

Bridging Global and Regional Perspectives in ISDS Reform: Regional Mechanisms and Legal Empowerment for the Middle East and Africa Regions

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Abstract

Investment arbitration is undergoing significant transformation, with UNCITRAL Working Group III (WGIII) leading initiatives to reform the investor-state dispute settlement (ISDS) system. This study evaluates the progress and challenges of these reforms, focusing on their implications for developing countries, especially in the Middle East and Africa. The objectives are twofold: first, to assess the potential of regional mechanisms as complementary frameworks to global ISDS structures, and second, to explore strategies for capacity building and ensuring equitable access for under-resourced states and small to medium-sized enterprises (SMEs) in these regions. Using a qualitative approach, the article examines policy proposals from WGIII through the lens of a regional perspective. The analysis highlights the benefits of integrating regional mechanisms to enhance procedural efficiency and local relevance. Additionally, it underscores the importance of advisory centres and training programs to address systemic imbalances in certain regions. The findings demonstrate that bridging global reforms with regional realities can nurture trust and cultivate inclusiveness in ISDS. The study concludes by offering actionable recommendations to policymakers and arbitration stakeholders, emphasising the need for reforms that balance global standards with regional adaptability.

Keywords: ISDS Reform, Middle East and Africa, Investment Arbitration, Regional Mechanisms, Capacity Building, Access to Counsel

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1. Introduction

Investor-State Dispute Settlement (ISDS) reform remains one of the most debated areas in international economic law. Critics argue that the current ISDS system is complex, costly, and perceived as favoring investors from developed economies. People think of ISDS proceedings – as a result of the influx of former litigators² into arbitration – more and more as resembling standard courtroom practice, followed thereby by a legalistic starting point that hinders entry for countries just starting out and

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² Alex Baykitch and Edmund Bao, 'A Return to Innate Arbitration Culture,' *Arbitration International* 35, no. 1 (2019): 63.

for small exporters in developing markets³.

The lack of legal guidance and support proves to be a huge obstacle to ISDS reform in some regions, notably in the Middle East and Africa (MEA). In many developing states, low ability for internal coordination and lack of expertise lead to high legal costs and inefficiency in dealing with investment disputes. The setting up of centralised advisory centres or regional hubs could serve to help accommodate treaties, avoid disputes and prepare legal systems more effectively⁴.

If viewed through the lens of UNCITRAL's attempts to encourage a more inclusive, transparent, and equitable system, the MEA regions embody distinctive dynamics and opportunities within the paradigms of ISDS reform conversations. The economy in MEA countries is heavily dependent on oil, gas and extractive industries, meaning that both the Middle East and Africa face particular problems in investment dispute arbitration over expropriation, changes in regulations and broader issues of public interest. And even though Africa's growing FDI in infrastructure and agriculture complements the Middle East's role as both a capital provider and an investment destination, procedural and financial obstacles continue to impede the access of SMEs and governments to ISDS. Studies suggest that excessive costs of arbitration (production of documentary evidence and long waiting times to hold a hearing) lead substantially to worries about the inefficiency of ISDS⁵.

From a legal and political standpoint, MEA regions contain a blend of different legal systems, including common law, civil law, Islam and customary law. Where poor judicial systems and domestic political instability are not conducive to litigation, arbitration quickly becomes the norm. It fits well with UNCITRAL's objective of improving access to justice to address these issues with regionally adapted mechanisms that are cost-effective.

To address these challenges, countries in the MEA need an ISDS reform approach tailored to their particular local conditions. Even if this doesn't eliminate all current problems, it will pave the way for future fair and effective ways to resolve disputes and a healthy investment environment. A hybrid model, where localized tools and infrastructure are blended with international standards, offers a promising pathway forward. By combining regional and global frameworks, this model envisions a system that enhances accessibility and contextual relevance, while maintaining consistency and credibility in arbitration outcomes.

To further explore these avenues, this article takes two interconnected approaches to ISDS reform. Part 2 discusses the role of regional mechanisms in complementing global frameworks for ISDS, leveraging local expertise and tools, and promoting fairness and efficiency. Part 3 focuses on capacity-building initiatives that seek to assist States and SMEs by making legal, financial, and procedural reforms more relevant to their needs.

³ Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, *Arbitration International* 25, no. 4 (2009): 517. Accessed January 22, 2025. <https://academic.oup.com/arbitration/article/25/4/515/206242>.

⁴ Lise Bosman and Emilie de Haas, 'Dispute Avoidance and UNCITRAL Working Group III: How Could a Proposed Advisory Centre Best Serve African States?' *Transnational Dispute Management* 19, no. 3 (2022).

⁵ Najar, *Inside Out*: 519.

2. ISDS reform through regional mechanisms: adapting arbitration frameworks for the Middle East and African regions

Although effective in some respects, the existing global ISDS framework is often criticised for being unable to account for regional economic, cultural, and legal variations. This is especially true in the Middle East and Africa, where nations face specific political and legal framework challenges. To effectively adapt it to their needs, a regionally tailored ISDS reform could offer a complementarity avenue in dispute resolution.

This section discusses how leveraging regional arbitration centres and expertise can facilitate ISDS reform, and how a hybrid model can bridge local mechanisms with international standards. It focuses as well as on the advantages and disadvantages of such an approach while recommending practical, actionable solutions ensuring the accessibility and equity of the ISDS processes.

2.1. Regional perspective: leveraging local arbitration tools

Institutions CRCICA, DIAC, KIAC, and LCA have long been established hubs for commercial arbitration in the MEA regions. They have the infrastructure and expertise to manage disputes effectively, but their use in ISDS is limited. Incorporating them into the ISDS system could improve procedural fairness, accessibility and cost effectiveness in a manner consistent with UNCITRAL's reform agenda.

