
Legitimacy Crisis and the ISDS Reform in a Political Economy Context

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The variation of countries' industrial policies and political strategies in a multipolar world brings the investor-state dispute settlement (ISDS) regime to a crossroad. Backlash to the inconsistency, non-transparency, partiality and unfairness of the ISDS regime results from the states' changing interests and policy priorities, including the rising awareness of democracy. In pursuing the benefits of multilateralism, a multilateral investment court can serve as an alternative to the current investment arbitration regime. States need to clarify the scope of consent based on their political economic considerations. Substantial investment protection standards can be different, whereas the principle of proportionality can serve as an approach to the balance between investment protection and states' policy arrangements. Meanwhile, there should be efforts to align the interpretation and application of key provisions, possibly through interpretation notes and an appellate body that reviews arbitral decisions, to generalise implicit consensus and to broaden collective acceptance of the regime.

Keywords

ISDS Reform, Legitimacy, Consent, Democracy, Sovereignty, Political Economy

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I. Introduction

The Investor-State Dispute Settlement (ISDS) allows an investor from one country to initiate arbitral proceedings directly against another country in which it has invested.¹ The mechanism is typically set out in bilateral investment treaties (BITs), free trade agreements (FTAs), and national foreign investment laws. It seeks to promote foreign investment by giving investors coherent expectations and fair processes for dispute resolution. The ISDS system includes binding rules (treaties and conventions), non-binding rules (international documents, arbitral practices) and participants (investors, states, relevant third parties, arbitrators).

Despite the investment tribunal's effort to make impartial decisions on investment disputes, intense debates on the legitimacy of the ISDS regime are calling for fundamental reform. Deficiencies in the ISDS regime, such as inconsistency of arbitral awards,² partial and self-interested arbitrators,³ lack of transparency⁴, long durations and high costs⁵ are challenging the legitimacy of the ISDS regime. Growing discontent arising from these deficiencies has made such countries as Ecuador, Indonesia and Venezuela decide on terminating many of their investment treaties that include ISDS provisions.⁶ Brazil, India and South Africa have separated the existing ISDS model in the new BIT text. These problems have led to different proposals for reforming the ISDS system to correct perceived deficiencies. The European Union (EU) finally initiated the multilateral investment court (MIC)⁷ as a new forum for arbitration. Countries advocating the current regime submitted different reform proposals. There are discussions at the United Nations Commission on International Trade Law

¹ Thomson Reuters Practical Law, Investor-State Dispute Settlement (ISDS) (2021), [https://uk.practicallaw.thomsonreuters.com/0-624-6147?Transitiontype=Default&contextdata=\(sc.Default\)&firstpage=true](https://uk.practicallaw.thomsonreuters.com/0-624-6147?Transitiontype=Default&contextdata=(sc.Default)&firstpage=true).

² Peter Yu, *Crossfertilizing ISDS with TRIPS*, 49 LOYOLA U. CHI. L. J. (2017).

³ UNCITRAL, Report of Working Group III: Investor-State Dispute Settlement Reform, Status of Work as of August 2021, https://uncitral.un.org/en/working_groups/3/investor-state.

⁴ Jonathan Klett, *National Interest vs. Foreign Investment-Protecting Parties through ISDS*, 25 TULANE J. INT'L & COMP. L. 213 (2016).

⁵ UNCITRAL Working Group III, Possible Reform of Investor-State Dispute Settlement(ISDS)-Cost and Duration, U.N. Doc. A/CN.9/WG.III/WP.153, at 17-18 & 21, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/057/51/PDF/V1805751.pdf?OpenElement>.

⁶ Nicolas Boeglin, ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives, Bilaterals.org (June 2013), <https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=en>.

⁷ Council of the EU, Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations (2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations>.

(UNCITRAL) Working Group III⁸ regarding the Proposed Amendment to the ICSID Convention Arbitration Rules.⁹

As these proposals further entrench and institutionalise the ISDS regime, they may leave structural problems and injustice intact. Indeed, the ISDS reform is bogged down with changing interests and considerations. The ISDS regime was initially designed to protect the interests of foreign investors.¹⁰ This inherent bias may threaten the host state's right to regulate, which is related to the policy autonomy concerning their domestic regulatory spheres. And there are ignored stakeholders in the ISDS regime, such as the affected communities by foreign investment, indigenous peoples and civilian populations. These affected constituencies are calling for the protection of their interests in the (re-)design of public policies and investment treaties. With the rising importance of these groups and the attention to asymmetries of participation in the rule-making of investment regimes, governments increasingly recognise that no single method is perfect in itself, nor can one solution satisfy the needs of all stakeholders. Therefore, the ultimate obstacle in reforming the ISDS regime lies in how the states are keen to cooperate in the field of foreign investment.

The difficulty in the ISDS reform lies, to a large extent, in political economy. Sovereign states are created to achieve certain political-economic functions in domestic and international spheres. States would act with a meaningful purpose which can be interpreted sociologically for a causal explanation of their courses and consequences. In this context, 'action' is 'social' insofar as the acting entity attaches a subjective meaning to its behaviour-be it overt or covert, omission or acquiescence -and its subjective meaning takes into account the behaviours of others.¹¹ States have both instrumental rationality (the means used to achieve ends) and value rationality (legitimate ends in themselves) to create or join an institution.¹² The former implies the motivation from the outside world to achieve specific goals. If keeping this perspective, for states, the objective of the ISDS regime used to be investment promotion and economic collaboration for mutual development as part of the efforts towards market integration and globalisation. Economic globalisation is marked by

⁸ UNCITRAL, Report of Working Group III, U.N. Docs. A/CN.9/WG.III/XLII/CRP.2; A/CN.9/WG.III/WP.213; A/CN.9/WG.III/WP.212; and A/CN.9/WG.III/WP.208.

⁹ ICSID Secretariat, *ICSID Rules and Regulations Amendment* (Working Paper No. 6: Proposals for Amendment of the ICSID Rules, 2021), <https://icsid.worldbank.org/resources/rules-amendments>.

¹⁰ Kenneth Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005).

¹¹ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 4 (republished in English by the University of California Press, 1978).

¹² Mark Rutgers & Petra Schreurs, *The Morality of Value-and Purpose-rationality: The Kantian Roots of Weber's Foundational Distinction*, 38 ADMIN. & SOC'Y 403-19 (2006).

mobilising goods, services, capital and information across borders.¹³ Parallel to this trend, policy discretion and regulatory autonomy concerning domestic issues, such as public health, environmental protection, labour protection, industrial policies and human rights protection, are often left unattended.¹⁴ These interests are reciprocal and dynamic in the pursuit of wealth and power by countries. Integrating these interests into a dispute resolution mechanism, a legitimate ISDS regime is founded on the states' consent after their careful political-economic considerations on participating in the ISDS regime.¹⁵

This research is to examine the legitimacy crisis and illustrate the difficulties in the ISDS reform through this political economy narrative. This political economy approach takes into account various interests and concerns that a state might have to consider when deciding whether, and how, to participate in the ISDS regime, which is conversely art of the institutional design process. This paper is composed of five parts including Introduction and Conclusion. Part two will discuss how the external variation leads to considerable resistance to the current ISDS due to its procedural and substantive drawbacks. Part three will examine the source of legitimacy of the ISDS regime, namely the states' consent and the political-economic benefits of the regime. Part four will reflect on current ISDS reform proposals, including incremental ISDS reform and alternatives, such as an investment court. It also advocates top-down and bottom-up efforts to issue guiding cases and interpretation notes to align key standards and concepts. Part five will conclude that fixing the complex ISDS regime entails systemic work, whether in terms of the jurisdiction given to the tribunal or the substantial protection standards agreed by the state parties. ISDS reformers should respect spatial and temporal discrepancies of public policies and leave room for manoeuvring by national governments. Meanwhile, soft laws can play a role in shaping new and solidifying previous consensus on the standards of protection and other institutional designs.

¹³ Fiona Adamson, *Globalisation, Transnational Political Mobilisation, and Networks of Violence*, 18 CAMBRIDGE REV. INT'L AFF. 2512 (2005).

¹⁴ Audrey Chapman, *Globalization, Health, and Human Rights*, in GLOBAL HEALTH, HUMAN RIGHTS, AND THE CHALLENGE OF NEOLIBERAL POLICIES 153-99 (A. Chapman ed., 2016).

¹⁵ Yoram Hafel & Alexander Thompson, *When Do States Renegotiate Investment Agreements? The Impact of Arbitration*, 13 REV. INT'L ORG. 25-48 (2018).

