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Ameliorate Investor-State Dispute Settlement (ISDS) Transparency exigences for Developing Nations: A Holistic Evaluation Utilizing a Pakistan Case Study

Aatir Zeeshan, Adil Mehmood Malik, Nosheen Zartaj
School of law and policy, University of Management and Technology, Pakistan

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Abstract
The opacity of Investor-State Dispute Settlement (ISDS) procedures has drawn Critique, especially in relation to poor countries like Pakistan. A crucial but controversial process in international investment agreements, Investor-State Dispute Settlement (ISDS) has been beset by structural problems that compromise fairness, openness, and just governance. The inherent bias towards foreign investors, disrespect for host state sovereignty, and failure to fulfill sustainable development imperatives are all exposed in this paper's critical study of ISDS. The report exposes the terrible financial, legal, and reputational costs of opaque ISDS procedures on developing countries through the prism of Pakistan's expensive Reko Diq and Karkey arbitration disputes. It calls for drastic changes to overthrow the current system and criticizes the ad hoc tribunal system for sustaining conflicts of interest, erratic decisions, and excessive financial obligations. The paper examines potential Artificial Intelligence (AI) can be used to unify and enhance transparency in ISDS processes, with a focus on Pakistan's experience in the Reko Diq case. The proposed revisions to seek strike a balance between protection of investor and the host state's authority to govern in the public interest by incorporating sustainable development goals and empowering local stakeholders. This study emphasizes how urgently ISDS governance needs to change to a model that eliminates exploitative behaviors, puts inclusion first, and is in line with international development goals. In order to promote responsible investment and preserve economic sovereignty, it urges governments, international organizations, and civil society to work together to rethink ISDS as a just, efficient, and equitable system. ISDS will continue to be an instrument of injustice, sustaining inequality and impeding the advancement of weaker countries, unless it is addressed with courage and decisiveness.

Keywords
Investor-State Dispute Settlement (ISDS), Arbitration dispute, Artificial Intelligence, Openness, Sustainable development, Local stakeholders, Exploitative behaviors

Corresponding Authors: aatirzeeshan1442@gmail.com;

1. Introduction

Investor-state dispute settlement (ISDS) is a legal mechanism that gives multinational firms a place to mediate a disagreement between a corporation and the host country outside of the native judicial system.[1] Before the introduction of ISDS, a disagreement between a foreign person or business and a host nation would be resolved by the host nation's domestic judicial system. The ISDS regime has generated a great deal of controversy regarding its legitimacy and transparency, primarily because it has been accused of being biased in favor of foreign investors by giving them extensive rights while neglecting to sufficiently address host state rights in terms of public interest government regulation.[2] Investor-state conflict remedies are

[1] Christoph Schreuer, Investment Disputes, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 22 (Rüdiger Wolfrum ed. 2010).

[2] Ali, Nilfat. "Backlash Against ISDS: A Case for a Sustainable Development Approach to Investment Arbitration for Developing Countries." *African Journal of Commercial Law* 1.1 (2019): 49-76.

common as a result of the widespread use of International Investment Agreements (IIAs). Currently, 2,222 of the 2,841 Bilateral Investment Treaties (BITs) that have been signed worldwide are in effect. On November 25, 1959, Germany and Pakistan signed the first Bilateral Investment Treaty (BIT). New Zealand and the United Arab Emirates recently signed a pact on January 14, 2025. Pakistan has signed 53 Bilateral Investment Treaties (BITs) with other nations. The most recent one was with Bahrain, which was signed on March 13, 2014, and went into force in 2015.[3] By invoking treaty violations, investors can unilaterally start legal action against the host government in an international arbitration tribunal under the investor-state dispute settlement system (ISDS) option, circumventing national courts. Since Pakistan and Germany signed their first bilateral investment treaty on November 25, 1959, provisions for ISDS have become essential parts of IIAs. Most investment treaties contain provisions that, in the event of a dispute between the investor and the host nation, provide for an arbitration agreement. Other mechanisms, such as litigation in the host nation's national courts or various procedures resolved by each party to the dispute, may also be included. Recognizing the necessity for impartial, objective, transparent, and effective dispute resolution, IIAs provide their foreign investors with recourse in international arbitration against host governments for noncompliance with investment discipline.

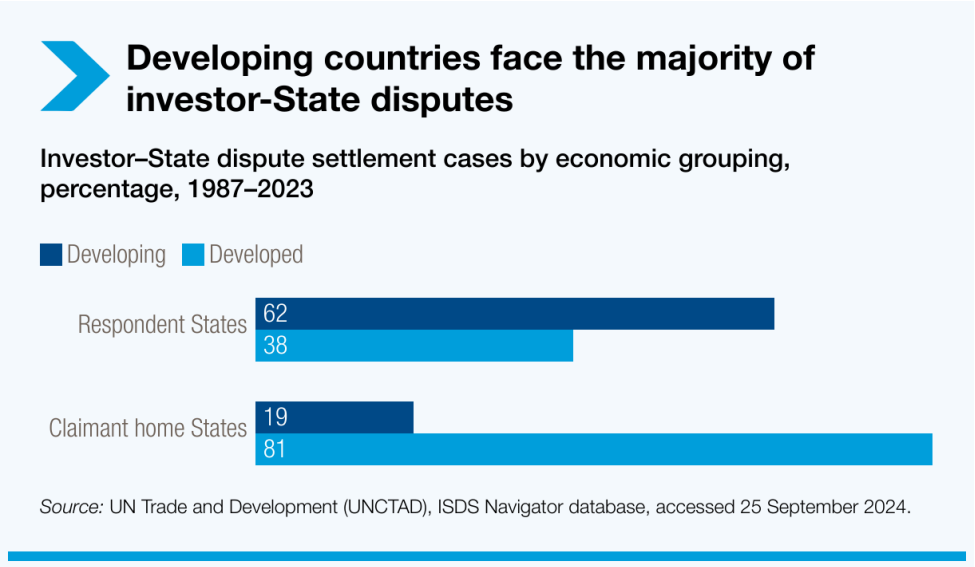
1.1 Adversities Faced by Developing Nations and Fostering Transparency