2.1.1. Utilising existing infrastructure

These centres already possess the relevant physical and institutional infrastructure. For instance, CRCICA, which works under UNCITRAL Arbitration Rules, has shown its capability in handling investment disputes with local and international character⁶. Extending their mandate to cover ISDS cases would enhance their position in the overall arbitration market.

⁶ Examples of issued Awards involving the Egyptian government or entities: Final Arbitration Award, Case No. 1147/2017, CRCICA, February 24, 2022; Final Arbitration Award, Case No. 1216/2017, CRCICA, October 11, 2021; Final Arbitration Award, Case No. 661/2010, CRCICA, July 20, 2011; Final Arbitration Award, Case No. 567/2008, CRCICA, September 12, 2009; Final Arbitration Award, Case No. 382/2004, CRCICA, March 7, 2006 (Unpublished). Examples of issued Awards involving the Egyptian government or entities: Final Arbitration Award, Case No. 1397/2020, CRCICA, December 7, 2020; Final Arbitration Award, Case No. 1340/2019, CRCICA, February 17, 2019; Final Arbitration Award, Case No. 165/2000, CRCICA, June 20, 2002 (Unpublished). The study analysed 8 arbitral rulings issued between 2002 and 2022, selected on the basis of their relevance to regional ISDS mechanisms. Selection criteria included (i) the involvement of Middle Eastern and African states, (ii) the nature of investment-related disputes, (iii) the application of ISDS rules in the regional context. These unpublished arbitral awards used in this article were obtained through restricted access to CRCICA archives as part of a research project on ISDS reform in the Middle East and Africa. These documents are not publicly available but have been reviewed in accordance with confidentiality principles imposed by the arbitral institution. In order to comply with the confidentiality rules imposed by the CRCICA, all sensitive data has been anonymized. The judgments cited in this article are used strictly for research purposes without revealing the identity of the parties or confidential strategic information. Although the study provides valuable insight into the application of ISDS in MEA regions, the restricted access to unpublished arbitral awards may limit the generalizability of the findings. To compensate for this limitation, the analysis was correlated with public data.

This scenario can be ensured with a kind of institutional adjustment on investment disputes, giving them a particular place amid the investment dispute landscape. If they partner with ICSID, UNCITRAL or the Multilateral Advisory Centre, they could be formally recognised as ISDS venues. CRCICA's partnership with UNCITRAL on commercial arbitration is an example of how CRCICA may similarly expand its ISDS offerings. Governments could likewise revise investment treaties to support regional centres for dispute resolution, emulating the approach taken by the AfCFTA Investment Protocol, which seeks to promote African arbitration institutions. In addition, such centres can also adopt UNCITRAL's ISDS procedural reforms, including those for transparency to accommodate public interest cases. DIAC, for instance, could add on the UNCITRAL transparency framework to increase accountability in environmental and infrastructure project disputes⁷. Aligning with UNCITRAL Working Group III's cost-control and procedural efficiency measures will also mean that regional centres will be far more attractive alternatives for ISDS⁸.

Such expansion should not only include an expansion of institutions or procedures but also a more profound understanding of the different legal, economic and social backgrounds of the parties in dispute. International arbitration operates within an intercultural framework, necessitating mechanisms that accommodate diverse legal traditions⁹.

2.1.2. Promoting regional expertise

One key benefit of a regional approach is the ability to assemble panels of arbitrators and experts who have a deep understanding of local laws, customs, and socio-economic conditions. This regional knowledge is vital in disputes involving culturally sensitive issues or sectors of strategic importance to MEA economies, including energy, mining, and infrastructure. Insistent upon the 'one-size-fits-all' nature of global ISDS mechanisms, many arbitration users have lamented a lack of arbitrators with specialised knowledge of the regional investment scenes in which they operate¹⁰. Disputes over energy in the Middle East, for example, need arbitrators who understand intricate local regulatory systems.

As legal scholars note, arbitration is not simply a manifestation of the legal culture but rather should be a 'communicative' process that respects and incorporates differing perspectives. Increasing the size and regional representation of panels of arbitrators ensures that cases are adjudicated by experts sensitive to local realities and practices of investment, thus increasing the legitimacy of the system and reducing what

⁷ DIAC is not the only centre in the MEA that has yet to fully incorporate UNCITRAL's transparency standards. Many regional centres, particularly those with commercial arbitration mandates, are still adapting to the shift toward transparency required for ISDS: CRCICA has incorporated UNCITRAL Arbitration Rules, including provisions on transparency. However, its application of transparency in ISDS cases may depend on specific party agreements, rather than being systematically applied; KIAC has demonstrated willingness to align with global standards, but like DIAC, its transparency mechanisms remain underdeveloped for public interest cases; the Lagos Court of Arbitration (LCA) focuses on commercial arbitration and has yet to fully integrate ISDS-specific transparency standards.

⁸ Najjar, *Inside Out*: 521.

⁹ Paolo Esposito & Jacopo Martire, *Arbitrating in a World of Communicative Reason*, Arbitration International 28, no. 2 (2012): 326–328.

¹⁰ Najjar, *Inside Out*: 521.

may be called ‘outsider bias’¹¹. For instance, KIAC has established a panel of arbitrators familiar with African legal systems, making it a preferred forum for African disputes. From this perspective, it is quite possible for a local panel of arbitrators to be a potential feeder pool for the standing mechanism and/or the appellate mechanism called for by UNCITRAL’s arbitration reforms. This is essential because the pool must include arbitrators from every corner of the world whose task is to resolve disputes which arise under universally accepted but regionally relevant rules.

