**2.1 The Colonial Era**

The evolution of international investment law cannot be understood without first examining its roots in the colonial era, a period during which property protection and commercial relations were deeply entangled with geopolitical domination and legal asymmetry. Well before the emergence of modern bilateral investment treaties (BITs), colonial powers employed instruments such as treaties of Friendship, Commerce, and Navigation (FCNs) to secure the rights of their nationals to trade, invest, and own property abroad[[1]](#footnote-1). These early agreements, though ostensibly commercial in nature, laid the normative foundations for the protection of foreign investment long before international law formally recognized private investors as legal subjects.

Investment relations in this period were shaped not only by treaty practice, but also by the interplay of customary international law and diplomatic practice. The concept of a “minimum standard of treatment” emerged in Western legal thought, but it was fiercely contested by newly independent states, particularly in Latin America, who advanced alternative doctrines of sovereignty and non-intervention[[2]](#footnote-2). Foreign investors, lacking standing in international law, could not bring international claims on their own; they relied instead on their home states to espouse claims on their behalf, transforming private disputes into matters of inter-state diplomatic controversy.

Enforcement mechanisms were also coercive: capital-exporting powers routinely resorted to military force – so-called “gunboat diplomacy” – to compel compensation or deter expropriation. In the early 20th century, Britain, Germany, and Italy intervened in Venezuela to enforce debt repayment, seizing ships and bombarding ports. The episode provoked strong criticism in Latin America and led Argentina to propose the Drago Doctrine, rejecting armed intervention for public debt collection.[[3]](#footnote-3). Legal scholars such as Edwin Borchard later criticized these coercive practices, arguing that they exposed all parties to outcomes shaped more by power politics than by legal principle, effectively allowing a claimant state to act as “plaintiff, judge, and sheriff” in its own cause[[4]](#footnote-4). Criticism of gunboat diplomacy contributed to a shift toward arbitration and rules-based mechanisms for handling investment disputes.¹ At the same time, the United States increasingly intervened to protect its nationals’ financial interests, especially in Latin America. This approach was formalised by the 1904 Roosevelt Corollary to the Monroe Doctrine, which declared that “chronic wrongdoing or impotence” in repaying debts could justify U.S. intervention. The 1905 takeover of Dominican customs revenues exemplified this, advancing U.S. regional hegemony under the guise of investor protection.[[5]](#footnote-5) Empirical research shows that the announcement and initial enforcement of the Roosevelt Corollary had measurable effects: Latin American sovereign bond prices rose dramatically (by as much as 74% within a year) in response to the credible threat of U.S. intervention[[6]](#footnote-6). These actions marked a significant evolution in U.S. foreign policy, effectively supplanting European gunboat diplomacy with American-led financial supervision and military occupation in the name of stability and investment security. By the 1930s, however, this era of overt intervention came to a close with the Roosevelt Administration’s “Good Neighbour Policy,” which renounced armed interference in Latin America and underscored the emerging norm of non-aggression in inter-state relations.

In summary, several features characterized the international investment regime of the colonial era. First, rather than having standalone treaties focused exclusively on investment protection, early agreements typically bundled provisions on trade and the treatment of property within broader commercial treaties. As historian Samuel Bemis explains, these 18th- and 19th-century FCN agreements were aimed primarily at establishing bilateral commerce, with clauses on the protection of property rights occupying a secondary role[[7]](#footnote-7). Second, the network of such treaties was narrow in scope and their protective effect was weak, particularly since the treaties provided no independent means of enforcement[[8]](#footnote-8). In the absence of legal remedies or international adjudication, the security of foreign investments depended on power politics – ultimately, the ability and willingness of the investor’s home state to intervene. This legal and institutional weakness produced a highly uneven system of investor protection, one that functioned more as an extension of great-power influence than as a true legal regime. As Salacuse and Sullivan note, international investment law through the mid-20th century consisted largely of scattered treaty provisions and contested customs, lacking binding dispute-resolution mechanisms and leaving aggrieved investors heavily reliant on diplomatic protection[[9]](#footnote-9).

**2.1.1. Foundations of Investment Relations in the Pre-BIT Era**

The modern framework of international investment agreements evolved from foundations laid well before the advent of BITs in the post-World War II period. Early state practice regarding foreign investors was rooted in principles of diplomatic protection and ad hoc claims settlements. Before the twentieth century, if an investor suffered injury at the hands of a host state, any recourse in international law had to be conducted by the investor’s home state. The classical formulation in the *Mavrommatis* case (1924) emphasized that, by espousing an investor’s claim, a state “is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.”[[10]](#footnote-10) Likewise, in *Barcelona Traction* (1970) the International Court of Justice stressed that the decision whether to pursue a claim remained “the sole judge” of the state, exercised at its discretion for political or other reasons[[11]](#footnote-11). In practical terms, this meant that many injuries to foreign investors went without international remedy, especially where the investor’s home government deemed the dispute not worth a diplomatic confrontation. This traditional, state-centric model left a significant gap: private investors themselves had no standing under international law to seek direct redress.

