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REMOVING NORTH FROM THE EQUATION: HOW DOES THE CONCEPT OF COLONIALITY INFLUENCE THE SOUTH-SOUTH INVESTMENT ARBITRATION?

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'Coloniality' is a term describing the arrangement of the post-colonial world, in which former colonisers are still seen as superior and their knowledge and social systems as default, while the former colonies are placed in an inferior position and continue to be dominated. When this concept is applied to the structure of International Investment Law (IIL), it is rather indisputable that the idea of equal opportunities for investors' home states and host states is heavily perpetuated by asymmetrical power dynamics, predominantly serving the interests of the capital-exporting states in the Global North.

Having acknowledged the divide between North and South in the international investment protection system, the next step forward is to examine whether the inequalities brought upon the investment regime by the coloniality mindset have also been transposed to disputes between states and investors from the Global South alike, and if so, what can be done to foster a level playing field in this regard.

This contribution seeks answers to two questions: when the North is removed from the equation, how much does the concept of coloniality resurface in IIL, and how can it be decolonised? It is further argued that the coloniality of knowledge manifests most prominently through the Investor-State Dispute Settlement (ISDS) system, and one of the ways of decolonising IIL is through the regionalisation of investment arbitration.

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I. CONCEPTUALISATION OF COLONIALITY IN LAW

Coloniality of power and coloniality of knowledge, the terms popularised by a Peruvian sociologist, Aníbal Quijano,[1] have now been considered widespread amongst scholars of regional and postcolonial studies. In conceptualising coloniality, Quijano links the notions of colonial dominance with the European perception of what is modern and/or rational, arguing that the remnants of colonialism are now observable in the arrangement of the post-colonial world, which is still hierarchically unequal.

The production of knowledge in itself is also not without purpose. It serves the dominants to control the subaltern by ascribing the beacon of objectivity to themselves – one of the many consequences of defining the colonial, European identity around the concept of hierarchy of cultures, with the West at its top, positioned as the most superior of them all. Thus, it is the West (North) that (allegedly) possesses the one true knowledge, while the South may only be the object of it, since it is perceived as culturally inferior to the West.[2] Such a perspective rejects any exchange of insights and strips the South of its credibility when shaping universal world orders, including the legal ones.[3]

Unsurprisingly, in the wake of critical legal studies, postcolonial perspectives have also been noticed. A fair share of scholarly writing,[4] has been devoted to the

[1] Aníbal Quijano, *Coloniality and Modernity/Rationality*, 21(2) CULT. STUD. 168 (2007) [hereinafter Quijano].
[2] *Id.* 174.
[3] Antony Anghie, *The Evolution of International Law: colonial and postcolonial realities*, 27(5) THIRD WORLD Q. 739, 747-749 (2006) [hereinafter Anghie].
[4] *See, e.g.*, *id.* 746-451; Luis Eslava & Sundhya Pahuja, *Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law*, 45(2) VERFASSUNG UND RECHT IN ÜBERSEE/J. L. &

interception of international law and the implications of colonialism.[5] Despite the growing inclusivity of the law-making process and amplification of voices of the 'unusual suspects' from the South (as opposed to those usually engaged in the international dealings of the Western powers and only the wealthiest non-European state actors), international law is still haunted by remnants of the chronologically direct post-colonial period. The aim of this article is thus, firstly, to argue that one of the most (or, more adequately, least) prominent examples of coloniality in international law is IIL, especially investment arbitration, and secondly, to propose an idea of a way forward for decolonisation through regionalisation.

A. COLONIALITY OF INTERNATIONAL INVESTMENT LAW

The arrangement of the post-colonial world in which the former colonisers are still seen as superior, and their knowledge and social systems as default, is most accurately reflected in the traditional design of investment promotion and protection.[6] Being a subsystem of international economic law, the foreign direct investment protection regime acts like a prism for inequalities that could generally be delineated between former colonising economies and the ones formerly colonised.[7] Further, it is a system built upon the premise of securing private capital and safeguarding commercial enterprises,[8] from what could essentially be brought

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POL. AFR. ASIA LATIN AM. 195 (2012); Sundhya Pahuja, *The Postcoloniality of International Law*, 46(2) HARV. INT'L. L. J. 459 (2005); PRABHAKAR SINGH & BENOÎT MAYER, CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM, AND TRANSNATIONALISM 123-219 (2014); Tatiana Cardoso Squeff, *Overcoming the "Coloniality of Doing" in International Law: Soft Law as a Decolonial Tool*, 17 DIREITO GV L. REV. 1 (2021) [hereinafter Squeff].

[5] Anghie, *supra* note 3, at 748 & 752 (it is sometimes proposed that the core of modern international law, the concept of sovereignty, was constructed in close relation to colonialism and until now often operates through imperialism).

[6] *See, e.g.*, DAVID SCHNEIDERMAN, INVESTMENT LAW'S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT (2022) (on critical approaches to international investment law), 12-15; M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015), 9-10.

[7] *See* Frank J. Garcia, *Globalization, Inequality & International Economic Law*, 8(5) RELIGIONS 78, 6 of 12 (2017).

[8] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 34-35 (2013) (Miles also argues that private enterprises actively partook in the making of the foundation for international investment law); *see id.* 55-76 (on the neoliberal contextualisation of international investment law as limiting state's interference).

down to an 'unstable,' 'corrupted,' or at least 'underdeveloped'[9] regimes from the former colonies. As such, since its dawn, IIL was destined to be biased towards the alien capital exporters, whilst failing to notice the perils it posed to the inviting states.