One of the longstanding problems of ISDS adjudication is the lack of diversity, with tribunals, even in a global setting, dominated by arbitrators from Western European and North American systems¹². This unbalance in turn gives rise to doubts over the fairness of arbitral awards and whether cultural prejudice might be affecting them at all. The position paper of the UNCITRAL Working Group III Working Paper puts forward a number of revisions intended to make it more diverse; now it’s up for approval with the general assumption that broad participation would lead to an equitable arbitration regime.

2.1.3. Advancing ISDS reform initiatives

Beyond reflecting disputes, a regional approach also offers a number of other means indispensable for the continued implementation of large-scale ISDS reforms. A regional centre might become a key tool in the reform process, particularly in implementing codes of conduct for arbitrators and mediators. Training of local practitioners on these codes will help them enhance their accountability within accepted local ethical parameters and ensure they operate independently of rigid hierarchical structures. This will improve reliability and credibility.

In addition, local arbitration centres can play an important role in reforming a key area of ISDS: prevention and mediation of disputes. This is a tool that has been given little emphasis across MEA. Some centres, such as CRCICA, KIAC, and DIAC, offer mediation services but no special panels are provided for mediating investment disputes. Modelled after the successful Singapore International Mediation Centre (SIMC), MEA centres can create specialised mediation panels to encourage early mediation of disputes, preventing needless resort to costly arbitration – this is also conducive to the UNCITRAL reform objectives.

Regional centres could also serve as satellite nodes to the Multilateral Advisory Centre on International Investment Law (ACIIL) to support states with limited resources. Such partnerships could enable the provision of legal advice and representation, as well as capacity-building programs specific to the needs of MEA countries. Initiatives from international organisations that strengthen local expertise and institutional capacity will be discussed further in Part 3 of this Article.

¹¹ Joseph E. Stiglitz, *Globalisation and Its Discontents* (New York: W. W. Norton & Company, 2002).

¹² Yanwen Zhang, ‘Equitable Representation on International Benches and the Appointment of Tribunal Members in Investor – State Dispute Settlement: A Historical Perspective,’ *Journal of International Dispute Settlement* 14, no. 4 (2023): 428.

2.2. An international perspective: the hybrid model as a bridge

A hybrid model of ISDS can expedite legitimacy and efficiency by combining global and regional frameworks with specialised mechanisms. Such measures would include the establishment of regional appellate bodies, sector-specific arbitration chambers, and decentralised advisory centres—all while guaranteeing adequate harmonisation with international standards and responsiveness to local needs.

2.2.1. Regional appellate mechanisms

The implementation of a new appellate structure to ensure uniformity and accountability in arbitral awards is arguably the most controversial aspect of ISDS reform. While UNCITRAL reform discussions today focus on the creation of a multilateral appellate mechanism, this effort could be supplemented by regional appellate bodies, operating as nodes of a global system.

Regional appellate bodies, functioning under the oversight of UNCITRAL, could provide a decentralised layer of review that accounts for regional contexts and sector-specific sensitivities. For example, energy investment disputes, which are important for many states in the Middle East, could be channelled into a Middle Eastern appellate mechanism while ensuring that international economic objectives are achieved in line with global standards. Moreover, an African appellate body could consider disputes—especially in extractive industries, one of the continent's most frequent sources of investment arbitration—ensuring that awards conform both with regional priorities and international legal standards.

Such a hybrid appellate structure could facilitate '*cultural harmonisation*' in arbitration, with regional interests represented but also in equilibrium with global norms¹³. Arbitration should become a '*cosmopolitan legal culture*' incorporating different legal traditions without imposing a dominant one¹⁴. ISDS reforms can facilitate a shift toward a more open system of dispute resolution through their encouragement of communicative engagement between states, arbitrators, and institutions. The proposed solution—the implementation of a regional appellate facility based on this hybrid model—would strike a balance between global consistency and local responsiveness, providing arbitration with the fairness and accessibility needed amid competing local traditions.

2.2.2. Specialised chambers for key sectors

As the economies of the MEA are heavily dependent on sectors that are prone to complex investment disputes (natural resources, agriculture, and infrastructure development), deliberately creating specific chambers or divisions for such disputes in the regional arbitration centres may also help address these issues.

For example, CRCICA could host a chamber dedicated to infrastructure disputes, utilising its experience in such major projects across the African continent. Likewise, DIAC could build expertise in energy-sector disputes, a key part of the

¹³ Esposito & Martire, *Arbitrating in a World of Communicative Reason*, 331–332.

¹⁴ Esposito & Martire, *Arbitrating in a World of Communicative Reason*, 337–338.

Middle East's economy. Such a design would tackle the critiques against the blanket nature of global ISDS machineries and guarantee that the arbitration procedures would be catered to the intricacies of specific sectors.

Specialised chambers would further supplement the potential of a regional appellate mechanism and reinforce the establishment of a harmonised expertise system for ISDS both on the first instance and appellate levels, supporting further the legitimacy of ISDS reform approaches.

2.2.3. Decentralised advisory centre offices

Complementing this effort would be enhanced by the establishment of regional offices for the Advisory Centre on International Investment Law to improve access in the MEA region. UNCITRAL Working Group III has acknowledged that such advisory services must be cost-effective and easily accessible for recipient states, which would be helpful for tackling any gap of capacities in under-funded regions.

Thus, the issue of location or locations becomes associated with the sustainability of the centre. It is important to ensure that the headquarters is both geographically and economically convenient for Members, particularly for beneficiaries¹⁵. The generic global advisory centre will not be able to cater to specific needs across different areas quickly. This is why the need for multiple regional offices located at different locations around the world is crucial, as it would lead to a more effective distribution of services and the ability to work with regional peculiarities and inclusiveness¹⁶.

As for the cost concerns and subsequent funding problems, virtual centres could be an option, i.e. as designated desks, either within the arbitration centres, within regional development banks, or within relevant institutions and structures in the different concerned regions. Of course, a single centralised centre is equally a solution if established with special units or region-specific service providers¹⁷.