Numerous political and economic barriers prevent developing countries from growing and stabilizing. The rise of investor-state conflicts, which are frequently started by claimants from wealthy nations, is one of the most important problems. With 60 new arbitrations initiated in 2023 alone, there are now 1,332 investor-state dispute settlement (ISDS) cases based on investment treaties. Developing countries are mostly involved in these disputes, underscoring the legal and financial challenges these states confront when handling international investments.[4] Approximately a third of all conflicts involve the energy supply and mineral extraction industries, making them one of the sectors most commonly involved in ISDS cases. Financial services, construction, and manufacturing also trail closely behind. Astonishingly, by the end of 2023, investors had filed 235 ISDS lawsuits about fossil fuels, but at least 123 instances involved investments in renewable energy. These legal disputes put a significant financial load on poor countries and frequently result in settlements that deplete national resources.[5]

[3] UNCTAD, Investment policy agreements, available at https://investmentpolicy.unctad.org/international-investment-agreements , accessed on 23-01-2025.

[4] UNCTAD Facts and figures on investor–State dispute settlement cases available at https://unctad.org/publication/facts-and-figures-investor-state-dispute-settlement-cases?utm_source accessed on 23-01-2025.

[5] Ibid.



The absence of transparency in governance frameworks and agreements of investment is one of the main causes of these disputes in developing countries. Strong legal safeguards to defend domestic economic interests against influential foreign investors are lacking in many nations. Furthermore, murky procedures used to negotiate investment treaties may produce disadvantageous terms, making countries open to abuse. Fair negotiations, the defense of national interests, and the avoidance of legal challenges that deplete financial resources all depend on more transparency.[6] Enhanced regulatory frameworks, open investment policies, and multilateral collaboration are all necessary for developing countries to meet these problems and strike a balance between national sovereignty and investor rights. These nations can safeguard their economic interests and promote a more fair investment climate that promotes sustainable development by increasing accountability and openness. [7]

The Reko Diq and Karkey instances demonstrate Pakistan's substantial financial obligations in international arbitration. When the government of Pakistan's Balochistan refused to provide a mining lease to Tethyan Copper Company (TCC), a joint venture between Barrick Gold and Antofagasta, the Reko Diq conflict began. TCC claimed violations of the Australia-Pakistan Bilateral Investment Treaty and filed an arbitration under ICSID.One of the biggest arbitration wins in the world, the $5.976 billion award from ICSID against Pakistan in 2019 included $4.08 billion in damages and $1.87 billion in interest. The case highlighted the absence of cler procedures and poor governance in Pakistan's mining industry. Barrick Gold was able to resume the project in 2022 after reaching a settlement, preventing additional financial harm.[8]

In the Karkey case, a Turkish business was hired to handle an energy crisis in 2008 as part of Pakistan's Rental Power Projects (RPPs) program. Alleging corruption, the Supreme Court of Pakistan halted RPP

[6] Sergio Puig, Anton Strezhnev, The David Effect and ISDS, *European Journal of International Law*, Volume 28, Issue 3, August 2017, Pages 731–761, https://doi.org/10.1093/ejil/chx058

[7] Ibid.

[8] Reflections on Tethyan Copper v Islamic Republic of Pakistan *LSE Law Review*, available at https://lawreview.lse.ac.uk/articles/515/files/submission/proof/515-1-2782-1-10-20230313.pdf. Accessed on 25-01-2025.

contracts in 2012 and imprisoned Karkey's power ships. Citing violations of the Pakistan-Turkey Bilateral Investment Treaty, Karkey sought arbitration under ICSID. Karkey was granted $1.2 billion in damages by ICSID in 2017. In 2019, Pakistan achieved a settlement that avoided full payment. These cases demonstrate the expensive expenses of arbitration, which include damages, interest, and legal fees, in addition to harm to the state's reputation. To avoid such disagreements, they stress the vital necessity of strong regulatory frameworks, openness, and risk reduction in contract design. In the past 10 years, the number of treaty-based investor-State dispute settlement (ISDS) cases has more than doubled.[9]

A State's attempt to highlight the legitimacy of its commitment to its international investment agreements must include the ISDS. About 93% of treaties are resolved through bilateral agreements, which include provisions for international arbitration. Investors may receive financial or other compensation if a nation is determined to have broken its end of a negotiated pact. The relevance of the ISDS's distinctive status should not be overstated, even though it is sometimes seen of as an odd and unique adjudication system in comparison to other organizations (WTO, IMF, UNCTAD, and GATT) established under various areas of international law. [10] Numerous additional organizations have peculiar approaches since the area of international conflict settlement bodies is so vast and diverse. A single or a few institutional models that represent a consensus on best practices do not govern international conflict resolution. In its place, other institutional designs have developed that take into account historical circumstances as well as relevant political and subject areas.

1.2 Revamping the Current ISDS Mechanism for a Better Future

Unfortunately, ISDS creates adverse externalities in its current form, which can jeopardize international efforts to promote sustainable development. Through ISDS, foreign investors can legally challenge national sustainable development legislation and seek compensation based on accusations of discrimination and expropriation. For instance, the Canadian methanol manufacturer Methanex sued the United States for an executive order issued by the governor of California to gradually remove a methanol-based gasoline additive in the state, and the French company Veolia sued Egypt for raising the minimum wage in Alexandria. Philip Morris v. Australia and Vattenfall v. Germany are two notable instances involving legislation for the protection of public interests that have recently increased in number and been published.[11] Have influenced attracting public attention to the system. Together with some states' notable rejections of ISDS, including Australia, South Africa, and India, activists' mistrust of "Non-Government Organizations (NGOs)" like Corporate Europe Observatory (CEO) and the Transatlantic Trade and Investment Partnership (TTIP) has grown. Many concerns associated with the current ISDS system have surfaced in recent years. Government representatives and civil society have vehemently attacked the system worldwide. The primary complaints include inconsistencies in the decision-making process and some arbitral tribunals' inadequate consideration

[9] Proceeding, Annulment. *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*. Diss. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 1918.