This fundamental vice is perhaps most noticeable in investment arbitration. When a dispute arises, the standard of investment protection, existing case laws, and even arbitrators themselves are more prone to lean eagerly towards the investor, diminishing the host state's chances for defence.[10] As such, host states are often exposed to the threat of paying compensation comparable to their whole spending budgets, as was the case in the dispute between Tethyan Copper v. Pakistan,[11] where the host state was ordered to pay almost as much as it was supposed to receive in a life-saving World Monetary Fund bailout a few months earlier. A few million dollars in compensation might be acceptable for a wealthy Western state. However, it is hard to imagine that less privileged nations, oftentimes battling existential threats, such as climate catastrophe or social unrest, would be willing to expedite a vast chunk of their budget to a displeased multinational corporation that won its case in a single-instance arbitration proceeding.

The description above outlines the most apparent elements of the post-colonial heritage of IIL, identifiable predominantly in agreements concluded between North (capital-exporting) and South (capital-accommodating) states. That being said, due to the rapidly globalising international economy, IIL is not a West-only

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[9] (As a side note, what is especially riveting in the concept of 'underdevelopment,' as described by Andre Gunder Frank, is its direct linkage to colonial dominance followed by the metropolis' abandonment once the exploitation becomes unprofitable.) *See* Andre Gunder Frank, *The Development of Underdevelopment*, 18(4) MONTHLY REV. 91 (1966).

[10] *See, e.g.*, Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50(1) OSGOODE HALL L. J. 211 (2012); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration*, 53(2) OSGOODE HALL L. J. 49 (2016), 49 (quantitative studies from 2012 and 2016, where a pro-investor trend was found in the arbitration proceedings); *see also*, M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 27 & 45 (2015), 27, 45 (the critique of expansionist interpretation of investment protection).

[11] Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award (July 12, 2019); *see also*, Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?*, INT'L. INST. FOR SUSTAINABLE DEV. 3 (Dec. 16, 2020), https://www.iisd.org/system/files/2020-12/compensation-investment-treaties-en.pdf.

domain anymore.[12] South-South Bilateral Investment Treaties (BITs) have been proliferating since the 1990s, successfully managing to wrap the world in a cocoon of bilateral investment obligations resembling a 'spaghetti bowl,' or, as Chaisse and Hamanaka[13] describe it in the Asian context, a 'noodle bowl' of BITs. A structural change has occurred within the catalogue of participants in the system, but how has this change affected them? How does the proliferation of South-South BITs influence the systemic power imbalance endemic to IIL? Furthermore, to what extent does the concept of coloniality resurface in IIL, and how can the system be decolonized.

Having noticed the adverse consequences of broader wording of investment protection provisions, policymakers turned to the gradual narrowing of protection guarantees by including the so-called 'local provisions,' which have become more and more popular, drawing attention to current challenges faced across the global community, such as climate change or labour laws. Some changes are visible, especially in the proliferation of the new-generation BITs, i.e., investment treaties that contain provisions regulating investment relations in a more levelled way,[14] as well as increasing incorporation[15] of Third World Approaches to International Law (TWAIL) perspectives,[16] local voices in the form of *amicus curiae*,[17] and even

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[12] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, https://unctad.org/topic/investment/international-investment-agreements. [hereinafter UNCTAD Navigator].

[13] Julien Chaisse & Shintaro Hamanaka, *The 'Noodle Bowl Effect' of Investment Treaties in Asia: The Phenomenon, the Problems, the Practical Solutions*, 33(2) ICSID REV. FOREIGN INV. L. J. 501 (2018).

[14] UNCTAD, *'International Investment Agreements Trends: The Increasing Dichotomy between New and Old Treaties'* 2 IIA ISSUES NOTE 5 (2024), https://unctad.org/system/files/official-document/diaepcbinf2024d4_en.pdf. (The new generation treaties described in this report consists of agreements that are contrary to their older counterparts and also strive to include more modern approaches to investment, strengthening States' right to regulate, reformed ideas of ISDS or even investor obligations).

[15] Laurence Boisson De Chazournes, *Environmental Protection and Investment Arbitration: Yin and Yang?*, 10 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL/COLOMBIAN Y. B. INT'L. L. 371 (2017).

[16] Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUROPEAN J.L INT'L L. 7, 32-33 (2023). (TWAIL is the part of international law scholarship devoted to the perspective of States outside of the Northern hemisphere in various sub-fields of international law, also in interdisciplinary contexts. According to Anghie, "The central TWAIL concern to understand international law through the 'lived experiences' of the Third World, continues to animate much TWAIL scholarship. (…) Broadly, TWAIL scholarship has ranged from close doctrinally oriented studies to historical, philosophical and sociological work.").

engagement of domestic justice systems. In this regard, some states themselves argue that incorporation of 'exhaustion of local remedies' as a prerequisite to international investment arbitration might assist in improving local judiciary regimes.[18] The obligations, such as the free transfer of funds, have been worded more restrictively,[19] and the general transparency of both states and investors has been promoted.[20] The newer the generation of the BITs, the more it reflects an increased consideration for sustainability in investment and allows more room for policy-making in an attempt to achieve a level playing field.[21] This shift is evidenced even by the occasional resignation from the investor-state dispute resolution system when entering into investment agreements,[22] as was the case in the Regional Comprehensive Economic Partnership,[23] or as a result of judicial activism, as observed in the Constitutional Court of Ecuador decision on the constitutionality of the Trade Association Agreement with Costa Rica.[24]

That being said, these trends are by no means universal, especially when it has become common for states to develop their own 'model BIT', a template investment treaty, offered for signature to trade partners. Nonetheless, states from

[17] Valentina Vadi, *Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration, in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 11-13 (Kate Miles eds., 2019).