That way the hybrid model can promote a bottom-up structure in aligning with the need for reform throughout the world and better consider the objectives of scattered regional systems for the MEA. But while regional mechanisms can help with accessibility, inclusivity, and sectoral knowledge, it can create challenges of coherence, neutrality, and implementation. Analysing their potentials and pitfalls is key to understanding their role in ISDS reform.

2.3. Assessing regional mechanisms: benefits and challenges

Despite the significant advantages that these regional arbitration mechanisms

¹⁵ UNCITRAL, *Report of the General Assembly – 57th Session*, para. 125, accessed February 5, 2025, <https://docs.un.org/en/A/79/17>.

¹⁶ UNCITRAL, *Summary of the first meeting on the operationalization of the Advisory Centre on International Investment Dispute Resolution submitted by the Government of Thailand*, A/CN.9/WG.III/WP.251, para 19. Accessed February 5, 2025, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/wp.251-e_advance_copy.pdf.

¹⁷ UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS)*, A/CN.9/WG.III/WP.221/Add.1, para. 8. Accessed February 5, 2025, <https://documents.un.org/doc/undoc/ltd/v21/090/97/pdf/v2109097.pdf>.

present, they necessarily also engage with a number of notable challenges that must be overcome in order to maintain the effectiveness of their operations and ensure alignment with international reforms.

2.3.1. Advantages of regional approaches

MEA states have a longstanding scepticism toward global ISDS systems, which are perceived as biased toward developed country investors. Regional mechanisms based on the local context may increase trust in host states, motivating them to become parties to investment treaties and arbitration.

Another benefit of the regional arbitration approach is accessibility. Arbitration under global ISDS mechanisms is highly expensive, which frequently discourages arbitration by smaller states and investors. Regional centres, on the other hand, provide a lower-cost option. Choosing local arbitrators lowers the fees, and proximity to the parties to the dispute decreases travel, logistical costs and costly international legal representation. This is especially vital for African states that often suffer from budgetary constraints when it comes to investment dispute claims.

Litigating a case before regional dispute resolution bodies, such as SADC in Gaborone, Botswana, slashes travel and communication costs compared to proceedings at the WTO, which requires appearances in Geneva, Switzerland¹⁸. This is a cost-saving feature that significantly enhances access to dispute resolution for under-resourced states, which would otherwise likely struggle to afford the high costs associated with global litigation.

Furthermore, regional mechanisms can be instrumental in aligning both investment laws and arbitration practices across their jurisdictions, enhancing an environment of more predictable and stable investment. Aligning rules with international standards could improve predictability and balance foreign investment interests with host states' concerns. This goes with the argument that arbitration needs to step out of the legal box and allow for '*interactive communication*' to be fair and legitimate¹⁹. A balance between the procedural need for efficiency and the necessity of including a local voice into the dispute resolution process should be found. This is particularly crucial for MEA regions where a variety of legal systems coexist.

Finally, regional mechanisms can cultivate sector-specific expertise. Specialised chambers make way for regional mechanisms to tackle disputes that matter most – namely, in energy, natural resources and infrastructure. Such sectoral expertise allows arbitration processes to be tailored specifically to the complexities of certain industries, resulting in more nuanced and effective resolutions compared to a generic global one-size-fits-all experience.

There is much to be gained from regional mechanisms, but if they are to be effective and complement global ISDS reforms, they need to take account of challenges and pitfalls.

¹⁸ Joost Pauwelyn, 'Going Global, Regional, or Booth – Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions,' *Minnesota Journal of Global Trade* 13, no. 2 (Summer 2004): 249.

¹⁹ Esposito & Martire, *Arbitrating in a World of Communicative Reason*: 333–334.

2.3.2. Key structural and operational challenges

One significant concern is that an influx of regional mechanisms could lead to a fragmentation of international arbitration norms undermining the coherence of the framework and the predictability of dispute resolution. This risk can be minimised by regional centres working closely with global institutions such as UNCITRAL and ICSID.

One other key concern is that regional mechanisms face challenges related to panel composition and legitimacy. Arbitrators and counsels should take a proactive approach in ensuring that arbitration remains an inclusive, culturally adaptable process to overcome the possible ‘*clash of cultures*’²⁰. Furthermore, although allowing disputing parties increased influence over the nomination of panellists – such as in the SADC dispute settlement process – will instil greater confidence in arbitration, it may also have the opposite effect by destroying the legitimacy of the process. Excessive party influence in panel composition can create an imbalance and place disproportionate decision-making authority in the hands of the panel chair, the only panellist not appointed by a single party²¹.

Another big issue is the question of impartiality. Regional centres may face scepticism, particularly in disputes involving local governments or powerful regional stakeholders. These are issues that can be addressed through improved governance structures, increased transparency in arbitrator appointments, and compliance with international ethical standards.

The enforcement of arbitral awards across different jurisdictions poses another serious issue that regional mechanisms have to deal with. Working together with UNCITRAL to enable enforcement mechanisms in the form of regional recognition agreements is a potential viable option available.

2.4. Conclusion

The purpose of these regional ISDS institutions is to supplement existing global ones rather than supplant them in any way. The main objective is the admission of more players to an arbitration-style dispute resolution: In other words, innovator experiments in ‘riding on two oxen’, made possible by the peculiar challenges faced by Arab States and African nations, have emerged. And the regional approach would not only answer local complaints; it would also increase the legitimacy of the global ISDS machine as a whole. The goal is, thus, to combine global consistency with continental flexibility. And as UNCITRAL Working Group III continues its reforms, there should be emphasis on the incorporation of regional approaches so that, even as the world changes, ISDS remains inclusive and contextually adapted. However, without targeted investments in capacity building and access for under-resourced states and SMEs, structural reforms alone cannot ensure true inclusivity.