[10] Dimitropoulos, G. (2018). Investor–State Dispute Settlement Reform and Theory of Institutional Design. *Journal of International Dispute Settlement*, *9*(4), 535-569.

[11] Eliason, A. (2018). Evidence Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform. *Geo. J. Int'l L.*, *50*, 1.

of the host state's regulatory authority when interpreting an IIA[12], issues with arbitrators' lack of impartiality, restrictions on the tools used to control arbitral tribunals and ensure the accuracy of their rulings, and rising fees for settling investment disputes. These factors have led to a robust response to the ISDS, with some nations leaving the current system, changing their real investment disciplines, and exploring alternative strategies for reforming investment disciplines at different levels. It is pertinent to note that the ISDS reform is currently a part of the framework of a number of international organizations, including the "Organization for Economic Cooperation and Development (OECD)" and the "United Nations Conference on Trade and Development (UNCTAD)." The USA, EU, "Association of Southeast Asian Nations (ASEAN)," and China are some of the powerful parties to IIAs contracts.[13] ISDS can be changed to incorporate sustainable development principles and steer clear of the current system's potentially dire social and environmental effects in order to lessen these negative externalities. Three main concerns should be addressed by an ISDS reform: investor responsibility, local stakeholder representation, and sustainable foreign investment. For Pakistan to have sustained growth and economic resilience, the Investor-State Dispute Settlement (ISDS) framework must be updated. This calls for a multipronged strategy, beginning with the revision of bilateral and multilateral treaties to include fair provisions that safeguard investor confidence while safeguarding national interests. To avoid arbitration, Pakistan should create a centralized institutional organization to monitor investment agreements and handle conflicts in a proactive manner, encouraging cooperation with investors. The nation's capacity to resolve conflicts effectively and fairly can be improved by bolstering domestic arbitration skills, such as by setting up specialist investment courts and educating legal professionals on international law. By offering affordable, regionally-specific solutions, the implementation of regional mechanisms, like arbitration within SAARC, could lessen dependency on pricey, Western-centric forums. By using artificial intelligence to evaluate investment contracts and forecast legal risks, governments can make better judgments and reduce the likelihood of disagreements. Pakistan must also support international ISDS reform initiatives, such those headed by UNCITRAL's Working Group III, in order to promote sustainability, inclusion, and transparency in arbitration. Pakistan can draw in ethical global investment while preserving its economic independence for a secure and prosperous future by coordinating ISDS reforms with national development aspirations.

2. Ameliorate Transparency

Foreign investors have utilized the ISDS in a number of instances to contest actions taken by governments that serve the public interest, such as those that advance environmental control, economic and social equity, or public welfare. There are questions regarding whether the three individuals nominated on an as-needed basis together have the legitimacy to judge whether state action is legitimate, especially when the debate involves dynamic public policy issues. The host nations must contend with $1.77 billion in awards and $114 billion in ISDS claims. Although in most cases, claims and awards are lower than this amount, they can potentially put enormous pressure on public finances and can inhibit public interest regulation and pose an

[12] Gervais, D. J. (2018). Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada. *UC Irvine L. Rev., 8*, 459.

[13] Gicquello, Myriam. "The Reform of Investor-State Dispute Settlement: Bringing the Findings of Social Psychology into the Debate." Journal of International Dispute Settlement 10, no. 4 (2019): 561-581.

obstacle to countries' sustainable economic development.[14] Even though the total amount assumed and granted is less than in most proceedings, they could still have a significant impact on public financial affairs and possibly discourage people from regulating their own interests, which would hinder a country's ability to grow economically. Additionally, even in cases where the disagreement concerns matters of shared interest, the ISDS hearings could remain completely private if both candidates so choose, even if the system's accountability has improved since the early 2000s.[15] Additional issues pertain to "nationality planning" which involves investors structuring their interests through intermediary countries primarily to profit from IIAs, which also incorporates the ISDS mechanism. States have voiced their concerns about transparency in addition to commentators, most recently during the UNCITRAL Working Group sessions on dispute settlement.[16] Transparency in the appointment of arbitrators, annulment committee members, and third-party funding has been a source of concern for states like Singapore, Pakistan, and Argentina. The United States, Australia, the European Union, and the Netherlands have also voiced concerns about the transparency of bilaterally negotiated treaties, with the Netherlands proposing multilateral negotiations as a solution.[17] Even without the parties' assent, Mauritius has gone so far as to propose that tribunals handle matters of openness on their own.[18] Nonetheless, every state is currently concerned about the transparency issue. China, for instance, thinks that transparency is a problem apart from conflict resolution changes and that the issue should be answered using facts rather than opinions or beliefs.[19] Chile believes that execution, not a lack of regulations, is the root cause of the transparency issue.[20]

a) Access to documents

More and more actions are being taken to guarantee the ISDS system's transparency. For the first time, the UNCITRAL norms on transparency required openness throughout the investor-state arbitration procedure. IISD has pointed out two issues with UNCITRAL's goal of guaranteeing transparency in the ISDS in its commentary on the organization's transparency regulations.[21]There is a growing movement to guarantee openness in the ISDS system. For the first time, the investor-state arbitration procedure had to be transparent,

[14] Huber, Mark, and Greg Tereposky. "The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism." ICSID Review-Foreign Investment Law Journal 32, no. 3 (2017): 545-594.

[15] Ibid.

[16] Roberts, Anthea. "Incremental, systemic, and paradigmatic reform of investor-state arbitration." *American Journal of International Law* 112.3 (2018): 410-432.

[17] Supra note 16 (page 7).

[18] Ibid.

[19] Anthea Roberts and Zeineb Bouraoui, UNCITRAL and ISDS Reforms: What are States' Concerns?, EJIL Talk!, June 5,2018) \www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/[.

