel Wasa mountain range* (leased-block).[938]

In 2009, *Mr Al Tamimi* was tried and convicted on two misdemeanour counts in the Court of First Instance: (a) stealing sands and stones without a permit; and (b) violating Omani environmental law by engaging in quarrying and crushing operations without the requisite permissions. However, *Mr Al Tamimi* subsequently in 2010 filed an appeal with the Court of

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[934] Vu, 'Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration' 316
[935] *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No ARB/11/33) Award, para 46
[936] Ibid Award, para 48-49 and 55
[937] Ibid Award, para 69-70
[938] Ibid Award, para 63

Appeal against his conviction. The Court of Appeal issued a judgment overturning Mr Al Tamimi's conviction on both misdemeanours.[939]

As a result of above facts, *Mr Al Tamimi* decided to commence international arbitration proceedings against Oman by filing a request for arbitration on 5 December 2011.[940] *Mr Al Tamimi* alleged that Oman had breached its obligation to protect investors under the Oman-U.S. FTA through expropriation of his investment, denial of fair and equitable treatment, and denial of national treatment. The claimant sought damages in the amount of US$273 million to cover both economic and moral damages.[941]

4.4.1.2 The main points in the award

The main points in the award can be provided as follows: as to the claimant's allegation that Oman had expropriated the claimant's investment, the tribunal found that no expropriation under Article 10.6.1 of the US–Oman FTA has been established.[942] This is basically because there was no relevant action or series of actions by Oman which interfered with a primary investment of the claimant.[943]

As for the Claimant's second claim which alleged that Oman failed to treat the claimant's investment according to the minimum standard of treatment (fair and equitable treatment or full protection and security) imposed by article 10.5 of the Oman-U.S. FTA, the tribunal considered that no case for breach of the minimum standard of treatment by Oman had been made.[944] In its analysis, the tribunal stated that the minimum standard under Oman-U.S. FTA must be linked to customary international law as article 10.5.2 expressly imposes only the minimum standard of treatment under customary international. The minimum standard of treatment in customary international law imposes a higher threshold for breach. Therefore, not every minor misapplication of a state's laws or regulations will meet that high standard. Breach of such standard requires more than that some inconsistency or inadequacy in Oman's

[939] Ibid Award, para 78-79
[940] Ibid Award, para 84
[941] Ibid Award, para 120 and 207
[942] Ibid Award, para 376
[943] Ibid Award, para 354
[944] Ibid Award, para 453

regulation of its internal affairs, rather requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations.[945]

Concerning the third allegation that Oman breached the national treatment standard because Oman did not treat his investment equal with local investors working in the same sector and in the like circumstances, the tribunal dismissed that claim on the basis that the comparative examples with local companies working in the same sector cited by the claimant to be compared with his investment were clearly not materially analogous.[946]

Considering the preceding points, the tribunal decided to (I)reject all of the Claimant's requests for declaratory and compensatory relief. (II) To order that the Claimant shall pay to the respondent the sum of US$5,667,410.24, which comprises the Respondent's reasonable costs and expenses incurred in connection with this arbitration.[947]

4.4.2 Samsung Engineering Co., Ltd. v. Sultanate of Oman

Samsung Engineering Co., Ltd. filed an investment claim against the Sultanate with the International Centre for Settlement of Investment Disputes (ICSID) in 2015. The legal instrument on which the claim was based is the Oman-Korea BIT (2003).[948] The dispute concerned a refinery improvement project. The claim derived from the claimant's alleged discriminatory treatment by the State during the bidding process for renovations to the Sohar refinery in northern Omani governorate run by the state-owned Oman Refineries and Petroleum Industries Company (ORPIC) in 2013. Samsung alleged that despite its lowest-priced tender submission, the project was awarded to a joint venture between UK firm Petrofac and South Korean Daelim Industrial.[949] In this arbitration Samsung sought to recover its losses, including expenses incurred tendering and preparing for the project and the amount of its bid bond.[950] In 2017, the tribunal issued its final decision, which represented the parties' settlement. However, neither the terms nor the facts of the settlement are available because the award has not yet been made public. [951]

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[945] Ibid Award, para 390
[946] Ibid Award, para 465
[947] Ibid Award, part VII
[948] *Samsung Engineering Co., Ltd. v. Sultanate of Oman* (ICSID Case No ARB/15/30, case details)
[949] Jarrod Hepburn, *Samsung files claim against Oman over refinery improvement project* (IAReporter 22 July 2015)
[950] Global Arbitration Review, *Samsung and Oman settle ICSID dispute* (GAR 22 January 2018)
[951] Ibid

4.4.3 Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman

Under Oman-Turkey BIT (2007),the Turkish firm *Attila Doğan Construction & Installation Co. Inc.* brought a claim against the Sultanate of Oman to the International Centre for the Settlement of Investment Disputes (ICSID) in March of 2016.[952] Interestingly, the claimant originally notified Oman of the existence of a dispute in March of 2013.[953] This means that, despite the fact that the Oman government had sufficient time to attempt an amicable resolution of this dispute through consultations and negotiations, as provided for in article 9 of the Oman-Turkey BIT (2007)[954], the dispute has been referred to international investment arbitration. This could be due to Oman's relevant authorities mishandling the disagreement in its early stages. Another possible explanation is that the competent authorities were unaware of the effects of their actions and measures on the investor rights under the Oman-Turkey BIT, which might be regarded a breach of Oman's obligations under that BIT.

The dispute arose from a construction contract in the oil and gas industry concluded by the claimant with *Petroleum Development of Oman*, a majority State-owned company.[955]

The Turkish firm claimed that: (I) the *Petroleum Development of Oman* had expropriated its investment by allowing a domestic firm to take over work allocated to it. (II) Furthermore, the investor claimed that officials from the Ministry of Manpower interfered with its staffing operations, by delaying or preventing the entry of investor's qualified foreign personnel into Oman and required the claimant to hire additional Omani nationals from a local construction company. Allegedly this attitude from Ministry of Manpower resulted in additional violations of the Oman-Turkey BIT (2007).[956]

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[952] See 'Case Details : Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman (ICSID Case No. ARB/16/7)' (*ICSID* <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/16/7> accessed 29 April 2022

[953] Zoe Williams, *Turkish firm, Attila Dogan Construction, makes good on earlier threat to sue Oman* (IAReporter 22 March 2016)

[954] Article 9 states that "……. As far as possible, the investor and the concerned Contracting Party shall endeavour to settle these disputes by consultations and negotiations in good faith……"

[955] *Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman* (ICSID Case No ARB/16/7)

[956] Williams, *Turkish firm, Attila Dogan Construction, makes good on earlier threat to sue Oman*; Lisa Bohmer, *Investor in Oman's construction sector files for annulment of still-confidential award* (IAReporter 10 Jun 2021)

Attila Doğan Construction & Installation Co. Inc. seeks over US$182 million in damages, excluding interest, additional losses, moral damages, and legal fees.[957]

The tribunal rendered its award on 1st February 2021; however, the claimant has sought annulment of the award, and therefore the award's content remains undisclosed. The annulment proceeding is still underway at the time of writing.

4.4.4 Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman

Omar bin Sulaiman Abdul Aziz Al Rajhi's Saudi company brought an investment claim against the Sultanate of Oman in 2017, related to a construction contract that been awarded to it.[958] The legal instrument on which the claim was based is the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (1981). The investor has initiated his investment claim before the *Permanent Court of Arbitration* (PCA) and the arbitration rules applied to the proceedings are the UNCITRAL Arbitration Rules 2010.

However, one may wonder why the investor chose PCA rather than ICSID like the rest of investment cases brought against Oman to resolve the dispute, although the ICSID arbitration contains more efficient mechanism for enforcement of award. The reason is that the OIC Investment Agreement (1981) does not provide for ICSID arbitration.[959] As a prerequisite for establishing ICSID's jurisdiction, the ICSID Convention requires contracting governments to provide written consent to arbitration.[960] There is no other legal instrument such as BIT between Oman and Saudi Arabia (as home state of investor) that provides for ICSID arbitration that investor can rely on to take his or her dispute to ICSID. As such the investor in this case was not able to take the dispute to ICSID.

The case is still pending. There is no detailed information available regarding this case. This could be because the applicable arbitration rules (UNCITRAL Rules 2010) do not necessitate the disclosure of case information and documents.

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[957] Tom Jones, *Investors takes Oman and Moldova to ICSID* (Global Arbitration Review 23 March 2016)
[958] Bohmer, *Investor in Oman's construction sector files for annulment of still-confidential award*
[959] Ibid
[960] Article 25.1 of 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 …….. and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"

4.4.5 Observations and Suggestions

First observation is that some of aforementioned cases like *Attila Doğan* and *Samsung cases* involving the Sultanate's most important industry, namely the oil and gas industry, a sector which generates the majority of the Omani government's revenue.[961] That being so, Oman has to manage the investment disputes related to its oil and gas sector more efficiently, particularly in the stage before the initiation of international arbitration by a foreign investor. This is particularly so, given the fact that the investment disputes concern an industry which could have a severe impact on production and, as a result, on Oman's GDP. Oman is in desperate need of foreign investment in this crucial sector, and any international investor-state arbitration pertaining to it may generate concerns among potential foreign investors in the oil and gas business, influencing their decision to invest in this sector. In addition, such disputes may postpone the construction of oil and gas projects that were intended to contribute to the national economy.

Also, as can be assumed from aforementioned investment arbitration cases, a number of Omani state-owned companies were directly involved in investment conflicts.[962] Therefore, state corporate authorities must be aware of the rights of foreign investors under Oman's international duties in this regard.

ICSID has provided some practical organizational suggestions for host states to manage and solve the investment disputes at an early stage and prevent their referral to international investment arbitration where possible as part of their overall approach to investor-state dispute settlement. One of those suggestions is that it is critical to ensure that government officials in various portfolios are aware generally of the state's treaties' obligations. Such a realistic step is expected to enable them to identify potentially non-compliant measures and verify that government behaviour is consistent with its treaties' commitments.[963]

For example, in the *Attila Doğan* case the claimant alleged that some measures taken by Omani authorities formed discrimination against *Attila Doğan* in favour of Other Contractors. According to the notice of dispute "on one occasion Oman, via its police, confiscated Mr. Kaan

[961] For example in 2020 the hydrcarbon sector contrubuted 68.2 percent to the government revenue see *The Annual Report of the Cntral Bank of Oman (CBO)*, 2020) 21
[962] These enterprises were: Oman Mining Company LLC, Refineries and Petroleum Industries Company (ORPIC) and Petroleum Development of Oman (PDO)
[963] ICSID, *Practice Notes for Respondents in ICSID Arbitration 4*

Dogan's passport for over a week for no apparent reason." Another example was that "Oman not allowing AD access to camp accommodation for its personnel on the same basis as it made such available to others (contractors)…"[964] Such acts may violate Oman's international investment commitments (protection standards) as stipulated in its BITs. If officials were aware of the likelihood that such actions could trigger Oman's responsibilities under its BITs, they may have approached the aforementioned situations with greater caution.

As a result, the involvement of officials of various Omani government authorities, particularly those in charge of programmes and policies involving foreign direct investment, and Officials of state-owned enterprise are critical.

Secondly, as has been seen, the vast majority of dispute settlement provisions in Oman BITs do not indicate the administrative body to whom the foreign investor's request for settlement or notice of the existence of a dispute should be directed; nor do the provisions establishing a clear process for such request.[965]

It is thought that a notice of a dispute is an excellent opportunity for the host state to assess the situation and determine whether the dispute can be resolved before being taken to international investment arbitration.[966]

Thus, it can be said that issue of determining the administrative entity to which a request for arbitration or notice of dispute should be addressed and establishing a clear course to be followed by that administrative body when dealing with investment disputes, is a further practical procedure that allows the Omani government to efficiently manage an investment dispute. Indeed, such institutional frameworks would offer foreign investors with a clear path to exercise their rights to take their problems to international arbitration if they could not be resolved peacefully. Recognizing foreign investors' ability to use international arbitration to address any disputes that may emerge between them, and the host country is crucial, but establishing transparent and obvious procedures to get that right is more crucial.

By way of example, in 2000, when the first foreign investment arbitration cases were filed against Peru, the government lacked a coherent response framework. Nevertheless, once Peru started to receive international investment arbitration cases, *the International Investment*

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[964] *Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman(Notice of Dispute)*
[965] See section 4.3.3.2
[966] ICSID, *Practice Notes for Respondents in ICSID Arbitration 7-8*

Disputes State Coordination and Response System was created by the government in 2006.[967] The system was designed to ensure an optimal response by the state to investor difficulties, even before they escalate into disputes, as well as a suitable institutional structure for the arbitration of international investment disputes.[968] The system positively impacts on the management of investment disputes in Peru. Since its creation, the system has prevented some investment disputes from reaching the stage of international arbitration and allowed the relationship between the state and investor to continue.[969] In addition, the system provides certainty for investors in creating a single contact in the government for investment disputes.[970] In general, it is believed that the response system in Peru saving time and resources for the state and the investor, and contributing to a better and more predictable investment climate.[971]

As for the current situation in the Sultanate regarding this matter, there is the lack of institutional framework to deal with investment disputes with foreign investors. It is not clear which the governmental entity is competent to deal directly with investment disputes that the investor tends to take them to international investment arbitration. Furthermore, there are no clearly defined procedures to be use when dealing with such disputes.

Choosing a governmental body to handle any future investment disputes in a systematic manner will aid the government in achieving the following objectives: (I) This competent agency would assist foreign investors in resolving investment problems with concerned state's authorities in an amicable manner during the dispute's earliest phases before they evolve into legal conflicts.[972]

(II) In addition, the government would be able to assess the cost-benefit of settlement as soon as it receives the notice of dispute through such specialised entity.[973] Without such an internal framework, it is possible that a dispute notice will not be directed to the relevant entity from the start. As a result, the government will not be able to devote sufficient attention to that

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[967] UNCTAD, *Best Practices in Investment for Development How to Prevent and Manage Investor-State Disputes: Lessons from Peru, Investment Advisory Series-Series B, Number 10. S. New York and Geneva: United Nation.* (United Nation 2011) 19-21
[968] Ibid 29
[969] Ibid 38
[970] Ibid 35
[971] Ibid 40
[972] Roberto Echandi, 'Investor-State Conflict Management Mechanisms (CMMs) in International Investment Law: A Preliminary Sketch of Model Treaty Clauses', *Handbook of International Investment Law and Policy* (Springer Singapore 2021) 628
[973] ICSID, *Practice Notes for Respondents in ICSID Arbitration 8*

dispute in a timely manner, avoiding taking it to international investment arbitration. For example, in the *Attila Doğan* case the claimant originally notified Oman of the existence of a dispute in March of 2013 and the arbitration proceedings were started in 2016.[974] This means that, despite the fact that the Oman government had sufficient time to attempt an amicable resolution of this dispute through consultations and negotiations, as provided for in article 9 of the Oman-Turkey BIT (2007)[975], the dispute has been referred to international investment arbitration. This could be owing to Oman's concerned authorities mishandling the dispute in its early stages.

(III) Moreover, a clear internal procedure framework would give the government enough time for early preparation for the international arbitration in event an amicable settlement was not possible.[976]

(IV) Furthermore, as the investment disputes could involve more than one government entity, the designated government body to deal with the investment disputes would play vital role to coordinate between all government entities involved and legal representatives. For example, in *the Al Tamimi* case, there were many governmental bodies involved in *Mr Al Tamimi's* investment dispute.[977]

(VI) Additionally, it can be argued that designating administrative procedures (a governmental agency and a procedural course) to deal with investment disputes would send a positive signal to international investors that the government is willing to implement its international obligations regarding foreign investment protection within clear and specified procedures and remove the applicable obstacles.

(VII) To go further and beyond the management of investment disputes, creating an internal response mechanism to investment disputes would enable the government to determine the nature and types of issues and obstacles faced by foreign investments. Consequently, the government would be able to identify opportunities to eliminate these hurdles to improve the investment climate.

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[974] Williams, *Turkish firm, Attila Dogan Construction, makes good on earlier threat to sue Oman*
[975] Article 9 states that "……. As far as possible, the investor and the concerned Contracting Party shall endeavour to settle these disputes by consultations and negotiations in good faith……"
[976] ICSID, *Practice Notes for Respondents in ICSID Arbitration 9*
[977] For example, there were: Omani Ministry of Housing, Electricity and Water, Omani Ministry of Commerce and Industry, the Ministry of Environment and Climate Affairs and Royal Oman Police.

Chapter 5 Analytical Overview of the European Union system for resolving Investment Disputes (Investment Court System)

5.1 Introduction

It is possible that the EU investment system for resolving investment disputes (Investment Court System)[978] represents the most recent innovation and trend in the investor-state dispute settlement field. It is thought that the EU system arose in reaction to concerns regarding investment arbitration in previous years.[979] Extensive policy discussions have taken place inside the EU to evaluate the potential need to reform the current legal framework of investor-state arbitration and address the criticisms and issues it has faced.[980]

It is crucial to note, however, that the EU's approach was not the only effort to improve the existing investor-state dispute settlement system. Indeed, in recent years, there have been some moves within the relevant international organisations to resolve some of the legal difficulties associated with that system.[981]

For example, the 2022 ICSID Arbitration Rules revisions sought to make significant changes to the Rules, which were last modified in 2006, and to reflect current practise of the ICSID Secretariat, ICSID tribunals, and other arbitral institutions. Some of those amendments will be explored in this chapter. Another example is UNCITRAL's adoption of the Rules on Transparency in Treaty-based Investor-State Arbitration in 2013 (the "Transparency Rules"). These rules make the arbitral proceedings more public by requiring, among other things, the public disclosure of awards and other essential documents, open hearings, and submissions by non-disputing parties.[982] Nevertheless, the application of ICSID's amended rules of

[978] Hereafter will be referred to as ICS
[979] Ana M. Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' (2017) 40 Houston Journal of International Law 139
[980] See 'European Union: Legal working paper no. 19: The new challenges raised by investment arbitration for the EU legal order' *Asia News Monitor* (Bangkok <https://www.proquest.com/newspapers/european-union-legal-working-paper-no-19-new/docview/2308907075/se-2?accountid=11528>
[981] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 340
[982] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 150-151

arbitration[983] and UNICITRAL's Transparency Rules[984] conditional on the consent of the disputing parties, as their respective application provisions require. The EU approach is thought to be more comprehensive than any other attempt to reform investor-state arbitration.[985] Therefore, this chapter will consider whether the EU approach to improving investor-state arbitration is more progressive than the compared approaches in this regard such as of ICSID.

However, as this thesis is about investor-state arbitration, this chapter will concentrate mostly on the technical features of the EU investor-state arbitration system (investment dispute resolution mechanism). Consequently, this chapter will not delve into additional topics such as the competence conflict between the EU and its Member States in the event of disputes, the issue of the primacy of EU law or the difficulty of EU access to ICSID as the EU is an international organisation rather than a sovereign state. Only they will be described briefly if necessary.

In the light of that, this chapter will offer context for section two's discussion of the evolution of the EU Investment Court System (ICS). The third section will examine the primary components of the given system and then briefly compares the ICSID and EU systems for investment arbitration (elements of difference only). Section four will briefly demonstrate the recent developments at international level regarding the EU proposal of Multilateral Investment Court (MIC). The final section will attempt to answer the question: what can Oman learn from the EU Investment Court System (ICS)?

[983] Cannon, 'ICSID Member States Approve Amended 2022 Arbitration Rules'
[984] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 151
[985] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 504*

5.2 Emergence of the EU Investment Arbitration System (Investment Court System-ICS)

The *Treaty of Lisbon* 2009 [986] was a watershed moment in the evolution of the idea of a new investment arbitration system in the EU.[987] The Treaty of Lisbon gives the EU sole authority over foreign direct investment and trade policy.[988] Accordingly, since 2009, the EU has the exclusive power to handle foreign direct investment policies on behalf of EU nations as part of the common commercial policy.[989] According to this new competence, in principle, the authority of investment treaty conclusion with a third country shifted from the Union's member states to the Union itself.

However, according to article 9 of *EU Regulation No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*[990]*,* the EU member states can be authorised by the EU Commission to enter into negotiations with a third country to amend an existing BITs or to conclude a new one provided that (I) the BIT does not conflict with EU law principles or the Union's principles and objectives for external action ,(II) the that the EU has not yet decided to begin discussions with the respective third country , and that concerned BIT will not pose a significant barrier to any prospective future negotiations. One example of the BITs that the EU member states recently concluded according to Regulation No. 1219/2012 is the *agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022*.[991]

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[986] The Treaty of Lisbon entered into force on 1 December 2009. It modifies rather than replaces the Treaty on European Union and the Treaty establishing the European Community (TEC). In turn, this procedure led to rename the latter treaty as the *Treaty on the Functioning of the European Union (TFEU)*. It gives the Union the legal foundation and instruments it needs to handle future problems and citizens' expectations.See 'Summaries of EU Legislation- summary of Treaty on the Functioning of the European Union' (*European Union-EUR-Lex,* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:4301854> accessed 6 July 2022

[987] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 333

[988] Article 3(1)(e) of Consolidated Version of the Treaty on the Functioning of the European Unionen - Official Journal of the European Union No C 202 on 7.7.2016 states that ' 1. The Union shall have exclusive competence in the following areas... (e) common commercial policy...'

[989] See 'Investment - objectives of EU investment policy' (*The European Commission's trade department,* <https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en> accessed 6 July 2022

[990] Regulation No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries -Official Journal of the European Union No L 351 on 20.12.2012

[991] See *Commission Implementing Decision of 9.9.2020 authorising Hungary to sign and conclude a bilateral investment agreement with the Sultanate of Oman* (European Commission 9 September 2020)

As a result of the EU's exclusive competence over foreign direct investments, the EU as a single economic bloc began to negotiate new investment treaties with non-EU countries or economic groups [992] such as Free Trade Agreements with Canada and Singapore.[993]

Nonetheless, the inclusion of investor-state disputes settlement clauses in the EU's agreements has produced a number of legal concerns, as well as strong resistance from European civil society, the EU Parliament and prominent politicians in the Member States in relation to investor-state arbitration as procedural aspect of investment chapter in the EU's FTAs .[994] This resistance reached the point of perceiving investor-state arbitration as "a secret parallel justice system for large multinational firms circumventing legitimate domestic courts intensified"[995]. The causes for this resistance will be discussed further on.