Even so, some early treaty instruments did seek to mitigate investors’ risks. One category of agreements – though not always formally titled as such – were treaties of “friendship, commerce and navigation.” The United States, for example, concluded its first Treaty of Amity and Commerce with France in 1778[[12]](#footnote-12), and went on to sign similar treaties with nations including the Netherlands (1782)[[13]](#footnote-13), Sweden (1783)[[14]](#footnote-14), Prussia (1785)[[15]](#footnote-15), Great Britain (1794)[[16]](#footnote-16), and Spain (1795)[[17]](#footnote-17). These 18th-century FCN treaties were designed principally to establish mutual trading rights, but they also contained provisions guaranteeing “special protection” or “full and perfect protection” for the property of foreign nationals. They typically required that any expropriation or confiscation be accompanied by compensation, and extended basic non-discrimination guarantees – most-favoured-nation (MFN) and national treatment – for the commercial activities of each party’s citizens in the other’s territory.[[18]](#footnote-18) Notably, however, prior to World War II such agreements focused far more on facilitating trade than on providing comprehensive legal security for investments.[[19]](#footnote-19) International law itself offered foreign investors only a patchwork of protections. Customary international law was underdeveloped in this area and remained controversial: capital-exporting states claimed that host countries were obligated to accord a minimum standard of treatment and to pay prompt and adequate compensation for expropriations, whereas capital-importing states often rejected this, insisting that the rights of foreign investors were governed by domestic law and that no higher international standard applied.[[20]](#footnote-20) This divergence was epitomized by the 1938 exchange between the United States and Mexico following Mexico’s nationalization of foreign oil assets. U.S. Secretary of State Cordell Hull, in a formal note to the Mexican government, asserted that international law required “prompt, adequate and effective” compensation for expropriated property – a formulation that became known as the Hull Rule and soon crystallized as the United States’ view of the minimum standard[[21]](#footnote-21). Mexico, however, maintained that it need only pay compensation according to its own constitution and laws, especially in cases of general land redistribution, and that foreigners were entitled to no better treatment than nationals. This clash foreshadowed decades of debate over the customary law standard for expropriation. The oft-cited *Neer* claim of 1926 articulated the high threshold for a breach of the minimum standard, requiring conduct “so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”[[22]](#footnote-22) Yet many newly decolonized and developing countries refused to accept even the existence of an international minimum standard, emphasizing national sovereignty and equality of treatment. Latin American nations, in particular, coalesced around the Calvo Doctrine, named for the Argentine jurist Carlos Calvo. The Calvo Doctrine held that foreign investors are entitled only to the same treatment as a country’s own citizens, that their rights are determined by local law, and that no state has a right to intervene on their behalf – diplomatically or otherwise – in the internal affairs of the host state[[23]](#footnote-23). This doctrine, grounded in principles of absolute sovereign equality and non-intervention, directly challenged the premise that international law imposed any higher standard of protection for aliens. It found expression in regional instruments – for example, the 1933 Montevideo Convention on the Rights and Duties of States (Art. 9)[[24]](#footnote-24) affirmed that foreigners may not claim rights more extensive than those of nationals – and later informed developing countries’ pushback against the “ Hull Rule”[[25]](#footnote-25) in the United Nations. Article 2(2)(c) of the 1974 U.N. Charter of Economic Rights and Duties of States**[[26]](#footnote-26)** explicitly declares the right of every state to nationalize or expropriate foreign property, with compensation to be determined by the state “taking into account its laws and regulations and all circumstances which the state considers pertinent,” rather than the “prompt, adequate and effective” formula of classical international law. This divergence of views meant that, in the mid-20th century, the legal standards governing investment were unsettled and largely depended on power dynamics rather than consensus.

In the absence of a universally accepted legal framework, aggrieved investors before 1960 had few options beyond diplomatic espousal and ad hoc arbitration commissions. No permanent dispute settlement mechanism existed to hear investor claims against states. The International Centre for Settlement of Investment Disputes (ICSID) would not be established until 1965, and even then its jurisdiction depended on the consent of the host state. Consequently, an investor’s only hope for redress was to exhaust local remedies and then persuade its home government to take up the case as a diplomatic protection claim – a process fraught with uncertainty.[[27]](#footnote-27) For investors, this system had two major shortcomings. First, as noted above, the decision to exercise diplomatic protection lay entirely with the home state and could be withheld for political or strategic reasons unrelated to the merits of the claim. Second, even if a claim was espoused, the home state controlled the proceedings and any settlement, often prioritizing its broader interests over the individual investor’s satisfaction. [[28]](#footnote-28) In practice, smaller investors or those lacking political leverage were effectively excluded from diplomatic espousal; home states were typically reluctant to risk diplomatic capital on behalf of claims deemed insignificant to national interests. As one commentator observed, many foreign investors – especially those with limited investments or lacking familiarity with diplomatic channels – were effectively left without a remedy under the old system, which tended to favour the politically influential[[29]](#footnote-29). Although occasional arbitrations did occur (indeed, Latin American states participated in nearly 200 inter-state arbitrations between 1794 and 1938, about 40 of them involving the United States[[30]](#footnote-30)), the overall regime prior to BITs offered no reliable, legal avenue for private investors to seek justice on their own. This fundamental limitation of the customary system gave rise to the drive for depoliticization – the idea that investor–state disputes should be removed from the vicissitudes of diplomacy and handled through neutral legal mechanisms. With the advent of modern investment treaties and institutions like ICSID, depoliticization became a central objective: as one arbitral authority put it, the “essence” of the investment treaty regime is that it insulates disputes “from political and diplomatic relations between states.”[[31]](#footnote-31)