II. Legitimacy Crisis of the ISDS Regime

A. Inconsistency of Arbitral Awards

The inconsistency of arbitral processes and outcomes challenges the predictability and thus legitimacy of the ISDS regime. Divergent interpretations occur to the recognition of jurisdiction and admissibility, as well as procedural and substantive standards. This inconsistency is most unjustifiable when tribunals interpret the same provision in the same treaty in two different ways,¹⁶ such as *BG Group v. the Argentine Republic*,¹⁷ limiting full protection and security in the UK-Argentina BIT to physical security, and *National Grid v. the Argentine Republic*,¹⁸ which found no reason to limit the protection to physical assets. The problem could also arise where two tribunals apply the same or similar provisions differently to the identical facts. For instance, there are different interpretations of whether the most favoured nation (MFN) treatment can be imported from treaties with third countries. Some opened this possibility (such as *White Industries v. India*¹⁹), while others did not (such as *Içkale v. Turkmenistan*²⁰). Inconsistency discourages states from adopting legitimate regulatory measures, either through the internalisation of the treaty constraints or the investor's threat of investment arbitration. For investors, arbitral inconsistency imposes uncertainty regarding the legality of state regulatory measures.

This phenomenon would arise from the inherent characteristics of the current decentralised ISDS regime. First, unlike common law systems, there are no binding requirements for arbitrators to follow previous cases as precedents. Under international law, investment dispute settlement procedures and tribunal's decisions do not have a *stare decisis* effect. Investment arbitral awards are binding only on the parties of the dispute.²¹ Arbitrators are not obligated to promote coherent investment legal norms, but focusing on the specific context of a case. The absence of any framework to

¹⁶ Rudolf Dolzer, *Perspectives for Investment Arbitration: Consistency as a Policy Goal?*, 3 *TRANSNAT'L DISP. MGMT.* (2012), <https://www.transnational-dispute-management.com/article.asp?key=1823>.

¹⁷ *BG Group Plc. v. The Republic of Argentina*, UNCITRAL (2007), at 100-1, <https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf>.

¹⁸ *National Grid plc v. The Argentine Republic*, UNCITRAL (2008), at 74, <https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf>.

¹⁹ *White Industries Australia Limited v. The Republic of India*, UNCITRAL (2011), at 105, <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

²⁰ *Içkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, ¶ 134 (Mar. 8, 2016), IIC 983 (2016).

²¹ ICSID Convention art. 53(1).

govern how precedent is used makes the goal of predictability impossible to achieve. Moreover, granting arbitrators power and discretion to consider other sources of international law opposes the privity nature of the arbitration.

Secondly, the interpretation and application of treaty provisions are at the discretion of selected arbitrators. The substantive law that the tribunals are shaping through precedents is fragmented. There are over three thousand investment treaties that are similar in content but formally distinct. The broad and variant wording of investment treaties generates divergent interpretations. For instance, the term “any dispute” in an umbrella clause may cover any dispute or only the engagement of states in a sovereign capacity. [Emphasis added] The procedural “after six months ... may ... consent to the submission” in Article VI(3)(a) of the US-Czechoslovakia BIT is different from the mandatory “provided that six months have elapsed” in Article 1120 of the NAFTA, thereby resulting in divergence in *Lauder v. Czech*²² and *Mesa Power v. Canada*.²³ Each arbitral award is conditioned upon the specific context of the case. “Like circumstances” in national treatment provisions often means a combination of several factors. What an investor may legitimately expect in a jurisdiction active in environmental matters can differ from a less pro-environment country.²⁴ Further, arbitrators can have different interpretations based on their understandings and experience. For example, as far as the MFN provisions are concerned, some awards favoured permitting the MFN clause to modify or override conditions on access to ISDS and expand the jurisdiction of tribunals in such cases like *Maffezini v. Spain*,²⁵ *Siemens v. the Argentine Republic*,²⁶ and *RosInvestCo UK v. Russian Federation*.²⁷ In contrast, others disallow such access in those cases like *Salini v. Jordan*,²⁸ *Plama v. Bulgaria*²⁹ and *ICS v. the Argentine Republic*.³⁰ If arbitrators do not give specific

²² Ronald S. *Lauder v. The Czech Republic*, UNCITRAL 38 (2001), <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>.

²³ *Mesa Power Group (U.S. v. Can.)*, 17 (Perm. Ct. Arb. 2012), <https://www.italaw.com/sites/default/files/case-documents/italaw7240>; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, ¶ 301 (Mar. 26, 2016); *Savarkar (Fr. v. U.K.)*, Hague Ct. Rep. (Scott) 275 (Perm. Ct. Arb. 1911).

²⁴ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 32 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

²⁵ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 (2000), Award ¶¶ 5-6 (Nov. 20, 2000).

²⁶ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (2007), Award ¶ 68 (Feb. 6, 2007), IIC 227 (2007).

²⁷ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction ¶ 53 (Oct. 1, 2007), <https://www.italaw.com/cases/923>.

²⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction ¶¶ 118-119 (Nov. 9, 2004).

²⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction ¶ 227 (Feb. 8, 2005).

³⁰ *ICS Inspection and Control Services Limited (U.K.) v. The Republic of Argentina*, UNCITRAL, PCA Case No.

reasons for adopting a particular standard or interpretation, this will leave even more uncertainties in future cases.

The third is a lack of framework to govern how precedent is used or a control mechanism to guarantee arbitral consistency. The arbitration tribunal is constituted to resolve a single dispute. There is no recourse for a country or investor to challenge the misapplication of the law or rulings that are substantively flawed. According to Article 52 of ICSID, the ad hoc Committee merely has the power to annul awards with procedural injustice, that is, to determine whether a tribunal manifestly exceeded its powers or failed to apply the applicable law. It does not have the power to overturn an award for errors of fact or law.³¹ This conforms to the desire of the Washington Convention drafters to ensure the finality and binding effect of awards, which is an expression of customary law based on the concepts of *pacta sunt servanda* and *res judicata* and is in line with the objective and purpose of the Convention.³²

As ISDS reformers seek consistency and coherence in treaty interpretation and arbitral awards, the problem is whether inconsistency itself is legitimate and brings more benefits than without. Binding consistency would imply that earlier rulings could impose persuasive effects of interpreting the rules on future cases and drive the system towards judicialization and centralised institutions, such as the domestic courts and the World Trade Organization (WTO). However, this can hardly be suitable for an international investment regime. FDIs and investors vary in policy and political significance. Fairness in investment arbitration thus does not have a fixed meaning and may vary in different contexts.³³

B. Selection of Arbitrators

Paramount to the substantial standards and interpretation, another problem regarding the ISDS regime is the lack of diversity, independence and impartiality of arbitrators. Concerns about the qualification and conduct of arbitrators include the following issues: (1) insufficiently precise codes of independence and impartiality of arbitrators;³⁴ (2) potential conflicts of interest, such as double hatting and the prejudgment of issues;³⁵

2010-9, Award on Jurisdiction ¶ 341 (Feb. 10, 2012).

³¹ ICSID Convention art. 52(1).

³² Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-state Arbitration & International Investment Law*, 44 GEO. J. INT'L L. (2012).

³³ Ross Buckley, *Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable*, 14 SYDNEY L. REV. 358 (1992).

³⁴ Chiara Giorgetti et al., *Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*, 21 J. WORLD INV. & TRADE 441-74 (2020).

³⁵ Gus van Harten, *Perceived Bias in Investment Treaty Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION:

(3) the limited number of individuals repeatedly appointed as arbitrators, and the lack of diversity in gender, age, ethnicity and geographical distribution of appointed arbitrators representing different levels of interests;³⁶ and (4) the challenge mechanism to disqualify an arbitrator based on actual or perceived lack of independence and impartiality.³⁷ Indeed, legitimate arbitration needs qualifications and experience. Raising the standards of arbitrator selection effectively enhances fairness, credibility, and impartiality. Progress has been made in the revised rules of the selection and appointment of tribunal members under the ICSID and the UNCITRAL arbitration rules.

The widespread criticism also requires the diversity of arbitrators to enhance the legitimacy of dispute settlements. Diverse adjudicators are more likely to avoid cognitive biases and group-thinking in decision-making.³⁸ Empirical evidence also showed that selected arbitrators are primarily men from either North America or Europe.³⁹ Participants from developing countries will benefit if arbitral institutions make diversity and heterogeneity a required standard of arbitrator selection. Diversity requirements would encompass more arbitrators from developing countries. Nationals from developing countries are more likely to understand and determine the nature of dispute involving domestic law and the public policy of similar countries. Moreover, arbitration needs democracy and respect for the will of the parties to depoliticise the ISDS regime. Arbitration bias can be inherent and subtle due to the nationality of arbitrators, gender, age, ethnicity and other identities.