²⁰ Esposito & Martire, *Arbitrating in a World of Communicative Reason*: 336.

²¹ Pauwelyn, “Going Global, Regional, or Both,”: 251.

3. ISDS rehabilitation: advancing access and capacity for states and SMEs

One key inequity with respect to ISDS is the difference in access to legal expertise between developed and under-resourced states. The challenge is especially acute in the Middle East and Africa, where governments and investors often lack the financial and technical capacity to participate meaningfully in arbitration. Such gaps perpetuate systemic inequalities that disproportionately benefit resource-rich actors. Strengthening their legal and institutional capacity is therefore essential to promoting inclusivity, equity, and fairness in ISDS. This section examines the key challenges states face, explores targeted reforms, and assesses how empowering both governments and SMEs can create a more balanced and accessible dispute resolution system.

3.1. State perspective: enhancing capacity and access to ISDS

The capacity limitations of MEA states lead to their heavy dependence on high-priced foreign legal consultants and inability to swiftly gather institution-wide expertise. To address these constraints, targeted solutions can enhance legal capacity, reduce costs, and promote self-reliance in arbitration.

3.1.1. Challenges: resource constraints and overreliance on foreign counsel

ISDS with its intrinsic features pose challenges for many MEA states to overcome, such as limited capacity and budgetary constraints, unavailability of high-end top-tier legal advisers, and a lack of expertise in investment treaties. Besides, weak governance and institutional inefficiencies are further barriers to effective participation. Furthermore, Many BITs involving African States have broad, vague provisions – especially regarding Fair and Equitable Treatment (FET) and expropriation – which increase the risk of arbitral interpretations favouring investors²². All these things tip the balance against developing states and SMEs.

The first main challenge is the high cost of arbitration that has resulted in an uneven playing field where wealthier parties hold a disproportionate advantage²³. Particularly, arbitration proceedings often favour parties that are well versed in international legal practices, typically multinational corporations. One such example can be seen through the P&ID v. Nigeria case²⁴ in which poorly executed legal preparation resulted in disastrous financial implications. Nigeria owes a \$10 billion arbitral award for failure in process and weak legal defence. The limited nature of legal representation has further exacerbated vulnerabilities in other disputes involving Zimbabwe and Tanzania, where similar patterns have emerged.

²² Uché Ewelukwa Ofodile, 'African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges,' *ICSID Review – Foreign Investment Law Journal* 34, no. 2 (2019): 296–364.

²³ Najjar, *Inside Out*: 526–528.

²⁴ Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria, *Part Final Award*, Ad hoc Arbitration, London, initiated August 22, 2012. Accessed February 5, 2025, https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-part-final-award-friday-17th-july-2015#decision_5288.

The second main challenge is the underrepresentation of African arbitrators in ISDS cases, which has implications for legitimacy and local expertise. There is both a supply-side deficit and a demand-side bias, with studies showing that African arbitrators are seldom nominated for high-value disputes²⁵.

Another big problem is the overreliance on foreign counsel. Though external legal teams bring knowhow, their paycheques drain state coffers, restricting a window for homegrown capacity building. This necessitates the development of local legal knowledge and investment in arbitration training programs. Many developing nations often face institutional constraints in capacity-building initiatives, similar to early challenges in environmental law²⁶. China, India, and Brazil have since built government expertise, but yet they continue to depend on foreign law firms for dispute resolution²⁷. Conversely, due to insufficient training programs and institutional initiatives in Africa, the arbitration culture within OHADA remains underdeveloped despite the presence of arbitration-friendly legal frameworks²⁸.

One other huge challenge is that usually states start building legal capacity reactively, after a claim is raised, which only leads to gaps, long lines, and expensive arbitration processes. For example, Argentina's Solicitor General was forced to research legal precedents in a mad dash before the ICSID hearings²⁹. In much the same way, for many states, investor complaints only come to the attention of the state once an arbitration notice is received, preventing early resolutions to disputes. A survey of cases brought against African states reveals poor intergovernmental coordination, which further compounds legal and financial vulnerabilities³⁰. States are hamstrung in responding strategically to investor grievances before they boil over into arbitration by fragmented decision-making.

To remedy these imbalances, we must empower under-resourced states with the legal means to effectively navigate arbitration.

3.1.2. Opportunities: advisory centre, sustainable funding & training initiatives

One of the most promising solutions is the establishment of an advisory centre with regional offices. The Advisory Centre on International Investment Law (ACIIL) could expand its mandate to include regional hubs in Africa and the Middle East to bring down legal costs (as long as they are not disproportionate to the technical facilities used) and facilitate a consistent understanding of treaty obligations and arbitration practices. Adequate financing would be vital to avoid systemic bias against low-income states, and

²⁵ Uche Ewelukwa Ofodile, « Africa and International Arbitration: From Accommodation and Acceptance to Active Engagement, » *Transnational Dispute Management*, 2015: 2-3.

²⁶ Donald Kaniaru, *Is Capacity Building Presently of Age?*, *Environmental Policy and Law* 40, no. 6 (2010): 314–315.

²⁷ Mihaela Papa, 'Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?', *Journal of International Dispute Settlement* 4, no. 1 (2013): 85, 107, 108.

²⁸ Gaston Kenfack Douajni, 'Recent Developments in OHADA Arbitration,' *Journal of International Arbitration* 23, no. 4 (August 2006): 363–373.

²⁹ Papa, 'Emerging Powers in International Dispute Settlement,': 87.