**2.1.2. Customary International Law and the Minimum Standard**

During the colonial era, the primary legal framework for protecting foreign investments was customary international law. Under classical doctrine, a host state was expected to accord foreign investors a certain minimum standard of treatment, irrespective of the standards applied to domestic investors.[[32]](#footnote-32) In theory, this *international minimum standard* required, inter alia, protection against denial of justice, full security for persons and property, and compensation for expropriation.[[33]](#footnote-33) In practice, however, the content and even the existence of this minimum standard were hotly contested. Capital-exporting states argued that international law imposed an obligation to treat foreign investments in accordance with basic norms of justice and civilized conduct, and, in the event of expropriation, to pay prompt and adequate compensation. Developing countries often rejected this view as a relic of imperialism, insisting on the Calvo principle that foreign investors were entitled only to national treatment.[[34]](#footnote-34) By the 1960s and 1970s – amid a wave of decolonization and a surge of nationalist economic policies – these disagreements came to the forefront. Scores of newly independent states undertook large-scale nationalizations of foreign-held assets in industries like oil, mining, and banking. Western nations protested that such takings without full compensation violated international law; the expropriating states replied that they were merely exercising their sovereign right to develop their economies and would pay such compensation as their domestic law required.[[35]](#footnote-35) The limitations of customary law in resolving these disputes soon became apparent. Not only did customary international law lack clearly defined substantive rules – beyond vague maxims about “reasonable” treatment – but it also provided no judicial forum to enforce whatever rules did exist.[[36]](#footnote-36) With no standing to sue and no compulsory international tribunal, investors could only appeal to their own governments for help. The outcome then depended on political discretion rather than legal merit and was often unsatisfactory or incomplete. Notably, as waves of nationalizations swept through parts of Asia, Africa, the Middle East, and Latin America in the 1970s, attempts to assert the traditional minimum standard faltered in the face of united opposition from developing countries. In 1974, the Group of 77 pushed through the U.N. General Assembly a set of resolutions – the New International Economic Order and the Charter of Economic Rights and Duties of States – that reasserted the primacy of national sovereignty over natural resources and effectively repudiated the *Hull* formula by advocating “appropriate” compensation to be determined by each state in light of its own circumstances[[37]](#footnote-37). While these resolutions were not binding law, they reflected a broad political consensus outside the West that the old rules of investor protection were illegitimate or at least in need of radical revision. The resulting stalemate left customary international law uncertain and fraught with ideological division. Even among those states accepting an international minimum standard, there remained deep ambiguity about its precise requirements. Was “adequate” compensation equivalent to full market value, or could it be something less? Did the minimum standard encompass concepts like fair and equitable treatment? Such questions were unresolved.

Unable to rely on custom alone, capital-exporting states increasingly turned to treaty-making as a solution. By the late 1950s, the idea gained ground that bilateral treaties could be used to clarify and guarantee investment protections on a reciprocal basis, thus bypassing the need for contested customary norms. The United States, in particular, hoped that establishing a dense network of BITs incorporating the traditional standards (especially the obligation to pay prompt, adequate, and effective compensation for expropriation) would over time generate the consistent state practice and *opinio juris* necessary to entrench those standards in customary international law[[38]](#footnote-38). In other words, the U.S. viewed BITs as a tool to *multilateralize* investor rights: if enough states formally agreed to high protection standards in their treaties, those standards might eventually be recognized as binding on all states even absent a treaty.[[39]](#footnote-39) This strategy met with mixed success. Western European nations, notably Germany and the Netherlands, also began signing BITs with developing countries in the 1960s, but many of these agreements used more flexible language (for example, omitting the strict Hull standard or allowing exceptions to full convertibility of currency) in order to attract willing partners.[[40]](#footnote-40) Rather than producing a uniform treaty practice, the first few decades of BIT-making yielded a variety of formulations for investor treatment and compensation, reflecting differing negotiating dynamics. Thus, the anticipated crystallization of clear customary rules did not occur as hoped[[41]](#footnote-41). Nonetheless, the proliferation of BITs undeniably filled the void left by the old system. These treaties gave investors enforceable rights and direct access to international arbitration, thereby achieving the depoliticization and legal certainty that had been lacking[[42]](#footnote-42).

**2.1.3. Diplomatic Espousal and State-to-State Dispute Practice**

Under the traditional customary law regime, an injured investor’s only path to an international remedy was through diplomatic protection – the espousal of the claim by the investor’s home state. This doctrine, codified in modern times by the International Law Commission, is defined as “the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State, with a view to the implementation of such responsibility.”[[43]](#footnote-43) In essence, the private injury is reformulated as a wrong against the investor’s state, which then seeks redress from the offending state. Diplomatic espousal was for many years the only established mechanism by which investors could press claims on the international plane. It was, however, an imperfect and unpredictable mechanism. Crucially, the investor’s home state retained full discretion over whether, and how, to pursue the claim. No home government was under a legal obligation to espouse its national’s grievance. The decision was inherently political: a state might refuse to act if, for example, espousing the claim would strain or jeopardize important diplomatic, military, or economic relations with the host state. As one scholar observed, many foreign investors without the benefit of a powerful champion simply may be effectively excluded from this process because their claims lack the strategic significance or magnitude to prompt government action[[44]](#footnote-44). Even when a home state did take up a claim, the investor ceded control over the proceedings. The claim became an inter-state dispute, subject to negotiation or arbitration between the two governments. The home state could settle the claim for reasons of expediency or broader interest, even if the result was less than full compensation for the investor. And any award or settlement amount was payable to the home state, which had no strict duty to pass it on in full to the investor (though in practice it usually did). Furthermore, customary international law required that the investor must first exhaust local remedies in the host state’s courts before diplomatic protection could be exercised. This rule, affirmed by the International Court of Justice in cases like *Interhandel* (1959)[[45]](#footnote-45), aimed to respect the host state’s sovereignty by giving its judiciary the first opportunity to correct any wrong. But it often meant that years of litigation had to be undertaken domestically – at great expense and often futilely – before an international claim could even be lodged. In many instances, local courts were not truly independent or impartial in cases involving vital national interests, so the likelihood of an investor obtaining justice at the local level was slim. International law did recognize exceptions to the exhaustion rule (for instance, if local remedies are obviously ineffective or unreasonably prolonged) [[46]](#footnote-46), but these were narrow and not easily proven.