A related issue is how far tribunals could scrutinise decisions of fact or law made at the domestic level. When the treaty or contract remains silent or obscure on a topic, arbitrators face a challenging situation to decide the appropriateness and legality of public policy. It is an open question whether arbitrators should accommodate the social needs that might affect their decisions, irrespective of whether those involved were the litigants before them. Unlike domestic public officials, current arbitrators only have limited obligation and power to consider economic forces, scientific reports and stated public opinions. The answer may lie in the intention of states in signing BITs and building the ISDS regime. However, arbitrators cannot decide on the real purpose and objectives of BITs on behalf of the state. It can be challenging to

PERCEPTIONS AND REALITY 443 (M. Waibel ed., 2010).

³⁶ Andrea Bjorklund et al., *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410-40 (2020).

³⁷ Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT'L DISP. SETTLEMENT 97-122 (2010).

³⁸ WON KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* 145 (2017).

³⁹ Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301-32 (2017).

empower arbitrators to decide on these issues unless there are clear political wills of cooperation (similar to the EU and its trading partners).⁴⁰

C. Transparency

The ISDS regime has been criticised for lacking transparency⁴¹ and giving insufficient opportunities for third parties to participate in the proceedings.⁴² These transparency issues have been addressed, for example, in the Mauritius Convention adopted within the UNCITRAL. Amendments to the ICSID Convention Arbitration Rules include strengthened disclosure requirements for arbitrators,⁴³ a provision on the possibility to hold open hearings,⁴⁴ expanded transparency provisions into publishing awards as soon as possible⁴⁵ and the opportunity for non-disputing parties to file submissions (amicus curiae briefs).⁴⁶ By allowing the participation of non-party stakeholders, tribunals are pressured to raise the quality of awards and ensure fairness with pertinent information from all stakeholders. The efficiency and fairness of procedures have also been improved by updating rules on the appointment of arbitrators and third-party funding.

Compared to enhancing transparency, unresolved ISDS legitimacy challenges are complex and indicate no single answer. Primarily, states now cast doubt on the scope of consent they gave when signing the investment treaties. Early BITs were designed to constrain capricious autocrats to prevent arbitrary treatment by the host state and political interference with dispute settlement. However, these initial intentions gradually evolved into a situation where ISDS awards tend to overcompensate investors and override the right of states to regulate.⁴⁷ This is probably because arbitrators have incentives to favour the interests of those who have the power to invoke the use of the system.⁴⁸ It is either that the states have not given consent to such

⁴⁰ Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment-How will the New EU Competence on FDI affect the Emerging Global Regime?*, 15 J. INT'L ECON. L. 51-84 (2012).

⁴¹ Antoine Duval, *Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport* 3-27 (TMC Asser Institute for International & European Law-Asser Research Paper No. 7, 2020).

⁴² Jesse Coleman et al., *Third-Party Rights in Investor-State Dispute Settlement: Options for Reform 2* (2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1149&context=sustainable_investment_staffpubs.

⁴³ Arbitration Rule 6(2); Arbitration (Additional Facility) Rules art. 13(2).

⁴⁴ Arbitration Rule 32(2); Arbitration (Additional Facility) Rules art. 39(2).

⁴⁵ Arbitration Rule 48(4); Arbitration (Additional Facility) Rules art. 53(3).

⁴⁶ Arbitration Rule 37(2); Arbitration (Additional Facility) Rules art. 41(3).

⁴⁷ Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: the TPP, CETA, and TTIP*, 19 J. INT'L ECON. L. 27-50 (2016).

⁴⁸ Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211 (2012).

compromise of their regulatory authority at the beginning or the scope of the consent of states has changed during the operation of the ISDS regime, or both. It is thus necessary to re-examine the source to re-establish the legitimacy of the ISDS regime.

III. Political Economy of the ISDS Regime

To a more or less degree, the legitimacy of an international regime comes from the consensus of parties, the beneficial consequences the regime brings about, and public reasons or democratic approval given by the specific community. In a state-centred international investment regime, it is necessary to review states' evolving attitudes towards foreign investment. The starting point is that states are purpose-rational and value-rational entities. States' actions are strategic to achieve some meaningful goals. In this process, states face international and domestic needs and pressures.

A. States' Interests in Foreign Investment

In an anarchic international community, the unification of national markets used to require an unequivocal political project led by a strong central executive.⁴⁹ However, markets face strong centrifugal forces in a politically divided world.⁵⁰ This often leads to the fragmentation of international investment rules and disorientation in systematic reform, which needs a political economy analysis of the state's request and orientation of the reform.

From an evolutionary perspective, States' interest in the ISDS regime is a series of complex adaptive decisions. Before BITs were implemented, foreign investment was protected by customary international law,⁵¹ under which a state could vindicate injury caused to its citizen by the host state through diplomatic protection, such as reprisals or even force.⁵² Developed countries imposed Western minimum standards on developing countries through diplomatic protection and imperial legal enclaves, moving foreign investment law "from a base of reciprocity, to one of imposition."⁵³

⁴⁹ Robert Putnam, *Diplomacy and Domestic Politics: the Logic of Two-level Games*, 42 INT'L ORG. 427-60 (1988).

⁵⁰ Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12-33 (2018).

⁵¹ ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES, STANDARDS OF TREATMENT* 12 (2009).

⁵² O Thomas Johnson & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, 649 Y.B. ON INT'L INV. L. & POL'Y 649 (2011).

⁵³ KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* 21 (2013).

The nations forming these rules were primarily wealthy European countries, whose nationals would be engaged in investment abroad. In response to the minimum standard of treatment, some states endorsed a national treatment or equality of treatment standard, particularly in Latin America.⁵⁴ An example is the Calvo Doctrine which was created with three key arguments: (1) foreign nationals are entitled to no better treatment than host state nationals; (2) the rights of foreign nationals are governed by host state law; (3) and host state courts have exclusive jurisdiction over disputes involving foreign nationals.⁵⁵ In addition, the Hull Rule, put forward by the then US Secretary of State Cordell Hull in his exchanges with Mexico in the 1930s in defending the rights of US investors in Mexico, set out the principle of “prompt, adequate, and effective” compensation for expropriation.⁵⁶

In the 1990s, along with the spread of market liberalism and neoliberal capitalism, most states joined the trend of signing BITs to embrace the profits of global free markets. Therefore, international investment arbitration became an efficient way of resolving disputes independent from host state politics.⁵⁷ The binding ISDS provisions in more than 3000 BITs and FTAs⁵⁸ allow foreign investors to rely upon international arbitration for rights protection, rebalancing the asymmetric relations between sovereign states and investors. States hoped that the ISDS system could contribute to a more investor-friendly environment; expand economic and political cooperation between contracting states; and enhance the stability and predictability of the policy framework. BITs reduce information asymmetric cost; increase economies of scale; and strengthen the enforcement of contracts. Even if not protected by the BIT, investors may see it as a signal of the engagement of the host state in the protection of FDIs and its willingness to formally and legally commit to it.⁵⁹

Despite the presumed benefits of signing BITs, there is no clear evidence showing the correlation between monetary value (in the form of inbound investment) and an ISDS regime.⁶⁰ Early econometric studies revealed a positive correlation between the

⁵⁴ Manuel Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQUETTE L. REV. 205 (1949).

⁵⁵ Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 BUS. L. INT’L 53 (2006).

⁵⁶ *Id.*

⁵⁷ Jeswald Salacuse & Nicholas Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67 (2005).

⁵⁸ UNCTAD, World Investment Report 2018: Investment and New Industrial Policies, at 88, https://unctad.org/system/files/official-document/wir2018_en.pdf.

⁵⁹ Liesbeth Colen & Andrea Guariso, *What Type of FDI Is Attracted by Bilateral Investment Treaties?* 17 (LICOS Discussion Paper 346/2014), <https://www.econstor.eu/handle/10419/101058>.

⁶⁰ UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* xiii (2009), https://unctad.org/system/files/official-document/diaeia20095_en.pdf.

signing of BITs and economic growth.⁶¹ However, the investment increase may be too slight to affect the total economic growth of the host state significantly. Policies can affect other determinants of FDI flows, which usually takes time to materialise the change.⁶² The quality of domestic institutions is another pivotal factor,⁶³ as BITs are crucial complements to sound local legal systems.

As the economic benefits of the ISDS regime remain dubious, an alternative explanation is that states may want to strengthen their political and diplomatic ties through bilateral and regional trade agreements. Law is linking centres and peripheries to one another, as well as the vernacular through which power and wealth justify their exercise and shroud their authority. States cooperate for a complex set of reasons, such as national security, specialisation, less policy externality, collective decision-making, dispute resolution, the credibility of policy commitments and lock-in by creating policy bias.⁶⁴ Therefore, it is sensible to regard international law as a terrain for political and economic struggle rather than a normative or technical substitute for political choice.⁶⁵ The states do not seek involvement in dispute resolution or any financial burdens resulting from arbitration.