Due to EU community opposition to conventional investor-state dispute settlement provisions, the free trade agreements with Canada and Singapore were included the initial reforms proposed by the EU Commission utilised arbitration for investor-state dispute. It merged some characteristics of a procedure comparable to that of the ICSID with several changes based on some of the new procedures introduced by various IIAs or UNCITRAL rules.[996] In general, that initial proposal included several innovative elements in the investor-state disputes settlement provisions as follows:

> An investor cannot bring multiple claims; an ISDS tribunal is prohibited from ordering the reversal of domestic laws or regulations; arbitrators are subject to a binding code of conduct; a roster of well-qualified and pre-vetted arbitrators will be established; a system is created to prevent frivolous or unfounded claims;

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[992] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 141-142

[993] See 'Reform of the ISDS mechanism' (*The European Commission's trade department,* <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes/reform-isds-mechanism_en> accessed 5 Julay 2022

[994] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 141; Laura Puccio and Roderick Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis* (European Parliamentary Research Services 2017) 1; Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 333-334

[995] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 333

[996] Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 11*; Elfriede Bierbrauer, *In-Depth Analysis: Negotiations on the EU-Canada comprehensive economic and trade agreement (CETA) concluded* (Directorate General for External Policies – Policy Department, European Parliament 2014) 7-9; also see EU Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15* (Council of the European Union 4 May 2015) 3

> costs are not borne by both parties, but by the unsuccessful party; an appellate mechanism will be created…[997]

At a subsequent stage, the *Transatlantic Trade and Investment Partnership (TTIP)*[998] negotiations between the EU and the US gave greater impetus to investment protection, investor-state dispute settlement, and the path forward for changes.[999] The EU Commission held a public consultation on investment protection and investor-state arbitration in the framework of the TTIP in order to gather public views on how EU could develop further its new approach on those matters.[1000]

The consultation results revealed four areas where specific concerns were raised and where further enhancements to the EU's approach should be investigated: i) the protection of the right to regulate; ii) the establishment and functioning of arbitral tribunals; iii) the review of ISDS decisions through an appellate mechanism; iv) the relationship between domestic judicial systems and ISDS.[1001]

For each of the four mentioned policy areas, the EU Commission proposed potential future courses of action. For the right to regulate, it provides for a further and clearer, legal provision to ensure that investment protection rules do not undermine the right to regulate. It suggested steps that can be taken to transform the system towards one which function more like traditional courts systems, by making their appointment to serve as arbitrators permanent, to move towards assimilating their qualifications to those of national judges, and to introduce an appeal system.[1002]

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[997] Bierbrauer, *In-Depth Analysis: Negotiations on the EU-Canada comprehensive economic and trade agreement (CETA) concluded 9*

[998] The TTIP negotiations were launched in 2013 and ended without conclusion at the end of 2016.They were formally closed in 2019after being considered obsoete. See 'Transatlantic Trade and Investment Partnership (TTIP) - Documents' (*EU Commission* <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en> accessed 27 July 2022

[999] The proposed draft of Transatlantic Trade and Investment Partnership(TTIP)-Chapter II Investment-between the EU and US

[1000] About the consultation and its results see EU Commission, *Commission Staff Working Document-Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (EU Commission 13.1.2015)

[1001] See Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 5*; Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 11-13*

[1002] See Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 6*; Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 153

In the same manner and within the context of TTIP negotiations, the EU Commission suggested that the EU should also seek to establish *multilateral investment court* (MIC) and appellate system with tenured judges to replace the bilateral ICS that would be formed in EU FTA. The suggested MIC can be established either as a self-standing international body or by embedding it into an existing multilateral organization.[1003] This due to the fact that multilateral investment court would be a more operational solution in the sense of applying to multiple investment agreements with multiple partners.[1004]

Eventually, the EU Commission adopted the position that any proposed improvements in the context of TTIP would serve as a benchmark for the development of investment protection clauses and investment arbitration in EU investment agreements.[1005]

Resulting from the public consultation's findings and the EU Commission proposed solutions, the European Parliament requested that international investment arbitration to be replaced with a new system in the framework of EU trade and investment negotiations.[1006] Because of this, in 2016 the EU and Canada renegotiated the Comprehensive Economic and Trade Agreement (CETA) and established a new investment court system (ICS) as the provisions of investor-state dispute settlement in CETA in 2014 was initially negotiated on the basis of a traditional arbitral proceedings.[1007] The CETA[1008] became the first EU FTA to include the new investment court system(ICS).[1009] Also, the EU has recently included elements of ICS in EU-

[1003] See Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 16*
[1004] Ibid 6
[1005] Ibid 7
[1006] Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 1*
[1007] Céline Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' in Armand de Mestral (ed), *Second Thoughts* (Investor State Arbitration between Developed Democracies, McGill-Queen's University Press 2017) 59; Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 4-5*
[1008] Chapter 8 of Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member State, of the other part [2016]OJ L 11
[1009] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 153

Singapore Investment Protection Agreement (not in force)[1010], EU-Vietnam Investment Protection Agreement(not in force)[1011], and EU-Mexico Agreement.

However, it is fair to state that the use of traditional investment arbitration as tool for investor-state disputes by the European Union is not an entirely new phenomenon. For example, the EU is a contracting party to the Energy Charter Treaty (ECT) which introduced investor-state arbitration as a tool for settling investment disputes in the mid of 1990s. Thus, there is a question as to the reasons for EU opposition to the existing investor-state dispute settlement system (investor-state arbitration) and imposed new reforms?

The EU has adopted a new paradigm for investment arbitration for a variety of interconnected reasons. Firstly, the opposition to the investor-state disputes settlement system in the EU has stemmed from arguments against its legitimacy.[1012] The legitimacy of investment arbitration has been criticised for numerous reasons, as described in earlier sections of this thesis.[1013]

However, in order to offer an overall overview of the EU system for investor-state dispute settlement, the recognised disadvantages may be useful to mention here again. The primary arguments against current investor-state arbitration are: (I) the traditional mode of investment arbitration has a severe impact on host states' regulatory authorities, preventing them from controlling and protecting public interests. This is evident when disputes arise, for example, over environmental issues or public services.[1014] This is related to the issue that the substantive protection standards (e.g., MFN and FET) in classic BITs are too ambiguous and imprecise,

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[1010] Chapter 3 of Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part. This agreemnt was signed in 19 October 2018 and the EU Parliament ratified it on 13 February 2019.It will enter into force after it has been ratified by all EU Memeber States according to their own national procedures, see 'Negotiations and agreements: EU-Singapore Free Trade Agreement and Investment Protection Agreement' 2018) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement_en> accessed 26 July 2022

[1011] Chapter 3 of The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part. This agreemnt was singed on 30 June 2019, but it has nit yet been ratified by the EU Parlaiment or the parliament of the EU Member States,see 'Negotiations and agreements: EU-Vietnam Trade Agreement and Investment Protection Agreement' 2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en> accessed 26 July 2022

[1012] August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 Journal of International Economic Law 762; Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 59-60*

[1013] In paricular see section No.4.2.1.2.2 ; also ,for example , see Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 9-11*

[1014] Subedi, *International investment law : reconciling policy and principle 11-13*

potentially leading to a level of investor protection that could undermine the regulatory freedom of host nations and their legal right to regulate.[1015] (II) The second point concerns arbitrators' impartiality. Arbitrators nominated by one side in investment disputes may simultaneously serve as consular for another party in other disputes, thereby creating a conflict of interest. (III) The lack of predictability and the lack of consistency, as there is no binding system of precedents for the investment arbitral tribunal, are an additional major criticism. (IV) Other purported disadvantages of traditional investor-state arbitration include a lack of transparency because the majority of investment arbitrations are confidential, despite the fact that they typically involve public interests. It is believed that the mentioned legitimacy gaps in investor-state arbitration "provided the fertile breeding ground upon which the active politicization and public contestation of ISDS could grow".[1016]

Secondly, Political pressures may have prompted the EU Commission to suggest the establishment of a permanent investment court rather than a conventional arbitral tribunal. For instance, the *Group of Progressive Alliance of Socialists and Democrats (S&D)* has opposed the traditional investor-state disputes settlement provisions and appears to advocate for enhancing the judicial features of procedural protection at the expense of arbitral features in the EU's Trade agreements. That political group has supported the establishment of a standing arbitration court with independent judges not subject to conflicts of interest and with mandatory rules on ethics and allowed for appeal mechanism.[1017] In the same context, according to Reinisch, the negative attitude toward the TTIP reflects the widespread phenomenon of "euro-skepticism," and thus a degree of mistrust toward EU institutions, which is linked to the anti-globalization movement of the 1990s, which resulted in the demise of the Multilateral Agreement on Investment (MAI) in 1998. Moreover, Reinisch noted that the general TTIP criticism coincided with revelations about US spying activities in Europe, feeding into the notion of the United States as an overwhelmingly powerful trade partner that would outwit Europeans on all fronts, including forcing their low standards (in the European public's perception) for health, safety, environment, and labour in the production of goods on

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[10151015] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 342-343

[1016] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 756

[1017] Group of the Progressive Alliance of Socialists and Democrats (S&D), *Position Paper on investor–state dispute settlement mechanisms in ongoing trade negotiations (4 March 2015), available at https://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf*

European consumers and empowering US corporations to prevent legitimate European regulation from being passed via investor-state arbitration.[1018]

The other factor is that , the EU is the world's most important source and destination of foreign direct investment (FDI).[1019] Thus, the EU has a strong incentive to improve the substantive rules of investment protection and the investor-state dispute settlement system in order to facilitate and protect international investment in the EU and to support its investors abroad, on the one hand, and to ensure that this system does not affect the EU and its Member States' ability to continue pursuing public policy objectives, on the other. In this regard the *Trade Commissioner Cecilia Malmström* stated that "...EU investors are the most frequent users of the existing model, which individual EU countries have developed over time. This means that Europe must take the responsibility to reform and modernise it. We must take the global lead on the path to reform."[1020] However, it is claimed that, in the context of TTIP negations, the Commission gave more attention to the concerns of the general public than to the special interests of EU outbound investors. The public consultation survey carried out by the European Commission reveals that only 126 corporations and trade associations representing business interests were included in the (approximately) 149,000 responses.[1021]

Thus, the EU system evolved as a response to the flaws of the existing investment arbitration system and embodied the EU's approach for the need to reform.[1022] The EU endeavoured to set up a system of dispute settlement which is fair and independent, through which the mentioned concerns can be addressed. That system, in particular, must strike a balance between the protection of investments and the protection of the right of EU's Member states to regulate[1023], which is essential for the implementation of public objectives such as public

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[1018] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 338

[1019] See Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 2*

[1020] EU Commissioner for Trade Cecilia Malmstrom, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (the EU Commission Press Release 16 September 2015)

[1021] Kyle Dylan Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17 The Journal of World Investment & Trade 783(footnote No.39)

[1022] Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law 210; Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 749

[1023] Subedi, *International investment law : reconciling policy and principle 11*

health, safety, environment, public morals and the promotion and protection of cultural diversity.[1024]

As demonstrated by the preceding analysis, the EU has taken a progressive approach to foreign investment protection. The first track of this approach is to make some essential elements of investment protection provisions (the key protection standards like "fair and equitable treatment" and "indirect expropriation") in the new generation of EU FTAs, clearer in the way that safeguard the rights of investors to be protected and host state to be able to safeguard its regulatory space. The second track is to improve investment arbitration as the primary mechanism for activating foreign investment protection by establishing the investment court system (ICS) with high standards of independence, transparency, and legitimacy, which should replace the old model of ad hoc arbitral tribunals established for specific disputes.[1025]

However, as a further step, on the international level, the EU has endeavoured to build some international consensus on the need to establish multilateral investment court (MIC) to replace the bilateral investment court system in the future.

Nonetheless, it should be noted that in general, as an abstract idea, the essence of both ICS and MIC is comparable in terms of structure and operation. The sole distinction is that the ICS would only act as a bilateral arbitral tribunal to address investor-state disputes within the framework of the EU FTAs. The proposed MIC, on the other hand, would act as a governmental international organisation to handle investor-state conflicts that may arise under various international BITs and FTAs. Furthermore, unlike MIC the ICS is no longer only a proposal, as it is included in the new generation of EU's FTAs.[1026] Consequently, the majority of the material in this chapter will be on the Investment Court System (ICS).

When it comes to the Investment Court System (ICS), however, the question is, what innovations has that system produced?

[1024] See Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15*

[1025] Lopez-Rodriguez, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' 153

[1026] See 'Reform of the ISDS mechanism'

5.3 The EU Investment Court System's Leading Innovations in Comparison to ICSID Arbitration

As mentioned in the preceding section, the EU's new approach to enhancing investor-state arbitration is built on two pillars: the first is to improve substantive investment protection provisions (theoretical or substantive pillar-standards of treatment and the right of state parties to regulate). The second is to improve the implementation and enforcement mechanism of those provisions (practical pillar-investor-state arbitration). This section, however, will only examine the practical components of the EU approach contained in ICS as compared to ICSID arbitration and will provide a comparative analysis between the two systems (the key distinctions) when applicable in a manner that will allow for a fair evaluation of the ICS.

The following justifications support this approach: the right of the host state to regulate, which is the main substantive issue that the EU system was designed to protect, has previously been discussed.[1027] Moreover, the substantive aspect (standards of treatment) of the EU approach to a substantial extent is similar to the practical options and suggested reforms provided by various international entities such as UNCTAD, ICSID, and OECD.[1028] The majority of these options and suggestions for reform were mentioned in the previous chapter. Furthermore, in general, there has been some bilateral efforts to change treaty's substantive rules prior to the EU approach. The United States 2004 and 2012 Models BIT, for example, brought certain reforms to such rules.[1029]

Thus, it is evident that the innovative component of the EU's investment agreements, when compared to other international attempts to improve the investment agreement regime, rest on the notion of procedural aspect (investor-state disputes settlement). As such, attention will be paid to that part of the EU's approach. Nonetheless, in general, many aspects of the current investment -state arbitration system are retained under the new investment court system, whereas others differ.[1030] Indeed the ICS was designed to address only some specific

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[1027] See section No. 4.3.4

[1028] See, for example: UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development*; ICSID, *Practice Notes for Respondents in ICSID Arbitration*; OECD, *Policy Framework for Investment, 2015 Edition*

[1029] Ho, Paparinskis and Lim, *International investment law and arbitration : commentary, awards and other materials 496-500*

[1030] Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 60

difficulties within traditional investor-state arbitration. The ICS has addressed several primary criticisms levelled against investor-state dispute settlement, including a perceived or actual lack of transparency, absence of appellate review (which has led to inconsistency in the outcome of the traditional copy of the investment arbitration) and lack of arbitrator independence, among others.[1031] Moreover, a full discussion of ICS is beyond the scope of this thesis.

Consequently, the sections that follow will only analyse of ICS features that differ from ICSID system. These features of ICS will be analysed primarily in the context of CETA (as it is the first EU's FTA in force which included ICS features) and TTIP "as it amounts to a model agreement that reflects the EU's political preferences for ISDS"[1032]. In addition, if appropriate, some reference will be made to in the context of the other EU FTAs.

5.3.1 The Two-tier Investment Court

The ICS's introduction of a two-level tribunal (tribunal of first instance and appellate tribunal) with permanent appointed judges is one of its most significant advancements.[1033] This quasi-judicial structure allows arbitral awards to be appealed. This section will analyse and assess this component of ICS from three perspectives: the makeup of ICS tribunals, the significance of the two-level tribunal for the investment dispute settlement system, and a comparison of ICS with ICSID in this regard.

5.3.1.1 Function and Composition of the two-level tribunal

The responsibility of the first instance tribunal is to adjudicate claims submitted pursuant to a given investment agreement, while the appellate tribunal assumes responsibility for reviewing awards rendered by the lower tribunal in a specific dispute if one of the disputing parties appeals that award. This appellate mechanism concerned with the legitimacy of the process of decision and the merits of awards. Opposite to that, under the ICSID Convention, the only means to challenge the arbitral awards is to apply for annulment them. However, this

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[1031] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' 346
[1032] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 762
[1033] Reinisch, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court'

mechanism does not allow for any substantial review as grounds for intervention are narrow and generally do not extend to the merits of awards as will be explained latter.[1034]

Regarding the composition of the two ICS layers, the tribunals are composed of specified number of members. The tribunal of first instance, in the case of CETA and TTIP for example, should be constituted by fifteen members for fixed term (a five-year term in the case of CETA and six-year in the case of TTIP). These appointees are eligible for re-appointment only once. Two-thirds of the fifteen members of the tribunal must be nationals of contracting nations, while the remaining third must be nationals of non-contracting states. The so-constituted tribunal will have a President and Vice-President, both of whom will be chosen from among the members who are nationals of third countries. Each dispute is to be decided by divisions of three Members, one from each of the contracting parties and one from a third country which will be the president of the division. The president of the tribunal appoints members of the division for a certain case on a rotation basis in a random and unpredictable manner. Nevertheless, the disputing parties may agree that a case be heard by a sole Judge who is a national of a third country, particularly where the investor is a small- or medium-sized enterprise. Unless the division requires more time, the final award must be made within a specified time period (24 months as for CETA and 18 months as for TTIP) of the date the claim is submitted by the investor. In order to ensure their availability, the members of the first instance tribunal will be paid a monthly retainer fee by the contracting states. [1035]

Regarding the appellate tribunal, it shall consist of six members appointed by contracting parties, two of whom shall be nationals of an EU member states, two of whom shall be nationals of the other contracting state, and two of whom shall be nationals of a third country. The appeal tribunal shall hear appeals in divisions consisting of three members choosing by the president of the appellate tribunal on a rotation basis in a random and unpredictable manner, one of whom shall be nationals of an EU member states, one of whom shall be nationals of the other contracting state, and one of whom shall be nationals of a third country.[1036] Within 90 days of the award's issuing, either disputing party may file an appeal with the appeal tribunal in which it has to issue its decision within 180 days calculated from the day a disputing party formally declares its decision to appeal. However, the tribunal may extend this term for no

[1034] Freya Baetens, 'Judicial review of international adjudicatory decisions: A cross-regime comparison of annulment and appellate mechanisms' (2017) 8 Journal of international dispute settlement 433
[1035] Article 8.27 of CETA and article 9 of TTIP
[1036] Article 10 of the TTIP; article 3.39 of the EU-Vietnam agreement and article 3.10 of the EU-Singapore agreement

longer than 270 days. In order to ensure their availability, the members of the first instance tribunal will be paid a monthly retainer fee by the contracting states. [1037]

With respect to qualifications and experience required for both tribunals' adjudicators: first instance tribunal's judges must be chosen from two categories: (I) professionals who meet the requirements in their respective contracting countries for appointment to national courts or international tribunals, such as the International Court of Justice or the WTO Appellate Body, or (II) jurists of recognised competence in their respective countries. The same principles apply to the appellate tribunal with the exception that members must possess the qualifications required for appointment to the "highest" judicial offices in their respective countries. Moreover, the appointed judges shall have demonstrated expertise in public international law. However, it is preferable that they have expertise in international investment law, international trade law, and the resolution of disputes arising under international investment or trade agreements.[1038] Given the public law nature of international investment disputes and the important issues of justice and rule of law frequently raised by these disputes, the EU approach appears appropriate; appointees should be persons qualified for judicial roles in their home country and have expertise in public international law.[1039]

Nonetheless, two notes might be expressed regarding the qualifications and experiences of the members of the ICS tribunals. (i)The above-mentioned qualifications and experiences necessary for appointment to ICS tribunals may limit the pool of qualified individuals to serve on them. Persons entitled to hold judicial office in their jurisdiction are frequently professionals in domestic law and lack established experience in public international law. [1040] (ii)The ICS does not consider experience in the complex, multidisciplinary, and highly technical issue of dispute that is typically associated to international investment. This may have a detrimental impact on the quality of ICS awards because the adjudicators have no technical competence in the disputed subject area. On the contrary, the ICSID Convention takes this issue into account, stating that those eligible as arbitrators must have a recognised

[1037] Article 29 of the TTIP, article 3.54 of the EU-Vietnam agreement and article 3.19 of the EU-Singapore agreement

[1038] See for example: articles 9.4 and 10.7 of TTIP, article 28.27.4 of CETA and articles 3.9.4 and 3.10.4 of EU-Singapore agreement

[1039] Howse, 'Designing a Multilateral Investment Court: Issues and Options' 244

[1040] American Bar Association Section on International Law Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal*, 14 October 2016) 22

competence in the disciplines of law, trade, industry, or finance.[1041] Consequently, some consideration should be given to this aspect.

5.3.1.2 The Novelty and Significance of this Feature

Regarding the uniqueness of this aspect (appellate tribunal) of the ICS, one could argue that several international investment agreements have previously established the ability for arbitral decisions to be reviewed by an appellate authority, and this could question the uniqueness of the ICS process.[1042] In reality, the United States is a pioneer in this regard, having incorporated provisions in its FTAs with the intention of establishing appeal facility. However, as yet, the formation of an appeals tribunal remains aspirational rather than empirical.[1043] For example, the Oman-US FTA emphasises the possibility of establishing bilateral appellate mechanism to review the arbitral awards rendered under that FTA.[1044]

It is suggested that "even if the possibility of appeal bodies is already anchored in some IIAs, the current EU treaties with Vietnam and Canada form the first agreements realizing concrete opportunities for appeal beyond purely formal review procedures as existing in the ICSID system"[1045]. Moreover, it can be argued that the EU's FTA also stands out from other international investment agreements since it includes an integrated and applicable appeal mechanism that is in terms of its structure, procedures, and scope. Lévesque suggests that it is the first time that international investment agreements include provisions to establish an appeal body rather than the aspiration idea of constructing such a body in the future.[1046]

in terms of the importance of having an appeal body as part of the investor-state dispute settlement mechanism,[1047] it is argued that the absence of an appeal body in the traditional investor-state arbitration has led to lack of effective legal controls and consistency in its

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[1041] Article 14.1 of ICSID Convention
[1042] About this see for example Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview '-10
[1043] Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' 799
[1044] Annex 10-D of Oman-United State Free Trade Agreement (FTA)
[1045] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 764 -765
[1046] Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 67
[1047] For more details on the significance of establishing an appellate body see Juan Pablo Charris Benedetti, 'The proposed investment court system: Does it really solve the problems?' (2019) Revista Derecho del estado 93-94

decisions. Different arbitral tribunals could render different decisions in factually equal cases.[1048] Thus, the establishment of an appeal mechanism would change the image. In general, appeal bodies serve two interdependent legal tasks. On the one hand, they offer the losing side the chance to have a judgement reviewed. On the other hand, appeal bodies give consistency and clarity in adjudication, contributing to the application of the concept of equitable treatment of factually equal cases.[1049] Moreover, Butler argues that such an appellate tribunal would resolve many of the current concerns in investment arbitration linked with inconsistency, such as a lack of predictability of the international investment law.[1050] Furthermore, Yannaca-Small suggests that the establishment of an appellate tribunal could also assist in improving award enforcement, which is frequently problematic in international investment arbitration.[1051] In fact, an appellate body would offer additional credibility to the reviewed arbitral award, increasing its acceptance in the stage of enforcement when it is reviewed by a higher tribunal.

Nonetheless, an issue concerning the appellate decision's binding must be raised in this regard. While ICS expressly states that the findings and conclusions of the appeal tribunal are binding on the first instance tribunal, it does not state whether the members of the first instance tribunal are bound by an earlier decision of the appeal tribunal or whether the appeal tribunal itself is bound by previous appeal tribunal findings.[1052] Accordingly, there must be more clarification about this issue in order to achieve a high level of consistency in the decisions(the system of precedent).

Another important point to highlight in this respect is that the ICS will only help to ensure uniformity in case law (investor-state arbitration's outcomes) within the context of EU bilateral FTAs. For example, the CETA appellate tribunal will only safeguard the consistency of arbitral judgements under that agreement but will be unable to do so in relation to other EU FTAs such as the EU-Vietnam agreement, which has its own separate appellate tribunal. As a result, such a setting may increase the inconsistency of investment case law.[1053]

[1048] Nicolette Butler, 'Possible Improvements to the Framework of International Investment Arbitration' (2013) 14 The journal of world investment & trade 632

[1049] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 757

[1050] Butler, 'Possible Improvements to the Framework of International Investment Arbitration' 632

[1051] Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview ' 12-13

[1052] Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' 801-802

[1053] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 765

It is believed that only the creation of a multilateral appeal body analogous to the WTO Appellate Body would have the legal power to achieve global legal consistency of investment case law.[1054] However, it can be claimed that beside the multilateral appeal body, a global agreement on foreign investment is also required for the development of uniform investment case law. This is since having numerous investment treaties will result in diverse interpretations by arbitral tribunals. Benedetti points out that the current co-governance of multiple investment treaties and the ambiguous combination of customary international law and treaty law has led to exacerbate the issue of inconsistency in the case law. Schill also emphasizes that applicable law will also determine the extent to which permanent institutions can promote consistency in decision making. If the law remains mostly incorporated in bilateral treaties, it will be more difficult to maintain uniformity and may run counter to the intentions of state parties than in a multilateral context.[1055]

Hence, the existence of a such a single global reference for foreign investment substantive rights would effectively contribute to the consistency of investment arbitration's case law.