Not surprisingly, diplomatic protection left many investors empty-handed. Home States tended to espouse only the most egregious or politically salient cases. Minor or commercially insignificant claims were often ignored. Moreover, the arbitral or commission settlements that did occur were inconsistent and could be influenced by power disparities. Nevertheless, diplomacy was not entirely ineffectual. In the 19th and early 20th centuries, the United States and several European powers managed to resolve numerous investor claims through ad hoc arbitrations with Latin American states. As Lionel Summers notes, Latin American republics participated in nearly 200 arbitral proceedings with foreign powers between 1794 and 1938 (of which about 40 were with the United States), often as a means to peacefully settle claims in the shadow of potential force[[47]](#footnote-47). While many of these arbitrations were prompted by diplomatic pressure or the threat of intervention, they did establish a rudimentary practice of third-party dispute resolution for investment issues. This experience – limited and politically fraught as it was – helped lay the groundwork for later acceptance of more judicialized mechanisms. Still, diplomatic espousal was widely regarded as unsatisfactory. It politicized what were essentially private disputes, skewing outcomes in favour of powerful investors or those backed by strong states, and leaving a gap in protection for the rest. The advent of investor–state arbitration through BITs and the ICSID Convention fundamentally changed this landscape. By giving investors direct standing to bring claims and by eliminating the need for home state involvement (and the exhaustion of local remedies, unless required by treaty), the modern system directly addressed the shortcomings of the espousal paradigm. The shift from gunboats and chancelleries to legal fora marks one of the most significant transformations in international investment law – one that the next section will explore in the context of the post-colonial era.

**2.1.4. Coercive Enforcement: Gunboat Diplomacy and Military Threats**

As an alternative to protracted negotiations or legal claims, the great powers of the colonial era often relied on coercive force to secure their investors’ rights. This strategy – colloquially termed *gunboat diplomacy* – involved the use or threat of military action to obtain redress for injuries to a nation’s investors or to enforce the payment of obligations owed to them.[[48]](#footnote-48) In the late 19th and early 20th centuries, naval demonstrations, blockades, and even direct occupations were employed to pressure weaker states into settling claims. One notorious episode was the joint intervention by Britain, Germany, and Italy against Venezuela in 1902–03 over the latter’s unpaid debts. European warships imposed a blockade and bombarded Venezuelan ports, leading to an international arbitration of the claims. The forcible tactics provoked outrage in Latin America – prompting Argentine Foreign Minister Luis Drago to declare the Drago Doctrine, which proclaimed that public debt claims could not justify armed intervention[[49]](#footnote-49). The Drago Doctrine echoed the long-standing Calvo principle and was an early attempt to codify restraints on the use of force in investment disputes.

The United States initially opposed European interventions in the Americas (consistent with the Monroe Doctrine), but it soon adopted its own form of gunboat diplomacy in the region. President Theodore Roosevelt’s annual message to Congress in 1904 announced what became known as the Roosevelt Corollary to the Monroe Doctrine: in cases of “chronic wrongdoing or impotence” by a Latin American state – for example, an inability or refusal to pay foreign creditors – the United States asserted a right to intervene as an “international police power,” ostensibly to pre-empt European intervention.[[50]](#footnote-50) In practice, this corollary was used to justify numerous U.S. interventions in the Caribbean and Central America, often directly aimed at protecting American financial interests. For instance, the U.S. assumed control of Dominican Republic customs revenue in 1905 to ensure debt repayments[[51]](#footnote-51), occupied Nicaragua[[52]](#footnote-52) in 1912 following political instability that threatened U.S. banking interests, and intervened in Haiti in 1915[[53]](#footnote-53), installing a military government that safeguarded creditors. These actions were defended as bringing stability and upholding obligations, but critics noted they placed the U.S. in the role of self-appointed enforcer. Economic historians have observed that Roosevelt’s policy had a tangible impact on investor confidence: the value of sovereign bonds from countries under the U.S. “sphere of influence” rose sharply once the Corollary was announced and implemented, reflecting investor belief that the U.S. would not allow defaults (one study estimates an average price increase of 74% in the year following Roosevelt’s pronouncement)[[54]](#footnote-54). Until the 1920s, U.S. interventions in Latin America under its gunboat diplomacy effectively continued colonial practices. In 1933, President Franklin D. Roosevelt repudiated such tactics, initiating the Good Neighbor Policy to prioritize cooperation over military enforcement in the Western Hemisphere.[[55]](#footnote-55) Over time, this shift was echoed in international law—first within the League of Nations framework and later in the UN Charter, which explicitly prohibits the use of force, including for debt collection.[[56]](#footnote-56) Coercive enforcement of investor claims became increasingly delegitimized, paving the way for more legal and institutional approaches to investment disputes in the later 20th century.