[18] *See* Samantha Smit & Louis Koen, *The (In)effectiveness of Requiring Prior Exhaustion of Local Remedies in Investment Arbitration*, 45(2) OBITER 371, 373-374 (July 7, 2024).

[19] Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30(1) NW. J. INT'L. L. & BUS. 101, 123 (2010) [hereinafter Poulsen].

[20] John Beechey & Anthony Crockett, *New Generation Of Bilateral Investment Treaties: Consensus Or Divergence?, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 5, 7 (Arthur W. Rowine ed., 2008).

[21] Catharine Titi, *The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties*, INTER-AMERICAN DEVELOPMENT BANK (IDB) & INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD) – RTA EXCHANGE THINK PIECE (Nov. 7, 2018).

[22] David Toscano et al., *Ecuador's Constitutional Court Does It Again: Declaring A Treaty To Be Constitutional Only Because It Does Not Contain Investor-State Arbitration Provisions*, KLUWER ARB. BLOG (Mar. 16, 2024), https://arbitrationblog.kluwerarbitration.com/2024/03/16/ecuadors-constitutional-court-does-it-again-declaring-a-treaty-to-be-constitutional-only-because-it-does-not-Scontain-investor-state-arbitration-provisions/.

[23] *See* Andrew Lugg et al., *Why Is There No Investor-State Dispute Settlement in RCEP? Bargaining and Contestation in the Investment Regime*, 26 BUS. POL. 1, 1-2 (2024) (analysis of the Regional Comprehensive Economic Partnership).

[24] Costa Rica - Ecuador Trade Association Agreement, Costa Rica-Ecuador, Mar. 01, 2023.

the South seem inclined to follow this trend,[25] at least to a modest degree,[26] especially in key issues such as restricting the National Treatment clause.[27]

These advancements may be seen as a move against the established nature of IIL and certainly, one that should be seen as contradicting the original, post-colonial premise of this branch of international law. Thus, such advancements are not a usual occurrence in North-South investment relations, although they tend to appear in South-South BITs. For example, according to Alschner W. and Skougarevskiy,[28] African states often adopt a 'rule-taker' stance in North-South dealings, where they tend to adjust themselves to the expectations of more powerful partners, whereas in South-South treaties, they more often tend to act as 'rule-makers,' demonstrating a stronger bargaining power when drafting investment agreements, as the authors conclude, mostly when they have the required expertise on hand and coherent investment policies.

B. COLONIALITY OF INVESTMENT ARBITRATION

Despite the grave accusations as to the Neo-Colonial nature of IIL, it is considered to be in a 'legitimacy crisis' mostly due to the ISDS system,[29] as arbitration between private parties and sovereign states is, to put it in one way, simply, unfair. This 'unfairness' is multi-layered and affects states not just in accordance with their qualification as 'developed/developing' or 'North/South' but in other ways as well.

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[25] *See* Chrispas Nyombi et al., *The Morocco-Nigeria BIT: Towards a New Generation of Intra-African BITs*, 29(2) INT'L. CO. & COMM. L. REV. 69 (2018); Odysseas G. Repousis, *Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism*, 52 TEXAS INT'L. L. J. 313, 359 (2017).

[26] *Cf.* Ibironke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples*, 21 AFR. J. INT'L. & COMP. L. 172 (2013); Ana Saggioro Garcia & Rodrigo Curty Pereira, *Political Economy of South–South Relations: An Analysis of BRICS' Investment Protection Agreements in Latin America and the Caribbean*, 44(1) THIRD WORLD Q. 57 (2023).

[27] Poulsen, *supra* note 19, at 118.

[28] Wolfgang Alschner & Dmitriy Skougarevskiy, *Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice* (TDM Special Issue on Int'l. Arb. involving Commercial and Investment Disputes in Africa Working Paper No. 7, June 2016) [hereinafter Alschner & Skougarevskiy].

[29] Shuping Li & Wei Shen, *Legitimacy Crisis and the ISDS Reform in a Political Economy Context.*, 15(1) J. EAST ASIA & INT'L. L. 31 (2022); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18(4) J. INT'L. ECON. L. 861 (2015); David Trubek, Alvaro Santos & Chantal Thomas, *World Trade and Investment Law in a Time of Crisis: Distribution, Development and Social Protection, in* WORLD TRADE AND INV. L. REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 1 (Alvaro Santos eds., 2019).

Among the usually mentioned faults, there is an unmitigable inconsistency of decisions accompanied by the lack of an appellate authority,[30] deficiencies in the transparency of proceedings, and excessively far-reaching expropriation protection.[31] All of them may be together described as a 'pro-investor bias,'[32] the greatest vice of the system, which even the most developed states cannot ignore. Thus, to no surprise, there have been noticeable trends of withdrawal from investment agreements, either limited to the oldest ones (as was the case with South Africa), or, in a more radical approach, encompassing all the BITs a state was party to (as happened with Indonesia).[33] That tendency, according to data from UNCTAD Investment Agreements Navigator,[34] is attributable predominantly to the Global South, with notable exception of the EU Member States terminating their investment agreements as a result of the *Achmea* judgement. This phenomenon represents a somehow natural consequence of widespread criticism of IIL, especially in its most traditional form of the first-generation BITs.