5.3.1.3 The Comparison with ICSID

This feature of ICS demonstrates two main differences compared with ICSID. First, while ICSID arbitration permits the disputing parties (state and investor) to choose and appoint their arbitrators on a case-by-case (*ad hoc*) basis[1056], the adjudicators in ICS are appointed permanently and publicly for fixed term by the contracting states to resolve any potential disputes over the provisions of the investment agreement.[1057] Hance, under the ICS, an investor's power to select his or her arbitrators is no longer available. Instead, respondent states (contracting states) have the right to appoint the arbitrators prior to the existence of a dispute. Thus, the disputes concerning the violation of each EU agreement on foreign

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[1054] Ibid 765

[1055] S. W. Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 Journal of international economic law 8

[1056] Article 37 of the ICSID Convention

[1057] For example: Article 8.27 of Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member State, of the other part [2016]OJ L 11; article 9 of The proposed draft of Transatlantic Trade and Investment Partnership(TTIP)-Chapter II Investment- between the EU and US; article 3.38 of The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

investment must be resolved by a single tribunal established in accordance with that agreement in advance.

Second, in terms of reviewing arbitral awards, there is no institutional permanent body to which disputing parties can appeal the arbitral award under ICSID arbitration. There is only an *ad hoc* Committee of three arbitrators appointed by the ICSID Chairman. The scope of its authority is restricted to annulment of the award but not to modify or reverse it. This is because that the arbitral award under ICSID is deemed final and shall not be subject to any appeal or to any other remedy except those provided for in ICSID Convention.[1058] In fact, this notion of finality has always been seen as a highly valued characteristic of the system of international investment arbitration, allowing conflicts to be resolved in the shortest and most cost-effective manner possible.

The ICSID's grounds for annulment are limited and restrictive. They are based upon abuse of process and concerns about the legitimacy of the procedure.[1059] These grounds including: "(a) the Tribunal was not properly constituted; (b) the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."[1060]

The ICS, in contrast to the ICSID, provides for a permanent appellate tribunal to which the disputing parties may appeal the award issued by the tribunal of first instance. Regarding the scope of award review, ICS's appellate tribunal may uphold, modify, or reverse the decision of the lower tribunal. Moreover, ICS's appellate tribunal has broader grounds for review. For instance, article 8.28.2 of CETA states

> The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

Two points can be highlighted based on the above analysis: (I) Under ICS, the investor is not able to influence the composition of the tribunal. This authority is confined to the investment agreement's contracting states. Furthermore, the ICS includes an appeal procedure for

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[1058] Article 53 of the ICSID Convention
[1059] Butler, 'Possible Improvements to the Framework of International Investment Arbitration' 631
[1060] Article 52 of the ICSID Convention

disputing parties. Indeed, existence of appellate tribunal with appointed members brings the resolution of investor-state disputes closer to the judiciary or the institutional design of existing international dispute settlement bodies than the traditional arbitration system in which the freedom of disputing parties is fundamental in the composition of the tribunal. (II) When compared to the ICSID system, the scope, and grounds for award review in the ICS system are broader. This could ensure a higher level of justice for the parties, since the appeal system entails reviewing the substantive correctness of the decision and may end in the original decision being overturned and replaced.[1061]

However, it has been argued that an appellate body with broader scope and grounds for reviewing the arbitral awards may lengthen dispute resolution processes. In addition, an appellate body may result in a greater number of challenges to arbitral awards. There was some concern that there would be a tendency to appeal in every case, which would undermine faith in most rulings and the authority of "first instance" arbitrators.[1062]

In response to some the foregoing arguments, some counterarguments have been made. Firstly, it has been suggested that the idea of correctness of arbitral award should be more significant from the idea of finality of arbitral award , and that the parties to the dispute would prefer that the tribunals make the correct decision rather than saving time and money.[1063] It is thought that it is possible that the expenses associated with an appeal method would be significantly less than the cost of review under the current system, such as through ICSID review mechanism. Secondly, it is emphasised that the finality of the award must not come at the expense of its correctness, especially when the award is tied to a public policy matter.[1064]

The third point is that the current rules for reviewing investment awards (ICSID annulment and review by national courts, for example) already generates significant delays in arbitration, with review often taking years to complete.[1065] Thus, by establishing strict time limits on the ICS's appellate procedure, the problem of further delay might be remedied.[1066] In fact, by comparing ICS and ICSID in terms of time limits for reviewing awards, it appears that ICS has placed time constraints for the review process[1067], whereas ICSID has left the reviewing period open and

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[1061] Butler, 'Possible Improvements to the Framework of International Investment Arbitration' 631
[1062] Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview ' 13
[1063] Jason Clapham, 'Finality of investor-state arbitral awards : has the tide turned and is there a need for reform?' (2009) 26 Journal of international arbitration
[1064] Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview ' 12-13
[1065] Ibid 13
[1066] Butler, 'Possible Improvements to the Framework of International Investment Arbitration' 635
[1067] See section 5.3.1.2

unrestricted. Moreover, there are two techniques in ICS that could help deal with the likelihood of a lengthy appeals process. (I)The ICS provides the appellate tribunal with the authority to dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the award shall become final. (II) Based on the ICS, If the appellate court finds the appeal to be well-founded, it will return the case to the same lower tribunal that issued the award to revise it according to the appellant's report.[1068] This should result in a faster resolution of investment disputes. The situation is different in ICSID arbitration, as article 25.6 specifies that if the award is annulled the dispute shall, at the request of either party, be submitted to a new tribunal. As a result of having to form a new arbitral tribunal, such a circumstance could increase the time required to resolve a dispute.

Finally, in respect of the additional caseload which could result from the widening of reviewing grounds of arbitral awards, it was suggested that it might be possible to negotiate a balance of disincentives, such as the demand of a bond to protect the award or the expenses of the procedures, which would discourage routine appeals.[1069]

5.3.2 Improving Arbitrators' Independence and Impartiality

Another novel aspect of ICS is the promotion of adjudicators' independence and providing for a code of conduct for them to ensure that high ethical and professional standards are followed.[1070] It can be argued that the ICS provides two main avenues for arbitrators' independence and impartiality to be enhanced. This section will examine them briefly.

5.3.2.1 The authority of arbitrators' appointment

Inspired by the principle of party autonomy, the ICSID promotes that the opposing parties appoint arbitrators on an ad hoc basis.[1071] According to article 37 of ICSID Convention the tribunal shall be composed of a single arbitrator, or any uneven number of arbitrators elected by the parties on case-by-case basis. Equally, arbitrators appointed by disputing parties may come from the panel established by the ICSID secretariat or from outside this panel, so long as

[1068] See, for instance, article 29 of the TTIP and article 3.19 of the EU-Singapore agreement
[1069] Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an overview ' 13
[1070] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 4*
[1071] For more details about principle of party autonomy in this regard see Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 63-64

they hold the same qualifications as stipulated by the ICSID Convention.[1072] According to articles 38 and 39 of ICSID, the other criterion in this respect is that, as a general rule, citizens of the states of disputing parties are prohibited from serving as arbitrators.

However, it is thought that the autonomy of disputing parties in the election of arbitrators may result in the lack of impartiality. This is due to the small number of arbitrators available to resolve investment disputes, and consequently, conflicts of interest have naturally arisen.[1073] To put this simply, the same individuals might serve as legal representatives and arbitrators in cases with similar legal issues.[1074] It is said that this arrangement can lead to real or perceived conflicts of interest, as well as worries that these individuals are not operating impartially when functioning as arbitrators.[1075]

In contrast to ICSID, and in response to earlier concerns about the system for naming arbitrators by disputing parties, ICS decided to remove party autonomy in the selection of adjudicators.[1076] As it seen in the forgoing section, among leading innovations in the ICS was that both the members of first instance tribunals and appellate tribunals must be appointed in advance by contracting countries for fixed period. Those adjudicators will be paid a monthly retainer fee by the contracting states.[1077]

It is believed that having a list of arbitrators agreed by the parties to an investment agreement would break the link between the disputing parties and the arbitrators, hence reducing the potential of partiality by arbitrators in the dispute settlement process. Arguably, such arrangements guarantee that each arbitrator has been screened by the parties before their appointment.[1078] It can be argued that this makes tribunal more like a court, as the members of the 'judiciary' would have greater independence. Additionally, the ICS's appointment scheme is thought to be intended to remedy a lack of impartiality by preventing the opposing parties from influencing the panel's composition.[1079] In addition, it is suggested that another advantage of the composition procedure under the ICS is that it is more streamlined and

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[1072] Article 40 of ICSID Convention
[1073] See section 4.2.1.2.2
[1074] Benedetti, 'The proposed investment court system: Does it really solve the problems?' 95
[1075] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 9*
[1076] Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 62
[1077] See section 5.3.1.1
[1078] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 10*
[1079] Benedetti, 'The proposed investment court system: Does it really solve the problems?' 104

efficient than the ICSID procedure. As explained, under ICS process the composition process shall not take more than 90 days meanwhile under ICSID such process could take up to 120 days in the case the parties have not agreed upon the number of arbitrators and the method of their appointment.[1080]

Nonetheless, there are criticisms of the ICS' method of arbitrator nomination.

Firstly, some have concern that such an approach may lead state parties to elect solely pro-state tribunal members.[1081] As mentioned above, under the ICS process the disputes are resolved by divisions made of one national of each contracting Party and a national of a third country. However, under the ICSID process, nationals of the disputing parties are prohibited from serving as arbitrators in such dispute.[1082] Thus, it may be stated that the ICSID's approach on this issue is more likely to bolster the independence and impartiality of arbitrators. In this regard, Benedetti points out that "although the ICS would certainly rebalance the equation, it may improperly favour the interest of the host States rather than finding the sought point of equilibrium between the parties".[1083] However, in responses to previous criticism, Lévesque argues that "if the states were to "stack" (so to speak) the tribunal system with only state-leaning individuals, one may question the point of including an investment protection dispute settlement process in such agreements at all"[1084]. In the same vein, the Court of Justice of the European Union (CJEU), in the context of its opinion 1/7 on the compatibility of the ICS provided in CETA with EU law, has emphasised that the power of contracting parties (through the joint committee) in appointing ICS tribunal members raises no independence concerns because the committee is composed of representatives from both parties and its decisions are adopted by mutual consent.[1085] Moreover, since both contracting countries and their investors might be claimants or defendants, one can argue that it is pointless to infer that contracting states could pick pro-state tribunal members, therefore independence and impartiality should

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[1080] Chi-Chung Kao, 'Assessing the Rules of Appointing Arbitrators under the EU's Investment Court System' (2019) 27 European review (Chichester, England) 213

[1081] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 6-11*

[1082] See Juan Miguel Alvarez, *How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement, Stanford-Vienna European Union Law Working Paper No. 43, at http://ttlf.stanford.edu* 27

[1083] Benedetti, 'The proposed investment court system: Does it really solve the problems?' 107

[1084] Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 66

[1085] The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN* , para 228; about analysing of opinion 1/7 see Maria Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' (2020) Europe and the World

be of permanent considerations. However, to eliminate the concern related to appointment of pro-state adjudicators, some have suggested that tribunal members to be chosen in a transparent manner through consultations with stakeholders.[1086]

A further concern is that the panel hearing the case which randomly selected from a pool of permanent tribunal members, would limit the parties' ability to nominate experts in the complex, multidisciplinary, and highly technical issue of dispute.[1087]

5.3.2.2 Ethics

The ethical framework is the additional method for enhancing the impartiality of adjudicators in ICS. It provides for a code of conduct to ensure that high ethical and professional standards are followed. The ICS's measures on the ethics and independence of tribunal members are intended to combat the idea that traditional investor-state arbitration is a secret court system in which adjudicators regularly switch roles from judge to advocates.[1088]

The key ethical aspects of ICS generally determine [1089]: (i)the members of the tribunals shall be chosen from amongst persons whose independence is beyond doubt. They shall not be affiliated with any government. However, there is exception on this obligation which indicates that "for greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible". It is thought that this exemption excludes persons like "academics, persons receiving pensions or having other family relationships with government officials as well as persons who were previously government employees (e.g., diplomats)"[1090]. However, according to some critics such a relationship between adjudicator and the government party to the dispute may threaten the principle of independence.[1091] It is thought that receiving an income from a state in addition to the state income stipulated in the

[1086] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 26*
[1087] Benedetti, 'The proposed investment court system: Does it really solve the problems?' 108
[1088] Alvarez, *How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement, Stanford-Vienna European Union Law Working Paper No. 43, at http://ttlf.stanford.edu 33*
[1089] Articles 8.30 of the CETA, 11 of the TTIP, 3.11 of the EU-Singapore agreement and 3.40 of the EU-Viet Nam agreement
[1090] Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' 7
[1091] See Koorosh Ameli; and others, *European Federation for Investment Law and Arbitration(EFILA),Task Force Report regarding the proposed International Court System (ICS)*, 1 February 2016) 16

treaty would establish a connection or financial interest that might compromise a judge's impartiality or give the impression of impropriety or prejudice.[1092] To address such potential threat, some have suggested that "clear rules should be established to ensure that any payment outside of non-contingent superannuation is prohibited"[1093].

(ii) The members of tribunals must comply with Code of Conduct annexed to the ICS under the EU FTAs.[1094] To maintain the impartiality of the dispute settlement procedure, the ICS has incorporated substantive obligations to ensure the observance of ethical norms. This is the first time such obligations have been included directly in the investment dispute settlement system. No existing agreement provides a code of conduct or integrates the IBA's[1095] ethical principles.[1096] Thus, incorporating obligatory ethical code was considered an improvement to the present ethical rules in investment dispute resolution. They define what constitutes independence and impartiality for the members of the ICS.[1097] Breaching those obligations by the ICS's members would lead to replace them. The code of conduct requires disclosure from prospective members of ICS's tribunals to avoid any potential conflict of interest.

(iii) Under the ICS, tribunals members on their appointment, are required to refrain from acting as counsel or party-appointed experts or witnesses in any pending or new investment dispute under this or any other international agreement. This obligation is an innovation because under traditional investor-state arbitration there are circumstance in which an arbitrator may also serve as counsel in other instances concurrently or sequentially.[1098] However, while this commitment serves the idea of impartiality, it is likely to make it difficult to locate candidates with the appropriate level of expertise. Baetens states that "excluding anyone acting as counsel or an expert in investment disputes that are unrelated to the disputes at hand, will likely result in severe difficulties in finding candidates with the level of required expertise. Eminent experts might not resign from their positions for the mere

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[1092] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 43*
[1093] Ibid 43
[1094] Unlike most EU agreements, CETA does not include a code of conduct; instead, it refers to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration to be observed by adjudicators in ICS
[1095] International Bar Association Guidelines on Conflicts of Interest in International Arbitration
[1096] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 4*
[1097] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 47*
[1098] Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' 5

possibility that they may be selected to serve as Judge or Member in a potential future dispute"[1099].

On the other hand, the situation regarding ethical standards under the ICSID Convention differs from its counterpart in the ICS. The ICSID Convention is believed to provide a lower level of independence for ICSID arbitrators.[1100] To explain this argument some of provisions of ICSID Convention need to be analysed.

Regarding the qualifications of ICSID arbitrators, Article 14.1 of the ICSID Convention states "Persons designated to serve on the Panels shall be persons of high moral character…". Contrary to the ICS, which has adopted a code of conduct, this brief wording on arbitrator ethics has prompted arbitral tribunals of ICSID arbitration to rely on outside resources such as the *International Bar Association Guidelines on Conflicts of Interest in International Arbitration* to decide if certain circumstances constitute a breach of the independence of arbitrators.[1101] Moreover, it is thought that this language causes some confusion since there seems to be a deviation in several important respects from the common standard.[1102] Thus, it can be argued that such situation could result in different of explanations for the ethical standard to which arbitrators has to comply and which could constitute breach for the principle of impartiality.[1103]

As seen above, the situation under ICS is distinct. The ICS has connected the disqualification of tribunal members to the code of conduct's required substantive requirements, and all the independence and impartiality requirements in the Code of Conduct are obligatory.[1104]

As for the disqualification of arbitrators and test of their independence, article 57 provides that "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14…". This article asks for facts that manifestly indicates the lack of arbitrator's impartiality leading to disqualification. Thus, according to that article, the mere

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[1099] Freya Baetens, 'The European Union's proposed investment court system: Addressing criticisms of investor-state arbitration while raising new challenges' (2016) 43 Legal issues of economic integration 370

[1100] Georgios Dimitropoulos, 'Constructing the independence of international investment arbitrators: Past, present and future' (2016) 36 Northwestern journal of international law & business 371

[1101] Ibid 393

[1102] Ibid 397

[1103] Ibid 399-403

[1104] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 47*

appearance of bias is insufficient to disqualify the arbitrators; rather, there must be plain evidence proving the arbitrator's prejudice. In this respect, Georgios states that this article "creates the impression that it establishes a less strict test than the common "appearance of bias" test"[1105]. Furthermore, the wording of this article gives raise to application difficulties as ICSID arbitration jurisprudence demonstrates.[1106] Therefore, it can be stated that the ethical standards of adjudicators in the investment dispute resolution system should be controlled with less ambiguous language and in a clear manner to increase the confidence of participants in its outcomes.

The other point in ICSID arbitration concerning the independence and impartiality of arbitrators is that person can serve contemporaneously as arbitrator and representative in ICSID. Arman states that "persons should not be able to serve contemporaneously as arbitrator and representative in ICSID arbitrations because this creates an apparent risk of inequality of arms"[1107] As previously stated, the ICS has addressed this issue critically.

As for the independence of arbitrators in ICSID process, it is worth noting that the ICSID, in collaboration with UNISTRAL, has begun an initiative to adopt a new code of conduct for adjudicators in the international investor-state settlement system. This code aims to be legally binding and enforceable, and it will apply to all future international investor-state disputes. It is suggested that most of the provisions in proposed code are consistent with CETA and other recent investment treaties and arbitration rules. Nonetheless, some of the ideas go far beyond this and, if accepted, would have a significant influence on the arbitration sector.[1108]

5.3.3 Arbitration Made More Transparent

Traditional investor-state arbitration has been criticised for not being open enough to permit access to proceedings and documents. Freya states that confidentiality can be defended when the issue only involves private parties, but there is a compelling public interest in making

[1105] Dimitropoulos, 'Constructing the independence of international investment arbitrators: Past, present and future' 399
[1106] See Sam Luttrell, 'Testing the ICSID Framework for Arbitrator Challenges' <https://go.exlibris.link/BNNqLj29> 600-606
[1107] Arman Sarvarian, 'Problems of Ethical Standards for Representatives before ICSID Tribunals' (2011) 10 The law and practice of international courts and tribunals 74
[1108] Nikos Lavranos, 'Towards a binding global code of conduct for arbitrators in ISDS disputes' 6 May 2020) <https://borderlex.net/2020/05/06/towards-a-binding-global-code-of-conduct-for-arbitrators-in-isds-disputes> accessed 9 October 2022

information about the dispute public in investor-state arbitration.[1109] The confidential character of traditional investor-state arbitration prevents the public from gaining access to the specifics of disputes, including hearings, outcomes, and award amounts. Most arbitration forums require the parties' consent prior to publishing dispute-related information as the situation in ICSID arbitration rules.[1110] Arguably, providing full access to information about investment arbitration cases may help achieve consistency in the system's outcome. The precedent system only works if it is permitted to view case reports.

Thus, investor-state disputes necessitate the development of tailored rules that strike a balance between foreign investors' protected commercial secrets and state secrets, as well as the requirement to inform the public. As a reaction, the ICS has developed a new method designed to increase the transparency of the investment dispute settlement procedure.[1111] This section explores the ICS from the perspective of transparency and draws comparisons with ICSID arbitration.

To begin with, it must acknowledge that initiatives to promote transparency in investor-state arbitration are not new. Prior to the creation of the ICS, there were various endeavours in this area.[1112] The most recent at the multilateral level, include, for example the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration[1113], as well as the 2022 modifications to the ICSID Arbitration Rules.

The ICS has adopted two modes in dealing with transparency obligations. It provides for the application of the UNCITRAL Transparency Rules, with minor amendments, in order to increase transparency in the resolution of investment disputes.[1114] The UNCITRAL Transparency Rules, along with the changes imposed by the ICS, strengthen transparency requirements in four contexts.

[1109] Baetens, 'The European Union's proposed investment court system: Addressing criticisms of investor-state arbitration while raising new challenges' 375

[1110] Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 10*

[1111] Joanna Lam and Günes Ünüvar, 'Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements' (2019) 32 Leiden journal of international law 782

[1112] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 115*

[1113] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration , available at https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/rules-on-transparency-e.pdf

[1114] See for example articles: 8.36 of CETA and 3.46 of EU-Vietnam agreement, as to the EU-Singapore agreement does not refer to the UNCITRAL Transparency Rules; rather, it contains its own transparency rules that are heavily influenced by the UNICTRAL framework

5.3.3.1 Making information and documents public

According to rule 2 of the UNCITRAL Transparency Rules, at the commencement of arbitral proceedings "the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made".

In addition, according to rule 3 of the UNCITRAL Transparency Rules, a wide range of case documents (procedural documents), including "the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing part" should be provided to public. However, the ICS goes beyond this rule in terms of which documents should be made public. It, for example, necessitates the publication of additional documents such as the request for consultations and the notice requesting a determination of the respondent.[1115] It can be argued that by adding information about requests for consultations to the records that must be made public, the dispute resolution process will become more transparent. This is because the consultation phase is typically confidential and therefore the least transparent part of the entire process.[1116]

In this respect, however, concern been raised about article 7.5 the UNCITRAL Rules. This article provides that states are not required "…to make available to the public information the disclosure of which it considers to be contrary to its essential security interests". It is thought that although it is critical to protect confidential information for investors and respondent governments, this provision may allow host countries to withhold material critical to dispute resolution under the pretence of 'essential security reasons'.[1117] This issue should be given more thought in order to give the tribunal more discretion in determining what is confidential and related essential security interests; otherwise, the respondent state could easily seek to withhold information related to the dispute on the grounds that it is contrary to its essential security interests.

[1115] See for instance articles: 8.36.2 of the CETA, 1 of Annex 8 of the EU-Singapore Agreement, and 18.2 of TTIP

[1116] Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 6*

[1117] Lam and Ünüvar, 'Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements' 799

As for the situation under ICSID arbitration, essentially, ICSID arbitration rules ensure that every ICSID award with its annexes , decision, orders and documents filed in the proceeding will be published in full or in part.[1118] To elaborate, ICSID arbitration procedures need the parties' permission before disclosing dispute-related information. However, if the parties do not consent, the ICSID Centre will publish excerpts from the award and documents from the relevant case.[1119] Based on the preceding statement, it appears that under ICSID arbitration rules, full disclosure of dispute information is entirely dependent on the disputing parties. Such a situation probably would not go far enough to guarantee public access.