³⁰ Hussein Haeri and Giacomo Gasparotti, *Prevention or Cure: The Role of Coordination in Investor-State Disputes in Africa*, *Transnational Dispute Management* 19, no. 3 (May 2022): 6–8.

a dedicated ISDS fund, administered by an independent body, such as UNCITRAL, could assist with arbitration costs for low-income states and finance long-term capacity development efforts, much like the World Bank's Capacity Development Trust Fund. The Turn to international law firms could broaden *pro bono* representation, following the example of the International Bar Association (IBA).

Capacity building is a cornerstone for the success of ISDS reforms. Regional arbitration centres, in collaboration with institutions like ICSID and UNCITRAL, could play a crucial role in strengthening state capacity by offering structured and continuous training in treaty drafting, negotiation, case preparation, and dispute management. As highlighted in UNCITRAL Working Group III discussions, there is a recognised imbalance between investors and developing states in arbitration, making long-term capacity-building essential to reducing dependency on external legal support and improving dispute prevention³¹. For example, UNCTAD's regional training programs play a crucial role in equipping government officials with the skills to navigate complex investment treaties and disputes³². Training is essential not only for arbitrators but also for magistrates, as it ensures effective judicial oversight and better cooperation with arbitration proceedings³³.

There already are notable examples that show such efforts can succeed. For example, KIAC has conducted workshops for African states focusing on treaty drafting and dispute management to strengthen their negotiation and arbitration capabilities. And although most African arbitral institutions offer no regular training initiatives, massively contributing to the skills gap, there are institutions, such as CRCICA, that have developed specialised programmes³⁴.

Additionally, legal systems evolve in dissimilar political, social, economic, and historical contexts³⁵. Fully fledged capacity-building initiatives – cornerstones of ISDS reform – can only be sensitive to context and should be aligned with each region's dynamic with respect to the relevant reforms. Arbitration is not merely a technical exercise but must be a long-term and institutionalised³⁶ '*process of communicative actions*,' where practitioners actively engage in cross-cultural learning³⁷. To that end, getting to grips with language barriers is also crucial, especially in multilingual areas where capacity building may be hampered³⁸. Linguistic challenges must be overcome. This includes ensuring that legal training, knowledge transfer and procedural accessibility are available to all.

If such programmes were implemented in the MEA region, through partnerships involving regional arbitration centres, UNCITRAL and international universities, this

³¹ UNCITRAL, *Note by the Secretariat of the UNCITRAL*, 38th Session, para. 23, accessed February 5, 2025, <https://docs.un.org/en/A/CN.9/WG.III/WP.168>; UNCITRAL, *Report of Working Group III on the work of its 38th Session*, para. 44, accessed February 5, 2025, <https://docs.un.org/en/A/CN.9/1004>.

³² Anna Joubin-Bret, Marie-Estelle Rey, et al., 'Chapter 2: International Investment Law and Development,' in Marie-Claire Cordonier Segger, Markus W. Gehring, et al., *Sustainable Development in World Investment Law*, Global Trade Law Series, Volume 30, Kluwer Law International, 2011: 15–31.

³³ Gaston Kenfack Douajni, 363–373.

³⁴ Ofodile, 'Africa and International Arbitration,' *Transnational Dispute Management*, 2015: 48.

³⁵ Marcia Gelpe, 'How to Make Capacity Building Work,' *Environmental Law Reporter News & Analysis* 31, no. 7 (July 2001): 10,857.

³⁶ Kaniaru, 316–317.

³⁷ Esposito & Martire, *Arbitrating in a World of Communicative Reason*, 338–339.

³⁸ Marcia Gelpe, 10,866.

could help in reducing legal costs, promote legal harmonisation, and facilitate a more consistent interpretation of treaty obligations. But these institutions need state-backed initiatives, regulatory frameworks, and financial support to thrive, for which the support of MEA governments is also key³⁹.

3.2. Business perspective: expanding SME participation and access in ISDS

For many African regions, SMEs contribute to varying amounts up to 40% to GDP and 70% of the jobs, making them the backbone of the economy. But challenges on a structural and procedural level remain, with the region experiencing a huge financial challenge owing to limited access to credit and prevalent informal economies⁴⁰. Replacement of this situation will necessitate targeted reforms, such as simplifying arbitration procedures, sharpening the legal system, and stylish training programs aimed at ensuring a more open and all-embracing form of dispute resolution.

3.2.1. Barriers: high costs, procedural complexity & legal uncertainty

Although investment protection rules are applicable to all business stakeholders, the nature of ISDS procedures provides a competitive advantage to larger multinational companies, whilst SMEs are often at a disadvantage due to high arbitration costs, a complex procedural framework and a lack of legal certainty⁴¹. Their vulnerability makes them more susceptible to state intervention. Some tribunals have gone even further, narrowly interpreting ‘investment’ and potentially denying ICSID protection to SME investments⁴².

However, SMEs have been largely ignored in ISDS reform despite their economic importance. In fact, discussions within UNCITRAL’s Working Group III have highlighted differing perspectives on extending advisory centre services to SMEs. While some suggest extending certain services to SMEs, others emphasise the difficulty in establishing clear and objective eligibility criteria and the potential cost implications. Additionally, concerns were raised about the potential conflict of interest⁴³, and that governments would be funding claims from foreign investors against themselves. Colombia has voiced similar concerns that state-funded assistance for SMEs could be seen as crediting investor claims in disputes⁴⁴. Some have argued that access to the SME would still be allowed, to the extent it can be granted under strict eligibility criteria

³⁹ Emilia Onyema, *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*. © Kluwer Law International: Kluwer Law International, 2016: 15–44.

⁴⁰ Connor A. Gibbons, ‘Equity Crowdfunding Economic Growth in African Countries: A Framework,’ *Case Western Reserve Journal of International Law* 54 (2022): 447–449.

⁴¹ Petra Butler, ‘Businesses Have Human Rights, Too,’ *Victoria University of Wellington Law Review* 50, no. 4 (2019): 573–586.