[20] UNCITRAL, Rules on Transparency in Treaty Based Investor State Arbitration 2014 (Transparency Rules) \www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-TransparencyE.pdf. Accessed on 28-01-2025.

[21]IISD, New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps, 2013, 5\www.iisd.org/pdf/2013/uncitral_rules_on_transparency_commentary.pdf[.accesssed on 28-01-2025.

according to the UNCITRAL norms on transparency. Two issues with UNCITRAL's goal of guaranteeing transparency in the ISDS have been noted by IISD in its discussion on the organization's transparency regulations.[22] In order to address the issue, the commentary suggests three options: adding a clause on transparency straight into the investment treaty; offering to arbitrate only under rules requiring transparency; or signing a new agreement to replace or supplement current investment treaties that require arbitration in accordance with rules requiring transparency.[23] Despite being a positive move, the UNCITRAL regulations only apply to certain situations. They only apply to UNCITRAL investor-state arbitrations based on treaties signed on or after April 1, 2014, unless the parties specifically agree differently.[24]

b) Access to hearing

The concept of open courts and public access to hearings is not exclusive to the common law system. "Not only must justice be done, but it must also be seen to be done," the English court of appeals stated in R v. Sussex.[25] This suggests that simply delivering justice is insufficient; it is also necessary for the public to perceive that justice is being delivered. Put another way, maintaining transparency is necessary to foster confidence in the legal system. Magna Carta from 1215 is credited with establishing the concept of open courts, as stated in Chapters 39 and 40.[26] In his Commentaries from 1765, Blackstone highlights the significance of open courts, stating that as the law is England's ultimate arbitrator, the courts of justice must always be accessible to the public.[27] Bentham's assertion that publicity is the essence of justice and that it keeps the judge presiding over the case at trial further supports the case for transparency.[28] As technology has evolved, courts have started using methods to increase transparency, like live-streaming court proceedings, making sure documents are available online, and even granting on-demand access to previous hearings. China's plan to live-stream court proceedings reveals that this endeavor is not just seen in common law nations.[29] The ICSID rule states that all hearings must be open unless any party objects in an effort to

[22] Ibid.

[23] Ibid.

[24] Transparency Rules, supra note 30

[25] R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233 (UK)

[26] Jane Bailey and Jacquelyn Burkell, Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information 48(1) Ottawa Law Review (2017) 147, 150.

[27] William Blackstone, Commentaries On the Laws of England: Book The First (Oxford, Clarendon Press, 1765) 138.

[28] See John Bowring (ed), The Works of Jeremy Bentham, Published Under the Superintendence of John Bowring, 9th edn (William Tait, 1843) 493; See also, AG (Nova Scotia) v MacIntyre, [1982] 1 SCR 175 at 185–86 (Canada). 121 Colin Trehearne, Transparency, Legitimacy, and Investor-State Dispute Settlement: What Can We Learn from the Streaming of Hearings?, Kluwer Arbitration Blog, June 9, 2018 \http://arbitrationblog. kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learnstreaming-hearings/[.

[29] Stephen McDonell, When China Began Streaming Trials Online, BBC, September 30, 2016 \www. bbc.com/news/blogs-china-blog-37515399[.

promote greater openness.[30] Before the modification, public access to hearings required the agreement of all parties. Pac Rim Cayman LLC v. Republic of El Salvador was the first ICSID hearing to be streamed live online in 2010.[31] ICSID has continued to webcast sessions, with BSG Resources v. Guinea being one of the most recent cases to be made publicly accessible for viewing. This practice has been hailed as a significant step in guaranteeing transparency in investor-state arbitration.[32] An efficient method of guaranteeing openness and granting credibility to ISDS arbitration without having to pay significant administrative expenses is to live-stream the proceedings. By postponing the web streaming of proceedings, it also provides room for anonymity in situations where instant disclosure may jeopardize it. For instance, in order to protect important or private material, the hearings in Vattenfall AB and others v. Federal Republic of Germany were televised four hours later than scheduled.[33]

c) Public Participation

Another aspect of sustainable development is public participation in issues that significantly affect their social and economic well-being. VanDuzer et al. note that in order to guarantee sustainable development through international investment regulations, decisions regarding the negotiation, application, and interpretation of agreements should be transparent and consistent and they should be developed through wide consultation with people in the host country.[34] This engagement also extends to the resolution of disputes. As taxpayers, members of the public are a major stakeholder in ISDS. Submissions as an amicus can accomplish this participation. Amicus involvement offers a number of benefits: promotes openness, raises the standard of the award, protects the public interest, and increases public scrutiny of the procedure.[35] Amicus briefs are rare under the existing ISDS regime.[36] The ICSID Rules on the admissibility of amicus briefs have been claimed

[30] ICSID Convention on Arbitration Rules 2006, Rule 32.

[31] Press Room, International Centre for Settlement of Investment Disputes hearing webcast for first time, CIEL, June 21, 2010)\www.ciel.org/news/international-centre-for-settlement-of-investment-disputeshearing-webcast-for-first-time/[; See also, Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12.

[32] BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea, ICSID Case No ARB/14/22.

[33] IBA Arbitration Subcommittee on Investment Treaty Arbitration, Consistency, Efficiency and Transparency in Investment Treaty Arbitration, 2018, 57 \www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569.

[34] UNCTAD Investment Policy for Sustainable Development, 2015, available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, accessed on 23-01-2025.

[35] Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, (Routledge, 2017) 123.