5.3.3.2 The hearings

The ICS also requires that the hearing should be made available to the public. Nonetheless, if the Tribunal determines that there is a need to protect confidential or protected information[1120], it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. However, it is the tribunal's responsibility, in consultation with the disputing parties, to determine appropriate logistical arrangements to permit public access to hearings.[1121] In this respect, it has proposed that these arrangements should include webcasting to ensure that cost and other hurdles which may sometimes prevent attendance at a hearing do not limit public access arbitrarily.[1122]

Regarding ICSID arbitration position as to making hearing available to the public, rule 65.3 of ICSID arbitration rules states that “upon request of a party, the Centre shall publish recordings or transcripts of hearings, unless the other party objects”. Accordingly, the default position is that the ICSID Centre, upon the request of any disputing party, shall make the hearing public, unless the other party objects. The will of the disputing parties in this matter prevails.

[1118] Arbitration Committee International Bar Association, *Consistency, efficiency, and transparency in investment arbitration*, November 2018) 57

[1119] Rules: 62,63,64 of ICSID Arbitration Rules(2022)

[1120] According to article 7 of the UNCITRAL Transparency Rules the confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty;(C) information excluded under domestic law and (d) information the disclosure of which would impede law enforcement

[1121] See for example articles: 8.36.5 of the CETA and 2 of Annex 8 of the EU-Singapore Agreement

[1122] Investment Treaty Working Group Of the International Arbitration Committee, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal 115*

5.3.3.3 Submission of a Third Person

Another context relating to transparency within the ICS framework is the submission of a third person which is called amicus curiae briefs. The submissions of a third person are "submissions from groups that have an interest in the matter and want to submit their exposition of the problem at hand"[1123]. In the same regard, the TTIP defines a third person as "any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party"[1124]. This could include submission from interested parties such as non-governmental organisation (NGOs)[1125] or trade unions.[1126] The amicus supports the development of transparency in the investment dispute process by allowing concerns of public interest to be considered during the arbitral proceedings.[1127]

The ICS, in incorporating the UNCITRAL Rules on Transparency, merely allow for the possibility that a tribunal may accept submissions of third party under certain conditions.[1128] Nonetheless, to create greater transparency, it is argued that the ICS should grant a right of intervention to third parties having a direct and existing interest in the outcome of a dispute, rather than relying on the tribunal's discretion.[1129]

However, on the other hand, it can be argued that since the tribunal has complete understanding of the dispute elements, arguably the tribunal is in the best position to determine whether a third party has a direct and existing interest in the dispute and its outcomes. Furthermore, it is pointed out that "this discretionary language allows the tribunal to assess the suitability and necessity of such submissions. The use of 'shall', instead of 'may' (or another phrase to the similar effect), would have compelled a tribunal to accept every

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[1123] Puccio and Harte, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis 11*
[1124] Article 23.1
[1125] Article 23.5 of TTIP
[1126] Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' 765; Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 4*
[1127] Alvarez and others, 'A response to the criticism against ISDS by EFILA' 5
[1128] Article 4.1 of the UNCITRAL Rules on Transparency provides" … the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute."
[1129] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 11*

amicus curia submission. Such an imbalance would bear the risk of exposing the proceedings to many unchecked submissions. Instead, the tribunal has the power to filter out unhelpful or frivolous submissions, among those intended to possibly hinder the effective and timely resolution of the dispute at hand"[1130].

Yet, for the tribunal to use its authority in a more structured manner, the conditions under which third parties are entitled to file briefs should be made more explicit.[1131] Some have argued that the ICS approach lacks a structured approach to amicus curiae participation. The conditions under which third parties may submit opinions are ambiguous and ultimately left to the discretion of the court, which must decide on a case-by-case basis whether the interested third party has a "significant interest" in the proceeding. It is also unclear to what extent amicus curiae submissions must be considered by the court in its decision-making.[1132] In this regard some have pointed out the importance for the ICS to include robust criteria to grantee that all those affected can participate meaningfully in the proceedings.[1133]

Thus, significant thought must be given to this question to establish a clear approach for the ICS's tribunals on the issue. Furthermore, procedures should be in place to prevent the submission of a third person from lengthening and increasing the cost of the dispute resolution process for the parties.

Regarding the ICSID arbitration position on the submission of third parties, the rules of ICSID arbitration, like the ICS, provide the tribunal with the authority to decide whether to allow the submission of a third party under almost similar considerations that provided for in the ICS framework.[1134] But the ICS goes a step further by explaining in detail how a third party can

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[1130] Lam and Ünüvar, 'Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements' 799

[1131] Article 4.3 of the UNCITRAL Rules on Transparency provides "In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) Whether the third person has a significant interest in the arbitral proceedings; and (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."

[1132] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 764

[1133] Lisa Diependaele, Ferdi De Ville and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24 New political economy 50

[1134] Rule 67 of ICSID Arbitration Rules(2022)

make a submission and what the requirements are for the content and length of the submission that the third party files.[1135]

5.3.3.4 Disclosure of Third-party Funding

The final context related to the transparency issue is disclosure of third-party funding. The ICS defines third-party funding as "any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute".[1136] It is thought that if not revealed, third-party funding can reduce transparency in investment arbitration as it help to avoid any conflict of interest .[1137]

The ICS requires the disclosure of the third-party funding.[1138] The disputing party who benefiting from such fund shall disclose to other party and tribunal the name and address of the third-party funder. The benefiting party shall disclose this information at the time of submission of a claim, or, when the financing agreement is concluded, or the donation or grant is made after the submission of a claim. Nonetheless, there are no processes outlined in the ICS framework for the benefiting party to undertake in order to reveal funding information. There are also no processes to follow if third-party funding is not disclosed. Furthermore, the ICS does not compel the beneficiary party to disclose the terms of the third-party funding agreement.

Similarly, the ICSID includes for the first time in its arbitration rules 2022 disclosure requirements for third-party funding. According to rule 14 of the ICSID arbitration rules, parties are required to disclose in writing the name and address of any non-party from whom the party has received funds for the pursuit or defence of the proceedings, either immediately after registering the request for arbitration or immediately after concluding a third-party funding arrangement after registration. In the case the non-party providing funding is a juridical person, a written notice shall include the names of the persons and entities that own and control that juridical person. The parties are also required to notify the ICSID Secretary-

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[1135] Eun Young Park; and others, *Procedural Issues in an Arbitration: Disclosure* (Global Arbitration Review 14 Junuary 2022)
[1136] See for example article 8.1 of the CETA
[1137] International Bar Association, *Consistency, efficiency, and transparency in investment arbitration 63*
[1138] Articles: 8.26 of the CETA, 3.8 of the EU-Singapore agreement and 3,37 of the UE-Vietnam agreement

General of any modifications to the information contained in their third-party funding agreement.[1139] The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the other parties and arbitrators. Moreover, the Tribunal may order disclosure of additional information concerning the funding agreement and non-party funding provider.

As can be seen, the definition of third-party funding is quite broad according to ICSID arbitration rules as compared to the ICS attitude. For example, for the corporate funders, it extends to persons and entities that own and control them. The most likely reason is that in ICSID arbitration, arbitrators are chosen by the parties, whereas the ICS has appointed adjudicators prior to the conflicts, as described above. As a result, broader provisions on this subject are required under ICSID arbitration rules to ensure that no conflict of interest exists. It is suggested that the primary concern driving mandatory disclosure under ICSID arbitration rules is the early identification of any potential arbitrator conflicts of interest - for example, arbitrators may have consulting roles with funders, may have served as counsel on cases funded by that funder, or may have been appointed by the funder in the past.[1140]

Furthermore, although the ICSID arbitration rules do not require the party receiving the funding to disclose the terms of the funding agreement, the tribunal may order a party to disclose any additional information about the funding agreement or the non-party providing funding at any stage of the Proceeding if it deems it necessary. Contrary to this, the ICS does not stipulate such a requirement. However, it is stated that disclosure of the funding agreement in its entirety or in part is unnecessary for this objective. Disclosure of financing arrangement details, on the other hand, provides an unfair advantage to the non-funded side, creating an imbalance that arbitrators and arbitral institutions should avoid.[1141]

To summarise, based on the preceding analyses, the ICS framework strengthens transparency duties at all phases of investor-state disputes. It implements more advanced standards in this regard, using the UNCITRAL Rules (which represent the most practical system available on this

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[1139] Nicholas Lawn and Helin Laufer, 'The 2022 ICSID Arbitration Rules - A Brief Overview' <https://www.lexology.com/library/detail.aspx?g=f466aa82-7d6c-4e82-9e96-e908ca7e1eb0> accessed 14 September 2022

[1140] , 'Investment Treaty Arbitrations: The Evolution Of Third Party Funding' *Mondaq business briefing* (<https://go.exlibris.link/NPcWG2wH>

[1141] Kirstin Dodge; and others, *Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?* (Kluwer Arbitration Blog 31 Junuary 2022)

issue)[1142] as the base, but also developing new rules to drive for greater transparency. Nevertheless, as was just mentioned, certain aspects must be reconsidered, such as the conditions under which third parties are permitted to file briefs, which should be made more explicit, and the issue of essential security reasons that respondent states may cite to refuse to make relevant information accessible to the public.

On the other hand, however, some have argued that the ICS does not bring substantial changes compared to the already-improved standards of transparency in investor-state arbitration by the UNCITRAL Rules and have suggested that the improvement of transparency by the ICS are “rather symbolic”.[1143]

Nonetheless, given that the ICS integrates the UNCITRAL Rules on transparency in addition to the measures on this topic that have been included in the ICS framework, it can be claimed that the ICS is likely to be more ambitious than ICSID arbitration rules. This is because in ICSID arbitration the autonomy of disputing parties continues to play a crucial role in determining the level of transparency in the arbitral procedure. In this respect some have claimed that the ICSID's party-led and consent-based approach to public disclosure of documents is less transparent than UNCITRAL's "presumed and compelled" approach. The UNCITRAL regulations "impose an absolute requirement on the tribunal to deliver its transparency policy" by utilising the term "shall" in numerous provisions. In contrast, the ICSID guidelines allow the extent of information disclosure to be governed by party permission.[1144]

Another aspect to consider is that Article 44 of the ICSID Convention allows disputing parties to deviate from the Arbitration rules. This means that the parties are not bound by the ICSID arbitration rules on transparency as they could agree to apply different set of rules. On the other hand, the ICS requirements on this subject are mandatory.

[1142] Robert W. Schwieder, 'TTIP and the Investment Court system: A New (and improved?) Paradigm for investor-state adjudication' (2016) 55 The Columbia journal of transnational law 196
[1143] Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 764
[1144] Sonia Anwar; and Ahmed Martinez, *Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation* (Kluwer Arbitration Blog 8 April 2021)

5.3.4 Further Issues

5.3.4.1 Enforceability of the ICS's awards

According to the ICS provisions, the claimant may submit a claim to the Tribunal under one of the following dispute settlement rules:(i) the ICSID Convention provided that both the respondent and the State of the claimant are parties to the ICSID Convention;(ii) the ICSID Additional Facility Rules;(iii) the arbitration rules of UNISTRAL; or any other arbitral rules if the disputing parties so agree.[1145] However, it should state that in all these cases "the ICS procedural rules prevail over the *lex generalis* of the ICSID Convention"[1146].

However, one of the challenges that could face the ICS is the enforceability of its awards rendered under one of the above-mentioned arbitral rules. The ICS' decisions may not be recognised and enforced outside of contractual parties.[1147]

The ICS provisions provide that the final awards issued by the ICS tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, or set aside, or annulment or any other remedy. Moreover, each party to the ICS shall recognise awards as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.[1148]

Nonetheless, the difficulty arises when the wining party seeks to enforce an award outside the jurisdiction of the ICS's parties (i.e., in third countries). This is because third countries that are not members of the ICS are not bound by its decisions.

To address this difficulty, the ICS provisions provide that all of its awards are automatically assumed to be in conformity with both the New York Convention and the ICSID Convention.[1149]

[1145] Articles: 8.23 of the CETA, 3.6 of the EU-Singapore agreement and 3.33 of the EU-Vietnam agreement

[1146] Baetens, 'The European Union's proposed investment court system: Addressing criticisms of investor-state arbitration while raising new challenges' 370

[1147] Catharine Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2016) Advance publication / Regular publication forthcoming Transnational Dispute Management 32

[1148] Articles: 30 of the TTIP, 8.41 of the CETA, 3.22 of the EU-Singapore agreement and 3.57 of the EU-Vietnam agreement

[1149] Articles: 8.41(para: 5 and 6) of CETA, 3.22(para: 5 and 6) of the EU-Singapore agreement and 3.57(para: 7 and 8) of the EU-Vietnam agreement

It is, however, difficult to see how domestic courts in third countries would be bound by these provisions, when faced with an enforcement request.[1150]

Some argue that the ICS awards could be enforced in territories of third countries under the New York Convention. This Convention provides that permanent arbitration bodies can also render awards that are enforceable. Thus, the ICS can be deemed to be a permanent arbitration body under the New York Convention, and therefore its awards can be enforced in third-party states that are signatories to the New York Convention.[1151]

On the other hand, the probability of ICS awards being enforced in the territories of third parties under the ICSID Convention faces two legal obstacles stemming form that the following facts: Firstly, the EU is not party to the ICSID Convention. Thus, a case cannot be brought before the ICSID which involves the EU as a respondent but can be brought against EU member states who are parties to the ICSID Convention.[1152] Secondly, some of the ICS rules (such as the mechanism for review of the award and adjudicating the dispute by appointed adjudicators) are contrary to the ICSID Convention as explained in previous sections. For the award to be enforceable under the ICSID Convention, arbitration proceedings must have been conducted in compliance with the ICSID Convention provisions. Therefore, the question arises as to whether ICS awards rendered under ICSID can be regarded ICSID arbitral awards for purposes of enforcement.

It is thought that an amendment of the ICSID Convention (either in its entirety or by way of a limited inter se amendment) would be required as a prospective solution to address these two obstacles.[1153] Consequentially, for greater degree of certainty about the enforceability of the ICS awards, a substantial amount of work remains to be undertaken.

[1150] Baetens, 'The European Union's proposed investment court system: Addressing criticisms of investor-state arbitration while raising new challenges' 380

[1151] Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' 766-768; Benedetti, 'The proposed investment court system: Does it really solve the problems?' 110

[1152] Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' 768-769

[1153] Jin Woo (Jay) Kim and Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Enforcement Issues* (Kluwer Arbitrtion Blog 29 March 2021); for more discsions about the possible solution for this issue see Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' 769-776; Benedetti, 'The proposed investment court system: Does it really solve the problems?' 110

5.3.4.2 Compatibility of the ICS with the EU law

There is some concern germane to the legal barrier that could prevent the ICS from operating, and this concern whether the ICS is compatible with the EU legal order. This concern was raised by the Belgian authorities at a time they were requested to become a signatory to CETA. It resulted in Belgium asking the Court of justice of the European Union (CJEU) for its opinion on the compatibility of the ICS with the EU law.[1154] In general, the CJEU held that the inclusion of ICS in the CETA as a mechanism for resolving any investment disputes is compatible with EU law. In particular, the Court conformed that the ICS complies with the (i) the principle of autonomy of the EU legal order and the exclusive jurisdiction of the CJEU for the interpretation of the EU law; (ii) the general principle of equal treatment and the requirement of effectiveness of the EU law; and (iii) the right of access to an independent tribunal. [1155]

However, for the purposes of this section, it may be useful to highlight some of the most important aspects of CJEU Opinion No. 1/17 on this issue. This serves to highlight potential future implications on the future of the ICS and IMC. Even though this opinion pertains to the ICS constituted pursuant to the CETA provisions, it will also cover the other investment courts and the envisaged Multilateral investment court that will be established pursuant to the other EU FTAs.

Firstly, as a recognised principle in its case-law, the court stated that in principle, an international agreement establishing a court responsible for interpreting its provisions and whose rulings are binding on the European Union is compatible with EU law. Indeed, the European Union's competence in the field of foreign relations and its ability to establish international agreements imply the authority to submit to the interpretation and application

[1154] Francisco de Abreu Duarte, ''But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2020) 30 European Journal of International Law 1210

[1155] The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN*

of their terms by a court constituted or designated by such agreements[1156],provided there is "no adverse effect on the autonomy of the EU legal order"[1157].

Based on the previous point, the court held that in order for the ICS to conduct its function as mechanism to settle any optional disputes that could arise under the CETA, it has jurisdiction to only interpret and apply the provisions of that agreement, having regard to the rules and principles of international law applicable between the parties. On the other hand, because the ICS is not part of the EU's judicial system, it cannot interpret or apply EU law or render judgments that could prevent EU institutions from operating in accordance with the EU's constitutional framework.[1158] However, although the ICS does not has the jurisdiction to interpret EU law, the domestic laws in the EU may only be considered by the ICS as a matter of fact, and the ICS is obliged to abide by the prevailing interpretation given to that domestic law by the domestic courts in the EU.[1159] Therefore, the concept of autonomy of EU law would only be violated if the ICS of the CETA interpreted and applied EU rules other than CETA provisions, or (ii) issued awards that prevented EU institutions from operating in conformity with the EU's constitutional framework. The court was convinced this was not the situation.[1160]

Secondly, concerning the impact on the operation of EU institutions, the Court ruled that it would be inadmissible for the CETA Tribunal's power to award damages to an investor where EU measures violate the substantive protections provided by CETA (e.g., fair and equitable treatment, indirect expropriation, unjustified restrictions to make payment and transfer capital, etc.) could "create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union"[1161]. On the other hand, the CETA provides enough safeguards in this regard, as it incorporates multiple guarantees ensuring public interest considerations and the Parties' right to regulate.[1162]

Thirdly, regarding the allegation that there would be no equivalent treatment of Canadian and EU domestic investors, the Court stated that the difference in treatment referred to stems from the fact that enterprises and natural persons of Member States investing within the

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[1156] Ibid para 106
[1157] Ibid para 108
[1158] Ibid para 118
[1159] Ibid para 131
[1160] Ibid para 119
[1161] Ibid para 149
[1162] Guillaume Croisant, *Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law* (Kluwer Arbitration Blog 30 April 2019)

Union and subject to EU law will be unable to challenge EU measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons investing within the same commercial or industrial sector of the EU internal market will be able to challenge those measures. Further, the Court determined that there was no inequality in treatment of those in a comparable position. Indeed, Canadian investors could rely on CETA provisions before the CETA Tribunal since they operate in their position as foreign investors.[1163]

Fourthly, on the effectiveness of EU competition law, the Court found that the effectiveness of EU competition law cannot be jeopardised by the CETA ICS (e.g., by awarding damages equivalent to the amount of fines imposed by the European Commission or a national competition authority).[1164] This is because CETA recognises that the Parties may take necessary measures to prohibit anti-competitive behaviour and guarantees their ability to regulate in order to accomplish legitimate public-interest objectives. However, "in exceptional circumstances, an award by the CETA Tribunal might have the consequence of cancelling out the effects of a fine", this is acceptable as "EU law itself permits annulment of a fine when that fine is vitiated by a defect corresponding to that which could be identified by the CETA Tribunal". Thus, the Court states that "provisions of the CETA do not adversely affect the requirement that EU competition law be effective".[1165]

Finley, in relation to the right to access an independent tribunal, the court referred to the fact that "in the absence of rules designed to ensure that the CETA Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources"[1166]. However, as the Council of the EU has pledged to ensure that "there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals' and provides, to that end, that the 'adoption by the Joint Committee of additional rules"[1167], the Court has stated that the Council commitment in this regard is sufficient justification to conclude that the ICS under CETA is compatible with the requirement that it should be accessible.[1168] As for the

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[1163] The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN para 162-186*
[1164] Croisant, *Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law*
[1165] The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN para 184-188*
[1166] Ibid para 213
[1167] Ibid para 217
[1168] Ibid para 219

independent of the ICS, the Court held that the CETA provides sufficient procedural guarantees for the ICS independence (particularly in terms of the tribunal members' remuneration schemes, appointment and removal, and the ethics rules that they must follow).[1169]

The next question should be address concern what the CJEU's opinion means for the future of the ICS and IMC?

One of the most important implications of the Court's decision is that no changes to the ICS provisions in the EU's agreements with Canada, Singapore, Mexico, and Vietnam will be required. Furthermore, the EU will be free to continue negotiating and concluding FTAs with its trading partners that include ICS provisions.[1170] However, the EU will have to consider the elements of the Court's opinion in future negotiations for new FTAs.

It can also be viewed that the Court's opinion is a first step in ensuring the ICS's continued operation, as no legal hurdles will threaten its function and effectiveness as a means of resolving investment disputes once it begins to operate.

Moreover, the court's opinion provides added impetus to the EU's ambition to construct MIC. The Court held that EU law does not preclude the CETA either from providing for the creation a multilateral investment Tribunal.[1171] Thus, the court theoretically ensures the legal viability of the MIC so long as it is founded on the same legal principles as the ICS. In other words, the MIC project would encounter no legal challenges in operating within the EU framework. In this regard, Fanou, states that the opinion No.1/17 can be considered as a set of indicators for future reference applicable to the ICS and MIC.[1172] The EU has provided MIC project before the UNCITRAL's Working Group III: Investor-State Dispute Settlement Reform. The next section will briefly provide recent developments concerning the MIC project.

As a general conclusion for the above comparative analysis of the ICS, it can be said that theoretically the ICS is arguably the most recent critical step in the evolution of investor-state settlement settlements. The ICS provided rational remedies to several of the complaints

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[1169] Ibid para 223-244

[1170] European Commission, *European Court of Justice confirms compatibility of Investment Court System with EU(30 April 2019), available at: Treatieshttps://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334*

[1171] The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at: https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN para 118*

[1172] Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' 14

levelled against investor-state arbitration.[1173] However, as previously said, some challenges arise and require special attention, particularly the enforcement of ICS awards. Nonetheless, from a practical standpoint, the ICS has not yet been investigated. It remains to be seen how these principles are put into practice. The extent to which it is effective in resolving investment disputes would be discovered critically through its application.

Moreover, it may be argued that by comparing the ICS and the ICSID arbitration processes reveals that the ICS has massively departed from the traditional arbitration under the ICSID. The ICS is more progressive with respect to certain crucial elements of investor-state dispute settlements, such as the issue of process transparency, ethical requirements, the mechanism for selecting and appointing adjudicators, and (arguably the most innovative aspects) the appeal mechanism of reviewing the awards.[1174]

5.4 Recent Developments on the Multilateral Investment Court (MIC) Project

Although this chapter focuses mostly on the ICS, it may be relevant to provide a quick introduction to the MIC. In principle, the MIC would build on the same foundations of the ICS[1175], as described above. Consequently, this part will simply provide an outline of this multilateral mechanism project without delve to details.

The currant framework of the ICS provides that the MIC should be the successor of all ICSs in the future.[1176] The envisaged MIC would replace all the bilateral ICSs included in the EU trade and investment agreements. Because of its bilateral nature, the ICS cannot resolve disputes under all the existing investment treaties. Thus, the MIC idea seeks to replace existing bilateral processes, such as those found in over 1,400 investment treaties signed by EU member states and other interested parties, with a permanent body to resolve international investment disputes.[1177] In fact, the EU has emphasised that the reforms of investor-state arbitration

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[1173] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' 4

[1174] Collins, *An introduction to international investment law 246*

[1175] European Commission, 'Multilateral Investment Court project' <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en> accessed 21 October 2022

[1176] Articles: 12 of the TTIP,8.29 of the CETA,3.12 of the EU-Singapore agreement and 3.41 of the EU-Vietnam agreement

[1177] Directorate-General for Trade in the EU, 'Commission welcomes adoption of negotiating directives for a multilateral investment court' 20 March 2018)

under the current ICS model represent “the steppingstones towards a permanent multilateral system for investment disputes”[1178].