In case of China, it offered a representative illustration of the compound motivations of states. Promoting FDI, together with stimulating consumption and export, has been one of the strategies China adopted for future economic development. Meanwhile, the change in the Chinese identity from a capital-importing state to a capital-exporting state raises new issues about how to protect the interests of its outbound investments. Along the Belt and Road Initiative, Chinese enterprises are likely to encounter political, economic, legal and financial risks in their overseas operations. The need for efficient settlement of investment disputes becomes even more pressing. The China International Commercial Court has been a top-down institutional effort of China to build a dispute resolution infrastructure in support of its BRI-related investment projects.⁶⁶

Additionally, the need for a reliable investment regime is driven by the US-China political economy disputes, the growing tension with countries like Australia and

⁶¹ Tim Büthe & Helen Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741-62 (2008).

⁶² Liesbeth Colen et al., *Bilateral Investment Treaties and FDI: Does the Sector Matter?*, 83 WORLD DEV. 193-206 (2016).

⁶³ Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567-85 (2005).

⁶⁴ ROBERT POWELL, IN THE SHADOW OF POWER: STATES AND STRATEGIES IN INTERNATIONAL POLITICS 7 (1999).

⁶⁵ David Kennedy, *Law and the Political Economy of the World*, 26 LEIDEN J. INT'L L. 7-48 (2013).

⁶⁶ Weixia Gu, *China's Law and Development: A Case Study of the China International Commercial Court*, HARV. INT'L L. J. 67-103 (2021).

corresponding policy adjustments and the “poison pill” provision in the United States-Mexico-Canada Agreement (USMCA),⁶⁷ all of which are intended to prevent the active participation of China in the global economy. To exert pressure on China to open its markets, according to Article 32.10 of the USMCA, if any of the three members enters a trade deal with a non-market country, the other two are free to quit after six months and form their own bilateral trade deal. This provision gives Washington a veto over Canada’s and Mexico’s other free-trade partners, especially China.

Given this matrix of challenges and opportunities, China and the EU reached a consensus on the EU-China Comprehensive Agreement on Investment (CAI). The CAI is expected to promote sustainable, balanced and inclusive growth of both economies and elevate the economic relationship into a genuine strategic partnership.⁶⁸ Similar to the Regional Comprehensive Economic Partnership (RCEP) that China signed in 2020 with the Association of Southeast Asian Nations (ASEAN) member states and other five states in the Asia-Pacific region, the CAI creates sufficient space for future negotiations on investment protection and investment dispute settlement. Participation in these treaties is part of the diplomatic strategies that China utilises as bargaining chips in the negotiation from one to another to achieve its political-economic goals.⁶⁹ It is crucial to understand the relationship of the ISDS regime with domestic public policies in a systemic way.

B. Globalisation, Democracy and Sovereignty

At the international level, the neoliberalism states that free trade and investment promote market efficiency and capitalist expansion is embedded in the current ISDS regime. In fact, the whole international investment regime established after WWII is efficiency and market integration oriented, based on the logic of capitalist expansion. In signing BITs, states ‘legalise’ their target interests in both inward and outward FDIs, such as funds and capitals, technologies, management skills, natural resources and the creation of employment opportunities.

This market-oriented policy design has become the core of the institutional reform debate, given the rising awareness of democracy and sustainable development across the world. The challenge to the legitimacy of the investment regime comes from the

⁶⁷ USMCA art. 32.10. See also Geraldo Vidigal, *A Really Big Button That Doesn’t Do Anything? The Anti-NME Clause in US Trade Agreements between Law and Geoeconomics*, 23 J. INT’L ECON. L. 45-64 (2020).

⁶⁸ EU and China Reach Agreement in Principle on Investment (Dec. 30, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541.

⁶⁹ Theresa Fallon, *The Strategic Implications of the China-EU Investment Deal*, DIPLOMAT, Jan. 4, 2021, <https://thediplomat.com/2021/01/the-strategic-implications-of-the-china-eu-investment-deal>.

states inside. To have democratic legitimacy, international agreements must offer broad benefits with democratic participation and public involvement. One of the contemporary views is that democracy should not be imposed on people who endorse a different set of values.⁷⁰ The formation of public opinion depends on baseline consensus and various opinions on institutional design.⁷¹ Previous negotiations and signature of investment treaties paid little attention to the voice of the public as capital-exporting countries seek market expansion with gunboat diplomacy. It has recently been realised that investment treaties and arbitration results should consider the general welfare and interests of party nationals. Democracy and markets are not antithetical. Instead, a social welfare-oriented market represents a higher level of development than unlimited capital expansion alone.⁷²

The legitimacy crisis of the ISDS regime also comes from the idea of sustainable development which has been promoted in recent years. Sustainable development incorporates broader social goals, such as climate change, clean energy, reduced inequalities, good health and well-being and peaceful and inclusive societies. Governments are now required to adopt various policies to create a better environment for developing manufacturing industries, in some cases through targeted industrial policies to support high-end manufacturing industries. As the US re-joined the Paris Agreement⁷³ and China restricted Australian coal,⁷⁴ potential ISDS claims may arise and tribunals will adapt to address new political-economic concerns.⁷⁵ Tribunals may adopt high thresholds of a breach of fair and equitable treatment, as was held in *Al Tamimi v. Oman* that the breach required a “gross or flagrant disregard for the principles of fairness.”⁷⁶ Investors should prepare to see more robust climate policies implemented by the host state under high carbon-emission reduction targets and observe environmental protection along with other international obligations. The transition towards cleaner energy sources while shutting down existing power plants involves a series of policy adjustments and compensation. The conflict is reflected in

⁷⁰ Laura Valentini, *No Global Demos, No Global Democracy? A Systematization and Critique*, 12 PERSPECTIVES ON POLITICS 789-807 (2014).

⁷¹ JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 90-5 (1989).

⁷² Koji Taira, *Development, Growth, and the Long Run*, 37 ECON. DEV. & CULTURAL CHANGE 425-33 (1989).

⁷³ Antony Blinken, *The United States Officially Rejoins the Paris Agreement*, Press Statement, Feb. 19, 2021, <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/>.

⁷⁴ Damien Cave, *China Battles the World's Biggest Coal Exporter, and Coal Is Losing*, N. Y. TIMES, Oct. 28, 2021, <https://www.nytimes.com/2020/12/16/world/australia/china-coal-climate-change.html>.

⁷⁵ Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETH. INT'L L. REV. 503-51 (2020).

⁷⁶ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award ¶ 390 (Nov. 3, 2015).

the reform of the Energy Charter Treaty (ECT) used by foreign investors to challenge the regulation of a coal-fired power plant in Germany⁷⁷ and the Dutch decision to phase out coal power.⁷⁸ Since the EU sees climate change as a fundamental and continuous task to work on, minor revisions to the existing investment treaties may not be enough to handle the complexity of this transformation.

States are often faced with the choice between sovereignty, economic integration and democracy, which involves a two-level game (negotiations and politics) in international and domestic societies.⁷⁹ By its nature, state is a political entity that exercises the highest power over internal and external affairs through its government. From its establishment, the logic of state is closely linked to social and economic activities.⁸⁰ States provide the protection of property rights and actively explore the ways to promote the development of the domestic economy through the establishment of rules and regulations, and take measures to attract foreign investment to their own countries. Governments play a pivotal role in shaping what FDI does (e.g., by banning or taxing certain types of activities, or providing subsidies to encourage others), where it goes (e.g., by providing preferential risk insurance policies and loans), and what it impacts (through direct obligations on conduct, accountability and liability schemes). As state reduces sovereign risks and regulatory discontinuities to welcome foreign investment, investors from abroad may weaken the efficacy of domestic policies for national economies, sometimes at the cost of equality and democracy.⁸¹ Growth is mainly calculated by economics, but distribution is related to politics. The social meaning of development should incorporate human rights and other public interests that have been promoted across countries and regions.⁸²

Meanwhile, democracy sometimes conflicts with FDI,⁸³ due to the misalignment of interests of the government and its citizens. Democracy has various meanings with the core of safeguarding the autonomy and participation of people in collective decision-making, including people who endorse a different set of values.⁸⁴ The formation of public opinion depends on baseline consensus and various views on

⁷⁷ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue ¶ 229 (Aug. 31, 2018).

⁷⁸ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Procedural Order No. 2 Decision on Bifurcation ¶¶ 49-50 (Feb. 25, 2022).