With this in mind, there are a set of drawbacks especially targeting states with smaller budgets or which are dependent on foreign capital. Firstly, no matter the nationality of the investor (North or South), the compensation accorded may reach numbers vastly exceeding the capabilities of a state, which may already be facing other more vital expenses related to national security, health, education, or environmental crises,[35] as has happened in the aforementioned case against Pakistan. Another example of overestimation of compensation accorded can be found in the *Libyan Al-Kharafi* saga, where the arbitration tribunal counted into the final sum a significant portion of potential loss of investor's profits (without,

[30] Juan Pablo Charris-Benedetti, *The Proposed Investment Court System: Does It Really Solve the Problems?*, REVISTA DERECHO DEL ESTADO 83, 91-94 (2019).
[31] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. INT'L. ECON. L. 1037, 1049 (2010).
[32] Martti Koskenniemi, *It's Not the Cases, It's the System: M. Sornarajah, Resistance and Change in the International Law on Foreign Investment.*, 18(2) J. WORLD INV. & TRADE 343, 352 (2017).
[33] Philippa Maister, *Breaking BITs: Why Are Countries Withdrawing from Bilateral Investment Treaties?*, FDI INTELLIGENCE (Feb. 12, 2015), https://www.fdiintelligence.com/content/news/breaking-bits-why-are-countries-withdrawing-from-bilateral-investment-treaties-58811.
[34] UNCTAD Navigator, *supra* note 12.
[35] Toni Marzal, *Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS*, 22(2) J. WORLD INV. & TRADE 249, 250-251 (2021).

however, taking note of the dramatic civil war that broke out right after termination of the investment).[36]

Secondly, dependence on foreign capital is the direct cause of 'regulatory chill', a stalemate in which states refrain from changing their policies in areas of investors' interest, such as taxation, land ownership, safety and labour standards, or licensing in fear of exposing themselves to compensation claims from affected investors or discouraging future investment.[37] Although even a lost battle before the tribunal might not be the ultimate failure for the state, the tables may yet turn at the point of enforcement proceedings in domestic courts.[38] The process of dispute settlement does not end once the arbitral award is issued - to the contrary, as exemplified by domestic decisions on already mentioned Libya cases,[39] it might only be the beginning of an enforcement saga, where the tribunal's decision - seemingly impossible to overturn - might never actually come to life.

A third setback, especially worth mentioning in this piece, is the traditional composition of arbitration tribunals. From a demographic standpoint, arbitration is a Western domain, with the South greatly under-represented in the community. As has been widely acknowledged, the roster of arbitrators is limited,[40] and diversity in international arbitration is generally at a low ebb.[41] Special emphasis should be put on two factors: firstly, the arbitrators' background is inevitably connected with the investors. The so-called 'double-hatting' is not an unusual occurrence in the field, with arbitrators serving interchangeably as referees or, at other times, as counsels in investment arbitration.[42] Secondly, their academic scholarship, undoubtedly

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[36] Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others, Ad hoc Arbitration Subject to the Unified Agreement for Investment of Arab Capital in the Arab States, Final Arbitral Award (Mar. 22, 2013).

[37] *See* Paul Alexander Haslam, *The Firm Rules: Multinational Corporations, Policy Space and Neoliberalism*, 28(6) THIRD WORLD Q. 1167 (2007) (on the issue of creeping state powerlessness in policing investment).

[38] Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20(3) AM. UNI. INT'L. L. REV. 465, 515 (2006).

[39] Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others, Arab Investment Agreement, Judgement of the Court of Cassation] (June 24, 2021); DS Construction FZCO v. Libya, Judgment of the Paris Court of Appeal, No. 2017-2, 23 Mar. 2021.

[40] James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30(2) ARB. INT'L. 189, 190, 260 (2014) [hereinafter Fry and Stampalija].

[41] Kabir Duggal & Amanda Lee, *A 360-Degree, Kaleidoscopic View of Diversity and Inclusion (or Lack Thereof) in International Arbitration*, 33(1) AM. REV. INT'L. ARB. 2-3 of 19 (2022).

[42] Thomas Dietz et al., *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26(4) REV. INT'L. POL. ECON. 749, 756 (2019); Jeffrey Dunoff et al.,

valuable, although written in a certain post-colonial context and produced in predominantly Western institutions, strongly suggests their stance on particular issues in ISDS, which is intricately scrutinised by the appointing parties.[43] Thus, it is instrumentalized as a way of promoting themselves in the field,[44] as their writings constitute a representation of their views and allow for at least a preliminary assessment of their stance in a particular case.

Further, a 2016 study,[45] found a correlation between arbitrators' nationality and professional background, concluding that investors' chances at favourable decisions increased significantly when the tribunal president was linked through nationality to an advanced economy and had worked for the government. This is, of course, not to say that arbitrators do not act independently and to the best of their abilities, but rather to pinpoint certain natural biases they may have in dealing with their work.

Considering all of the above, it is evident that the South states are put in a rather precarious position in the ISDS system. Being politically and financially dependent, they are on the unfavourable side of arbitration, which is already biased systematically in favour of their opponents.