36M Sornarajah, Aaron Cosby, 'The Road to Hell Investor Protections in Nafta's Chapter 11' in Lyuba Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards*, (Monetary Institute for International Studies 2005), Frank Emmert and Begaiym Esenkulova, 'Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to SquaretheCirclavailablehttps://www.researchgate.net/publication/327729018_Balancing_Investor_

to include an inherent conflict.[37] Amicus briefs, however, are increasingly playing a big role in cases addressing crucial public policy issues, as has been noted.[38] Actually, in the most recent Achmea v. Slovak case,[39] The amicus submissions were made at the tribunal's invitation, marking what is considered a major turning point in ISDS history regarding amici briefs.[40]

d) Amicus curiae

For the first time, in Methanex v. US, the NAFTA panel decided that it had the authority to entertain amicus comments in investment arbitration.[41] Although the tribunal recognized that the matter had public interest, it also pointed out that the third party submitting arguments had no legal claim to the dispute. Amicus filings have also continued to be accepted by subsequent NAFTA tribunals.[42] But they have insisted that when resolving the dispute, it is not necessary to take the evidence presented into consideration.[43] The appropriateness of amicus submissions was first brought up in an ICSID case, Aguas del Tunari, S.A. v. Republic of Bolivia.[44] Despite expressing gratitude for the effort taken by environmental NGOs that wanted to participate in the proceedings, the tribunal ruled that it lacked the authority to include non-parties.[45] In Suez S.A. v. Argentine Republic, an ICSID tribunal ultimately granted an amicus submission by utilizing

Protection_and_Sustainable_Development_in-Investment_Arbitration_-Trying_to_Square_the_Circle, accessed on 23-01-2025.

[37] Ibid, "On the one hand, Rule 37(2)(a) requires that "the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is *different* from that of the disputing parties". On the other hand, unless the disputing parties give broad consent, the non-disputing party will have very limited rights and even more limited access. But how are the *amici* supposed to know what they might be able to add beyond what is already presented to the tribunal by the disputing parties, if they do not have access to the files?".

[38] Ibid.

[39] Supra note 35 (page no.11).

[40] Ibid.

[41] Methanex Corp v United States, NAFTA Arbitration, 2005, 44 ILM 1345 [1]; See, Methanex Corp v United States, NAFTA Arbitration 2000, Petitioner's Final Submissions Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status [10] \www.naftaclaims.com/Disputes/USA/Methanex/MethanexAmicusStanding IISDFinal.pdf[. [134] Methanex Corp v United States, 44 ILM 1345 [30].

[42] Katia Fach Gomez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest 35 Fordham International Law Journal (2012) 510, 536.

[43] See Glamis Gold Ltd v United States, NAFTA Arbitration, Award, (2009) [286] \www.naftalaw.org/ Disputes/USA/Glamis/Glamis-USA-Award.pdf[.

[44] See Aguas del Tunari, SA v Republic of Bol, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21 2005.

[45] Supra note 44 (page no:11).

Article 44 of the Washington Convention.[46] Tribunals have used Article 41(3) of the ICSID Arbitration (Additional Facility) Rules and Rule 37 of the ICSID Rules to accept amicus submissions in later cases.[47]

Transforming Mistakes into Wisdom and Embracing the Power of Consistency

Arbitral verdicts that were made public revealed recurring instances of equivocal outcomes. These included differing legitimate interpretations of the same or analogous treaty clauses as well as variations in determining the importance of court cases featuring the same facts. The goal of important agreements has been unclear due to inaccurate interpretations, and it is unclear how they will be implemented in different eventualities.[48]Erroneous decisions are another issue; the arbitrators begin making important legal choices without considering the potential repercussions of the substantial appraisal. Current review processes that operate within constrained jurisdictional boundaries include the cancelation of the "International Centre for Settlement of Investment Disputes (ICSID)" or national judicial review in the arbitration seat for matters unrelated to the ICSID. It is important to note that even after an apparent legal error has been discovered, an ICSID cancellation committee may not be able to cancel or precisely define a prize. Furthermore, since arbitral tribunals and other annulment committees are created on an as-needed basis to resolve a single dispute, they may potentially come to (and have come to) incorrect decisions, further undermining the coherence of foreign investment laws.[49]

Arbitrators Embracing Integrity and Overcoming Undue incentives cost and time

The rising proportion of arbitrator issues could indicate that the parties in dispute believe the arbitrators are prejudiced or inclined. The obvious willingness of all the other opposing parties to elect people who shared their views raised particular worries. The arbitrators' desire to be reappointed in the future, sometimes as lawyers and other times as arbitrators, as well as the ongoing "Changing of Hats" raise these issues.[50] The frequently cited idea that arbitration indicates a speedy and inexpensive dispute settlement process has come under scrutiny due to the actual ISDS practice. Legal fees, which typically account for 82% of the overall expenses and tribunal costs, have climbed by an average of $8 million for each case and each side.[51] This places a tremendous strain on state budgets in all countries, but particularly in the less developed ones.

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[46] Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Arg Republic, ICSID Case No ARB/03/19, Decision on Jurisdiction, August 3, 2006 [1]

[47] See Biwater Gauff (Tanz) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award, July 24, 2008 [1–3]; Piero Foresti v Republic of South Africa, ICSID Case No ARB(AF)/07/1, Award, August 4, 2010 [55]

[48] Lam, Joanna. "WTO AB as a Model for Other Adjudicatory Bodies—The Case of EU's Investment Court System." In *The Appellate Body of the WTO and Its Reform*, pp. 331-348. Springer, Singapore, 2020.

[49] Ika, Syahrir, and SigitSetiawan. "Investor-State Dispute Settlement and Indonesian Reform Policy in Mining Downstream Sector." *Journal of Economics and Behavioral Studies* 10, no. 4 (J) (2018): 185-196.

[50] Supra note 49(page no:12).

[51] Jaime, Margie-Lys. "A New Legal Framework for Improving Investor-State Dispute Settlement (ISDS)." In *Privatizing Dispute Resolution*, pp. 483-532. Nomos VerlagsgesellschaftmbH& Co. KG, 2019.