The primary characteristics of the proposed permanent MIC are: two-tier tribunal (first instance and appeal tribunal) with appointed judges, effective enforcement mechanism and dedicated secretariat.[1179]

The EU envisions the MIC applying to numerous agreements and between different trading partners through an opt-in system. There are two options for establishing of the MIC, as a self-standing international body or by embedding it into an existing multilateral organization.[1180]

However, because such a promising project necessitates a level of international consensus, on 20 March 2018, the EU Council issued negotiating directives, empowering the EU Commission to conduct negotiations under the auspices of UNCITRAL.[1181] Accordingly, the EU has participated in multilateral discussions with other nations under the auspices of UNCITRAL Working Group III: Investor-State Dispute Settlement Reform[1182], which has a broad mandate to examine the potential reform of ISDS.[1183] The mandate of the Working Group III comprises three stages: (a) first, to identify and consider concerns about investor-state dispute settlement; (b) second, to consider whether reform was desirable in light of any identified concerns; and (c) third, to develop any relevant solutions to be recommended to the Commission if the Working Group concluded that reform was desirable.[1184]

During the third stage (reform solutions), the EU submitted its suggestion on the MIC as possible reform option. The main pillars envisaged for MIC are: (i) a two-tier tribunal with appointed full-time adjudicators, (ii) a strict ethical requirements, (iii) a strict transparency

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<https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en> accessed October 2022

[1178] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 6*

[1179] Commission, 'Multilateral Investment Court project'

[1180] Commission, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15 16*

[1181] Council of the European Union, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes* (20 March 2018)

[1182] To see the works of this group browse United Nations Commission On International Trade Law (UNCITRAL), 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 23 October 2022

[1183] Talat Kaya, 'Multilateral Investment Court: Is It a New Breath for the Settlement of International Investment Disputes or a Stillborn Project?' (2020) 17 Manchester journal of international economic law 339

[1184] The UNCITRAL, *Report of the United Nations Commission on International Trade Law (NUCITRAL) Fiftieth session, A/72/17, (3-21 July 2017*) 46 para 264

requirements, and (iv) an effective enforcement (the EU suggests that given that the envisaged MIC would feature an appeal mechanism, there is no need for review of awards at the domestic level or through ad hoc international mechanisms).[1185]

The working group III has begun to consider the MIC as a possible option for reform in its 38th session (20-24 January 2020). In this session, the key elements of the proposed MIC were discussed, including the determination of its jurisdictional structure, the selection and appointment of its members, its financing, and the enforcement of its decisions.[1186] Through its last two formal sessions (42nd session 14-18 February 2022 and 43rd session 5-16 September 2022), the working group III started to discuss the draft provisions of the instrument establishing the MIC .[1187]

The outline of the discussions of the working group III is as follows: regarding structure of the MIC and appointment of its adjudicators, it was proposed that the Tribunal consist of adjudicators whose appointment process should be transparent, with due regard for geographical and gender diversity, serving full-time, without other professional activity, for a non-renewable long term, with the same qualification requirements as those of international tribunals. This tribunal would have two adjudication levels: first instance and appeal. A first instance tribunal, with its own rules of procedure, would have to deal with disagreements about the determination of facts and the application of applicable law. An appeal tribunal would be required to hear decisions rendered by the first instance tribunal based on errors of law or manifest mistakes in fact assessment, excluding *de novo* investigation of the facts. The MIC would apply to disputes arising under existing and future investment treaties through either accession to the instrument creating the mechanism or notification under the existing treaty recognising the tribunal's jurisdiction. As to The MIC's jurisdiction over disputes is supposed to be defined within the treaty, drawing inspiration from existing bilateral investment treaties in this regard. Its jurisdiction could be limited to the dispute within the framework of an investment treaty or more broadly encompassing any dispute regardless of the instrument from which it arises (investment treaty or contract). With respect to Enforcement of decisions made by the MIC, it may take the shape of a tribunal-specific legal system or in accordance with the New York Convention, which entails determining the scope

[1185]The UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States' <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/004/19/PDF/V1900419.pdf?OpenElement> accessed 25 October 2022
[1186] The NUCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (20–24 January 2020)*)
[1187] (UNCITRAL), 'Working Group III: Investor-State Dispute Settlement Reform'

of the Convention's application to decisions made by the multilateral investment tribunal. The financing of the MIC would be given by the contracting parties in accordance with their development or by the parties through the payment of specific fees.[1188] However, it remains to be seen what the ultimate outcomes of the work of UNCITRAL's working group III will be and whether the MIC proposal will be accepted entirely as suggested by the EU.

Regardless of the current discussions on the project of MIC under UNCITRAL's working group III and how it can be achieved, and the concerns that been voiced within those discussions about some aspects of the project, one may argue that in the past, international efforts to multilateralize the settlement of investor-state investment disputes, such as through a "Multilateral Agreement on Investment" (MAI) considered at the Organisation for Economic Co-operation and Development (OECD) between 1995 and 1998, failed.[1189] Therefore, in this context, the question that arises is what distinguishes the MIC from past initiatives to be persuasive reform solution?

Probably, the MIC has a better chance of succeeding as a possible option for the reform for different reasons. First, according to the submission of the EU and its member states, the MIC provides integrated answers to the concerns levelled at existing international investment dispute settlement mechanism.[1190] Catharine suggests that The EU's proposal tries to address the difficulties that have generated the legitimacy crisis in investment dispute settlement, and its proposed reform goes a long way.[1191] in the same context, Subedi states that "the EU proposed MIC goes a long way to addressing the concerns associated with the current ISID mechanism"[1192].

The second reason is that the EU has suggested the establishment of the MIC at a time when the international investment regime faces critical challenges. Because of their worries about the current system of resolving investment disputes, some states have changed their practice

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[1188] Pascale Accaoui Lorfing and Arnaud De Nanteuil, 'UNCITRAL Working Group III / Proposal for the establishment of a standing multilateral investment court' (2020) 2 Revue de droit des affaires internationales 275-276; NUCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (20–24 January 2020)*

[1189] Danish and Daniel Uribe, *Research Paper 162: The proposed standing multilateral mechanism and its potential relationship with the existing universe of investor: state dispute settlement* (South Centre 2022) 2

[1190] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States'

[1191] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' 6

[1192] Subedi, *International investment law : reconciling policy and principle 287*

regarding investor-state disputes settlement system. For example, some states (such as India and South Africa) have begun to reconsider the need to provide investors with recourse to ISDS through investment treaties. Other governments in the Latin America (such as Bolivia) have elected to denounce a specific instrument of investor-state dispute settlement (i.e., the ICSID), while some (such as Ecuador) have decided to dissolve their bilateral investment treaties (BITs) in a sweeping rejection of the system.[1193] Given these circumstances it may be that the MIC project becomes more desirable to interested parties.

Thirdly, as previously stated, the EU is the world's largest exporter and importer of FDI. All member states of the EU (27 states) support the MIC project as reform option. In this regard Freya suggests that given that EU nations are parties to more than half of the world's BITs, if the EU is serious about establishing a multilateral investment court system, the EU would be a suitable place to begin.[1194]

In the same context, it can be argued that since all new EU's FTAs include provisions requiring the parties to pursue the formation of a multilateral investment tribunal and a multilateral appellate system for the adjudication of investment disputes, it can be assumed that all EU trade partners (such as Canada, Mexico, Singapore, and Vietnam) would be supportive of the MIC's establishment. Furthermore, as an additional pushing force to achieve the MIC, EU member states have referred to the establishment of the MIC in their BITs with non-EU countries. In this regard, it has pointed out that the EU promotes the concept of MIC not just in abstract discourse, but also in the arena of international trade negotiations, and recent EU trade agreements has put the concept into practice.[1195] For instance, article 10.11 of the Oman-Hungary BIT states that "upon entry into force between the contracting parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this agreement, the relevant parts of this agreement shall cease to apply".

Indeed, no other proposal has the backing of one of the world's leading trading powers like the EU proposal (the MIC).[1196] This would bolster the MIC's weight as possible option for the

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[1193] Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' 4-5; Subedi, *International investment law : reconciling policy and principle 9-18*
[1194] Baetens, 'Judicial review of international adjudicatory decisions: A cross-regime comparison of annulment and appellate mechanisms' 458
[1195] Thomas D. Grant and F. Scott Kieff, 'Appointing Arbitrators: Tenure, Public Confifidence, and a Middle Road for ISDS Reform' (2022) 43 Michigan journal of international law 173
[1196] Ibid 173

reform. In this regard Lévesque suggests that the TTIP imply that the US favours the ICS which ultimately lead to creation of multilateral investment court.[1197]

5.5 What Can Oman Learn from the EU Model of the ICS?

As was seen in the previous section of this chapter, it is probable that the EU investment court system (ICS)would dominate the field of international investment law as one of the most practical reform options for the current investor-state arbitration. Howse points out that the EU approach has already attracted the interest of dozens of states.[1198] Consequently, non-EU countries and non-parties to the new generation of EU FTAs will inevitably be impacted by this system.

Oman, for its part, can learn from the EU model in developing its international legal framework for investor-state dispute resolution under its BITs. The components of the ICS that pertain to the transparency of the dispute settlement process, the independence of arbitrators, and ethical standards offer the greatest benefit to Oman's policymakers in this regard. It can be claimed that this movement would be promising step forward for Oman while improving its international framework (i.e., Oman BITs) in this regard. This is because the new EU model, for the most part, provides a strong response to numerous frequently argued legitimacy issues in the contemporary investor-state disputes settlement system.[1199] According to Subedi, the ICS with its judicial features promotes a more balanced tendency in the resolution of international investment disputes. It establishes a balance between the investor's private interests and the host state's public interests.[1200]

Indeed, Oman already has adopted some of the ICS provisions included in the new EU FTAs in its latest BIT with Hungary as member state of the EU. For example, as to the independence of the arbitrators, article 10.9 of that BIT stipulates that arbitrators appointed as the members of the tribunal shall be independent. In particular, the arbitrators shall not: (i) affiliate with any government, (ii) take any instructions from any organisations or government regarding matters related to the dispute; and participate in the consideration of any disputes that would create a

[1197] Lévesque, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' 67
[1198] Howse, 'Designing a Multilateral Investment Court: Issues and Options' 212
[1199]Dietz, Dotzauer and Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' 749
[1200] Subedi, *International investment law : reconciling policy and principle 21*

direct conflict of interest. Furthermore, this article provides that upon their appointment, the arbitrators shall refrain from acting as party appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

Other than the BIT with Hungary, Oman is a party to BITs with a number of EU Member States, including Austria, Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, Luxembourg, the Netherlands, and Sweden.[1201] According to the EU's common commercial policy, all bilateral investment treaties (BITs) between EU member states and third nations will be gradually replaced with Union investment agreements.[1202] Thus, it is anticipated that Oman's BITs with EU member states will be renegotiated and replaced with new BITs provided for the ICS.

In addition, at the regional level, if negotiations for a free trade agreement between the EU and the Gulf Cooperation Council (GCC) continue, after being suspended, the EU may attempt to include an ICS body in the agreement.[1203]

At the international level, as mentioned in the previous section, Oman-Hungary BIT refers to the likelihood of establishment of the MIC according. In the same manner, Oman-US FTA states that" If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body…". Accordingly, it can be assumed that Oman's policymakers are, in principle, in favour of establishing a Multilateral body like the MIC to handle investor-state disputes.

The preceding comparative analysis demonstrates that the new EU system provides a more progressive change in response to most of the concerns about investor-state dispute resolution in its existing form. Thus, Oman may wish to consider supporting the MIC project before the NUCITRAL's working group III. The Working group III documents reveal that the Omani government attends some group meetings as an observer.[1204]

[1201] See section 4.3.1.2

[1202] Regulation No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries -Official Journal of the European Union No L 351 on 20.12.2012

[1203] Curtis, *What Does The EU's Proposed "Investment Court System" Mean For The Rest Of The World?* (Curtis, Mallet-Prevost, Colt & Mosle LLP 9 December 2019)

[1204] (UNCITRAL), 'Working Group III: Investor-State Dispute Settlement Reform'

In addition, Oman is a member of the 1985-established Arab Investment Court. This judicial body closely resembles the proposed MIC. Judges selected and appointed by contracting countries to the *Unified Agreement for Arab Capital Investment in Arab States* adjudicate investment disputes filed before this Court.[1205] Therefore, one might reasonably argue that Oman is ahead of the field in the concept of a judicial body comprised of appointed judges to resolve investment disputes, and should capitalise on its farsighted and holistic approach to the area of investor-state arbitration.

[1205] For example, article 28.2 of the Unified Agreement for Arab Capital Investment in Arab States stipulates that "The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court"

Chapter 6 Summary and Conclusion

6.1 Introduction

The central question of this thesis is whether the legal framework governing investor-state arbitration in Oman, conforms to international standards. The investor-state arbitration is the primary international legal procedural mechanism for the protection of foreign investors rightes. The basic premise of this thesis was the need to identify those aspects of the legal framework governing investor-state arbitration in the Sultanate of Oman that should be improved in order for Oman to become a major plyer in attracting foreign investment. In order to test the hypothesis that with some revision and some legal adjustments Oman could become a major player in attracting foreign investment, the thesis has analysed (i) the character of investor-state arbitration and its interaction with international investment law as foundation for the study. (ii) The national legal framework, and (iii) regional international legal framework that govern investor-state arbitration in the sultanate of Oman. (iv) As a basis of comparison, the new European Union mechanism for resolving investment disputes (Investment Court System).

This chapter will begin with a summary of the major findings from the preceding chapters and end with the conclusion.

6.2 Summary of research

6.2.1 The Concept of Investor-state Arbitration

The second chapter contextualised the problem by analysing the concept of investor-state arbitration and the elements that affect its dimensions. Additionally, this chapter demonstrated the interaction between investor-state arbitration and international investment law.

There are important characteristics that distinguish investor-state arbitration from commercial arbitration. The application of public international law and the participation of the state as a disputing party give investor-state arbitration a public dimension and distinguish it from commercial arbitration. However, this system also includes the foreign investors as private

parties. This dynamic has given investor-state arbitration a mixed character. It has been described as a “hybrid between public and private"[1206]. Historically, in the domain of international business, a system of arbitration was established to deal with international commercial disputes. Subsequently, a new system (Investor-State Arbitration) has developed to deal with international investment disputes between a foreign investor and a host state. Consequently, investor-state arbitration cannot be completely categorized either under public law or under a private law. It has created a distinct niche for itself as it involves elements of both the area of public law and private law.

Acquiescence by a host state to be sued by a foreign investor before an international arbitral tribunal might be seen as the focal point in the investor-state arbitration system. Foreign investors cannot launch arbitral procedures without the consent of the host state. The chapter noted that agreement of the host states to this process may be provided in four ways. The traditional method being an investment contract between the host country and a foreign investor. However, the chapter noted that investment treaty is currently the most popular approach. The host state expresses its willingness to use investor-state arbitration to resolve any disputes arising under these treaties. Furthermore, to encourage foreign investment, some nations include in their national laws on foreign investment the option for foreign investors to use an arbitration procedure to resolve issues linked to their interests. Rarely, some countries announce their willingness to participate in investor-state arbitration in the investment permits they provide to foreign investors.

The terms of the foreign investment also has a significant influence in shaping the idea of investor-state arbitration. The chapter set out that disputes must be related to foreign investment in order for it to be subject to investor-state arbitration. Foreign direct investment has traditionally been in the form of foreign investment (FDI). However, as global economic transactions have evolved, foreign portfolio investment (FPI) and indirect investments have been included in investment treaties to enjoy the protection.

Chapter two noted that not all transactions qualify as investments because they may be ordinary business transactions. The case law of investor-state arbitration has established criteria for differentiating investment transactions from ordinary commercial agreements. These criteria include contributions, a certain duration of contract performance, a participation in the risks of the transaction, and the investment's contribution to the economic

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[1206] Alvarez, 'Is investor-state arbitration 'public'?' 534

development of the host state. In addition, the host state can control the realm of foreign investment through its investment treaties and domestic law on foreign investment in order to achieve its economic objectives.

The reciprocal effect link between international investment law and investor-state arbitration also shapes the dimensions of the investor-state arbitration concept. International investment law created investor-state arbitration. Thousands of bilateral investment treaties stipulate arbitration as a means of settling investment disputes between contracting states and their nationals. In exchange, investor-state arbitration plays a major part in the process of international investment law development. Lastly, the jurisdiction of investor-state arbitration affects the design of investment treaties and the general direction of international investment law. In light of investor-state outcomes, for instance, some countries have terminated their treaties while others have amended theirs.

6.2.2 National Legal Framework on Investor-state Arbitration

Chapter three looked at national laws governing arbitration in Oman. National laws and policies regarding investor-state arbitration are crucial. Such laws and policies can be viewed as one element of a state's marketing plan to persuade international investors that it meets the necessary conditions for the protection of foreign investments and is, thus, a country deserving of selection by potential investors.

In relation to the Omani legal regime, Islamic Sharia is the basis for legislation. However, that regime can be described as a mixed legal system. Personal matters such as marriage, divorce, and inheritance are governed by Islamic law. Simultaneously, Oman has relied on other worldwide legal standards to develop secular legislation, especially in the economic and commercial realms. As a result of globalisation and the interconnection of world interests, Oman has been impacted by diverse international western legal traditions, that are civil and common law.

Nonetheless, the chapter noted that some have argued that Islamic law is one of the most significant hurdles to the growth and advancement of international arbitration in Middle Eastern nations, including Oman. The discussion in the chapter concluded that this argument is exaggerated. This argument (i.e., Islamic law is an impediment to the growth of international arbitration) may have been partially motivated by prejudices about the Islamic religion.

Islamic law is not the real threat to international arbitration in the region. In fact, the difficulties faced by international arbitration in the past are a result of the historical and political factors that accompanied the beginning of the exploration of natural resources and the disputes between international corporations and governments in this regard. A series of intensely contested arbitration disputes between foreign firms and governments of several Arab nations, particularly in the sector of oil concession in GCC states, has led to widespread mistrust in international arbitration among GCC and other Arabic nations.

The advanced legal infrastructure of arbitration in the region's countries asserts that Islamic law is not an impediment to the growth of arbitration as a component of the global business system. The countries of the region have enacted modern arbitration legislation based on the UNCITRAL Law. Moreover, numerous regional and domestic centres of arbitration have been established in the area. In addition, most of these countries are signatories to international arbitration conventions, such as the ICSID and the New York Conventions.

In this context, the chapter stated that Islamic *law* in Oman, at an early stage, did not constitute an obstacle to the practice of international arbitration nor the enforcement of its awards, rather it was clear that both the law and judiciary were willing to facilitate its process. This argument was supported by two pieces of evidence noted in chapter three. First, the Committee for the Settlement of Commercial Disputes was founded in the 1970s, when Oman began the process of enacting and modernising its national legislation. Its purpose was to hear disputes arising under the Commercial Companies Law. In 1981, this body was replaced by an arbitration board. The second point is that case law indicated that the Omani judiciary supports international arbitration and is willing to facilitate the process of enforcing international arbitral awards in Oman, even when those judgements favoured foreign firms.[1207]

Contemporaneously, Oman has a sophisticated legal structure governing arbitration. Nonetheless, certain components of this framework should be reformed.

6.2.2.1 Competence Court over Arbitral Award Enforcement

In terms of determining the judicial body's competence in questions of international and domestic arbitration, Chapter three discovered some fragmentation in determining which courts have jurisdiction over arbitral issues, resulting in some complication and ambiguity.

[1207] See section 3.2.1.1

Omani law distinguishes between international arbitral awards conducted under Omani arbitration law and foreign arbitral awards issued in foreign countries and under the auspices of foreign arbitration law. While international arbitral awards must be enforced through the Muscat Court of Appeal, foreign arbitral awards must be enforced through the Court of First Instance (triple circuit). Furthermore, international arbitral awards must be enforced in accordance with the provisions of the Arbitration Law in Civil and Commercial Disputes 47/97. Nonetheless, the Code of Civil and Commercial Procedures 29/2002 contains procedures for enforcing foreign arbitral awards.

Such a distinction between international and foreign arbitral awards lacks obvious explanation and would not serve the objective of fostering or easing the legal climate for arbitration in Oman. This is because the legal structure for the enforcement of arbitral awards appears excessively complex and may impose additional burdens on the wining party.

This chapter suggested that, moving forward, the provisions governing the recognition and enforcement of all sorts of arbitral awards should be governed by arbitration law. In addition, a central judicial authority should be established to handle matters of local, international, and foreign arbitration in Oman. As an alternative, a specialised court comprised of trained judges may be established.

6.2.2.2 The Basic Statute of the State (Constitution)

The third chapter also explored the significance of Oman's constitutional law in attracting and protecting international investment. This chapter suggested that the Basic Statute establishes a supporting constitutional framework for investment arbitration in Oman. However, that theoretical framework's operation is dependent on the law that implements it.

The Basic Statute enshrines the place of international and bilateral agreements on foreign investment within the national legal system. These agreements are an integral part of national law, and obligatory for all within Omani territories. Thus, all national laws related to foreign investment and investment arbitration should be designed to be consistent with Oman’s obligations under these agreements.

In addition, the Basic Statue underlines some of the importance substantive standards of treatment related to foreign investment which have been established in the realm of international customary law and international investment law. For example, foreigners are entitled to protection for themselves and their property, and illegitimate expropriation is prohibited. Such fundamental rights are crucial to international investment.

6.2.2.3 Law of Arbitration in Civil and Commercial Disputes

Omani arbitration legislation is a key instrument for attracting international investors. This legislation gives foreign corporations the option of using arbitration and benefit from its advantages to settle their disputes outside of the court system. The Omani arbitration legislation is based in part on the UNCITRAL Model Law on International Commercial Arbitration. It has, however, not been revised since its enactment in 1997. As a result, considering the 2006 modifications to the UNCITRAL Model Law on International Commercial Arbitration and the most recent developments in this area, Oman should evaluate the relevance of updating its domestic arbitration law. Such a movement will put Oman's arbitration law in line with international commercial arbitration norms, thereby promoting Oman's arbitration legal environment.

6.2.2.4 The Civil and Commercial Procedures law

Also, the third chapter examined the provisions of the Civil and Commercial Procedures law that govern the procedures for recognising and enforcing foreign arbitral awards. It was observed that these provisions were originally designed to address the procedures for recognising foreign court sentences. Thus, theatrically foreign arbitral awards are treated as foreign court sentences under this law. There are no particular legal provisions in this law that take into account the unique nature of foreign arbitral awards and Oman's obligations under the ICSID and New York Convention on this subject.

The Civil and Commercial Procedures law provides that application of its provisions should not prejudice to the international Conventions Oman party to in this regard. The legislature has relied on this broad provision to presume that all judges dealing with foreign arbitral awards are conscious of the requirements imposed by the ICSID and the New York Conventions in this regard. However, such situation would result in uncertainty for the enforcement of foreign arbitral awards in Oman. The enforcement of foreign arbitral must not be left for the discretion and understanding of the national judges, especially considering that there is no specialised court with trained judges to handle international arbitration issues.

The national legal provisions regulate the enforcement of foreign arbitral awards should enjoy high level of clarity and should be consistent with Oman’s international obligations.