II. REGIONALISATION OF INVESTMENT ARBITRATION – A NEW PATH FORWARD?

As showcased in the previous section, many a vice of the arbitration system stems directly from its unsuitability for states without much leverage. It should not come as a surprise that at the time of designing its structure, ISDS was being built on the premise that the power imbalance between disputing parties leans in favour of the state while letting the investor's bargaining power sneak unnoticed. Simultaneously

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Lack of Independence and Impartiality of Arbitrators, University of Amsterdam (2019) (Dunoff et al. claim, however, that the practice of double-hatting is not that widespread).

[43] Michael Waibel, *Arbitration Selection. Towards Greater State Control*, *in* REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 333, 344 (Andreas Kulick ed., 2017). *See* also Fry and Stampalija, *supra* note 40, at 226-227 (on the unsuccessful arbitrator challenge motived by the opinions presented in their academic contributions).

[44] Bryant Garth, *One Window into the State of Insiders' Arbitration Scholarship,* 19(1) J. WORLD INV. & TRADE 155, 158 (2018) (The author describes the reviewed volume as a particular kind of advertisement: "What is actually published in the book is then a kind of advertisement for what each author represents. One way to advertise is to demonstrate insider knowledge. Another way is to market what one represents.").

[45] Anton Strezhnev, *Detecting Bias in International Investment Arbitration*, SEMANTIC SCHOLAR (Mar. 12, 2016).

to cultivating this omission, a centralised system of arbitration was developed, prompted by the Washington Convention,[46] and the establishment of the International Centre for Settlement of Investment Disputes (ICSID), as well as the development of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,[47] and engagement of the Permanent Court of Arbitration (PCA) in the resolution of investor-state conflicts.

This global, semi-institutionalised system has been subject to heavy critique, strongly linked to general allegations concerning biases and transparency issues that have already been mentioned in the previous paragraphs. In addition to the well-known and exhaustively written texts on disadvantages, yet another dimension of the global investment arbitration system should be pinpointed, i.e., the inadequacy stemming from its universality. Washington-based ICSID or the PCA in the Hague are located in the centres of the Global North business and politics, bringing together arbitrators, counsels, and policymakers who naturally belong to a Western background. The distance from South states is thus visible not only geographically, but also in the pro-investor mindset, costly and time-consuming proceedings, and high financial compensations accorded.

A. 'DEFAULTNESS' AND UNIVERSALITY OF EXISTING SYSTEM

It is perhaps the distance, literally and figuratively, that puts the South host states in a more vulnerable position. What might be perfectly understandable and adequate in dealings between developed, wealthy, and democratic Western host states and their equally affluent, capital-transferring entrepreneurs may not work when the economic standing of a state is nowhere equal to that of the investor. Since the primary decision-making process takes place in the North, the challenges the South faces become unnoticed, and no due attention is directed at their regulatory needs and priorities, oftentimes misunderstood as discrimination,[48] and unjustified expropriation,[49] or lack of fair and equitable treatment.[50] A universal,

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[46] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 8359 [hereinafter ICSID Convention].

[47] Rep. of the United Nations Commission on International Trade Law, Fifty-fourth Session, Annex IV, UNCITRAL Expedited Arbitration Rules, U.N. Doc. A/76/17 (2021).

[48] *See, e.g.*, Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, (Sept. 18, 2009) (in this case, an attempt at stimulating the local Mexican sugar cane industry resulted in a multimillion-dollar claim by an American foreign investor).

[49] *See, e.g.*, Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000) (in this case, the introduction of regulatory measures aimed at the protection of the natural environment, resulting in the halt of the construction of a landfill, was considered indirect expropriation).

centralised system of arbitrating disputes is not only more prone to neglect challenges which the South faces in terms of preserving the environment and combating climate change, maintaining control over critical sectors of the economy, or ensuring national security but also fails to notice the exploitative potential of capital-transferring private investors.

South's accession to the universal system,[51] is partially, of course, attributable to obvious and non-omittable technical reasons, such as know-how on drafting effective rules or organisational and spatial capabilities. It should also be perceived as adding to the general investment attractiveness of South states, as it grants the investors access to the presumably impartial dispute resolution system that cannot be influenced by public officials of the host state (as could be the case in the instance of resolving conflicts in domestic courts).[52] It could also positively affect the fulfilment of good governance standards of respective states.[53] Additionally, for the better half of IIL's existence, there has been no alternative to ICSID that could gain as much credibility and popularity, with a notable exception of UNCITRAL Rules and arbitration services offered in the PCA. Only recently, the European idea of a centralised investment court has been raised; however, it seems prone to many risks - for example, Charris-Benedetti,[54] points at the threat of re-politicisation of the system,[55] predicts a decrease in award quality,[56] and delays in

[50] *See, e.g.*, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/03/19, Award (Apr. 9, 2015) (in this case, the means of protection from severe financial crisis were considered a breach of treaty fair and equitable treatment obligations).

[51] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, DATABASE OF ICSID MEMBER STATES, https://icsid.worldbank.org/about/member-states/database-of-member-states (more than a hundred South states are part of the Washington Convention).

[52] Christoph Schreuer, *Do We Need Investment Arbitration?, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 879, 888 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) [hereinafter Schreuer].

[53] *Id.* 882.

[54] Juan Pablo Charris-Benedetti, *The Proposed Investment Court System: Does It Really Solve the Problems?*, 42 REVISTA DERECHO DEL ESTADO/ State L. J. 83, 106-111 (2019).