Nonetheless, tribunals have often refrained from requiring the investment claimant to reimburse the respondent's expenses in the event that the regime prevails. Rising costs are another issue for investors, especially those with limited resources. For every case, large law firms that have a significant impact on the industry seem to gather a team of attorneys who charge higher fees and employ costly litigation techniques, such as a detailed investigation of each potential arbitrator, extensive and unsettling document discovery, and drawn-out arguments about minor case details.[52]The fact that many legal issues are still unsolved, as demonstrated by a careful examination of numerous previous arbitral rulings, makes it necessary to expend a significant amount of money in order to establish a legal position. Many of the same goals are also caused by the lengthy arbitration process, which often takes decades to complete.[53]

Sustainable Foreign Investment

An investment does not need to be sustainable in order to be protected by a treaty under the conventional ISDS framework. IIAs should define foreign investments in accordance with the host country's sustainable development goals and investor commitments to basic sustainability standards in order to strike a balance between investor protection and the need for sustainable development. A change to the definition of a covered investment of this kind would lessen the incentives for multinational corporations to use ISDS when the state's activities are driven by a sustainable development objective that aligns with the IIA's requirements. These clauses may be based on UN SDGs, the Paris Agreement, or ILO Conventions. Furthermore, IIAs that define covered investments based on a "contribution to the development of the host state" criterion may be extended to include a "contribution to sustainable development" criterion[54] Multinational corporations may be directly encouraged to engage in sustainable FDI by such an inclusion. The criteria for sustainable development may benefit the foreign investor rather than constitute an additional expense. Multinational corporations have two options for internalizing competitive benefits: they can reduce negative externalities by investing in less consumption, overuse of natural resources, and harm to social cohesion, or they can increase knowledge, wealth, and health for host countries.[55]

Local Stakeholder Representation and Investor Accountability

Foreign companies are granted legal remedies under current ISDS rules that are not available to other stakeholders, such as domestic companies or local populations that may be exposed to corrupt or defective governments. Provisions for sustainable development in ISDS should permit the representation of impacted local stakeholders in order to lessen the adverse externality caused by subpar national governance.[56]Third

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[52] Supra note 21(page no:8).

[53] Johnson, Lise, Brooke S. Guven, and Lisa E. Sachs. "Alternatives to Investor-State Dispute Settlement." (2019).

[54] Sauvant, Karl P., Matthew Stephenson, and Yardenne Kagan. "Green FDI: Encouraging carbon-neutral investment." *Columbia FDI Perspectives* 316 (2021).

[55] Montiel, Ivan, et al. "Implementing the United Nations' sustainable development goals in international business." *Journal of International Business Studies* 52.5 (2021):

[56] Sachs, Lisa, Lise Johnson, and Ella Merrill. "Environmental injustice: how treaties undermine human rights related to the environment." *Sachs, Lisa, Johnson, Lise, Merrill, Ella, Environmental Injustice: How treaties undermine human rights related to the environment (January 18, 2020). La Revue de Juristes de Sciences Po* 18 (2020).

parties suing multinational corporations for breaching their investor commitments will benefit from this modification. By shifting the burden of monitoring investor behavior away from states that might rely on foreign direct investment (FDI) for development, it will also help to safeguard the national sovereignty of vulnerable groups, lessen voter marginalization, or lower the danger of overriding the separation of powers. A particular enforcement framework that permits complaints regarding alleged violations of sustainable development commitments is necessary in order to include investor obligations for sustainable development into IIAs. To safeguard the interests of both host countries and multinational corporations, such a framework is required. Either the ISDS arbitration system or the function of already-existing human rights tribunals can be used to execute it. For instance, the new EU-China Comprehensive Agreement on Investment has a reporting system for infractions that promotes corporate access to markets and safeguards sustainable development objectives.[57] Nevertheless, in order to make systematic reform of the ISDS more effective, reform proposals must be developed based on an internationally accepted theoretical and normative framework. Thus, the developed conceptual framework could be used to develop some concrete proposals for legal investment reforms, greatly increase the institutionalization of ISDS, and put in place systems that enable a state to attest that ISDS develops in a democratic, civil, and rule of law-compliant manner.[58] As an outcome, conversations about ISDS reform must go on with sufficient knowledge and take into account the interests of all stakeholders as well as investor responsibility in a reasonable way.

Safeguarding the Authority to Regulate

There have been some concerns raised over the potential boundaries of the government's authority to control the public interest. Interestingly, the claim is that this new law has no beneficial effect on investors' earnings and that the ISDS gives them the ability to sue a government at any time.[59] Meanwhile, it has been stated in public discussions that the arbitral tribunals have only taken into account the goals of safeguarding the investors' financial interests when interpreting investment agreements; they have not weighed this against the states' independent authority to enact laws for the benefit of the public. Prefaces to such agreements remind us that the European Union and a nation with which it has negotiated, Singapore and Canada, have regarded the power to regulate as an integral part of their agreement.[60] Meanwhile, it has been stated in public discussions that the arbitral tribunals have only taken into account the goals of safeguarding the investors' financial interests when interpreting investment agreements; they have not weighed this against the states' independent authority to enact laws for the benefit of the public. Prefaces to such agreements remind us that the European Union and a nation with which it has negotiated, Singapore and Canada, have regarded the power to regulate as an integral part of their agreement. In accordance with public discussions, arbitral tribunals have not considered the states' independent power to pass laws for the public's benefit; instead, they

[57] Silander, Daniel. "The European Commission and Europe 2020: Smart, sustainable and inclusive growth." Smart, sustainable and inclusive growth. Edward Elgar Publishing, 2019. 2-35.

[58] Shan, Wenhua, and Yunya Feng. "A Trinity Analytical Framework for ISDS Reform." AJIL Unbound 112 (2018): 244-248.

[59] Supra note 11 (page no:08).