**2.1.5. Legacy of Colonial Legal Forms in Modern BIT Practice**

The legal forms and practices developed in the colonial era left a lasting imprint on the modern investment treaty regime. In the post-colonial decades following World War II, newly independent states entered a global economy whose rules had been shaped in part by colonial-era precedents. One legacy was the model of FCN treaties, which the United States revived after 1945 to address investment concerns in the absence of a multilateral framework.[[57]](#footnote-57) A draft multilateral attempt – the Havana Charter of 1948, which would have created an International Trade Organization with investment provisions – failed to receive ratification, leaving investment governance to bilateral and regional arrangements.[[58]](#footnote-58) In the late 1940s and 1950s, the U.S. negotiated 21 new FCN treaties, updating the earlier format to reflect contemporary priorities. As Walker notes in his seminal study of U.S. commercial treaties, the post-war FCNs incorporated expanded clauses on national and most-favoured-nation treatment for foreign nationals, assured legal rights of entry and establishment for foreign businesses, and guaranteed access to local courts for the resolution of disputes[[59]](#footnote-59). These treaties also increasingly referenced international standards – for example, obliging host states to treat foreign nationals “in accordance with international law” – a phrase that, as Wilson critically observed, was often invoked as a flexible but ambiguously defined benchmark[[60]](#footnote-60).

The post-war FCNs typically provided for “equitable treatment” and “constant protection and security” of property, prohibited uncompensated expropriations, and affirmed rights to transfer funds. In many respects, they presaged the substantive protections later seen in BITs. However, they lacked any direct investor–State enforcement mechanism. Disputes under FCNs remained State-to-State (with an option in some treaties to refer disputes to the International Court of Justice)[[61]](#footnote-61). By 1968, the United States had concluded its FCN program, partly because these broad treaties were seen as diplomatically general and not sufficiently enforceable.[[62]](#footnote-62)

Meanwhile, European capital-exporters turned directly to BITs. The first BIT was signed between West Germany and Pakistan in 1959, and throughout the 1960s and 1970s, European states – led by Germany, Switzerland, the Netherlands, and later the United Kingdom and France – negotiated BITs across the developing world.[[63]](#footnote-63) These BITs drew on some concepts from the FCN experience (non-discrimination, compensation for takings, etc.), but were narrower in scope, focusing specifically on investment protection and incorporating investor–state arbitration provisions for enforcement.[[64]](#footnote-64) Interestingly, many developing countries proved more willing to conclude BITs with their former colonial powers than to sign up to broader multilateral guarantees. Historical ties and ongoing economic relationships likely played a role. As Salacuse observes, some newly independent states may have viewed European BITs as a natural extension of their pre-existing economic linkages, facilitated by a degree of trust and familiarity born of colonial-era interactions[[65]](#footnote-65). In other words, the patterns of colonial influence eased the acceptance of bilateral agreements in the post-colonial context – a continuity that arguably helped European countries secure a first-mover advantage in spreading the BIT model. By contrast, the United States – which did not launch its BIT program until 1982[[66]](#footnote-66) – had by then largely abandoned FCNs and was catching up to a framework already molded in significant part by European practice. Nevertheless, the modern BIT regime, though a product of the late 20th century, carried forward the core aims that had animated investment diplomacy for over a hundred years: protecting foreign investors’ rights, depoliticizing disputes, and reconciling the sovereignty of states with the demands of an integrated global economy. In that sense, today’s BITs and investor–state arbitration system are the direct descendants of the legal and diplomatic innovations (and failures) of the colonial era. They represent an effort to remedy the weaknesses of that era – the lack of clear standards and effective remedies – while perpetuating its fundamental premise: that foreign investment is a subject of international concern warranting legal safeguards beyond those afforded under domestic law.

**2.2 The Post-Colonial Era**

**2.2.1 The Rise of Sovereignty and the NIEO Movement**

In the decades following decolonization, newly independent states sought to reassert control over their economies and natural resources as an essential attribute of sovereignty. This push found expression in the United Nations through resolutions proclaiming the principle of permanent sovereignty over natural resources. Early milestones included U.N. General Assembly Resolution 1803 (XVII) of 1962, which affirmed that States and peoples have “inalienable” rights over natural wealth and resources and may nationalize foreign-owned assets for public purposes, subject to payment of “appropriate” compensation[[67]](#footnote-67). The assertion of resource sovereignty was linked to the broader right of self-determination and a corrective to the exploitative arrangements of the colonial era. By the 1970s, developing countries – now a numerical majority in the U.N. – launched an ambitious agenda to transform the international economic order on more equitable terms. In 1974 the General Assembly, led by the Group of 77, adopted the Declaration on the Establishment of a New International Economic Order (NIEO) and the accompanying Charter of Economic Rights and Duties of States (CERDS[[68]](#footnote-68). These instruments proclaimed foundational principles of a post-colonial economic regime: sovereign equality, the right of every State to choose its own economic system, and control over foreign investment in accordance with national development goals. As Anghie observes, the NIEO reflected the new States’ realization that *“political sovereignty would be meaningless without corresponding economic independence”* – prompting them to regain control over natural resources through nationalization of foreign enterprises acquired under colonial auspices.[[69]](#footnote-69) The NIEO movement thus epitomized post-colonial sovereign resurgence: it was an attempt to remake international law’s economic doctrines to remedy historical inequities, by affirming that sovereignty entailed not just political self-rule but also the authority to regulate and utilize a nation’s wealth for its people’s benefit. This reorientation was inherently doctrinal: it challenged prevailing customary norms and sought to redefine the legal balance between host State prerogatives and foreign investor rights.