⁷⁹ ROBERT PUTNAM, *INTERNATIONAL ORGANIZATION* 427-60 (1988).

⁸⁰ DOUGLASS CECIL NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 2 (1981).

⁸¹ DANI RODRIK, *ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH* 196 (2007).

⁸² JAMES MIDGLEY, *SOCIAL DEVELOPMENT: THE DEVELOPMENTAL PERSPECTIVE IN SOCIAL WELFARE* 95 (1995).

⁸³ Quan Li & Adam Resnick, *Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries*, 57 INT'L ORG. 175-211 (2003).

⁸⁴ LAURA VALENTINI, *PERSPECTIVES ON POLITICS* 789-807 (2014).

institutional design.⁸⁵ Previous negotiations and signature of investment treaties paid little attention to this because capital-exporting countries seek market expansion even with gunboat diplomacy. Democratic systems such as the institutions and procedures of changing policies and leaders, check and balance of the executive power, and civil liberties of political participation may hinder FDI inflows by prioritising the protection of indigenous businesses over foreign investors.⁸⁶ As climate change-related policies are carried out within other states, it is part of the state sovereignty to make their domestic policies, and part of social democracy to guarantee people's participation in the decisions about how they live. Democracy, in its worst form, may turn to be populism which politicises economic problems and shifts the blame for domestic problems to foreign countries as political expediency.⁸⁷

In the process of globalisation, the design of the ISDS mechanism is shaped by various forces. On the one hand, the political economic cooperation between capital-importing and exporting parties narrows their policy autonomy. The ISDS mechanism, at least in part, serves to restrict the regulatory power of host states by challenging the enforcement of laws and regulations made and approved through legitimate domestic procedures.⁸⁸ On the other hand, the benefits of market integration improves the interconnectivity between private investors. Interactions initially at the economic level engender complex interdependence in inter-state relations and drive the governance of foreign investment towards judicialisation. Yet, investment arbitration, in contrast to a centralised domestic legal system, is inherently decentralised, depending on the state's preference of foreign investment and use of capital at a specific period, including the pandemic.⁸⁹

Given the complex relationship among sovereignty, democracy and globalisation, it is extremely difficult, if not at all, to harmonise all investment protection norms. A legitimate public institution needs to accommodate different stages of national development and various economic, political, social, cultural and legal systems. If necessary to tie countries' interests and power together towards some common goals, the regime designer, or the ISDS reformer, has to hear all voices, disciplines,

⁸⁵ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 89 (1989).

⁸⁶ Li & Resnick, *supra* note 83, at 175-211.

⁸⁷ Bart Bonikowski, *Three Lessons of Contemporary Populism in Europe and the United States*, 23 *BROWN J. WORLD AFF.* 9-24 (2016).

⁸⁸ Vera Korzun, *The Right to Regulate in Investor-state Arbitration: Slicing and Dicing Regulatory Carve-outs*, 50 *VAND. J. TRANSNAT'L L.* 355 (2017).

⁸⁹ OECD, *Foreign Direct Investment Flows in the Time of COVID-19*, OECD Policy Responses to Coronavirus (COVID-19) (May 4, 2020), <https://www.oecd.org/coronavirus/policy-responses/foreign-direct-investment-flows-in-the-time-of-covid-19-a2fa20c4>.

perspectives, interests and ideologies. This coordination and integration will be a tedious task, given the “slow haste” and numerous configurations of political interests. Still, it is worthwhile to present all factors in the choice set, and let states weigh their own decisions.

IV. Rethinking the ISDS Reform Options

State may adapt the rules to its interest and need. There are three types of strategy: exit, voice, and loyalty.⁹⁰ If a state is willing to join the institution, it can adapt the rules (BITs and arbitration rules) at its preference. Hence, some states (i.e., China, US, Japan, and Chile) are pushing for incremental reform of the current ISDS regime.⁹¹ If there are problems with arbitration rules, the state can propose amendments or at least, dialogues between states to deliver their ideas and reach consensus. If a state tries to abandon the regime, it can exit and seek alternatives. For instance, the EU (as a representative of its member states), Canada, and Mauritius have agreed on the establishment of a MIC.⁹² Brazil and South Africa are reversing to domestic courts by requiring the exhaustion of domestic remedies, state arbitration for international dispute resolution, and conciliatory settlement of disputes through a joint committee of the parties. As these disparities reflect different strategies and considerations in establishing the ISDS regime, core issues lie in the governance structure of the ISDS regime,⁹³ legal and consent bases of an arbitration tribunal or a court,⁹⁴ and the appointment of arbitrators or judges.⁹⁵

⁹⁰ ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY : RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3-5 (1970).

⁹¹ Ondřej Svoboda, *UNCITRAL Working Group III and Multilateral Investment Court-Troubled Waters for EU Normative Power*, 6 EUR. INV. L. & ARB. REV. (Online) 104-26 (2022).

⁹² Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410-32 (2018).

⁹³ Anna Herranz-Surrallés, *'Authority Shifts' in Global Governance: Intersecting Politicizations and the Reform of Investor-state Arbitration*, 8 POLITICS & GOVERNANCE 336-45 (2020).

⁹⁴ Yanwen Zhang, *The Judicial Function of Investment Tribunals: Taking Foundational Assumptions Seriously*, 25 J. INT'L ECON. L. 129-47 (2022).

⁹⁵ Thomas Grant & F. Kieff, *Appointing Arbitrators: Tenure, Public Confidence, and a Middle Road for ISDS Reform*, 43 MICH. J. INT'L L. 171-239 (2022).

A. Consent Base

1. Multilateral or Bilateral

The large number of ISDS reform proposals may risk fragmenting the international investment regime further and cause disorientation in undertaking systematic reform.⁹⁶ Historically, the unification of national markets has required an unequivocal political project led by a strong central executive. In a less integrated world, markets face strong centrifugal forces, rendering cooperation even more difficult. Nevertheless, the significance of a public institution should never be ignored. A multilateral institution provides rules for the game in the management of FDIs, trying to incorporate universal values, reducing transaction costs and uncertainties in domestic policies.⁹⁷ It influences domestic policies mainly by changing the costs and benefits of alternatives. The notion of reciprocity and the desire to depend on the observance of rules of other nations leads many countries to observe rules to which they do not want.⁹⁸ In response to domestic political pressures, national administrative entities may choose to internationalise domestic issues, politicise economic and trade issues, and blame other states for their problems. This has created the breeding ground for political populism and isolationism,⁹⁹ which will cause as much damage to the state itself as to others. An effective ISDS regime should eliminate the role of power politics in protecting FDIs and reducing arbitrary interventions by host states.¹⁰⁰

Current multilateral investment regime under the ICSID Convention offers an appropriate prototype to which incremental reform can be made. Multilateralism means that the designing of BIT and the ISDS regimes are not purely driven by competitive forces that put countries seeking FDI in a weak bargaining status, but a holistic evaluation of the political-economic effects of the regime. Compared with bilateral arrangements, multilateralism enhances the indivisibility of interests.¹⁰¹ It diffuses reciprocity between countries, particularly if guaranteed by a dispute settlement mechanism through which redress can be sought. A multilateral regime

⁹⁶ Stephan Schill, *Reforming Investor-state Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649-72 (2017).

⁹⁷ Oran Young, *Political Leadership and Regime Formation: On the Development of Institutions in International Society*, 45 INT'L ORG. 281-308 (1991).

⁹⁸ JOHN JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 7 (2000).

⁹⁹ BERTJAN VERBEEK & ANDREJ ZASLOVE, *POPULISM AND FOREIGN POLICY*, OXFORD HANDBOOK OF POPULISM 384-405 (2017).

¹⁰⁰ Roberto Echandi, *The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications*, 34 ICSID REV.-FOREIGN INV. L. J. 32-61 (2019).