[55] Since MIC is supposed to be a court (as opposed to arbitration tribunal), the dilemma of biased arbitrators is replaced by the dilemma of judges appointed by the political stakeholders. As such, the aim of safeguarding neutrality in dispute settlement will not be achieved. Instead, it might be swayed way too far to accommodate only States' interests. *Id.* 106-107.

[56] This prognosis is also directly related to the transition from arbitration to judicial proceedings, since instead of appointment of experts in the specific field, the case will be decided by randomly chosen judges from the court's pool. There is also little anticipation

proceedings,[57] as well as poses a question of their enforceability.[58] From this standpoint, the turn to North-led investment arbitration is thus understandable.

Let us then circle back to the introductory remarks on coloniality. "Knowledge is not innocent but profoundly connected with the operations of power," writes Loomba, in her renowned work *Colonialism/Postcolonialism*.[59] Indeed, the ability to forge knowledge and accord it the quality of truth is a crucial factor in bending the global order to one's needs and aims. It has to be noticed that the arrangement of the dispute settlement system is heavily reliant on West's knowledge dominance. It is Europe (and North America) that provides the world with arbitration rules,[60] for arbitrators to decide on cases,[61] venues to conduct the hearings,[62] and even counsels to advise parties to the dispute.[63]

The under-representation of the South in all of these dimensions ought to be traced back to the notions of colonialism in law, as one of the most pronounced displays of coloniality of IIL. It is evident that the ISDS system, developed under the auspices of states looking towards profiting from the export of capital to their

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of sufficient costs being allocated for this project, making the top figures less likely to join the court. *Id.* 107-108.

[57] Due to introduction of the possibility to appeal. This delay will also naturally increase the overall costs of dispute settlement. *Id.* 108-19.

[58] This issue, more technical in nature, stems from current lack of suitable international law tools to enforce such decisions, since the ICSID Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) concern arbitral awards (as opposed to court rulings). *Id.* 110.

[59] ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 43 (3rd ed. 2015) (1998).

[60] *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ABOUT ICSID https://icsid.worldbank.org/About/ICSID.

[61] *See* ANNUAL REPORT, 20-21 ICSID, https://icsid.worldbank.org/sites/default/files/publications/ICSID-AR2024-WEB.pdf (in the last ICSID fiscal year, arbitrators from Western Europe and North America (including Mexico) accounted for 58% of all arbitrator appointments, with the top five nationalities being the United States of America, the United Kingdom, France, Canada, and Germany).

[62] *See 2021 International Arbitration Survey: Adapting arbitration to a changing world*, at 6 WHITE & CASE LLP, https://www.whitecase.com/sites/default/files/2023-05/qmul-international-arbitration-survey-2021-web-single-final-v3.pdf (ICSID proceedings predominantly take place in Washington, D.C., while the PCA is located in The Hague. According to this 2021 survey, the top five arbitration seats are London, Singapore, Hong Kong, Paris, and Geneva).

[63] *See, e.g.*, LAW FIRMS, ARBITRATORS & ARBITRATION CENTERS – ISDS, https://isdslac.georgetown.edu/law-firms-arbitrators-centers-2/ (this is a ranking of law firms and arbitrators hired in investment arbitration by the Center for the Advancement of the Rule of Law in the Americas at Georgetown University).

former dependencies, has become the default by its presumed universality. A touchstone of ISDS design, the current model of dispute resolution was to either be implemented fully or truthfully copied onto smaller institutions.[64] It was a purely Northern development, built on what it took for the objective knowledge of mechanisms of international investments, economic data, and legal scholarship while disregarding the expertise and needs of the South. And yet, its current prevalence proves that what was designed by only the wealthy regions of the world, has become a universal system.

The negligence in inclusion of Southern perspectives is observable not only in dealings between the North and the South, but can also be noticed in South-South disputes. This occurrence stems from the universality of the system described above: those disputes are still decided upon in the global centres by arbitrators from the North with backgrounds in the Northern academia. It is the ultimate symptom of the coloniality of knowledge in IIL, the prevalence of well-established Western know-how, even in instances where the traditional political power imbalance (coloniality of power) between (former) metropolis and colony does not apply. An interesting exemplification of this argument is the study of negotiation powers. Some scholars[65] argue that investment agreements between the South states, or states considered to be still 'developing,' often follow the same pattern as their original North-South counterparts; there always is a stronger party, with more bargaining power, that will be able to dictate pro-investor provisions. It should be

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[64] *See, e.g.*, Unified Agreement for the Investment of Arab Capital in the Arab States, League of Arab States, Economic Documents, No. 3 (Sept. 7, 1981); Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, General Secretariat of the Organisation of Islamic Conference, June 5, 1981 (entered into force on Sept. 23, 1986) (the above-mentioned agreements are some of the examples to show the self-contained dispute settlement systems in regional multilateral agreements. Although they provide for independent adjudication bodies, respectively the Arab Investment Court and the OIC dispute settlement organ, their structures closely resemble the UNCITRAL Arbitration Rules and the ICSID Rules); *see also* MOHAMED S. ABDEL WAHAB & KABIR DUGGAL, THE RESURGENCE OF THE UNIFIED ARAB INVESTMENT AGREEMENT AND THE ORGANISATION FOR ISLAMIC COOPERATION INVESTMENT AGREEMENTS: A DAWN OF A NEW CHAPTER ON INVESTMENT PROTECTION? 1, 2-7 (2022).