The NIEO initiative, while political in nature, had concrete doctrinal implications. Its resolutions declared, inter alia, that full permanent sovereignty over natural resources is a basic component of statehood and development, and they repudiated the notion that prior colonial-era economic arrangements (such as long-term resource concessions or foreign control of key industries) could fetter this sovereignty.[[70]](#footnote-70) In effect, developing countries argued that the classic international law of foreign investment – largely crafted by and for capital-exporting powers – lacked their consent and legitimacy. They contended that fundamental tenets of that law had to be revised or rejected to reflect sovereign equality.[[71]](#footnote-71) Western States, for their part, resisted, maintaining that traditional rules (for example, stringent protections for foreign property) remained binding and that entry into independence implied acceptance of existing international norms.[[72]](#footnote-72) This standoff underscored the post-colonial era’s central tension: the extent to which newly decolonized States could reshape international investment law to vindicate sovereign rights long suppressed under imperial legal frameworks. Although U.N. General Assembly resolutions lack binding force, they served as important doctrinal manifestos. Resolution 3201 (NIEO Declaration) and CERDS (Resolution 3281) articulated a vision of international law grounded in distributive justice and respect for *economic self-determination*. In particular, Article 2 of CERDS asserted the right of States to regulate foreign investment and to nationalize assets, reinforcing that such acts are *“inalienable”* aspects of sovereignty and that no foreign interest should override the public welfare of the State[[73]](#footnote-73). In sum, the rise of sovereignty in this era was not mere rhetoric but a concerted legal effort: post-colonial nations attempted to shift the locus of authority in investment relations from external norms to domestic control, laying the intellectual foundation for subsequent legal conflicts over expropriation, compensation, and investor–State dispute settlement.

**2.2.2 Nationalization and the Fight over Compensation Standards**

Nowhere was the post-colonial legal struggle more pronounced than in the debates over expropriation and compensation. As newly independent States exercised their sovereign prerogative to nationalize foreign-owned industries – from oilfields and mines to utilities – divergent legal doctrines clashed over what international law required by way of compensation. Capital-exporting countries insisted on the traditional Hull Rule, derived from U.S. Secretary of State Cordell Hull’s 1938 diplomatic note to Mexico, which demanded “prompt, adequate and effective” compensation for any expropriated property[[74]](#footnote-74). This standard, rooted in the idea of a minimum international standard of justice for alien property, effectively required full market value compensation paid without delay and in convertible form.[[75]](#footnote-75) Developing countries, however, challenged the Hull formula as a vestige of colonial imposition. They argued that, as sovereign equals, they were entitled to determine compensation in good faith pursuant to their own laws and the circumstances of the taking – an approach sometimes termed “appropriate” compensation rather than “adequate” compensation. This position drew on the Calvo-inspired principle that foreign investors should not receive more favourable treatment than nationals, and it gained broad support in the U.N. during the 1960s and 1970s.[[76]](#footnote-76)

The competing views led to an intense doctrinal contest over the content of customary international law. Western jurists long claimed that the full-compensation Hull Rule had crystallised as customary law by the mid-20th century (often citing arbitral precedents and general State practice). But many newly decolonized States refused to concede any such rule, maintaining that no uniform international standard governed expropriations and that only the expropriating State’s municipal law (or a negotiated settlement) should control[[77]](#footnote-77). This rift came to a head in U.N. General Assembly Resolution 1803 (1962) on Permanent Sovereignty over Natural Resources. Resolution 1803 was a carefully crafted compromise: it affirmed the legality of nationalization for public purposes and called for payment of “appropriate compensation” *in accordance with the national laws of the expropriating State and international law[[78]](#footnote-78)*. Notably, the text stopped short of the Hull formula, substituting the more flexible term “appropriate” and acknowledging the role of domestic law. The resolution further provided that disputes over compensation should be resolved by national courts of the taking State, or through international arbitration/adjudication by agreement of the parties – implicitly rejecting unilateral external adjudication. While adopted by consensus, Resolution 1803’s ambiguous language (“appropriate compensation”) revealed the unsettled state of the law. Developed States could read into “international law” a reference to the traditional full-value standard, whereas developing States could emphasize that *domestic law and national interest* predominated in fixing compensation.

Over the next decade, as waves of nationalizations occurred (notably in the oil sector with OPEC countries and in mining industries across Africa and Latin America), the divergence only widened. In 1973, the General Assembly passed Resolution 3171, which more explicitly endorsed the position that compensation terms in each nationalization were to be determined by the sovereign State’s own law and that any disputes should be resolved in its forums[[79]](#footnote-79). This trend culminated in Resolution 3281 (XXIX), the 1974 Charter of Economic Rights and Duties of States – a centrepiece of the NIEO program. Article 2(c) of the Charter unambiguously proclaims each State’s right to *“nationalize, expropriate or transfer ownership of foreign property”*, upon payment of “appropriate compensation” taking into account the State’s laws and “all circumstances that the State considers pertinent.” It further stipulates that any controversy over compensation *“shall be settled under the domestic law of the nationalizing State and by its tribunals, unless otherwise freely agreed by all States concerned”[[80]](#footnote-80)*. This language was a direct repudiation of the Hull Rule. It codified the developing world’s view that compensation need not equate to full market value in all cases, but rather could reflect equitable considerations (such as prior exploitation, the investor’s gains, or the needs of the population), and that the forum for resolving disputes presumptively lay in the host State’s jurisdiction. Developed countries vehemently opposed Resolution 3281 – it was adopted over their dissenting votes – and they refused to recognize it as expressing binding law. The Charter nevertheless carried political weight: it signified that a majority of States rejected the universality of the old standard and asserted an *alternative norm* grounded in sovereign equality and distributive justice.