For example, the ICSID Convention stipulates that each contracting state shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations

imposed by that award within its territories as if it were a final judgment of a court in that State. However, the civil and commercial procedures law violates this obligation in two ways. This law subjects the foreign arbitral awards to review as the situation with the normal foreign court sentences. Moreover, the procedural method for enforcement of foreign arbitral awards results from investment arbitration differs from procedural way through which national court judgments are usually enforced.

Based on above findings this chapter has suggested that the creation of one set of rules under one piece of law regulating the matters of investment arbitration and commercial arbitration, including the enforceability of local, international, and foreign arbitral awards seems to be the obvious way forward, with additional possibility of dedicating specific piece of legislation for questions of international investment arbitration. The ICSID and New York Conventions must be taken into consideration in implementing such suggestions.

6.2.2.5 The Foreign Capital Investment Law

The third chapter also examined the foreign capital investment law from two perspectives. That is its significance for supporting Oman's objective of attracting international investment and the methods for resolving disputes between foreign investors and others.

It has been stated that this law is critical for Oman to attract foreign investment. It protects foreign investors and their investments from illegal nationalisation and expropriation, as well as arbitrary and discriminatory measures, and offers foreign investors incentives such as tax and customs duty exemption. The efficiency of this law in attracting foreign investment, however, will be determined by the level and mechanisms of its implementation on the ground by competent governmental bodies.

Regarding the methods for resolving disputes between foreign investors and others, this law provides two methods for the settlement of investment disputes: (I) judicial proceeding in the courts as a rule. In this regard, Oman issued Litigation Procedures Simplification Law No. 125/2020, to streamline and speed up litigation for certain disputes, including commercial disputes of foreign investment projects established under the foreign capital investment law.[1208] According to article 10 of that law, the competent court must rule on these disputes within 30 days from the date of transmission of statement of claim to that court. (II)

[1208] Article 1 of Litigation Procedures Simplification Law 125/2020

Arbitration method as an exception to this rule. An arbitration agreement can be entered into by a foreign investor with a natural person, a judicial person, or a government entity. The reference to arbitration in this law, however, does not imply that the government is offering foreign investors the opportunity to bring their disputes with the government to international investment arbitration. Article 17 of The Foreign Capital Investment Law has adopted a clear and a reasonable attitude in respect to Omani government's consent to investor-state arbitration. It is permitted for foreign investors who are in dispute with the government, to resolve their disputes by arbitration, provided they obtain government consent to do so.

6.2.2.6 Oman Commercial Arbitration Centre (OAC)

Finally, chapter three explored the importance of the is of vital significant to support foreign investment and improve business environment and Alternative Dispute Resolution (ADR) in Oman. The Centre is regarded as a central facility for foreign businesses since it will provide institutional arbitration services. One of effective strategies to promote this centre in the area of foreign investment disputes, is to include it in Oman's BITs as an optional forum for international investors to resolve disputes.

6.2.3 International Legal Framework Governing Investor-state Arbitration

Chapter four explored the international legal framework governing investor-state arbitration in Oman. This framework is made up of international and regional conventions, as well as bilateral investment treaties. Moreover, this chapter has explored the Oman experience in the field of international arbitration in investment disputes.

6.2.4 The International and Regional Conventions on Arbitration

Chapter four shed light on Oman's accession to the ICSID Convention. It stated that Oman was aiming from its accession to ICSID Convention to enhance its international position as reliable country for international investments. The ICSID Convention is an integral part of the Omani legal system governing investor-state arbitration. Oman's membership in the ICSID Convention, as a specialised and effective system for resolving investor-state disputes, provides an additional layer of protection for foreign investors in the Sultanate, thereby enhancing Oman's standing as a destination for foreign investment. Most Oman's bilateral investment treaties include ICSID as a possible forum for resolving potential investment disputes with foreign investors. This led to the engagement of the Oman government in

several investor-state arbitration proceedings before ICSID. Nonetheless, it must be remembered that not only foreign investors in Oman have benefited from the protection provided by the ICSID Convention; outbound investments (Omani investors investing overseas) have also sought protection under the Convention. At least two investment cases have been filed with ICSID by Omani investors.

In addition, this chapter highlighted the significance of the ICSID Convention as a supportive international instrument for foreign investment, as well as the critiques it encounters. It been stated that the ICSID Convention is still the only international /governmental arrangement that is devoted exclusively to the settlement of international investment disputes between foreign investors and their host states. The Convention promotes international investment and enables it to play its role in global economic development. It is doing so through providing the legal means to settle the potential international investment disputes between foreign investors and their hosting states. Moreover, the ICSID Convention has influential role in the construction of substantive norms of international investment law.

However, the ICSID convention and its arbitration jurisprudence has revealed some concerns. the ICSID arbitration has been criticized for different reasons including a lack of transparency, the absence of an appellate mechanism and the arbitrators' lack of independence and impartiality. Accordingly, these concerns need to be considered through improvement of some aspects of ICSID arbitration, to be able to keep up with global economic transitions and the legitimate interest of all stakeholders involved in that system (states, investors, and non-governmental societies).

Moreover, the significance of the New York Convention as part of the international framework governing investor-state arbitration in Oman was highlighted in Chapter four. Although this Convention was designed to apply to international commercial arbitration, it is also applicable to international investor-state arbitration. It is international mechanism for enforcing non-ICSID investment arbitral awards and the non-pecuniary obligations of ICSID awards.

This chapter highlighted some inconsistency between Oman's international obligations under the ICSID and New York Conventions on the one hand and domestic law requirements governing the procedure for recognising and enforcing foreign arbitral awards on the other.[1209]

[1209] See section 6.3.4

In addition, chapter four highlighted the regional agreements to which Oman is a signatory that allow investor-state arbitration for resolving investment disputes. The Sultanate is a signatory to *the 1981 Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States (OIC), the 1980 Unified Agreement for Arab Capital Investment in Arab States* and *the 2001 Unified Economic Agreement between the Countries of the GCC.* These agreements provide for arbitration as alternative means to settle investor-state disputes. However, this chapter has argued that these regional agreements are not as supportive of the concept of investor-state arbitration as Oman's BITs. The regional investment agreements do not provide for Oman's direct consent to investor-state arbitration, as is the case with the majority of Oman's BITs.

6.2.5 The Bilateral Investment Treaties (BITs)

The fourth chapter examined the Oman BITs as the second component of the international legal framework governing investor-state arbitration in Oman. It has been argued that BITs would continue to be important in the FDI sector at least until an international instrument governing FDI arises. Foreign investors prefer to invest in countries that have BITs with their home countries. The BITs serve as the legal basis for foreign investment protection.

Oman signed a series of BITs to provide a safe environment for international companies and encourage FDI. Oman's BITs can be regarded as a persuading and marketing mechanism for overseas investment. At the same time, Oman's BITs serve to secure Oman's direct investment abroad. In this regard, chapter four emphasised that, in the coming phases, Oman must place a greater priority on concluding new BITs with home states of investors specialising in crucial industries and areas recognised as determinants of development in Oman Vision2040.

Furthermore, Chapter four argued that, while BITs around the world have relatively identical wording, i.e., they follow certain patterns and contain similar provisions, each country's BITs must still be revised considering that country's experience in investor-state arbitration as well as its economic policy.

In this regard, this chapter highlighted the fact that Oman has established a team of negotiators to undertake negotiating the BITs that Oman decide to conclude with other countries. Also, there is a specific Model BIT that has been utilised as a starting point in negotiations with other potential contracting states, but this Model is not available to the public.

Nonetheless, as a suggestion for improvement and maximisation of the intended benefits of Oman BITs, this chapter suggested that (i) Oman needs to develop a new Model BIT that compatible with its current obligations and overall investment strategy. This Model must hold space to protect public policy interests that could be affected by foreign investment activities. Furthermore, this Model must increase the clarity of core provisions such as the definition of investment, fair and equitable treatment, and rules for resolving investor-state disputes and consider Oman's experience in international investor-state arbitration as well as the most recent trends in the international investment treaties regime.

(ii) To boost the role of negotiating team in this regard continued collaboration with various competent authorities within the sultanate is necessary to obtain their opinion on the agreement's provisions. Such an approach would aid in ensuring that all levels of government are aware of any obligations and in highlighting any potential contradictions between those commitments and domestic legislation. In addition, to improve negotiating skills, legal and economic awareness, and other associated talents required for BIT negotiation, the team of negotiators must undergo specialised training.

(iii) Furthermore, it is critical to equip policymakers with updated Model BITs, reports, preparatory studies, and research on international investment law, including the international regime of BITs and related topics, on a regular basis. Such arrangements would enable them to participate more efficiently in the treaty-making process.

Regarding the BITs-making process, this chapter found that the Majlis Oman (legislative authority/parliament) lacks the necessary authority; rather, it serves as a consultative body. The government is not required by the law to consider Majlis' opinion. Nonetheless, it has been argued that it is crucial for Oman to strengthen the Majlis' supervision function in relation to BITs-making process, as the Majlis represents the interests and aspirations of the people, and some BIT clauses may be detrimental to the public interest.

Another aspect that has been considered in relation to BITs is substantive protections (protection standards). These substantive safeguards including a fair and equitable standard of treatment, full protection and security, most-favoured-nation, national treatment standard of treatment, and guarantee against expropriation. It has been observed that the meaning and scope of these norms are ambiguous, allowing for a great degree of interpretation by the arbitral tribunal. However, some Oman BITs have used drafting techniques to provide a higher level of certainty in this area. For example, the Oman-US FTA explicitly links these standards to customary international law, which helps to make the standards predictable and keeps them from being interpreted in ways that limit the host state's regulatory rights. Another technique

to clarify the scope of these standards in BITs is to state explicitly that they only apply to a specified range of instances.[1210] However, this chapter argued that a multilateral agreement on foreign investment is the most effective method to address the challenge of undefined substantive norms on an international level.

The other important aspect discussed in chapter four is the investor-state dispute settlement provisions in Oman BITs. These provisions are to allow foreign investors to seek redress for damages caused by the Omani government's alleged breaches of BITs' obligations. In this respect, it has found that while most of Oman BITs use the phrase "any dispute concerning an investment" to refer to the scope of dispute settlement clauses, some BITs impose certain limitations on the scope of these clauses. For example, Oman-Hungry (2022) has limits the scope of these clauses to be applied to breach of BIT obligations. Oman-China (1995) limits the use of arbitration to specific issues, namely those concerning expropriations or the payment of compensation following an act of expropriation. However, under some BITs, the scope of dispute resolution has expanded by the MFN and Umbrella Provisions.[1211]

Moreover, it was found that the language of investor-state dispute settlement provisions on exhaustion of local remedies is varied. While some of these provisions give investors a choice whether to use local remedies or directly use international arbitration, other provisions obliged the disputing party first to seek resolution in a domestic court and if the disagreement cannot be resolved through that court, they may seek international arbitration. However, it noted that the language of some of BITs' provisions on this issue are vague. Uncertainty in these provisions could lead to conflicting interpretations and, as a result, undesirable outcomes. Thus, policymakers must devote the necessary attention to such a technical issue.[1212]

On the question of an arbitral forum and arbitration rules, the analysis of dispute settlement provisions in Oman BITs revealed that these provisions provide for the following arbitral forums: ICSID arbitration, arbitration under UNCITRAL rules, arbitration under the rules of the International Chamber of Commerce (ICC), ad hoc arbitration established in accordance with the BIT itself, Arab Investment Tribunal in accordance with the Unified Agreement for

[1210] See sections 4.3.2
[1211] See section 4.3.3.1.1
[1212] See section 4.3.3.3

investment of Arab Capital ,and GCC Commercia Arbitration Centre. However, most Oman BITs refers to ICSID arbitration and arbitration under UNCITRAL rules.

6.2.6 Regulatory power of Host State

Chapter four reviewed the question of regulatory power of host state within the context of international investment arbitration. It was illustrated that the question of regulatory power of host state refers to the regulatory measures taken by host state to safeguard the public interests. These regulatory actions taken by the host state may result in investor-state disputes, as the foreign investor may claim that such measures violate the standards of protection. In return, concerns have been raised that the investor-state arbitration system has had a chilling effect on legitimate state regulation.

Moreover, this chapter demonstrated the reasons give rise to conflict between the power of the host state to regulate its public interest and foreign investors interest. In general, these factors are related to the absence of uniform, agreed-upon, and unambiguous language in investment treaty provisions. The alternative solutions provided by international investment law literature and case law to address this issue were also shown.[1213]

However, this chapter argued that two practical solutions will be more effective in addressing ambiguity and disagreement regarding host state regulatory authorities. The first is reforming the international investment dispute settlement system. The EU's investment court system, which offers unique innovations for the resolution of investment disputes, is a viable reform choice. The second strategy is to establish a multilateral agreement to govern foreign investment. These two critical methods would result in greater stability, clarity, and uniformity in international investment law, and thus would help to address the issue of host state regulatory powers.

6.2.7 Oman's Experience in the Field of International Investment Arbitration

The fourth chapter explored the investor-state arbitration proceedings in which Oman was involved. Oman was a disputing party in six investment arbitration cases. Except for one case, all cases were brought before the ICSID. This demonstrates the significance of the ICSID

[1213] See section 4.3.4.2

Convention for Oman's economic development in terms of attracting foreign investment. On the other side, Oman benefits from this Convention by having its outbound investments protected and supported. Some Omani investors have filed investment disputes with the ICSID.

Interestingly, it was found that despite the fact that Oman has been involved in investor-state arbitration cases, there was the lack of integrated institutional framework to response and manage investment disputes with foreign investors. It is not clear which the governmental entity is competent to deal directly with investment disputes that the investor tends to take them to international investment arbitration. Furthermore, there are no clearly defined procedures to be use when dealing with such disputes.

As way forward, this chapter suggested that an institutional framework for management of investment disputes should be established. This framework should provide for governmental body in charge of management of investment disputes and clear procedures in this regard.

The existence of an effective internal institutional framework to handle investment disputes is crucial. Such institutional framework would offer foreign investors with a clear path to exercise their rights under Oman BITs to take their problems to international arbitration if they could not be resolved peacefully. It would offer investors with certainty by establishing a single government contact for investment disputes. In addition, would prevent some investment disputes from reaching the stage of international arbitration and allowed the relationship between the state and investor to continue. In general, it would be saving time and resources for the state and the investor and contributing to a better and more predictable investment climate.[1214]

6.2.8 The European Union system for Resolving Investment Disputes (Investment Court System)

As a promising new paradigm for investor-state dispute resolution, the fifth chapter examined the EU investment court system (ICS). This was performed through a comparison of ICS and ICSID arbitration. The ICS's leading innovations are the two-tier investment court, improving arbitrators' independence and impartiality and improving the transparency of process. The comparison between the ICS and ICSID in these aspects revealed that the ICS has massively

[1214] Regarding the benefits of such an institutional framework, see section 4.4.5

departed from the traditional arbitration under the ICSID. The ICS is ahead of the curve on several important fronts. These include process transparency, ethical requirements, the mechanism for selecting and appointing adjudicators, and, most notably, the appeal mechanism for reviewing the awards.[1215] The ICS is the most recent critical step in the evolution of investor-state settlement settlements. The ICS provided rational remedies to several of the complaints levelled against investor-state arbitration. However, some challenges arise and require special attention, particularly the enforcement of ICS awards.

On the international front the EU endeavours to establish Multilateral Investment Court (MIC). The EU intends for the proposed MIC to eventually replace all bilateral ICSs included in EU trade and investment agreements. Under the aegis of UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, the MIC project is still in the discussion phase. This chapter argued that the MIC project has a high chance of success as a reform option for the international system of investor-state dispute settlement. This is because the project attempts to address the issues that have led to the legitimacy crisis in investment dispute resolution, and its proposed reform goes a long way toward addressing them. In addition, this argument is backed by the fact that the EU, the world's largest exporter and importer of FDI, as well as its international trading partners, support this endeavour.

In addition, chapter five suggested that since it is likely that the EU investment court system (ICS) will dominate the field of international investment law as one of the most practical reform options for the existing investor-state arbitration, Oman can learn from the EU model in developing its international legal framework for investor-state dispute resolution under its BITs.

[1215] See section 5.3

6.3 Conclusion

What becomes clear from this research is that the legal framework governing investor-state arbitration in Oman has strengths and weaknesses. The research points to the conclusion that Oman must reform some elements of this legal framework to provide the foreign investors with security and protection. This framework improvement will contribute to Oman's efforts to achieve its goal of attracting greater international investment. As a result, the Oman government must adopt an integrated plan to review and modernise this framework in response to Oman Vision 2040 and as part of its broader foreign investment and economic development policy.

6.3.1 The Way Forward

This research has provided the basis for further exploration of what is a complicated domestic and international matter. The place of Oman in the wider family of nations is of supreme importance given the economic changes that are taking place internationally. The economic diversification and move away from fossil fuels requires Oman to encourage investment in its many other natural resources and industries, technology, and service sector. But this move, and the need for foreign investment is not without difficulties both domestically and internationally. The thesis has demonstrated the status quo but the way forward requires political, intellectual, and economic re-evaluation which will not happen by happenstance, but by a concerted effort by all parties to evaluate the future.

The preceding chapters have presented some recommendations for enhancing the legal framework governing investor-state arbitration in Oman and the administrative arrangements associated with it. It therefore seems appropriate that the cumulative result of this research should be condensed into some recommendations for a general strategy to advance the legal framework of investor-state arbitration and related arrangements.

Improvements to the legislative and organisational framework for investor-state arbitration need the government to synchronously focus on three areas:

The first concerns the domestic legislative provisions governing international investor-state arbitration in Oman, where there is an urgent and essential need for modernisation. The legal update of these provisions would bring the Sultanate into conformity with modern legislation, while also assisting the Government of Oman in meeting its international commitments under

its BITs and international conventions concerning investor-state disputes settlement. This action would give stronger protection for foreign investors, and consequently have a positive effect on the investment climate in the Sultanate.

Thus, the government and legislature must co-operate in swiftly bringing about the necessary legal adjustments appertaining to the legal structure of international arbitration. Several crucial elements must be considered during the reform and improvement process. The proposed revisions must be compliant with the international Conventions relevant to international investor-state arbitration that Oman has signed. Furthermore, recent trends and improvements in this regard provided by related international forums and organisations must be adopted. For example, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, should be considered. In order to facilitate changes to this legal framework, the relevant legal provisions must be brought together under one law rather than distributed across multiple laws, as is currently the case. This would make the application of the legal framework of investor-state arbitration easier. Any proposed legislation should apply to all forms of arbitration (international, foreign, and domestic). Furthermore, the proposed legislation must be clear about the processes vis a vis the court that has jurisdiction over arbitration matters, when intervention by the judiciary is appropriate, particularly regarding the enforcement of arbitral awards and the related procedural steps. Oman should consider whether there should be a dedicated judicial body with trained judges whose remit is to deal with arbitration matters particularly those involving international arbitration. Such an action would enhance the Sultanate's arbitration environment.

Secondly, insofar as the improvement of the international component (i.e., the Oman’s BITs) of the legal framework governing international investor-state arbitration, it is vital for the government to benefit from the EU approach of ICS in order to improve the clauses in Oman's BITs pertaining to investor-state arbitration resolution. As previously stated, the ICS has brought about reforms to investor-state dispute settlement process in response to criticism. These reforms are designed to make the resolution of investor-state disputes more equitable, unbiased, and transparent. Oman must also improve the substantive aspect (standards of protection) to make their scope clearer. These steps should offer international investors protection while not compromising the Omani Government's regulatory power.

Oman can take the initiative to present the GCC an integrated report on the EU's approach to ICS and MIC in order to improve the GCC's legislative framework for investor-state dispute

settlement based on the EU model. In addition, this action would encourage the GCC to adopt a cohesive stance towards current UNCITRAL's efforts to reform the international system for investor-state dispute resolution.

Finally, at the administrative and organisational levels, Oman must allocate a skilled team to manage and deal with investor-state disputes that may arise under its BITs and monitor the implementation of the government's international commitments in this area. The recommended team should include representatives from the Ministry of Justice and Legal Affairs, the Ministry of Economy, the Foreign Ministry, the Oman Investment Authority, and the Oman Commercial Arbitration Centre. This team, however, should be overseen by the Ministry of Commerce, Industry, and Investment Promotion, as it is the authority in charge of investment promotion. To be qualified to properly manage the international investment dispute with foreign investors, this team must get training in international investment law and international investment dispute resolution. The suggested team should work as reference for foreign investor and the governmental authorities that dealing with the issue of foreign investment. These procedures would allow for the professional and flexible administration of international investor-state disputes, thereby boosting the confidence of foreign investors.

6.3.2 The contribution to knowledge

The primary objective of this thesis was to contribute to the existing body of knowledge regarding the effectiveness of the legislative structure that governs investor-state arbitration in the Sultanate of Oman, by providing a critical analysis of this structure. This analysis explored the potential areas for reforms and has provided suggestions for reforms. As the first study to present a comprehensive, analysis of the Omani system for investor-state arbitration, this research contributed to the body of knowledge in this area.

Furthermore, the research set up an analytical comparison between the ICS and ICSID in this regard to examine the effectiveness of the EU model of ICS as a reform model for the current investor-state dispute resolution regime that Oman can learn from to improve the investor-state dispute settlement mechanism under its BITs.

6.3.3 Limitations on the Research

The scope of this research has been limited due to unforeseen circumstances. There was a lack of information surrounding several international arbitration cases brought before the ICSID and PCA by the Oman government and foreign investors.

Moreover, there is no judicial precedents in Oman regarding international investor-state arbitration. Such information would have provided a clearer picture of the practical side of the attitude of Omani judiciary towards international investor-state arbitration matters, specifically the recognition and enforcement of foreign investment arbitral awards.

Furthermore, several administrative decisions germane to the organisational aspect of the conclusion of Oman's BITs have not been accessible. Another issue was that several Omani laws did not have English translations, therefore those laws had to be translated from Arabic to English.

6.3.4 Areas for Future Research

There are some related areas which have been revealed by this study that represent opportunities for further research. One such topic worth analysis and investigating is the international investment arbitration cases in which the Oman government has been a disputing party. The investigation of this topic would provide an integrated picture of the practise of various governmental authorities in implementing Oman's foreign investment policy. The government's foreign investment policy may be promising, but its effectiveness is always dependent on how well it is implemented.

The second topic that must be investigated is whether Oman's local remedies for investor-state disputes are effective and suit the requirements of foreign investors in this regard. If not, how can they be enhanced and made more efficient? Provision of effective local legal means for disputes relating to foreign investment is seen as a crucial component of the optimal business climate.

The final aspect that could be the subject of future research is evaluating the legal systems of investor-state dispute settlement in GCC countries and identifying the possibility of learning from the EU's approach to investor-state dispute settlement. The GCC is a single economic group that is striving to become a more attractive investment destination. As a result, it is critical to enhance its legal infrastructure in this area.