[60] Roberts, Anthea. "Incremental, systemic, and paradigmatic reform of investor-state arbitration." American Journal of International Law 112, no. 3 (2018): 410-432.

have only considered the objectives of protecting investors' financial interests when interpreting investment agreements. Such agreements' prefaces remind us that the European Union has viewed the authority to regulate as an essential component of its deal with Singapore and Canada, two countries with which it has negotiated.[61]

Understanding the Formation and Functioning of Arbitral Tribunals

In modern times, the contesting parties have the ability to choose the arbitrators for each case before the ISDS tribunals. Similar people can practice law in various ISDS cases under the current paradigm. As a result, these situations may intensify conflicts of interest and cause anxiety that the arbitrators are not operating impartially.[62] The ad hoc character of their selection is perceived by the public as interfering with their capacity to act correctly and independently, hence establishing stability in investment safeguards against the regulatory body. It also created the impression that it provides arbitrators with financial incentives to take on more ISDS cases. An institutional public good that serves the interests of states, investors, and other stakeholders would be a functional arbitral tribunal. Many of the above-mentioned difficulties can be addressed by the tribunal. In conjunction with facilitating consistent and accurate rulings, it would significantly increase the legitimacy and transparency of the system and ensure the independence and impartiality of adjudicators.[63] The initial suggestion stipulates that each arbitrator be chosen from a list that has been pre-established by an agreement party. This option won't cause any technical problems and will allow a party to the dispute to cut off communication with the arbitrator. This implies that every arbitrator would have been closely examined by each party. Such a duty may be coupled with a demand for the specific qualifications of arbitrators, including that they be qualified to hold a judicial position in their nation of origin.[64]This would therefore serve as a supplement, as they also need expert knowledge of the application of international law as contained in pledges that differ greatly from their intended use and drastically lower the risks of unforeseen comprehension of the rules pertaining to investment protection. As a result, even the determinations made by a disputing party may be limited to those who consent to being chosen beforehand and who are competent, unbiased, independent, and reliable in making decisions in accordance with established and predictable legal standards. The proposal also emphasized the tribunal's ability to approve amicus curiae papers. It should grant the power to step in and help third parties with a particular and compelling interest when the dispute is being resolved.

Indispensability of an appellate mechanism to review erroneous ISDS decisions

The majority of the issues that received the most support from investors and NGOs during public consultations was the potential inclusion of an appellate process. The general consensus was that any

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[61] Saha, Himaloya. "A critical analysis of the commonly recommended reforms of investor-state dispute settlement (ISDS)." *Legal Issues J.* 4 (2016): 39.

[62] Campbell, Jodie, Christopher Law, Sam Durant, and Thomas Faunce. "Biosecurity, Investor-State Dispute Settlement and Corporatogenic Climate Change: A Challenge for Australian Public Health Regulation and Human Rights." (2019).

[63] Supra note 35 (page no :10).

[64] Schill, Stephan W. "Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment: 2017 Roll of Honors–Changes to the Masthead." *The Journal of World Investment & Trade* 19, no. 1 (2018).

functional judicial or quasi-judicial system should include the power to appeal. To ensure more validity, it is crucial to create appropriate institutional arrangements that include permanent judges. An appeal system is indicated in the "Transatlantic Trade and Investment Partnership (TTIP)" negotiation directives. According to their agreement, consideration should be given to the potential for developing appellate tools that apply to investor-to-state dispute settlements. This reform proposal should be incorporated into ISDS's bilateral appellate procedures.[65]States must specify their function, structure, and operational protocol in detail. In order to guarantee consistent interpretation of TTIP and the growth of validity on substance and institutional design by enhancing independence and impartiality predictability, this appellate mechanism would then assess awards related legal mistakes and a revealed error during the assessment of facts.[66] Making the international investment regime more autonomous is crucial because it would allow for the control of legislative events within the ISDS through an appellate mechanism and a permanent investment court. If a member of an investment court or a standing appellate mechanism is not allowed to act as counsel during an ISDS proceeding, conflicts of interest issues may be overlooked. Compared to the current arbitral framework, it will ensure more independence and impartiality in this way. Even while it may be managed by imposing rigorous deadlines, adding an appellate phase would also increase the duration and costs of the process.[67]

Connection between ISDS and conventional judicial systems

It is frequently asserted that ISDS gives investors a distinct and matching tracking system to resolve investment issues, allowing them to circumvent the regular jurisdiction of domestic courts. It is argued that domestic courts should be the only ones to settle disputes involving foreign investors, and that they should not be given the opportunity to appeal a domestic court's ruling to the special ISDS tribunals. There aren't many IIAs that demand that domestic remedies be exhausted before filing a claim with ISDS.[68] Some even explicitly oppose this notion, among other things, because it is thought to increase the cost and duration of litigation. For instance, this method guarantees that investors cannot receive double compensation by prohibiting comparable claims. A simpler method under this approach is for investors to make definitive decisions at the beginning of a legal procedure between the ISDS and local courts.[69] Therefore, by avoiding the fact that issues are first tried in a local court and then before ISDS tribunals, it would help to reduce litigation times and costs. However, when a claim is filed with ISDS, investors will be asked to give up their ability to pursue legal action in local courts. This option has the advantage of lowering the number of potential

[65] Schill, Stephan W. "Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework." Journal of International Economic Law 20, no. 3 (2017): 649-672.

[66] Supra note 44(page no:11).

[67] Ranjan, Prabhash, and PushkarAnand. "Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far" In International Investment Treaties and Arbitration Across Asia, pp. 579-611. Brill Nijhoff, 2018.

[68] Kristkova, Pavla. "A Comparative Study of Judicial Safeguards in Relation to Investor-State Dispute Settlement." (2020).

[69] Supra note 49(page no:13).