The result of this “fight over standards” was a prolonged doctrinal stalemate. Throughout the 1970s, arbitral tribunals and scholarly opinions split on the applicable rule. Some arbitral awards, often rendered by Western arbitrators, continued to apply the traditional approach – for example, the Texaco v. Libya award (1977) famously held Libya accountable to pay full compensation as measured by international law[[81]](#footnote-81), largely disregarding Libyan national law and NIEO resolutions. The sole arbitrator in that case (Dupuy) treated U.N. Resolution 1803 as reflective of customary law (emphasizing the phrase “international law” in its compensation clause) but *declined to give effect* to Resolution 3281, noting it was not consensual law[[82]](#footnote-82). In contrast, other jurists sympathetic to developing countries argued that the accumulation of General Assembly resolutions and State practice had eroded any universal Hull Rule, leaving only a requirement of *some* compensation, of an “appropriate” character, to be determined case-by-case[[83]](#footnote-83). Professor M. Sornarajah, for example, notes that by the late 1970s the developing States’ collective stance had “effectively torn down the Hull rule” as a purported customary norm, even though Western investment treaty practice later resurrected stringent compensation obligations by other means[[84]](#footnote-84). By 1980, it was evident that no consensus existed in general international law on a single compensation standard. The legal standard for lawful nationalization remained contested, oscillating between the classical view of full reparation and the new sovereign-oriented view of appropriate compensation. Each expropriation thus became a site-specific negotiation (or dispute) influenced as much by bargaining power as by law. In practical terms, many nationalizations in the 1970s were resolved through lump-sum settlements or ad hoc arbitration, rather than strict adherence to either extreme formula[[85]](#footnote-85). The lasting legacy of this era was to cast doubt on the universality of the old standard and to cement the principle that *States may subordinate foreign property rights to national economic interests* – a principle later moderated by the rise of treaties as discussed below. As one contemporaneous commentator observed, developing countries by the 1970s had forged an “alternative legal order” in the U.N. resolutions on permanent sovereignty and NIEO, one which confronted the traditional investment protections advanced by the West[[86]](#footnote-86). The full implications of that alternative order, however, would soon be tested in new legal frameworks emerging at the end of the post-colonial era.

**2.2.3 The Calvo Doctrine Reaffirmed: Latin American Legal Exceptionalism**

Latin American states occupied a distinctive position in the post-colonial investment law landscape. Long before the mid-20th century, Latin America had championed the Calvo Doctrine – a principle, named after Argentine jurist Carlos Calvo, which rejects special international protections for foreign investors and insists that aliens are entitled only to the same treatment and remedies as a host State’s nationals. The Calvo Doctrine, formulated in the 19th century, was a direct response to gunboat diplomacy and interventionist claims by European powers in the Americas. It has three core elements: (i) *no higher standards* for foreigners than for locals (absolute equality of treatment); (ii) exclusive jurisdiction of local courts over disputes arising from foreign investments; and (iii) a strict ban on diplomatic or military intervention by the investor’s home State to press claims[[87]](#footnote-87). In essence, Calvo’s view was that sovereignty and non-intervention are paramount – a foreign investor, by choosing to invest, implicitly agrees to be bound by the host State’s laws and cannot appeal to an external authority for greater protection. Prior to World War II, this doctrine remained regionally influential but had not attained the status of customary international law, as the major capital-exporting countries continued to assert a minimum international standard at odds with Calvo’s equality rule.

In the post-colonial era, Latin American legal exceptionalism reasserted itself on the global stage. Latin American states consistently aligned with the broader developing world’s sovereignty campaign, yet often with an even more categorical refusal to submit to external investment adjudication. For example, the 1933 Montevideo Convention on Rights and Duties of States – a Pan-American treaty – explicitly enshrined the Calvo principle by providing (in Article 9) that nationals and foreigners must be treated alike and that foreign nationals may not claim rights more extensive than those of citizens[[88]](#footnote-88). This commitment carried over into the 1950s–1970s: at the United Nations, Latin American delegations were among the most vocal proponents of permanent sovereignty, the NIEO, and the repudiation of the Hull Rule. They saw these initiatives as extensions of the Calvo Doctrine’s underlying tenets. Notably, when U.N. Resolution 1803 was negotiated, several Latin American countries pushed to ensure the language on compensation and dispute settlement reflected deference to national law and courts – a reflection of Calvoist thinking[[89]](#footnote-89). Their influence can be seen in the requirement of exhausting local remedies in Resolution 1803, paragraph 4, and in the emphasis on national law in determining compensation.