¹⁰¹ James Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations*, 46 INT'L ORG. 599-632 (1992).

will help build a more harmonised, open, stable, transparent and enforceable legal regime to govern how foreign investors are treated. Such preference for multilateral institutions including the WTO and the Permanent Court of Arbitration, is shown in Article 19.11 of the RCEP Agreement concluded by fifteen Asia-Pacific countries. Compared to domestic litigation and state-state arbitration, a multilateral ISDS regime empowers investors with stronger capabilities to file claims; enables more neutrality of arbitral awards without interference from domestic power and diplomacy;¹⁰² imposes binding obligations on states;¹⁰³ and grants more certainty in the operation of FDI.¹⁰⁴

The multilateral reform led by the UNCITRAL provides a wide range of possible solutions for the ISDS reform.¹⁰⁵ The multilateral system is expected to incorporate extensive reform recommendations from governments and other stakeholders. These include, but are not limited to: terminating investment treaties or withdrawing consent to ISDS procedures; allowing states to bring counter-claims based on international human rights obligations and environmental duties; protecting the right and duty of states to regulate by dismissing claims against legitimate, non-discriminatory, and lawful decisions to protect the public interest; denying access to ISDS for investors that violate domestic or international obligations; allowing affected third parties to join a case with full rights on equal grounds with the main parties to the dispute; setting up a permanent appellate mechanism; and imposing higher qualification standards of arbitrators.¹⁰⁶

Previous ISDS cases have accumulated diverse experience and knowledge of reform options. It is a systemic work that state parties decide whether to give more or less arbitration power and discretion to the tribunal. For instance, if procedural fairness and transparency are enhanced, states may be willing to have a broader interpretation of jurisdictional concepts and allow for a wider scope of decisions made by the tribunal. Once contentious issues are settled, the multilateral reform can reduce uncertainties in arbitration through straightforward clarification and

¹⁰² Rebecca Katz, *Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body*, 22 HARV. NEGO. L. REV. 163 (2016).

¹⁰³ Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361-409 (2018).

¹⁰⁴ *Id.*

¹⁰⁵ UNCTAD High-level IIA Conference 2017, Reforming the International Investment Regime: Phases 1 and 2, Introductory Statement by James Zhan, Director Investment and Enterprise, UNCTAD (Oct. 9, 2017), <https://www.iisd.org/itn/en/2017/12/21/unctads-2017-high-level-ii-a-conference-moving-forward-on-addressing-older-generation-international-investment-agreements-james-zhan-moritz-obst>.

¹⁰⁶ Reform Options for ISDS, UNCITRAL Working Group III, <https://www.somo.nl/nl/wp-content/uploads/sites/2/2018/04/UNCITRAL-recs-and-justification-final.pdf>.

discussions among participating states.

Multilateralism is imperfect and may involve various drawbacks and dysfunctions in its operation. As a legal foundation of arbitration, multilateral agreements have to avoid political manipulation and try to coordinate consensus among different parties. In some ways, the investment-related is similar to the situation of the trading system—the impasse of the WTO Dispute Settlement Body (DSB). There is now vociferous criticism against the WTO DSB, such as the abuse of the appellate mechanism,¹⁰⁷ the long duration of the proceedings under appeal,¹⁰⁸ the quasi-automatic approval of the expert report under the principle of negative consensus,¹⁰⁹ the excessive use of narrow textualist argument,¹¹⁰ the exertion of trade-restrictive measures in the violating country,¹¹¹ and the interference with sensitive democratic processes in sovereign nations.¹¹² Among these, an imperative problem for the WTO is to reappoint the members of the appellate body,¹¹³ which brought significant challenges to the powers and competencies of the Dispute Settlement Understanding (DSU) mechanism. The WTO jurisprudence used to be understood as resistance to constitutionalizing international trade law¹¹⁴ to build a law-based, depoliticised global trading system. In order to facilitate dispute resolution before the appellate body resumes, nearly twenty WTO member states approved an alternative dispute resolution system called multi-party interim appeal arbitration arrangement (MPIA),¹¹⁵ acting under Article 25 of the DSU. The MPIA system uses arbitration to provide binding resolutions for trade disputes in placing an appellate body and conduct independent and impartial

¹⁰⁷ Padideh Ala'i, *Free Trade or Sustainable Development: An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129 (1998).

¹⁰⁸ Claus-Dieter Ehlermann, *The Workload of the WTO Appellate Body: Problems and Remedies*, 20 J. INT'L ECON. L. 705-34 (2017).

¹⁰⁹ Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT'L L. J. 469 (2003).

¹¹⁰ Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: a Critique*, 9 J. INT'L ECON. L. 117-48 (2006).

¹¹¹ See, e.g., Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WTO Doc. WT/DS26/AB/R; WTO Doc. WT/DS48/AB/R (adopted Jan. 16, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/26ABR-00.pdf&Open=True>; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007), https://www.wto.org/english/tratop_e/dispu_e/332abr_e.pdf.

¹¹² Vern Walker, *Keeping the WTO from Becoming the World Trans-Science Organization: Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT'L L. J. 251 (1998).

¹¹³ S. Keynes & C. Bown, *Holding the WTO Hostage, Trump Style*, Trade Talks Podcast (Sept. 22, 2017), <https://tradetalkspodcast.com/podcast/trade-talks-episode-4-holding-the-wto-hostage-trump-style>.

¹¹⁴ William Magnuson, *WTO Jurisprudence and its Critiques: The Appellate Body's Anti-Constitutional Resistance*, 51 HARV. INT'L L. J. (Online) 121 (2010).

¹¹⁵ European Commission, *The WTO Multi-party Interim Appeal Arrangement Gets Operational* (2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176>.

reviews in the place of panel reports.¹¹⁶ The experience of the WTO DSU system provides an essential lesson to the ISDS reform, i.e., multilateral disciplines should be reflected in the ISDS rules to avoid hegemony in future operations and abuses of the mechanism by superpowers. The regime should also leave out flexibilities and exception measures for future deadlock and change.¹¹⁷

2. Arbitration Tribunal or Investment Court

Arbitration, compared to litigation, is assumed to have the advantages of the expedition, expertise and enforceability which reflect the fundamental need for freedom and autonomy in dispute resolution by private entities. ISDS derives its legitimacy in part from the parties giving consent to arbitration and appointing the arbitrators. The strengths and advantages are still kept in most ISDS reform proposals, but states want more control of the adjudication system.

Within the EU, there is a trend of judicializing this dispute settlement mechanism in the place of conventional ISDS arbitration. In March 2018, the *Achmea* judgment¹¹⁸ by the Court of Justice of the EU (CJEU) found that the investment dispute settlement mechanism established by the Netherland–Slovakia BIT is not capable of ensuring the proper application and full effectiveness of the EU law. Later on, in its ruling of *Energoalians (Komstroy) v. Moldova*,¹¹⁹ the CJEU confirmed its jurisdiction to interpret the ECT and all acts adopted by the EU institutions, including international treaties. The EU thus proposed amending the definition of investment under the ECT as part of the overall ‘modernisation’ of the treaty.¹²⁰ Yet, this modernisation must respect the constitutional arrangements and public policies of the states. Member State’s courts may decline to give effect to the *Achmea* judgment if the domestic court finds that CJEU exceeded the competence conferred on it by the EU Treaties to exercise its judicial functions in that case.¹²¹

There is criticism over the disproportionate CJEU judgment that violates

¹¹⁶ Shilpa Jaswant, *Arbitration in the WTO: Changing Regimes under the New Multi-Party Interim Appeal Arbitration Arrangement*, *Kluwer Arbitration Blog* (May 14, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/05/14/arbitration-in-the-wto-changing-regimes-under-the-new-multi-party-interim-appeal-arbitration-arrangement>.

¹¹⁷ LEVENT SABANOĞULLARI, *GENERAL EXCEPTION CLAUSES IN INTERNATIONAL INVESTMENT LAW: THE RECALIBRATION OF INVESTMENT AGREEMENTS VIA WTO-BASED FLEXIBILITIES* § 7 (2018).

¹¹⁸ Case C-741/19, *Republic of Moldova v. Komstroy*, 2021, ECLI:EU:C:2021:655.

¹¹⁹ *Energoalians TOB v. Republic of Moldova*, UNCITRAL (2013), <https://www.italaw.com/sites/default/files/case-documents/italaw10494.pdf>.

¹²⁰ EU Text Proposal for the Modernisation of the Energy Charter Treaty (2021), at 1, https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

¹²¹ Jaswant, *supra* note 116.

Article 5(1), 5(2) and 5(4) of the Treaty on European Union.¹²² The decision of the German Constitutional Tribunal (BVerfG) of 5 July 1967 held that the “act of assent to the founding treaties functions as the decisive order to give legal effect” to the European law.¹²³ The BVerfG hinted at constitutional limitations on the transfer of public authority rights to the European Council in the context of the guarantee of fundamental rights of the German constitution. Similarly, the Czech Constitutional Court held that CJEU acted ultra in its judgment in *Landtová*¹²⁴ and gave Czech national law precedence over the EU law.