[65] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 92 (2013); Alschner & Skougarevskiy, *supra* note 28, at 17-19 (presents similar conclusions on power asymmetries, determining that expert knowledge provides for more bargaining power. The issue of actual provisions seems, however, more nuanced, as sometimes 'rule-makers' will advocate for provisions that will in fact attract investors, instead of preparing the ground for exporting capital, for example, the case study of Mauritius).

also noted, however, that there are also notable examples of redefining IIL by the Southern states. It is visible when scrutinising the newest South-South BITs; for example, the 2019 Brazil-Morocco agreement stipulates that investors are obliged to adhere to various corporate responsibility standards and contribute to the sustainable development of the host state.[66] However, that change is also observable in the research produced, with leading centres being institutions outside of Europe and North America, such as the Centre for Trade and Investment Law in India or the National University of Singapore.

The legal and socio-economic knowledge of the South, especially on the adverse effects of too far-reaching leniency towards foreign direct investments, is widely neglected and not attributed the significance it deserves. Therefore, universal modes of dispute settlement are the enunciation of coloniality, promoting hegemonic, Euro-centric knowledge and as such, this European universalism rejects any other contribution (and especially those that could come from their former colonies).[67] Were the ICSID system acquainted with the issues and needs of the South, it could have been designed as an actual global means of dispute settlement. However, to no avail, apart from being detrimental to the developing communities in the ways described above, such an arrangement significantly hinders the establishment of a fair and balanced ISDS regime. Holding on to the default, the ICSID-based structure cannot facilitate this progress, and failure to accept that will result in further deterioration of international investment protection and promotion generally.

Notwithstanding all of the above, it is not the aim of this paper to bring down investor-state arbitration as a whole. The idea of investment enhancement through international legal instruments is not in itself wrong. Overall, it does constitute an indispensable element of the international investment protection system, and although it requires reform, it should not be relinquished entirely.

B. DECOLONISATION AND LOCALISATION OF FUTURE SYSTEMS

A solution to the coloniality-infused dominant system is rather simple: to exchange universal for regional. Giving way to shape the ISDS so that it would suit the local paradigms of law and economy would allow regional scholars and practitioners to come up with ideas that actually correspond to the specific contexts of their investment policies and goals. Further, it could contribute to the general decolonisation of IIL, since it is decolonisation that makes room for the

[66] *See, e.g.*, Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Kingdom of Morocco, Braz.-Morocco, art. 13, (June 13, 2019).
[67] Squeff, *supra* note 4, at 12.

deconstruction of the European universalism and shifts the focus on the subaltern.[68]
There are several regional institutions in place established to facilitate local arbitration, such as the Arab Investment Court, the Cairo Regional Centre for International Commercial Arbitration, the Hong Kong International Arbitration Centre, and the Centro de Solución de Conflictos in Panama. Although they specialise mostly in commercial arbitration (except for the Arab Investment Court, which is, as the name suggests, devoted entirely to investment disputes),[69] their establishment proves that there is sufficient infrastructure to regionalise ISDS.

With that already in place, the transfer of dispute resolution to regional institutions could facilitate the development of local approaches to local issues and would accord greater flexibility and sustainability in adjudicating disputes between the Southern states and investors. Hence, exploration of regional dimensions of investment protection and development of local standards, guarantees, priorities, and principles could begin, ultimately resulting in reshaping the ISDS structure and mitigation of setbacks presented in previous paragraphs. With the reduction of geographic distance between the tribunals and the parties to the dispute, a more in-depth analysis of region-specific circumstances could take place; interests would be balanced, and South scholarship on investment issues would develop. It is, anyway, one of the most possible outcomes of IIL evolution yet; perhaps a further reformed unification of ISDS will not take place anyway, and the fragmentation of the system will only deepen.[70]

Local dispute settlement centres would play a pivotal role in the dissemination of newly produced case law and attract scholars and practitioners from the region, serving as an expert hub. With the development of endemic expertise in investment dealings, both regional investment policies and investors'

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[68] *Id.* 13.
[69] *See* Walid Ben Hamida, *The First Arab Investment Court Decision*, 7(5) J. WORLD INV. & TRADE 699, 707 (2006); *see* Julia Sochacka, *Arbitration That Barely Was: Investor-State Dispute Settlement in the OIC Investment Treaty*, 21(2) MANCHESTER J. INT'L. ECON. L. 153 (2024) (despite it being devoted solely to investment disputes, the Arab Investment Court was designed to originally be a temporary solution until the Arab Court of Justice is established. Moreover, it is not the only regional ISDS initiative. The Organization of Islamic Cooperation's multilateral investment agreement from 1981 also stipulates establishment of its own arbitration system, the 'organ for settlement of disputes.' However, it is yet to become operational. Regrettably, both these institutions are not granted sufficient attention from scholars and practitioners alike, making them a rather obsolete instrument in need of revival).
[70] *See also* José E Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. FOREIGN INV. L. J. 253, 275 (2021).

entrepreneurial strategies could be adjusted to mutually benefit each other, without the exploitative undertones prevalent in Western thinking about doing business in the South. In short, removing the North from the equation would facilitate a breakthrough in the coloniality of knowledge in the sphere of IIL.