⁴² Tamas Szabados, ‘Investment Arbitration and National Interest,’ *Hungarian Yearbook of International Law and European Law* 2019 (2019): 583.

⁴³ UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Advisory Centre*, A/CN.9/WG.III/WP.212, para. 62, accessed February 5, 2025, <https://documents.un.org/doc/undoc/ltid/v21/090/91/pdf/v2109091.pdf>.

⁴⁴ UNCITRAL, *Comments from the Republic of Colombia on the Draft Statute of an Advisory Centre*, accessed February 5, 2025, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_colombia.pdf.

without creating cost burdens or legal conflicts⁴⁵. In this respect, UNCITRAL's Working Group III has discussed the advisability of expanding advisory centres' services to SME's that meet specific requirements, ensuring access without creating conflicts of interest⁴⁶.

Of course, there is a political cost to facilitating access to ISDS for SMEs and vulnerable investors⁴⁷. Although the advisory centre's scope is primarily directed toward assisting governments, limited access for SMEs to some of its services could act to bridge adversarial gulfs between investors and states, which often arises even before arbitration proceedings begin⁴⁸. Moreover, with sufficient investment, granting SMEs access to the advisory centre's resources under Article 6⁴⁹ may provide the best of both worlds – enabling early dispute resolution, while ensuring investor-state relations remain positive. A proposal to include similar provisions into Article 7 – for the purpose of engaging legal support – was not adopted, however⁵⁰.

3.2.2. Solutions: SME-focused legal training, simplified arbitration & financial support

The debate on SME access to ISDS advisory services remains unresolved. To address these challenges, a potential compromise could be the provision of training on how to negotiate investment contracts and how to settle disputes early as opposed to more radical legal representation or the like. The initiatives would provide SMEs with investment treaty literacy and help them avoid disputes before considering arbitration. This could also be a platform for regional dialogue, allowing governments and SMEs to get their views out to one another and smooth over communication and reduce tensions where the ADR is used⁵¹.

Also, expedited arbitration is emerging as an economical alternative to increase SMEs participation. Unlike routine arbitration that can be time-consuming and expensive, expedited procedures set strict time limits, lower arbitrator fees and simplify processes for disputes under a certain threshold amount. For instance, the SCC Expedited

⁴⁵ UNCITRAL, *Report of Working Group III on the work of its 38th Session*, para. 30, accessed February 5, 2025, <https://docs.un.org/en/A/CN.9/1004>.

⁴⁶ UNCITRAL, *Note by the Secretariat of the UNCITRAL*, 38th Session, para. 25, accessed February 5, 2025, <https://docs.un.org/en/A/CN.9/WG.III/WP.168>.

⁴⁷ Catharine Titi & Katia Fach Gómez: https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/EN/note_on_access_to_isds_for_small_and_medium.pdf, accessed February 5, 2025.

⁴⁸ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/joint_submission_to_uncitral_wgiii_advisory_centre_wb_partner_organizations.pdf, accessed February 5, 2025.

⁴⁹ 'Article 6 – Technical assistance and capacity building: 1. *The Advisory Centre shall provide technical assistance to (...) 3. (b) Other persons or entities to participate in the activities (...); it shall also determine the extent to which the Executive Director may allow other persons or entities to participate in those activities.*' (underline added), UNCITRAL, *Annex III-Statute of the Advisory Centre on International Investment Dispute Resolution (adopted in principle)*, accessed February 5, 2025, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2413025e.pdf>.

⁵⁰ UNCITRAL, *Report of the General Assembly – 57th Session*, para.115, accessed February 5, 2025, <https://docs.un.org/en/A/79/17>.

⁵¹ UNCITRAL, *Submission to the UNCITRAL Working Group III (ISDS Reform) by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and the Regional Cooperation Council (RCC)*, accessed February 5, 2025, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/joint_submission_to_uncitral_wgiii_advisory_centre_wb_partner_organizations.pdf.

Arbitration usually settles cases in six to nine months, which has a significant effect on the amount of litigation costs⁵². UNCITRAL has considered expedited arbitration rules and building upon these initiatives in a way tailored to cases involving SMEs could produce significant benefits.

The second key solution, of course, is to set up financial support mechanisms. Funds can be created through development banks, international organisations and private domestic actors. There has also been a rise in other financing mechanisms, like equity crowdfunding, allowing international investors to fund African SMEs, leading to enhanced capital flows⁵³. Therefore, we can make the most of a more general approach that includes training, supporting expedited arbitration alongside access to financing, in order to assuage the avail of SMEs through ISDS and other investment protections.

3.3. Cross-cutting solutions: knowledge sharing & digital transformation

Regional knowledge-sharing platforms and digital innovation will be the cherry on top solution if well implemented throughout the MEA. Such initiatives will provide states and SMEs the tool to navigate arbitration and ensure that ISDS is accessible, fair, and responsive.

3.3.1. Regional platforms for legal knowledge & best practices

Structured knowledge-sharing is imperative for long-term capacity building in ISDS. Although UNCITRAL Working Group III has recently reiterated the importance of existing legal resources, they may be insufficiently localised and accessible for key MEA stakeholders⁵⁴. To bridge this gap, region-specific knowledge-sharing platforms should be developed, ensuring that MEA policymakers, legal practitioners, and SMEs have access to relevant, tailored materials.

Proposals include building online databases of ISDS case law, treaty interpretations, and/or best practices in investment protection and risk mitigation. Regional arbitration forums would also foster dialogue between policymakers, academics, and practitioners, balancing global perspectives with regional realities. Through this approach, we can create such platforms (supported by organisations such as the African Arbitration Association, AfAA, OHADA, the Association for the Promotion of Arbitration in Africa – APAA –, the Arab Investment Court), which would ensure that knowledge spread in accordance with regional needs and would reach governments and SMEs.