Partly to avoid the conflicts of adjudication power on the EU-related investment and strengthen the internal control of the EU in dispute resolution and investment governance, and partly to avoid the deficiency of the current ISDS regime, the EU proposed a MIC, in lieu of the ICSID tribunal for the settlement of investment disputes. This has been mentioned in the EU–Vietnam Trade and Investment Agreements (EVTIA) of June 2020, EU–Singapore Investment Protection Agreement (IPA) of January 2019, EU–Canada Comprehensive Economic and Trade Agreement (CETA) of 2016, and the European Commission proposal for Investment Protection and Resolution of Investment Disputes in the EU-US Transatlantic Trade and Investment Partnership (TTIP).¹²⁵ The CJEU has ruled on the compatibility of MIC with the EU law,¹²⁶ and the EU Member States have agreed on the termination of BITs between them.¹²⁷ Institutionally modelled after the WTO dispute resolution system,¹²⁸ the MIC intends to be a permanent international institution. It combines elements of investment arbitration with judicial features, such as tenured judges, transparent proceedings and open hearings, appeals against a decision, third-party interventions and enforcement of the decisions.¹²⁹

¹²² Wojciech Sadowski, *Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, 55 COMMON MKT. L. REV. 1025-60 (2018).

¹²³ BVerfGE 22, 293 1 BvR 248/63 & 216/67, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=593>.

¹²⁴ Marie Landtová v. Česká správa sociálního zabezpečení C-399/09, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-399/09>.

¹²⁵ Markus Krajewski & Rhea Hoffmann, *The European Commission’s Proposal for Investment Protection in TTIP* (2017), <http://library.fes.de/pdf-files/bueros/bruessel/12662.pdf>.

¹²⁶ CJEU Opinion 1/17 of the Court, 30 April 2019, <https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN>.

¹²⁷ Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union dated May 29, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29>.

¹²⁸ Stephen Kho et al., *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 32 ICSID REV.-FOREIGN INV. L. J. 326-45 (2017).

¹²⁹ Fernando Simoes, *Can Investment Dispute Settlement Ever Be Depoliticized?*, 4 CARDOZO INT’L & COMP. L. REV. 507 (2020).

Underlying the establishment of MIC is a series of interactions between political economy and legal arrangements. The EU has built up a legal system with more considerable control, while taking advantage of existing international institutions. The EU investment agreements stated that both the ICSID and the UNCITRAL arbitration rules are applicable,¹³⁰ which renders the procedural rules familiar to investors and follows with the enforcement of awards under the ICSID Convention and the New York Convention.¹³¹ Awards are binding the disputing parties in respect of the claim. Signatories to the EU investment agreements must recognise the final award and enforce any pecuniary obligation within its territory as if it were a final judgment of domestic court.¹³² The application of the New York Convention is feasible. In case the MIC awards are incompatible with Articles 25, 53(1), 54(1) and 67 of the ICSID Convention, the EU and its trading parties may modify the ICSID Convention under Article 41(1)(b) of the Vienna Convention on the Law of Treaties. Still, the annulment procedure will not apply to the MIC proceedings because the EU investment agreements, as *lex specialis*, prevail over the ICSID Convention as *lex generalis*.¹³³

A crucial aspect that affects the legitimacy of a dispute settlement decision is the selection of adjudicators. In the current ISDS regime, arbitrators are appointed by the parties. In the investment court of the EU, cases shall be adjudicated by three tribunal members with third-country nationals presiding over such tribunals.¹³⁴ The three members appointed by the president of the tribunal will be random and unpredictable, affording equal opportunities to all members of the tribunal to serve.¹³⁵ This is contrary to the traditional ISDS, where the disputing parties are free to select their arbitrators,¹³⁶ subject to the condition that they should not be nationals of disputing parties.¹³⁷ Members of the tribunal will be paid by monthly retainers and must conform to specific standards of independence. The newly-reached EU-Singapore IPA offered a more detailed structure of the tribunal. The six members of the tribunal shall be appointed by both parties (two nominated by the EU, two

¹³⁰ CETA art. 8.23.2; EU-Singapore IPA art. 3.6.1; EU-Vietnam IPA art. 3.33.2; EU-Mexico GA art. 7.2.

¹³¹ CETA art. 8.41.5; EU-Singapore IPA art. 3.22.5; EU-Vietnam IPA art. 3.57.7; EU-Mexico GA, art. 31.5.

¹³² August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761-86 (2016).

¹³³ Jin Woo Kim & Lucy Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges*, 16 GLOBAL TRADE & CUSTOMS J. 181-92 (2021).

¹³⁴ CETA art. 8.27(6); EU-Singapore IPA art 3.9(7).

¹³⁵ CETA art. 8.27(7).

¹³⁶ UNCITRAL Arbitration Rules, art. 9.

¹³⁷ ICSID Convention arts. 38 & 39.

nominated by Singapore, and two jointly nominated by both parties), with an eight-year term that could be renewed.¹³⁸ Long-term appointments and secured tenure will enhance the independence of adjudicators by eliminating the incentives of reappointments. Hence, it could dispel the outsider of these sorts of suspicions by removing the adjudicators from the adjudicative marketplace and by positioning them as participants in a public institution.

Despite these efforts to guarantee the independence of adjudicators, there are concerns that a regionally-established court system in the name of consistency, legitimacy and transparency may risk the impartiality of judgment and influence from politics,¹³⁹ which exacerbates the uncertainty and partiality of decisions. Moreover, the location of the forum and institutional management of adjudicators are likely to affect the decision-making process and results. Solving these problems largely depends on the negotiation between states. The EU has to shape political-economic consensus from its Member States and trading partners to carry on the MIC operations.

Since arbitrator is selected by his/her capability, professionalism and experience, it can be easier for the EU and its trading partners to agree on substantive protection standards, arbitral procedures, rules of arbitrator selection and references to domestic laws. By the time the current ISDS regimes are established, states could have no clear answer to the ambiguity and bifurcation of treaty interpretations. As states try to align these inconsistencies in a multilateral reform, they should take a chance to clarify emergent specific questions, as demonstrated either by the reform notes of the UNCITRAL Working Group,¹⁴⁰ or in what scenarios a different standard can be applied. For instance, clarifications are needed regarding whether a mere breach of the legitimate expectations of an investor could constitute a breach of the fair and equitable treatment standard and, if so, whether these expectations must be grounded on a specific commitment on the part of the host state or can arise from general legislation. States should try to provide specific, predictable and equal treatment of investments and ensure the judiciary power granted to the arbitral tribunals. States could also take a chance to strengthen human rights, labour and environmental protection in the investment treaty, in order to reshape the scope of legitimate expectations held by the investors.¹⁴¹

As the EU seeks support from the international community, it may push forward

¹³⁸ EU-Singapore IPA art. 3.9(4)(5).

¹³⁹ Ronald Montaperto, *Thinking Globally, Acting Regionally*, 6 *COMP. CONNECTIONS* 75-84 (2004).

¹⁴⁰ UNCITRAL Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS)-Consistency and Related Matters, U.N. Doc. A/CN.9/WG.III/WP.153.

¹⁴¹ Srinath Kethireddy, *Still the Law of Nations: Legitimate Expectations and the Sovereignist Turn in International Investment Law*, 44 *YALE J. INT'L L.* 315 (2019).

a trend of fusion between traditional arbitration, which features efficiency, and tenured adjudicator litigation granting more uncertainty in terms of adjudicator selection and substantial rules. Even though tenured judges may reduce the partiality and inconsistency of arbitral decisions, there is fundamental divergence in the power arrangements and policy considerations of states.¹⁴² In this regard, it is unlikely that neither an investment court nor a reverse to domestic court-dominated resolution could replace the status and advantages of the current ISDS regime.¹⁴³ It is more imperative to clarify the source of legitimacy of the regime.¹⁴⁴ This legitimacy further determines how much control states or a union can have in establishing such a venue, shaping its decisions and guaranteeing equal opportunities for all parties.¹⁴⁵ Ultimately, so long as the forum founders are willing to devote money and efforts to support the institution, the various dispute settlement forums can exist in parallel. The EU's investment court and arbitration tribunals can serve as a substitute to each other in the multi-polarisation trend. This can even be a good thing if investors can choose where to sue the government, so that competition between dispute resolution mechanisms (including litigation, arbitration, mediation and conciliation) can promote fairer judgment or decisions.'

B. Towards Legitimate Consistency

Whichever the forum, some common techniques can be used to enhance its legitimacy. Bifurcations and divergence can be a solution, so long as the common sense in dispute resolution (key concepts and provisions) are gradually shaped in various ways.

1. Interpretation Guidance and Notes

At a time of policy transition and for the governance of the FDI, which is essentially heterogeneous and decentralised, soft law can have a superior effect to hard law, because the former gives the state more flexibility to adapt to new rules and mitigate representational deficits in the design of cross-border dispute settlement norms.¹⁴⁶ Moreover, in this decentralised system of investment treaties and arbitral awards,

¹⁴² Lorenzo Cotula, *(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties*, 23 J. INT'L ECON. L. 431-54 (2020).

¹⁴³ José Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV.-FOREIGN INV. L. J. 253-77 (2021).