The solution proposed above is directly opposite to one of the most popular reform options suggested in both the academic and political forums: the Multilateral Investment Court (MIC). Despite the apparent differences, the proposal for a court stems from similar concerns regarding investment arbitration as the regionalisation of dispute settlement. Put forward by the European Commission, the proposal is a result of discussion on safeguards, case-law consistency, appellate mechanisms, high costs, and transparency of the system.[71] A lot of critique has been directed towards the idea of replacing the existing arbitration system with an actual judiciary institution, portraying the solution as giving rise to anti-investor bias.[72]

Although the comparison of the MIC and regionalised dispute settlement system exceeds the scope of this paper, some of the most prominent differences should be acknowledged. Firstly, the structure of the MIC makes it fall within the category of international courts, which would require the establishment of a permanent seat,[73] with a whole new infrastructure,[74] and a list of supplementary international agreements to provide for jurisdiction *rationae voluntatis*.[75] Regionalising the

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[71] Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Document Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention establishing a Multilateral Court for the Settlement of Investment Disputes, at 11-15, SWD (2017) 303 (Sept. 16, 2024).

[72] Amina Akperlinova & Kasper Jastrzebski, *Reforming Investor-State Dispute Settlement: The EU Multilateral Investment Court Perspective*, 11(1) J. INV. MGMT. 1, 7 (2022).

[73] The need for a permanent seat naturally stems from the idea of one uniform institution and professionalisation of the adjudicative role. As a side note, since the proposal has been put forth by the European Union, it would be reasonable to expect that the organisation would also lobby for the seat being located within its borders. Even if that would not be the case, practice shows that international courts designed to accommodate disputes from all over the world tend to be located in the north nonetheless: the International Court of Justice, the International Criminal Court, the International Residual Mechanism for Criminal Tribunals, and the Permanent Court of Arbitration all have their seats in The Hague; the International Tribunal for the Law of the Sea is based in Hamburg; and the Appellate Body of the World Trade Organisation is located in Geneva.

[74] For example, the premises.

[75] MARC BUNGENBERG & AUGUST REINISCH, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT: OPTIONS REGARDING THE INSTITUTIONALIZATION OF INVESTOR-STATE DISPUTE SETTLEMENT

arbitration does not require any of the above; the necessary institutions already exist, and they can accommodate disputes under multiple variations of arbitration rules, such as the UNCITRAL Rules. Referral to regional centres, as the best-case scenario, would only depend on the willingness of the parties or an amendment of the ISDS clause in investment treaties, thus limiting costs incurred and time spent on the preparation of the infrastructure.

Secondly, while the MIC seeks to counter pro-investor bias, its strong emphasis on state-led settlement proceedings may fall short of addressing the broader challenges of the international investment system. At the same time, this approach risks alienating investors to such an extent that they might altogether avoid engaging with the mechanism. As has been shown in the previous sections of this paper, arbitration is indeed the weakest point in levelling the playing field between states and investors; however, it is not the core of the issue but rather its most apparent symptom. Albeit the MIC could aid in alleviating the adverse effects of dispute settlements, it cannot cure the underlying colonial assumptions of international investment law since it is to be expected that cases would be fewer (due to organisational reasons) and case laws would lack diversified perspectives (since the number of judges would also be limited).

Upholding the traditional investor-state arbitration alongside making it more adjusted to local circumstances could potentially have a better chance of preserving the trust of the investors. Furthermore, multiple centres producing investment case law could positively influence the development of IIL doctrine as a whole, facilitating a pluralistic discussion and leading to systemic changes in the investment agreements.

Finally, recognising the importance of the incorporation of TWAIL perspectives into the design and development of international law, it should be noted that another push at centralisation of international disputes would enable wealthy (and, naturally, the North) states to once again overpower their less privileged counterparts while also exacerbating doubts as to the success of returning the voice and strengthening the bargaining power of the South. Overall, the idea of MIC is yet another proposal for a universal default system, which, as has been proven in the sections above, cannot go in line with the effective decolonisation of international investment law.

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194 (2nd ed. 2018) (in a comprehensive study of the proposal, Bungenber, and Reinisch suggest at least ten treaties and secondary legislation that would need to be produced and agreed upon in order to accommodate the works of MIC).

III. CONCLUSION

'Coloniality' is a term describing the arrangement of the post-colonial world, in which former colonisers are still seen as superior and their knowledge and social systems as default, while the former colonies are placed in an inferior position and continue to be dominated. When applying that concept to the structure of IIL, it is rather indisputable that the idea of equal opportunities for investors' home states and host states is heavily impacted by asymmetrical power dynamics, predominantly serving the interests of the capital-exporting states in the Global North. Having acknowledged the divide between the North and the South in the international investment protection system, the next step forward is to examine whether the inequalities brought upon the investment regime by the coloniality mindset have also been transposed to disputes between states and investors from the Global South alike.

This short contribution sought to investigate whether the harmful colonial undertones of IIL are found also in investment relations between Southern states. As argued in previous paragraphs, the detrimental paradigm of capital's prevalence over public interest remains in South-South investment dealings, its most prominent exemplification being the ISDS system. Universal, ICSID, and UNCITRAL-based investment arbitration regimes embody the coloniality in IIL, especially the Northern appropriation and instrumentalisation of knowledge.

There is, however, a potential remedy to dispose of the colonial residue in IIL. As it is proposed in this article, decolonising the default, universal ISDS system should commence with localising the resolution of disputes. The transfer of proceedings to regional arbitration centres will facilitate the development of regional approaches to investment disputes, with due regard given to public interests, local communities, and sustainable development.