Bibliography

Cases

Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No ARB/11/33)

Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman (ICSID Case No ARB/16/7)

Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman PCA Case No 2017-32 (Permanent Court of Arbitration)

Samsung Engineering Co., Ltd. v. Sultanate of Oman (ICSID Case No ARB/15/30, case details)

Marvin Roy Feldman Karpa v. United Mexican States (award in 16/12/2002 , ICSID Case No. ARB(AF)/99/1)

Amco Asia Corporation and others v. Republic of Indonesia ICSID Case No ARB/81/1,Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 400

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt ICSID Case No ARB/84/3, Decision on Jurisdiction, 27 April 1985

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco ICSID Case No ARB/00/4

Loewen Group, Inc. and Raymond L. Loewen v. United States of America ICSID Case No ARB(AF)/98/3 , Award (26 June 2003), para 139 and 140

Azurix Corp. v. Argentine Republic ICSID Case No ARB/01/12 ,paras 311-312

Desert Line Projects LLC v. Republic of Yemen (ICSID Case No ARB/05/17)

Noble Ventures, Inc. v. Romania ICSID Case No ARB/01/11, 12 October 2005,page 105

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic ICSID Case No ARB/02/1,decision on liability of 3 October 2006,paras 238,240and 266

Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania ICSID Case No ARB/05/22 ,Award on 24 July 2008,para 343

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan ICSID Case No ARB/05/16 , Award, pages 1-3 and 154-162

Murphy Exploration and Production Company International v. Republic of Ecuador ICSID Case No ARB/08/4, Award on 15 December 2010 , para 149

Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay ICSID Case No ARB/10/7, para 305

Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia ICSID Case No ARB/12/14 and 12/40

Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No ARB/13/13) Decision on the Proposal for Disqualification of Arbitrator Bruno Boesch (March 20, 2014)

Conventions

Consolidated Version of the Treaty on the Functioning of the European Unionen - Official Journal of the European Union No C 202 on 7.7.2016

Energy Charter treaty (1994)

North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA)

Washington convention of 1965 on settlement of investment disputes between states and nationals of other states

The Economic Agreement Between the GCC States

, 'Unified Agreement for Arab Capital Investment in Arab States' (*Investment Policy Hub-UNCTAD* 1980) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download> accessed

, 'Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States.' (1981) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download> accessed

Bilateral Investment Treaties

Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments 1979

Agreement between Oman and China for the Promotion and Protection of Investments 1995

Agreement between Oman and Sweden for the Promotion and Protection of Investments 1995

Agreement between Oman and United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments 1995

Agreement between Oman and Finland for the Promotion and Protection of Investments 1997

Agreement between Oman and Austria for the Promotion and Protection of Investments 2001

Agreement between Oman and Iran for the Promotion and Protection of Investments 2001

Agreement between Oman and Korea for the Promotion and Protection of Investments 2003

Agreement between Oman and Belarus for the Promotion and Protection of Investments 2004

Agreement between Oman and Germany for the Promotion and Protection of Investments 2007

Agreement between Oman and Singapore for the Promotion and Protection of Investments 2007

Agreement between Oman and Turkey for the Promotion and Protection of Investments 2007

Agreement between Oman and Belgium-Luxembourg Economic Union for the Promotion and Protection of Investments 2008

Agreement between Oman and Netherlands for the Promotion and Protection of Investments 2009

Oman-United State Free Trade Agreement (FTA)

Agreement between Oman and Viet Nam for the Promotion and Protection of Investments 2011

Agreement between Oman and Tanzania for the Promotion and Protection of Investments 2012

Agreement Between Oman and Japan for The Reciprical Promtion And Protection of Investment 2015

The proposed draft of Transatlantic Trade and Investment Partnership(TTIP)-Chapter II Investment- between the EU and US

Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member State, of the other part [2016]OJ L 11

Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part

The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

Agreement between Oman and Hungary for the Reciprocal Promotion and Protection of Investments 2022

Legislation and rules

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration , available at https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/rules-on-transparency-e.pdf

Regulation No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries -Official Journal of the European Union No L 351 on 20.12.2012

Statute of the International Court of Justice 1945

Arbitration (international Investment Disputes) Act 1966

Trade Law No. 55/90

Royal decree No. 29/1994 on Ratification of Unified Agreement for Arab Capital Investment in Arab States

Royal decree No.121/1994 on Agreement on Promoting, Protecting, and Guaranteeing Investments Among Organization of the Islamic Conference Member States

Royal Decree No. 33/1995 on Ratification of the ICSID Convention 1965

The Omani Law of Arbitration in Civil and Commercial Disputes

Royal Decree No. 36/1998 on Ratification of the New York Convention 1958

Judicial Authority law 90/99

Royal Decree No .91/99 regarding establishment of the Administrative Court and issue its law

Civil and commercial procedures law 29/2002

Tander Law No 36/2008

the Military Judiciary Law 110/2011

Civil Law No. 29/2013

Royal Decree No. 26/2018 on Establishing Oman Commercial Arbitration Centre

The Foreign Capital Investment Law Promulgated by Royal Decree 50/2019

Litigation Procedures Simplification Law 125/2020

Royal Decree 97/2020 Amending the Name of the Ministry of Commerce and Industry to the Ministry of Commerce, Industry, and Investment Promotion, Determining Its Competences, and Adopting Its Organisational Structure

Royal Decree 111/2020 Forming the Council of Ministers

The Basic Statute of the State 6/2021

the Law of Majlis Oman 7/2021

Royal Decree 42/2021 on Granting Government Land

ICSID Arbitration Rules(2022)

Royal Decree 35/2022 regarding the Governance of the Administration of Judicial Affairs

Royal Decree NO. 11/2022 Ratifying the BIT Btween Oman nad Hungary

, 'UNCITRAL Model Law on International Commercial Arbitration (1985)' (*United Nations Commission On International Trade Law(UNISTRAL),* <https://uncitral.un.org/en/texts/arbitration> accessed

Books and Chapters in Books

, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2 edn, Oup Oxford 2018)

Allen CH and Rigsbee WL, *Oman under Qaboos: from coup to constitution, 1970-1996* (Frank Cass 2000)

Bashayrah MH, *Dispute esolution in accordance with the mechanism of the commercial arbitration center of the gcc countries* (1 edn, The GCC Commercial Arbitration Centre 2015- in Arabic)

Bishop RD, Crawford J and Reisman WM, *Foreign investment disputes : cases, materials, and commentary* (Kluwer Law International 2005)

Bonnitcha J, Skovgaard Poulsen LN and Waibel M, *The Political Economy of the Investment Treaty Regime* (Oxford University Press USA - OSO 2017)

Bücheler G, *Proportionality in investor-state arbitration* (First edn, Oxford University Press 2015)

Cleis MN, *The independence and impartiality of ICSID arbitrators*, vol 8 (Nijhoff international investment law series, Brill Nijhoff 2017)

Collier JG and Lowe AV, *The settlement of disputes in international law : institutions and procedures* (Oxford University Pres 1999)

Collins D, *An introduction to international investment law* (Cambridge : Cambridge University Press 2019)

Dolzer R and Schreuer CH, *Principles of international investment law* (Oxford University Press 2012)

Douglas Z, Pauwelyn J and Viñuales JE, *The foundations of international investment law* (First edn, Oxford University Press 2014)

Dugan; CF and others, *Investor-state arbitration* (Oxford University Press 2008)

El-Ahdab AHE-AaJ, *Arbitration with the Arab Countries* (Wolters Kluwer Law International 2011)

Gazzini T and De Brabandere E, *International investment law. the sources of rights and obligations* (1 edn, Brill 2012)

Henriksen A, *International law* (Oxford University Press 2017)

Ho J, Paparinskis Mrs and Lim CL, *International investment law and arbitration : commentary, awards and other materials* (Cambridge University Press 2018)

Hussein G, *Oman - The Islamic Democratic Tradition* (2006)

Ismail MAM, *International investment arbitration: lessons from developments in the MENA region* (Routledge 2016)

Jones J and Ridout NP, *Oman, culture and diplomacy* (Edinburgh University Press 2012)

McLachlan C, Shore L and Weiniger M, *International investment arbitration : substantive principles* (Oxford international arbitration series, Oxford University Press 2007)

Moses ML, *The principles and practice of international commercial arbitration* (Third edition. edn, Cambridge University Press 2017)

Najjar N, *Arbitration and international trade in the Arab countries*, vol 13 (Brill Nijhoff 2018)

Newcombe AP and Paradell L, *Law and practice of investment treaties: standards of treatment* (Kluwer Law International 2009)

OECD, *Policy Framework for Investment, 2015 Edition* (OECD Publishing 2015)

Owtram F, *A Modern history of Oman: formation of the state since 1920* (I B Tauris 2004)

Peterson J, *Oman's insurgencies: the Sultanate's struggle for supremacy* (Saqi 2007)

Reed L, Paulsson J and Blackaby N, *Guide to ICSID arbitration* (Kluwer Law International 2004)

Salacuse JW, *The law of investment treaties* (Oxford University Press 2010)

Schreuer CH, *The ICSID Convention: a commentary : a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2001)

Sornarajah M, *The settlement of foreign investment disputes* (Kluwer Law International 2000)

Sornarajah M, *The international law on foreign investment* (2nd edn, Cambridge University Press 2004)

Sornarajah M, *The international law on foreign investment* (3rd edn, Cambridge University Press 2010)

Sornarajah M, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015)

Sornarajah M, *The international law on foreign investment* (Fifth edn, Cambridge University Press 2021)

St. John T, *The rise of investor-state arbitration* (First edn, Oxford University Press 2018)

Subedi SP, *International investment law : reconciling policy and principle* (Third edn, Hart Publishing 2016)

UNCTAD, *The 2015 version of the United Nation's Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development* (UNCTAD 2015)

Valeri M, *Oman: politics and society in the Qaboos state* (C. Hurst in association with CERI/Sciences PO 2009)

Van Harten G, *Investment treaty arbitration and public law* (Oxford University Press 2007)

Abdallah AK, 'Arbitration in Oman' in Blanke G (ed), *Arbitration in the MENA* (1st edn, JURIS 2016)

Boisson Chazournes L, 'Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law', *Van den Berg, AJ Arbitration Advocacy in Changing Times* (Austin [Texas] : Wolters Kluwer Law & Business 2011)

Echandi R, 'Investor-State Conflict Management Mechanisms (CMMs) in International Investment Law: A Preliminary Sketch of Model Treaty Clauses', *Handbook of International Investment Law and Policy* (Springer Singapore 2021)

How K and Choo E, 'Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective' in Mangan; M and QC NR (eds), *The Guide to Investment Treaty Protection and Enforcement* (Global Arbitrtion Review(GAR) 2022)

Lévesque C, 'The European Commission Proposal for an Investment Court System Out with the Old, In with the New?' in de Mestral A (ed), *Second Thoughts* (Investor State Arbitration between Developed Democracies, McGill-Queen's University Press 2017)

Loibl G, 'International law' in Evans MD (ed), (3rd ed. edn, Oxford University Press 2010)

Merrills J, 'The Means of disputes Settlement' in Evans MD (ed), *International Law* (Fifth edition. edn, Oxford University Press 2018)

OECD, 'Definition of Investor and Investment in International Investment Agreements', (OECD Publishing 2008)

OECD, ''Investment Policy' in Policy Framework for Investment: A Review of Good Practices', (OECD 2008)

Puig S, 'No Right Without a Remedy: Foundations of Investor-State Arbitration', *The Foundations of International Investment Law* (Oxford University Press 2014)

Reinisch A, 'The European Union and Investor-State Dispute Settlement From Investor-State Arbitration to a Permanent Investment Court' in de Mestral A (ed), *Second Thoughts* (Investor State Arbitration between Developed Democracies, McGill-Queen's University Press 2017)

Russell PH, 'Judicial Independence in Comparative Perspective ' in Peter H R and M.O'Brien D (eds), *Judicial Independence in the Age of Democracy : critical perspectives from around the world* (the Universty Press of Virginia 2001)

Schreuer CH, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Schreuer C (eds), *The Oxford handbook of international investment law* (Oxford University Press 2008)

Subedi SP, 'International Investment Law' in Evans MD (ed), *International law* (Fifth edition. edn, Oxford University Press 2018)

Thomsen S, 'The Policy Framework for Investment: What it is, why it exists, how it been used and what's new' in Love P (ed), *Debate the Issues:*

Investment (OECD Publishing 2016)

Collins D, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013)

UNCTAD, *Scope and definition : UNCTAD series on issues in international investment agreements II* (United Nations 2011)

Moss GC, *Commercial Arbitration and Investment Arbitration: Fertile Soil For False Friends?* (Oxford ; New York : Oxford University Press 2009)

Almahfudi H, *The Criminal Justice System in the Sultanate of Oman* (2004)

Academic Articles

Al-Khasawneh FNaA, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' <https://digitalcommons.law.scu.edu/scujil/vol13/iss2/5/>

Al-maani Z, 'Oman's Judiciary System' <https://www.researchgate.net/publication/313920170_Oman's_Judiciary_System> accessed 9 April 2021

Bernardini P, 'ICSID Versus Non-ICSID Investment Treaty Arbitration' <https://www.lawinsider.com/contracts/4RT61Ci9OqG>

Gaillard E and Mitrev Penusliski I, 'State Compliance with Investment Awards' <https://go.exlibris.link/xXZQZDK6>

Howitt SFC, 'When international arbitration meets Sharia' <https://iclg.com/cdr/arbitration-and-adr/when-international-arbitration-meets-sharia>

Luttrell S, 'Testing the ICSID Framework for Arbitrator Challenges' <https://go.exlibris.link/BNNqLj29>

Mbengue MM, 'Consent to Arbitration Through National Investment Legislation' Investment Treaty News <https://www.iisd.org/itn/en/2012/07/19/consent-to-arbitration-through-national-investment-legislation/>

Parmentier P, 'International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules' SSRN Electronic Journal <http://hull.summon.serialssolutions.com>

Pauwelyn J, 'At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' <http://hull.summon.serialssolutions.com>

Rothkopf EJPaI, 'Constitutional Courts and Rule of Law in

Islamic Law States: A Comparative Study' <http://jcl-mena.org/assets/submissions/4.Constitutional-Courts-and-Rule-of-Law-in-Islamic-Law-States-Comparative-Study.pdf>

Mann H and von Moltke K, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (International Institute for Sustainable Development 2005)

, 'Oman: Recent Developments' (2000) 15 Arab law quarterly

Abdallah A, 'A critical analysis of foreign capital investment law in Oman' (2015) 16 The journal of world investment & trade

Abdallah AK, 'Arbitration in Administrative Disputes in Oman' (2014) SSRN Electronic Journal

Abu Lughod I, 'Retreat from the secular path?: Islamic dilemmas of Arab politics' (1966) 28 The review of politics

Accaoui Lorfing P and De Nanteuil A, 'UNCITRAL Working Group III / Proposal for the establishment of a standing multilateral investment court' (2020) 2 Revue de droit des affaires internationales

Akaddaf F, 'Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: is the GISG compatible with Islamic law principles?' (2001) 13 Pace international law review

Albasoos H and Maashani M, 'Oman's diplomacy strategy: Maneuvering tools to face regional challenges' (2020) 9 International Journal of Research in Business and Social Science

Alexandrov SA, 'International Investment Agreements: Key Issues (Volume I) By Karl P. Sauvant and Jorg Weber (eds.) United Nations Conference on Trade and Development, 2004' (2005) 20 ICSID Review 647

Ali Radhi H, 'State Courts and Arbitration in the Gulf Cooperation Council (GCC) Countries' (1992) 57 ICC Int'l Ct Arb Bull

Almutawa AM and Maniruzzaman M, 'Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC arbitration law:an empirical study' (2015)

Alqudah MA, 'The impact of sharia on the acceptance of international commercial arbitration in the countries of the gulf cooperation council' (2017) 20 Journal of legal, ethical and regulatory issues

Alschner W, 'The impact of investment arbitration on investment treaty design: myth versus reality' (2017) 42 The Yale journal of international law

Alschner W, Skougarevskiy D and Wang M, 'Champions of protection? A text-as-data analysis of the bilateral investment treaties of GCC countries' (2017) 2016 International Review of Law

Alvarez GM and others, 'A response to the criticism against ISDS by EFILA' (2016) 33 Journal of international arbitration

Alvarez JE, 'Is investor-state arbitration 'public'?' (2016) 7 Journal of international dispute settlement

Anthea R, 'Divergence Between Investment and Commercial Arbitration' (2012) 106 Proceedings of the Annual Meeting (American Society of International Law)

Arcuri and Montanaro F, 'Justice for All ? Protecting The Public Interest in Investment Treaties' (2018) 59 Boston College law review

Ayad MB, 'Towards a Truly Harmonised International Commercial and Investment Arbitration Law Code (HICIALC): Enforcing MENA-Foreign Investor Arbitrations via a Single Regulatory Framework: A New Map for a New Landscape' (2010) 7 Macquarie J Bus L

Baetens F, 'The European Union's proposed investment court system: Addressing criticisms of investor-state arbitration while raising new challenges' (2016) 43 Legal issues of economic integration

Baetens F, 'Judicial review of international adjudicatory decisions: A cross-regime comparison of annulment and appellate mechanisms' (2017) 8 Journal of international dispute settlement

Bashmill H, 'Foreign Investment Disputes Settlement under ICSID and the Protection of FDI' (2016) 21 Journal of Internet Banking and Commerce

Benedetti JPC, 'The proposed investment court system: Does it really solve the problems?' (2019) Revista Derecho del estado

Berge TL and St John T, 'Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws' (2020) Review of international political economy : RIPE

Blanke G and Corm-Bakhos S, 'The enforcement of international commercial and investment arbitration awards in the MENA region' (2017) 83 Arbitration (London, England)

Böckstiegel K-H, 'Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*' (2014) 28 Arbitration International

Broad R, 'Corporate bias in the world bank group's international centre for settlement of investment disputes: A case study of a global mining corporation suing El Salvador' (2015) 36 University of Pennsylvania journal of international law

Brower CN and Schill SW, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium: International Judges' (2008) 9 Chi J Int'l L

Brower CN and Schill SW, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law

Butler N, 'Possible Improvements to the Framework of International Investment Arbitration' (2013) 14 The journal of world investment & trade

Charles N B and Jeremy K S, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 American Journal of International Law

Clapham J, 'Finality of investor-state arbitral awards : has the tide turned and is there a need for reform?' (2009) 26 Journal of international arbitration

Cotula L, 'Democracy and International Investment Law' (2017) 30 Leiden journal of international law

Cristani F, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' (8/2014) 13 The law and practice of international courts and tribunals

Daradkeh L, 'Commercial Arbitration under Investment Treaties and Contracts: Its Importance and Danger in the Arab World' (2013) 27 Arab law quarterly

de Abreu Duarte F, ''But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2020) 30 European Journal of International Law

de Chazournes LB and McGarry B, 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15;2014; The journal of world investment & trade

Dickson-Smith KD, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17 The Journal of World Investment & Trade

Diependaele L, De Ville F and Sterckx S, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24 New political economy

Dietz T, Dotzauer M and Cohen ES, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26 Review of International Political Economy

Dimitropoulos G, 'Constructing the independence of international investment arbitrators: Past, present and future' (2016) 36 Northwestern journal of international law & business

Duce M, 'Definitions of Foreign Direct Investment (FDI): a methodological note' (2003)

Eudelle P and Shrestha A, 'Foreign Direct Investment and Economic Growth: The Cases of Singapore and Oman' (2017) 8 Global policy 402

Fanou M, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' (2020) Europe and the World

Farag SA, '"International arbitration in investment disputes" case study of Egypt' (2020) ahead-of-print Review of economics & political science : REPS

Forere MA, 'The New Developments in International Investment Law: A need for Multilateral Investment Treaty?' (2018) 21 Potchefstroom electronic law journal

Franck SD, 'The ICSID effect? Considering potential variations in arbitration awards' (2011) 51 Virginia journal of international law

Gantz DA, 'An appellate mechanism for review of arbitral decisions in investor-state disputes: prospects and challenges' (2006) 39 Vanderbilt journal of transnational law

Ghouri AA, 'The evolution of bilateral investment treaties, investment treaty arbitration and international investment law' (2011) 14 International arbitration law review

Giorgetti C, 'Challenges of Arbitrators in International Disputes: Two Tribunals

Reject the "Appearance of Bias"' (6 June 2012) 16 The American Society of International Law

Grant TD and Kieff FS, 'Appointing Arbitrators: Tenure, Public Confifidence, and a Middle Road for ISDS Reform' (2022) 43 Michigan journal of international law

Haftel YZ and Thompson A, 'When do states renegotiate investment agreements? The impact of arbitration' (2017) 13 Review of International Organizations

Hepburn J, 'Domestic Investment Statutes In International Law' (2018) 112 The American journal of international law

Hill TW, 'The Commercial Legal System of the Sultanate of Oman' (1983) 17 The International lawyer

Hirst A, 'Contemporary Mercantile Jurisdiction in Oman' (1992) 7 Arab LQ

Hirst A, 'The Recognition and Enforcement of Foreign Arbitral Awards in the Sultanate of Oman' (2014) 1 BCDR International Arbitration Review

Howse R, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law

Jarvin S, 'Enforcement of an arbitration award in Oman' (1985) 13 International business lawyer

Junaibi RHSA, 'Comparative Study Between the Omani and the British Legal Systems in Terms of Judicial Independence and Separation of Powers' (2020) 6 European Journal of Interdisciplinary Studies

Kao C-C, 'Assessing the Rules of Appointing Arbitrators under the EU's Investment Court System' (2019) 27 European review (Chichester, England)

Kaplan N, 'Arbitration in Asia Developments and Crises' (2002) 19 Journal of international arbitration

Kaya T, 'Multilateral Investment Court: Is It a New Breath for the Settlement of International Investment Disputes or a Stillborn Project?' (2020) 17 Manchester journal of international economic law

Khan A, 'The Interaction between Shariah and International Law in Arbitration' (2006) 6 Chicago Journal of International Law

Kim D, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment-based system' (2011) 86 New York University law review (1950)

Kutty F, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loy LA Int'l & Comp L Rev

Lam J and Ünüvar G, 'Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements' (2019) 32 Leiden journal of international law

Lane T and Morton W, 'Enforcing a Foreign Arbitration Award in Oman' (1985) 4 33

Lew JDM, 'The Recognition and Enforcement of Arbitration Awards in England' (1976) 10 The International lawyer 425

Li Q, Owen E and Mitchell A, 'Why do democracies attract more or less foreign direct investment? A metaregression analysis' (2018) 62 International studies quarterly 494

Lopez-Rodriguez AM, 'Investor-State Dispute Settlement in The EU: Certainties and Uncertainties' (2017) 40 Houston Journal of International Law

Makdisi JA, 'The Islamic origins of the common law' (1999) 77 North Carolina law review

Marshall M, 'Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation' (2017) 17 Pepperdine Dispute Resolution Law Journal 233

McHugo JHA, 'The practice of law by foreign lawyers in the Sultanate of Oman' (1985) 7 Michigan yearbook of international legal studies

McLaughlin JT, 'Arbitration and Developing Countries International Commercial Arbitration' (1979) 13 Int'l L

Mellahi K and others, 'Motives for foreign direct investment in Oman' (2003) 45 Thunderbird International Business Review

Moloo R and Khachaturian A, 'The compliance with the law requirement in international investment law' (2011) 34 Fordham international law journal

Monebhurrun N, 'The (mis)use of development in international investment law: understanding the jurist’s limits to work with development issues' (2017) 10 Law and development review (Berkeley, Calif)

OECD, 'Most-Favoured-Nation Treatment in International Investment Law' (2004)

Paleviciene S, 'Consent to Arbitration and the Legacy of the Spp V. Egypt Case' (2014) 7 Baltic journal of law & politics

Peters P, 'Exhaustion of Local Remedies: ignored in most bilateral investment treaties' (1997) 44 Netherlands international law review

Pooley J and Harthi SA, 'A New Dawn for Foreign Direct Investment in Oman' (January 2021) The MENA Business Law Review-Special Edition: Foreign Investment Law

Porterfield MC, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2016) Vol. 41 Yale Journal of International Law online