¹⁴⁴ Thomas Dietz et al., *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26 REV. INT'L POL. ECON. 749-72 (2019).

¹⁴⁵ *Id.*

¹⁴⁶ SHAHLA ALI, FORMING TRANSNATIONAL DISPUTE SETTLEMENT NORMS: SOFT LAW AND THE ROLE OF UNCITRAL'S REGIONAL CENTRE FOR ASIA AND THE PACIFIC 13 (2021).

it would be of immense help if some international organisations or entities could contribute some centralised efforts to align the diversity and guide the system practice towards common standards, in similar ways taken by the World Bank and the International Monetary Fund.

As a top-down approach, the ICSID Convention committee and the UNCITRAL working group may issue case guidance and treaty interpretation notes for the panels and potential arbitrators case guidance can be seen as a fusion trend between case law and treaties. China has adopted the guiding cases system to align the court rulings on controversial legal issues in domestic legal systems.¹⁴⁷ Although these guiding cases are not legally binding as precedents, they reflect policy orientations and clarify legal uncertainties in specific contexts. Similarly, while guiding arbitral awards are not legally binding, they will provide an aligned reference for arbitrators to decide on the case. Guiding cases need to be updated every few months or years to remain current with the overall legal and social environment. These centralised institutions could also offer guidance on applying customary international law in the ISDS arbitration.¹⁴⁸

Regarding the bottom-up efforts, meanwhile, forming consensus on jurisdiction and protection standards requires arbitral practice and common knowledge. These two components are similar to the essential elements of customary international law-state practice and opinion juris. In particular, the decentralised nature of ISDS (given the diversity of FDI and social policies) requires even more time and effort to shape such a sense of legal obligation. Some of the common views among states and investors have been founded in implicit or explicit ways.¹⁴⁹

The UNCTAD noted in a recent study that there is an increasing convergence regarding the standard of compensation included in BITs, most of which incorporate the Hull standard.¹⁵⁰ The OECD Report even concludes the standard as part of the customary international law.¹⁵¹

The ICSID Committee may organise treaty parties to issue interpretation notes of key concepts and provisions. Since international investment arbitration is founded on the state's consent, solutions to these problems ultimately go back to clearer and more precise agreements given by the parties, through either the specification of critical terms, exceptions and reservations in the treaty (CETA annexes, exclusions

¹⁴⁷ Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213-34 (2016).

¹⁴⁸ Anna De Luca et al., *Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options*, 21 J. WORLD INV. & TRADE 374-409 (2020).

¹⁴⁹ Giammarco Rao & Caroline Croft, *States' and Investors' Views on ISDS Reforms—Closer than One Would Expect*, 6 EUR. INV. L. & ARB. REV. (Online) 339-54 (2022).

¹⁵⁰ SURYA SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 142-3 (2008).

¹⁵¹ OECD, *Indirect Expropriation*, at 2, <https://www.oecd.org/daf/inv/internationalinvestmentagreements/37781493.pdf>.

to the chapter, joint declarations and reservations from future measures), or travaux préparatoires and interpretive notes to assist interpretation (NAFTA Note of Interpretation). The “second-generation” investment treaties have made much more progress on the clarity and specification of the treaty standards than their first-generation counterparts.¹⁵² New treaties and interpretations can further reduce ambiguity. Existing criticism against inconsistencies offers a road map for the states’ reflection on the conflicts between intended policy objectives and actual outcomes and decisions upon the balance of different priorities. States can also establish a committee to build up control over the interpretation of the treaty and an open list of fair and equitable treatment standards. Although retroactive interpretation has been questioned as a sort of amendment to the treaty, it indeed contributes to a coherent approach to the protection standard.

In deciding specific protection standards, proportionality is a crucial standard. A sound appreciation of proportionality requires considering the inherently imbalanced conception of international investment agreements, the incoherence of the ISDS regime, and the ad hoc ISDS method in interpreting diverging and ambiguous norms.¹⁵³ The diversity and even complexity of investment arbitration should be increasingly understood and accepted by countries and investors, given the various functions and effects of FDI in different countries and their domestic governance structure.

To remove other ambiguities with the application of BITs or FTAs, state can publicise documents and other supplementary materials to specify the protection standards and clarify key concepts in the treaty. This clarification will serve as an essential reference for interpretation and application. Of course, both guiding cases and interpretation notes should remain evolving to adapt to future situations and policy changes.

2. Appellate Body

An appellate mechanism has been recommended to conduct substantive reviews of decisions, enhance treaty interpretation consistency, and improve consistency among arbitral awards without having to start the process over.¹⁵⁴ The appeal body can be authorised to conduct a substantive review of decisions within some days of their

¹⁵² U.N. Doc. A/CN.9/935, ¶ 28.

¹⁵³ Eric De Brabandere & Paula Cruz, *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 NORDIC J. INT’L L. 471-91 (2020).

¹⁵⁴ Malcolm Langford et al., *UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction*, 21 J. WORLD INV. & TRADE 167-87 (2020).

issuance, correct substantial legal and factual errors, and uphold, modify or reverse the award of the initial tribunal. Illustrations of appellate review mechanisms can be found in certain investment treaties,¹⁵⁵ including the MIC proposal of the EU.¹⁵⁶ This would result in the current ISDS regime maintaining most of its basic features while complementing an appellate body to guarantee fairness and consistency.

The appellate body could also act as a controlling mechanism in reviewing the heterogeneous substantial standards of investment protection and the various textual expression of treaty provisions. This updating has been acknowledged in many new agreements. The EU–Japan Economic Partnership Agreement confirmed it would not affect the state’s right to regulate.¹⁵⁷ Both the EU–Vietnam IPA and EU–Singapore IPA established the state’s right to determine its sustainable development objectives, strategies, policies and priorities; set up its own levels of domestic protection in the environmental and social areas; and adopt or modify its relevant laws and policies in line with international standards and agreements.¹⁵⁸ Even though similar textual wording does not necessarily indicate the same policy meaning, specific interpretation then depends on the interpretations given by the state or other supplementary materials.

V. Conclusion

International investment regimes are coordination results of the states based on their consensus and agreements. Such a regime formation reflects a variety of motivations of the states, especially their political economy considerations in domestic and international contexts. The consensus and agreement previously reached are now challenged by the heterogeneity of foreign investment scenarios. The legitimacy crisis of the ISDS regime reflects some changes in the ideology of investment institutions, represented by the divergent political-economic concerns of the states. These concerns have not been adequately addressed in previous ISDS practices. In this process, democracy and globalisation sometimes come into conflict due to domestic policy needs and global coordination pressures.

¹⁵⁵ US–Uruguay BIT, 4 November 2005, Annex E; Chile–US FTA, 6 June 2003, art. 10.19 (10) and annex 10-H; Dominican Republic–Central America Free Trade Agreement, 5 August 2004; CETA art. 8.28.

¹⁵⁶ CETA art. 8.28; EVTIA arts. 28 & 29(2); EU–Singapore IPA, art. 3.19(3).

¹⁵⁷ EU–Japan EPA, art. 16.2.

¹⁵⁸ EU–Vietnam IPA art. 13.2; EU–Singapore IPA art. 2.2.

There is no single correct answer regarding how the ISDS regime can produce fair and legitimate results. In the ISDS regime, rule of law does not necessarily mean unification. The ISDS regime should allow for diversity in national institutions and priorities.¹⁵⁹ Uniform global investment protection standards under the ICSID framework can be a general rule applied to all FDI. However, key concepts and provisions can have different meanings in different contexts. “Fair and equitable treatment of investment” and the “investor’s legitimate expectation” require a re-examination of the role and effect of the FDI in a specific social-economic system. Irrespective of the situation, rights and responsibilities should proportionately coexist with the same player.

States should embrace the complexity of the institutional investment design; find ways to restore it; build up mutual trust; promote cooperation; and manage differences in a balanced way. As the investment community demands certainty and predictability from unequivocal arbitration rules and investment treaties, consensus-based legitimacy can be achieved in various ways. Procedural transparency and impartial arbitrators should be necessarily guaranteed for a fair legal system. As far as the substantive protection standards are concerned, consensus formation needs centralised coordination and decentralised efforts. To align the norms and practices of investment arbitration, case guidance, interpretation notes and appellate review are suggested within the current ISDS regime. Although these documents and materials are not binding, they will help find consensus from previous arbitral practices while allowing countries to voice their opinions, learn from each other, and shape new consensus.

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¹⁵⁹ Wei Shen & Shuping Li, *China’s Engagement in ISDS Reform: Text, Practice, and Political Economy*, 7 CHINA & WTO REV. 269-304 (2021).