⁵² Hafliði Kristján Larusson, 'Expedited Arbitration – Meeting the Needs of SMEs,' *Scandinavian Studies in Law* 63 (2017): 177.

⁵³ Connor A. Gibbons, 449.

⁵⁴ Which include: Practise Notes – e.g. ICSID's practice notes for respondents; Policy Papers & Reports – e.g. UNCTAD's investment policy reviews and the Energy Charter Secretariat's model instrument for managing investment disputes; Handbooks & Research Tools – e.g. APEC's investment treaty negotiators' handbook, UNCTAD's Investment Policy Hub, and PluriCourts' Investment Treaty Arbitration Database (PITAD). UNCITRAL. *Note by the Secretariat of the UNCITRAL, 38th Session, para. 24, 25*. Accessed February 5, 2025. <https://docs.un.org/en/A/CN.9/WG.III/WP.168>.

3.3.2. Digital tools for ISDS: e-arbitration, AI & blockchain

We must acknowledge that digital tools still constitute a significant barrier in ISDS. Though online hearings and electronic case management are useful for efficiency, they are not applied consistently. Digital transformation can, however, mitigate key financial and procedural constraints in ISDS. While E-submissions, case management systems, and streamline proceedings reduce delays⁵⁵, digital databases improve transparency by granting access to awards, procedural documents, and case law. Also, AI-driven legal research will be of big help to tribunals and disputing parties in case law analysis. Furthermore, blockchain-based authentication will enhance security in e-arbitration. Additionally, if these digital solutions are sustainable, this could address the recurring issue of short-term technical cooperation.

Nevertheless, challenges remain. One can consider the challenges of infrastructure gaps, cybersecurity risks, and data privacy issues. To counter these, investment in digital capacity-building and training opportunities for all stakeholders should be made to avoid major difficulties in engaging with e-arbitration tools. In addition, regional cooperation can help to create a harmonising e-arbitration framework, leading to uniformity and accessibility across Africa and the Middle East. User-friendly platform development can be further supported through public-private partnerships (PPPs) within arbitration centres, technology firms, and legal institutions. By embracing digital solutions, all ISDS stakeholders can enhance their participation in ISDS. Investing in technological infrastructure, legal training, and regional cooperation will be key to fully benefit from e-arbitration and navigate disputes more effectively.

3.4. Conclusion

Strengthening regional expertise, reducing foreign counsel dependence, enhancing SMEs participation and responding to digital tools will enable MEA states to create broader and equal ISDS access. A holistic approach—which includes the establishment of advisory centres, funding mechanisms, and targeted training—must assist states and SMEs navigate through financial, procedural and educational reforms. It takes continued cooperation between multilateral organisations, regional institutions, governments and the private sector to fill these blank spaces in expertise. Together, these reforms will not only lower the barriers to ISDS but also increase its legitimacy in general.

4. General conclusion: toward an inclusive and balanced ISDS framework

For regions like the Middle East and Africa, where gaps in investment protection and judicial capacity persist, ISDS reform is not just necessary but also a key step toward building trust, stability, and sustainable international investment.

This article has put forward two interlinked solutions: Regional mechanisms, as discussed in Part 2, offer a practical means to bridge the gap between global ISDS

⁵⁵ Oluwaseye Thompson Adeboye, Joshua Olukayode Olatoke, and John Afolabi Ogedengbe, 'Empowering Developing Countries: Unveiling Perspectives on the WTO Dispute Settlement Mechanism,' *Nigerian Law Journal* 25, no. 1 (2024): 34.

frameworks and local realities. By using existing arbitration centres and adjusting procedural rules to fit regional conditions, these mechanisms can help build confidence among host nations, lower costs and harmonise legal standards. Their success will, however, be contingent upon overcoming challenges, such as ensuring neutrality, meeting global standards and sorting out enforcement problems. Capacity building and facilitating access to ISDS, as discussed in Part 3, are crucial. Benefitting from the advisory centre, the creation of funding mechanisms for less developed states, and the empowerment of SMEs through streamlined procedures and focused training programs are all essential parts in an equitable ISDS system.

These solutions take a multi-faceted approach to ISDS reform. On the one hand, regional fora provide the infrastructure and flexibility in procedures that are needed to solve local problems. On the other hand, capacity-building and digital transformation measures to equip stakeholders with the tools and expertise to participate effectively in the system.

International organisations, regional arbitration centres, governments and private interests have to collaborate to give effect to these reforms. Only if this happens, could these reforms not end up like another eight-hundred-page paper? Beyond merely changing legislation, this reform means ensuring open and fair economic development. However, while intermingling global and regional perspectives offers greater fairness and accessibility to ISDS, its success in the MEA region ultimately depends on active participation from local stakeholders. From our survey of states submissions and notes prepared by the UNCITRAL Secretariat, we find that African and Arab states have been slow to engage, risking marginalisation and missed opportunities to shape reforms that reflect their needs. It is understandable that the change must be gradual, not imposed, as there is a psychological aspect to this: governments must own the reform process rather than feel it as an external agenda. However, a more proactive approach would certainly not harm. While reform should not be rushed, it must not stall. Finding the right balance between the need to adapt and to engage is the challenge. One thing that is certain: the MEA region should not fall behind in shaping a system that will directly impact its economic and legal future.

Reforming ISDS is necessary, though not sufficient to overcome these longstanding challenges – it is a step, not a solution. The road ahead will be long and will require continued commitment and adaptation. But it is one worth taking. With further cooperation and balance between different perspectives, these reforms have the potential to result in a more equitable, accessible, and effective dispute resolution system, ultimately contributing to a stronger global investment environment.

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