Potesta M, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 Arbitration international

Puig S, 'Recasting ICSID's legitimacy debate: towards a goal-based empirical agenda' (2013) 36 Fordham international law journal

Reinisch A, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 Asia Pacific law review

Reinisch A, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 Journal of International Economic Law

Salacuse JW, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International lawyer

Samples TR, 'Winning and Losing in Investor–State Dispute Settlement' (2019) 56 American Business Law Journal 115

Sarvarian A, 'Problems of Ethical Standards for Representatives before ICSID Tribunals' (2011) 10 The law and practice of international courts and tribunals

Schill SW, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 Leiden Journal of International Law

Schill SW, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 Journal of international economic law

Schreuer C, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 The law and practice of international courts and tribunals

Schreuer CH, 'The World Bank/ICSID Dispute Settlement Procedures, in: Settlement of Disputes in Tax Treaty Law' (2002) Lang/Züger, eds

Schwieder RW, 'TTIP and the Investment Court system: A New (and improved?) Paradigm for investor-state adjudication' (2016) 55 The Columbia journal of transnational law

Seyadi RM, 'Understanding the jurisprudence of the Arab Gulf States national courts on the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2017) 2017 International Review of Law

Shahry SBSA, 'Enforcement of Arbitral Awards in the Sultanate of Oman' (2014) 1 BCDR International Arbitration Review

Shihata IFI, 'The settlement of disputes regarding foreign investment: the role of the World Bank with particular reference to ICSID and MIGA' (1986) 1 The American University Journal of international law and policy

Shihata IFI, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review - Foreign Investment Law Journal

Siegfried N, 'Legislation and Legitimation in Oman : The Basic Law ' (2000) 7 Islamic law and society

Spoliansky LGR, 'Modern Business Law in the Sultanate of Oman' (1979) 13 The International lawyer

Titi C, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2016) Advance publication / Regular publication forthcoming Transnational Dispute Management

Vadi V, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39 Denver journal of international law and policy 67

Valenti M, 'The scope of an investment treaty dispute resolution clause: It is not just a question of interpretation' (2013) 29 Arbitration international

Vandevelde KJ, 'A brief history of international investment agreements' (2005) 12 UC Davis journal of international law & policy

von Papp K, 'Biting the Bullet or Redefining 'Consent' in Investor-State Arbitration? Pre-Arbitration Requirements After BG Group v Argentina' (2015) 16;2015; The journal of world investment & trade

Vu D, 'Reasons not to exit? A survey of the effectiveness and spillover effects of international investment arbitration' (2019) 47 European Journal of Law and Economics

Wagner M, 'Regulatory space in international trade law and international investment law' (2014) 36 University of Pennsylvania journal of international law

Wang G, 'Consent in investor-state arbitration: A critical analysis' (2014) 13 Chinese journal of international law (Boulder, Colo)

Wang M, 'Are alternative dispute resolution methods superior to litigation in resolving disputes in international commerce?' (2000) 16 Arbitration international

Wong J, 'Umbrella clauses in bilateral investment treaties: of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes' (2006) 14 George Mason law review

Yackee JW, 'Conceptual difficulties in the empirical study of bilateral investment treaties' (2008) 33 Brooklyn journal of international law

Yannaca-Small K, 'Improving the System of Investor-State Dispute Settlement: an overview ' (2006)

Yin W, 'Domestic arbitral institutions and foreign direct investment' (2021) 21 International relations of the Asia-Pacific

Ziade NG, 'Arbitration under MENA regional investment treaties' (2017) 83 Arbitration (London, England)

Legal Documents, Working papers and Reportes

Croisant G, *Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law* (Kluwer Arbitration Blog 30 April 2019)

, *COURSE ON DISPUTE SETTLEMENT - Module 2.9. ICSID: Binding Force and Enforcement* (United Nations Conference Trade Development (UNCTAD) 10 Mar 2003)

, *Book of Oman 2020* (Ministry of Information in Oman 2020)

Alvarez JM, *How Innovative Is the EU's Proposal for an Investment Court System: A Comparison between ICS and Traditional Investor-State Dispute Settlement, Stanford-Vienna European Union Law Working Paper No. 43, at* http://ttlf.stanford.edu

Danish and Uribe D, *Research Paper 162: The proposed standing multilateral mechanism and its potential relationship with the existing universe of investor: state dispute settlement* (South Centre 2022)

Gaukrodger; D and Gordon K, *Investor-State Dispute Settlement :A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment 2012)

Group of the Progressive Alliance of Socialists and Democrats (S&D), *Position Paper on investor–state dispute settlement mechanisms in ongoing trade negotiations (4 March 2015), available at* https://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf

ICSID, *Special Features and Benefits of ICSID Membership* (ICSID publications , 5 April 2021)

ICSID, *Practice Notes for Respondents in ICSID Arbitration* (ICSID 2015)

Kituyi M, *Meeting with the Supreme Committee for Vision 2040 - UNCTAD's Science, Technology and Innovation Policy Review in Oman* (UNCTAD-Statement from the Office of the Secretary General 10 November 2014)

Park; EY and others, *Procedural Issues in an Arbitration: Disclosure* (Global Arbitration Review 14 Junuary 2022)

The Court of Justice of the EU, *C-1/17 ECLI:EU:C:2019:341 (Opinion 1/17), (30 April 2019), available at:* https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN

UNCTAD, *Best Practices in Investment for Development How to Prevent and Manage Investor-State Disputes: Lessons from Peru, Investment Advisory Series-Series B, Number 10. S. New York and Geneva: United Nation.* (United Nation 2011)

Union CotE, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes* (20 March 2018)

Williams Z, *Turkish firm, Attila Dogan Construction, makes good on earlier threat to sue Oman* (IAReporter 22 March 2016)

, *Oman Vision 2040 - Vision Decument* (Oman government)

, *Commission Implementing Decision of 9.9.2020 authorising Hungary to sign and conclude a bilateral investment agreement with the Sultanate of Oman* (European Commission 9 September 2020)

Bierbrauer E, *In-Depth Analysis: Negotiations on the EU-Canada comprehensive economic and trade agreement (CETA) concluded* (Directorate General for External Policies – Policy Department, European Parliament 2014)

Commission E, *Commission Concept Paper on Investment in TTIP and beyond – the path for reform 8555/15* (Council of the European Union 4 May 2015)

Commission E, *Commission Staff Working Document-Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (EU Commission 13.1.2015)

Puccio L and Harte R, *From arbitration to the investment court system (ICS)-The evolution of CETA rules-in-depth analysis* (European Parliamentary Research Services 2017)

Roberts A, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 The American journal of international law

, *World Investment Report 2020 (UNCTAD)*)

, *World Investment Report 2021 (UNCTAD)*)

, *World Trade Organization Trade Policy Review Report by the Secretariat-Oman WT/TPR/S/418*, 13 October 2021)

, *The Annual Report of the Cntral Bank of Oman (CBO)*, 2019)

, *The Annual Report of the Cntral Bank of Oman (CBO)*, 2020)

, *Oman Country Report (BIT Project)2020, at https://www.bti-project.org/en/reports/country-report-OMN-2020.html*, 2020)

Ameli; K and others, *European Federation for Investment Law and Arbitration(EFILA),Task Force Report regarding the proposed International Court System (ICS)*, 1 February 2016)

Bank TW, *Report of the Executive Directors of the World Bank on Settlement of Investment Disputes*)

Information NCfSa, *The Fourteenth Bulletin on the Foreign Investment Statistcs in Sultanate of Oman*, 2020)

International Bar Association AC, *Consistency, efficiency, and transparency in investment arbitration*, November 2018)

Investment Treaty Working Group Of the International Arbitration Committee ABASoIL, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal*, 14 October 2016)

Nohen A, Pohl J and Mashigo K, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, 2012)

NUCITRAL T, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (20–24 January 2020)*)

OECD, *The MENA-OECD Investment Programme -Assessing Investment Policies of Member Countries of the Gulf Cooperation Council*, 2011)

The PRS Group I, *Political Risk Yearbook: Oman Country Report*, 2020)

UNCITRAL T, *Report of the United Nations Commission on International Trade Law (NUCITRAL) Fiftieth session, A/72/17, (3-21 July 2017*)

Thesis

Al-Adba N, 'The limitation of state sovereignty in hosting foreign investments and the role of investor-state arbitration to rebalance the investment relationship' (University of Manchester 2014)

Al-Enazi MSa, 'Grounds for refusal of enforcement of foreign commercial arbitral awards in GCC states law' ([Great Britain] : Brunel University, 2013. 2013)

Al-Harthy ASH, 'The political change in Oman from 1970 : transition towards democracy' (Hull : University of Hull, 2004. 2004)

Al-Jabry KSH, 'Multilateral versus bilateral trade : policy choices in Oman' (University of Durham 2009)

Al-Maimani ASS, 'An institutional development policy framework for growth in the non-hydrocarbon sectors of Oman : a systems approach' ([Great Britain] : University of Hull, 2015. 2015)

Al-Nahdi YRN, 'Barriers to Omanisation : analysis and policy recommendations' ([Great Britain] : University of Huddersfield, 2016. 2016)

Al-Rawahi Sa, 'The right of access to a lawyer in Oman : the need for reform : critical and analytical study of the relevant provisions of the Omani Penal Procedures Code 1999' ([Great Britain] : University of Aberdeen, 2012. 2012)

Al-Siyabi MKA, 'A legal analysis of the development of arbitration in oman with special reference to the enforcement of international arbitral awards' (ProQuest Dissertations Publishing 2008)

Al Azri MSJ, 'Foreign investment in the Sultanate of Oman : legal guarantees and weaknesses in providing investment protection' (University of Leeds 2016)

Al Kindi T, 'Economic development and reform of skill formation in relation to VET : the case of Sultanate of Oman' ([Great Britain] : Cardiff University, 2007. 2007)

Al Kiyumi BM, 'The Omani Constitution: Critical Analysis' (The University of Manchester, Manchester, UK 2012)

Al Shabibi I, 'Planning for entrepreneurialism in a rentier state economy : entrepreneurship education for economic diversification in Oman' ([Great Britain] : Cardiff University, 2020. 2020)

Alenezi A, 'An analytical study of recognition and enforcement of foreign arbitral awards in the gcc states' (ProQuest Dissertations Publishing 2010)

Alsalmi HS, 'Oman's Basic Statute and Human Rights: Protections and Restrictions: With a Focus on Nationality, Shura, and Freedom of Association' (University of Manchester 2012)

Côté C, 'A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment' (2014)

Devaney M, 'The remedies stage of the investment treaty arbitration process : a public interest perspective' ([Great Britain] : Queen Mary, University of London 2015)

Joemrith Ka, 'Enforcing arbitral awards against sovereign states : the validity of sovereign immunity defence in investor-state arbitration' ([Great Britain] : SOAS University of London. 2015)

Ranjan P, 'India's international investment agreements and India's regulatory power as a host nation' ([Great Britain] : King's College London (University of London) 2013)

Wick DM, 'The Counter-productivity of ICSID Denunciation and Proposals for Change' (ProQuest Dissertations Publishing 2011)

Media Articles and Conferences

Al-Hejailan S, 'Mediation as a Means for Amicable Settlement of Disputes in Arab Countries' (Conference on Mediation , Geneva- Switzerland , March 29,1996)

Laufer NLaH, 'The 2022 ICSID Arbitration Rules - A Brief Overview' <https://www.lexology.com/library/detail.aspx?g=f466aa82-7d6c-4e82-9e96-e908ca7e1eb0>

Bohmer L, *Investor in Oman's construction sector files for annulment of still-confidential award* (IAReporter 10 Jun 2021)

Hepburn J, *Samsung files claim against Oman over refinery improvement project* (IAReporter 22 July 2015)

Jones T, *Investors takes Oman and Moldova to ICSID* (Global Arbitration Review 23 March 2016)

Review GA, *Samsung and Oman settle ICSID dispute* (GAR 22 January 2018)

Company AT, *Enforcement of Foreign Arbitration Awards in the Middle East* (SyndiGate Media Inc 2014)

, 'New headquarters of Oman Commercial Arbitration Centre opens' *Oman Daily Observer* (Oman <https://www.omanobserver.om/article/1108636/oman/new-headquarters-of-oman-commercial-arbitration-centre-opens>

, 'Tanfeedh programme to review ways to enhance investment' *Oman Tribune* (Muscat, Oman <https://search.proquest.com/docview/1820462357>

, 'Investment Treaty Arbitrations: The Evolution Of Third Party Funding' *Mondaq business briefing* (<https://go.exlibris.link/NPcWG2wH>

, 'European Union: Legal working paper no. 19: The new challenges raised by investment arbitration for the EU legal order' *Asia News Monitor* (Bangkok <https://www.proquest.com/newspapers/european-union-legal-working-paper-no-19-new/docview/2308907075/se-2?accountid=11528>

, 'Quantum leap in transport infrastructure' *Oman daily Observer* (Oman <https://www.omanobserver.om/quantum-leap-in-transport-infrastructure/>

Cannon A, 'ICSID Member States Approve Amended 2022 Arbitration Rules' *Mondaq business briefing* (<https://go.exlibris.link/nX9kYwdC>

Team OW, 'Oman Supports Mutual Protection of Investments Agreements ' *Oman Observer* (Oman <https://www.omanobserver.om/article/1102827/business/economy/oman-supports-mutual-protection-of-investment-agreements>

Commission E, *European Court of Justice confirms compatibility of Investment Court System with EU(30 April 2019), available at: Treatieshttps://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334*

Malmstrom ECfTC, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (the EU Commission Press Release 16 September 2015)

Websites and Bloges

Anwar; S and Martinez A, *Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation* (Kluwer Arbitration Blog 8 April 2021)

Curtis, *What Does The EU's Proposed "Investment Court System" Mean For The Rest Of The World?* (Curtis, Mallet-Prevost, Colt & Mosle LLP 9 December 2019)

Curtis, *New Foreign Capital Investment Law* (Curtis, Mallet-Prevost, Colt & Mosle LLP 12 Augast 2019)

Curtis, *Executive Regulations of the Foreign Capital Investment Law* (Curtis, Mallet-Prevost, Colt & Mosle LLP 19 August 2020)

Dodge; K and others, *Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?* (Kluwer Arbitration Blog 31 Junuary 2022)

Farchakh M, *The Arab Investment Court and Intra-Arab BITs: a Potential New Frontier?* (29 December 2020)

Khattar M, *Recent Investor-State Arbitration Trends in the Middle East* (Kluwer Arbitration Blog 2019)

Vaublanc JTaMVd, *The Investor-State Dispute Settlement System: The Road To Overcoming Criticism* (Kluwer Arbitration Blog, 6 August 2018)

Winnington-Ingram JWJKaLM, *Investment Court System Under EU Trade and Investment Agreements: Enforcement Issues* (Kluwer Arbitrtion Blog 29 March 2021)

, 'Arbitration (international Investment Disputes) Act 1966' (<https://www.legislation.gov.uk/ukpga/1966/41/section/2> accessed

, 'Case Details : Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman (ICSID Case No. ARB/16/7)' (*ICSID* <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/16/7> accessed

, 'Cases Database-ICSID ' (<https://icsid.worldbank.org/cases/case-database> accessed

, 'Database of ICSID Member States' (*International Centre for Settlement of Investment Disputes,* <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed

, ' International Centre for Settlement of Investment Disputes (ICSID)' (<https://icsid.worldbank.org/en/> accessed

, 'Investment - objectives of EU investment policy' (*The European Commission's trade department,* <https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en> accessed

, 'Investment Laws Navigator-Qatar Investment Law' (*United Nations Conference on Trade and Development(UNCTD),* <https://investmentpolicy.unctad.org/investment-laws/laws/314/law-no-1-of-2019> accessed

, 'Investment Laws Navigator-the United Arab Emirates Investment Law' (*United Nations Conference on Trade and Development(UNCTD),* <https://investmentpolicy.unctad.org/investment-laws/laws/320/federal-law-regarding-foreign-direct-investment> accessed

, 'Investment Volume - Foreign Direct Investment (FDI) in Oman ' (*the National Centre for Statistics and Information (NCSI) Oman* <https://www.ncsi.gov.om/> accessed

, 'Oman -Country Commercial Guides - Transportation & Logistics' (*the International Trade Administration-US,* <https://www.trade.gov/country-commercial-guides/oman-transportation-logistics> accessed

, 'Oman Commercial Arbitration Centre (OAC)' (<https://omanarbitration.om/> accessed

, 'Overview of Tender Board (the Tender Board -Sultanate of Oman) ' (<https://etendering.tenderboard.gov.om/> accessed

, 'Reform of the ISDS mechanism' (*The European Commission's trade department,* <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes/reform-isds-mechanism_en> accessed

, 'State Audit Institution: Role and responsibilities' (*State Audit Institution-Sultanate of Oman,* <https://www.sai.gov.om> accessed

, 'Summaries of EU Legislation- summary of Treaty on the Functioning of the European Union' (*European Union-EUR-Lex,* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:4301854> accessed

, 'Transatlantic Trade and Investment Partnership (TTIP) - Documents' (*EU Commission* <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en> accessed

, 'Arbitration Law in Oman – Recent Developments' (*CMS Law-Now*^{tm}*,* 10 May 2021) <https://www.cms-lawnow.com/ealerts/2021/05/> accessed

, 'The New foreign Capital Investment Law in Oman ' (*The Advisory Excellence* 18 February 2020) <https://www.advisoryexcellence.com/the-new-foreign-capital-investment-law-in-oman/> accessed

, 'DIAC takes it all: the integration of Dubai's arbitration institutions' (*CMS Law-Now™,* 23 September 2021) <https://www.cms-lawnow.com/ealerts/2021/09/> accessed

, 'Glossary of Selected Financial Terms and Definitions' (*International Monetry Fund* 31 October 2009) <https://www.imf.org/external/np/exr/glossary/showterm.asp#F> accessed

, 'Arab Political Systems: Baseline Information and Reforms – Oman 2008' (*Carnegie Endowment,* 2008) <www.carnegieendowment.org/arabpoliticalsystems> accessed

, 'Negotiations and agreements: EU-Singapore Free Trade Agreement and Investment Protection Agreement' (2018) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement_en> accessed

, 'Negotiations and agreements: EU-Vietnam Trade Agreement and Investment Protection Agreement' (2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en> accessed

, 'Global Peace Index2020' (*Institute for Economics and Peace* 2020) <https://www.economicsandpeace.org/research/> accessed

, 'A Guide to State's General Budget for Fiscal Year 2021 .Oman ' (*Ministry of Finance* 2020) <https://mof.gov.om/Portals/1/documents/Financial-reports/The-state-budget/2021/2021(Eng).pdf> accessed

, 'His Majesty Sultan Haitham Bin Tarik's Royal Speech on 23.02.2020' (*Oman News Agancy (ONA),* 2020) <https://omannews.gov.om> accessed

, 'Investment Climate Statements: Oman' (*The U.S. Department of State,* 2020) <https://www.state.gov/reports/2020-investment-climate-statements/oman/> accessed

, 'Investment Trends Monitor' (*United Nations Conference on Trade and Developmen(UNCTD),* 2020) <https://unctad.org/en/PublicationsLibrary/diaeiainf2020d1_en.pdf> accessed

, 'History ' (*Foreign Ministry of Oman* 2021) <https://fm.gov.om/about-oman/state/history/> accessed

, 'Investment Climate Statements: Oman' (*The U.S Department of State* 2021) <https://www.state.gov/reports/2021-investment-climate-statements/oman/> accessed

, 'Investment Treaty Arbitration: Oman' (*Global Arbitration Review,* 2021) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/oman> accessed

, '2021 Investment Climate Statements: Oman' (*United States Department of state* 2022) <https://www.state.gov/reports/2021-investment-climate-statements/oman/> accessed

, 'Member States of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' ( ) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed

, 'Overview on ICSID Convention' (*The International Centre for Settlement of Investment Disputes*) <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview> accessed

(UNCITRAL) UNCOITL, 'Working Group III: Investor-State Dispute Settlement Reform' (<https://uncitral.un.org/en/working_groups/3/investor-state> accessed

Commission E, 'Multilateral Investment Court project' (<https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en> accessed

Economy-Oman tMo, 'Challenges facing Agreements on The Encouragement and Reciprocal Protection of Investments' (23 .6.2021) <https://twitter.com/MOE_Oman> accessed

EU D-GfTit, 'Commission welcomes adoption of negotiating directives for a multilateral investment court' (20 March 2018) <https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en> accessed

ICSID, 'Database of ICSID Member States-Oman ' (<https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details> accessed

ICSID, 'Amendments to the ICSID Rules and Regulations' (5 April 2006) <https://icsid.worldbank.org/news-and-events/news-releases/amendments-icsid-rules-and-regulations> accessed

Lavranos N, 'Towards a binding global code of conduct for arbitrators in ISDS disputes' (6 May 2020) <https://borderlex.net/2020/05/06/towards-a-binding-global-code-of-conduct-for-arbitrators-in-isds-disputes> accessed

Martin HN, 'What Oman legal system needs today' (June 29, 2014) <https://www.linkedin.com/pulse/20140629144025-66699887-what-oman-legal-system-needs-today> accessed

Mersch Y and others, 'The new challenges raised by investment arbitration for the EU legal order' (*The European Central Bank,* 2019) <https://www.ecb.europa.eu/pub/research/legal-working-papers/html/index.en.html> accessed

OECD, 'Draft of Multinational Investment Agreement ,documents from the negotiations' (*The Organisation for Economic Co-operation and Development (OECD),* <http://www.oecd.org/daf/mai/> accessed

UNCITRAL T, 'Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States' (<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/004/19/PDF/V1900419.pdf?OpenElement> accessed

UNCTAD, 'International Investment Agreements Navigator' (*United Nation Conference on Trade and Development, Investment Policy Hub* <https://investmentpolicy.unctad.org/international-investment-agreements> accessed

UNCTAD, 'International Investment Agreements Navigator-Oman's Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions ' (<https://investmentpolicy.unctad.org/international-investment-agreements/countries/159/oman> accessed

UNCTAD, 'Investment Dispute Settlement Navigator' (*UNCTAD* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/159/oman> accessed

UNCTAD, 'Investment Dispute Settlement Navigator-Qatar ' (<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/171/qatar> accessed

UNCTAD, 'Investment Dispute Settlement Navigator - Oman - Omar Bin Sulaiman Abdul Aziz Al Rajhi v. The Sultanate of Oman (PCA Case No. 2017-32)' (<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/159/oman> accessed

UNCTAD, 'International Investment Agreements Navigator-UNCTAD' (*United Nation-UNCTAD* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed

UNCTD, 'International Investment Agreements - Issues Notes' (*United Nations Conference on Trade and Development(UNCTD),* 1 January 2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> accessed

Valentine TE, 'How are GCC legal systems viewed by Canadian courts?' (*Norton Rose Fulbright,* June 2017) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/5351f04e/how-are-gcc-legal-systems-viewed-by-canadian-courts> accessed

Xi Z, 'Consent to arbitration in international investment' (*China Business Law Journal,* 12 December 2018) <https://law.asia/consent-to-arbitration-in-international-investment> accessed

ZHAN J, 'UNCTAD's 2010 World Investment Forum: High-level experts discuss investment policies for sustainable development' (*Investment Treaty News,* 16 December 2010) <http://www.iisd.org/itn/2010/12/16/unctads-2010-world-investment-forum-high-level-experts-discuss-investment-policies-for-sustainable-development> accessed

Uncategorized References