ISDS claims by not discouraging an investor from attempting to seek remedy before a national court.[70] Utilizing verified that the practice of domestic rules and laws is not covered under the competencies of the ISDS tribunals, it was also determined that the proposal should be explicit on the relevance of each party's domestic laws for the ISDS. As a matter of fact, the ISDS tribunals have the authority to consider state laws and regulations. ISDS tribunals will not be regarded as required by domestic courts if they interpret any domestic legislation .[71]

3. Conclusion

The Investor-State Dispute Settlement model's foundations are out of date and do not reflect the current reality it was developed before globalization. Therefore, it's time to update ISDS to the modern period and adjust it to the multilateral, worldwide system that exists now. This has led to substantial doubt over the future of ISDS while improvements have been proposed, it is now unclear if they are adequate or how best to implement them. The inclusion of the ISDS language in the TPP is an ongoing instance of how governments appear to be continuing to provide for ISDS in their treaties, despite the fact that some nations have already begun to eliminate Investor-State Arbitration or withdraw from the ICSID.[72] If thousands of IIAs continue to exist, many issues will be impossible to resolve due to the nebulous and unclear nature of substantive treatment criteria.[73] As a consequence, it's time for governments to evaluate the current system, carefully consider reform options, and ultimately decide on the best course of action. Some reform options can imply that certain government initiatives are necessary, while others need for the cooperation of a real number of nations. The majority of options could benefit from being supplemented by comprehensive training and capacity building to improve comprehension and knowledge of the ISDS-related issues.[74]

Given the problems that have arisen since the present ISDS system, combined action options may be able to move forward, but they may encounter greater challenges in their implementation and require further cooperation from several States. The combined efforts can aid in creating a consensus on the preferred course for reform and action at the multilateral level.[75] One important thing to keep in mind is that the ISDS is the method used to apply the legislation.[76] Arguments stated by some ISDS opponents calling for omissions or at least significant modifications appear to be grounded in truth. In light of this, there need to be sufficient

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[70] Nowakowski, Jesse. "A Critical Examination of Investor State Dispute Settlement in Canada." PhD diss., Universitéd'Ottawa/University of Ottawa, 2019.

[71] Supra note 51(page no:13).

[72] Magraw, Daniel B., and Sergio Puig. "Greening Investor-State Dispute Settlement." *BCL Rev.* 59 (2018): 2717.

[73] Dietz, Thomas, Marius Dotzauer, and Edward S. Cohen. "The legitimacy crisis of investor-state arbitration and the new EU investment court system." *Review of International Political Economy* 26, no. 4 (2019): 749-772.

[74] Supra note 54 (page no:14).

[75] Nichols, Shawn. "Transnational Capital and the Transformation of the State: Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)." *Critical Sociology* 45, no. 1 (2019): 137-157.

[76] Kaufmann-Kohler, Gabrielle, and Michele Potestà. "Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options." (2020): 117.

room for reform in order to boost public confidence in the legality and objectivity of the regime. However, it also seems that an obvious exclusion might legitimately diminish the confidence that an investor has in the safety of their foreign investments.[77]

The Investor-State Dispute Settlement (ISDS) mechanism, while integral to international investment agreements, remains deeply flawed, particularly in its impact on developing nations like Pakistan. The country's experiences with high-profile cases such as Reko Diq, which resulted in a $5.976 billion arbitration award,[78] and Karkey, with a $1.2 billion award, highlight the grave financial and reputational consequences of a system lacking transparency, accountability, and fairness. These cases underscore the urgent need for reforms that protect national sovereignty while fostering investor confidence. The current ISDS framework disproportionately favors multinational corporations, enabling them to bypass domestic legal systems and challenge legitimate government regulations under opaque arbitral tribunals. This imbalance, combined with high arbitration costs averaging $8 million per case, with legal fees accounting for 82% creates insurmountable challenges for resource constrained developing nations.[79]

To address these systemic flaws, this study proposes mandatory reforms tailored to the unique needs of developing countries. Pakistan, for example, must establish a centralized institutional body to oversee investment agreements and disputes, ensuring that contracts align with national interests and sustainable development priorities. Bilateral and multilateral treaties should be revised to include clauses that protect the host state's regulatory autonomy, particularly for public welfare initiatives. Artificial intelligence tools can be leveraged to analyze contracts, predict legal risks, and improve transparency in arbitration processes. Introducing an appellate mechanism within ISDS is critical to correcting erroneous decisions and ensuring consistency in rulings, while the creation of specialized investment courts with trained legal experts can enhance domestic arbitration capabilities. Regional arbitration mechanisms, such as those within SAARC, should be prioritized to reduce dependence on costly Western-centric tribunals, offering cost-effective and culturally relevant alternatives.

Considering its ability to boost economic growth, improve governance, and solve acute problems, artificial intelligence (AI) has the potential to revolutionize developing nations like Pakistan. AI-powered solutions, such precision farming methods that increase crop yields and minimize resource waste, can maximize agricultural output. AI in healthcare makes it possible for early disease diagnosis, effective diagnostics, and better telemedicine access, especially in rural areas. Additionally, by automating bureaucratic procedures and lowering inefficiencies, AI can improve governance by thwarting corruption through data-driven transparency. AI-powered disaster management technologies, such as earthquake and flood prediction models, can reduce losses and save lives in Pakistan.[80]Pakistan may use AI to solve its socioeconomic problems and promote sustainable development by funding AI education and encouraging public-private partnerships. Reforms must also address investor accountability by embedding sustainability criteria into

[77] Fan, Xiaoyu. "Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI) Negotiation and the ISDS Reform." *The Chinese Journal of Comparative Law* (2020).

[78] Supra note 08 (page no:04).

[79] Supra note 09 (page no:05).

[80] Asian Development Bank, 2023 "Artificial Intelligence in Action: Selected ADB Initiatives in Asia and the Pacific" available at https://www.adb.org/publications/ai-action-adb-initiatives-asia-pacific accessed on 24-01-2025.

investment agreements, requiring foreign investments to contribute to the host nation's socio-economic development. Measures such as transparent selection of arbitrators, public access to hearings, and provisions for local stakeholder representation in disputes are essential to fostering trust and equity in the system. Recent initiatives by international organizations like UNCITRAL's Working Group III and the EU-China Comprehensive Agreement on Investment offer valuable blueprints for achieving transparency and inclusivity. By championing these reforms, Pakistan and other developing nations can attract responsible foreign investment while safeguarding their economic sovereignty and public interest. Without bold, innovative action, the ISDS mechanism will continue to exacerbate inequalities and hinder the sustainable development of vulnerable states.

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Stephen McDonell, When China Began Streaming Trials Online, BBC, September 30, 2016 \www. bbc.com/news/blogs-china-blog-37515399.

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