Beyond rhetoric, Latin America’s actual engagement with investment law institutions demonstrated this exceptionalism. The most salient example is the ICSID Convention of 1965 (discussed further below). While many developing countries signed on to ICSID in the 1960s, Latin American uptake was conspicuously limited. Major economies like Mexico, Brazil, and Argentina initially declined to ratify ICSID, reflecting concerns that submitting to international arbitration would violate Calvo’s non-intervention principle and erode sovereign control. Brazil in particular has never ratified the ICSID Convention to this day, nor did it for decades ratify any bilateral investment treaties (BITs), a stance often described as the epitome of Calvo Doctrine fidelity[[90]](#footnote-90). Even those Latin American states that joined ICSID included reservations or maintained a wary distance from actual cases for many years. This regional scepticism was so marked that it earned a moniker in scholarship as the “Latin American resistance” to investment arbitration. In 1972, the Organization of American States adopted a resolution (sometimes referred to as the “Declaración de Buenos Aires”) essentially reaffirming the Calvo Doctrine and warning against any treaty commitments that would bypass domestic jurisdiction for investment disputes[[91]](#footnote-91). Such actions signalled that, despite global trends, Latin America held to a form of legal exceptionalism – an insistence on its own regional norms of investor–State relations.

It is important to note that Latin American exceptionalism was not merely obstinacy; it was grounded in a distinct legal-historical experience. The region had suffered repeated foreign interventions (military and arbitral) in the early 20th century and thus cultivated deep suspicion of international adjudication as an infringement on sovereignty. The Calvo Doctrine and its contractual corollary, the Calvo Clause (where foreign investors contractually waive diplomatic protection), were mechanisms to preclude a return to gunboat diplomacy by legal means. In the 1970s, this outlook dovetailed with the NIEO’s ethos. For instance, Venezuela’s nationalization of its oil industry (1975) and Chile’s nationalization of copper (early 1970s) were carried out under claims of sovereign right, with compensation determined largely unilaterally; Latin American jurists defended these acts by emphasizing that international law could not impose any greater obligation than national law would require[[92]](#footnote-92). The region also showed **legal innovation** consistent with Calvo’s legacy: some states created special local tribunals or administrative claims processes to handle foreign investor grievances, aiming to demonstrate that local remedies were adequate and obviate any need for external forums[[93]](#footnote-93).

By the late 1980s, geopolitical and economic shifts (the debt crisis, a turn toward liberalization) began softening Latin America’s uniform opposition to investment treaties and arbitration. Several countries entered into BITs and joined ICSID in the 1990s, signalling a partial departure from classic Calvo Doctrine rigidity. Nonetheless, the enduring impact of Latin American exceptionalism is evident even in the 21st century: for example, Brazil’s continued non-participation in ICSID and its novel approach to investment agreements (eschewing investor–State arbitration in favor of state–state and ombudsman mechanisms) reflect Calvo’s influence in contemporary form. Moreover, a wave of withdrawals from ICSID by Bolivia, Ecuador, and Venezuela in the 2007–2012 period – alongside critiques branding ICSID tribunals as biased against host states – has been characterized by scholars like Fach Gómez as a **“David versus Goliath”** battle, hearkening back to Latin America’s historical stance of resisting hegemonic legal regimes[[94]](#footnote-94). In sum, the post-colonial era saw Latin America *reaffirming its maverick role* in investment law: it championed the notion that sovereignty and non-intervention trumped external accountability, thereby providing an early counterpoint to the emerging global regime of investor protections. This standpoint created a persistent friction between Latin American countries and the conventional investor–State arbitration system, one that would resurface as investment arbitration expanded worldwide.

**2.2.4 North–South Dialogue and the Decline of Espousal Models**

The post-colonial reordering of investment law was not confined to pronouncements about sovereignty and compensation; it also prompted a re-examination of *how investment disputes should be resolved*. Traditionally, before the 1960s, a foreign investor with a grievance against a host State had no direct recourse under international law. The classical model required the investor to seek relief in local courts and, if that failed or justice was denied, to rely on diplomatic protection – essentially persuading its home State to espouse the claim against the host State. This espousal system was grounded in inter-State law: as articulated in the Permanent Court of International Justice’s *Mavrommatis* decision (1924), when a State took up the case of its national, it was “in reality asserting its own rights” against the respondent State[[95]](#footnote-95). The International Court of Justice reaffirmed this in *Barcelona Traction* (1970), emphasizing that an investor’s home State remains the “sole judge” of whether to bring an international claim and may withhold or discontinue espousal at its discretion[[96]](#footnote-96). The problems with this diplomatic protection model were well known. From the investor’s perspective, it was uncertain and politicized: the home State might refuse to espouse for political or economic reasons unrelated to the legal merits, and even if it did espouse, the ensuing negotiations or arbitral claims could be settled or compromised based on inter-State interests (with any compensation potentially pocketed by the State[[97]](#footnote-97). Smaller investors or those lacking strategic importance were often left without remedy, as home governments would not risk diplomatic capital on their behalf. From the host State’s perspective, diplomatic protection meant that what began as a private dispute could escalate into a bilateral conflict, straining international relations. And in the worst case, as history showed, powerful States could leverage espousal to justify armed intervention or economic sanctions – something the post-colonial order, committed to sovereign equality and non-aggression, sought to prevent.

It is against this backdrop that the North–South dialogue of the 1960s–70s pursued new mechanisms to handle investor–State disputes. Developing countries were keen to depoliticize such disputes to avoid the spectre of neo-colonial interference, while capital-exporting States and international institutions were interested in more reliable enforcement of investors’ rights (to encourage foreign investment). The confluence of these interests eventually led to the creation of neutral arbitration frameworks, which fundamentally altered the role of diplomatic espousal. A key development was the ICSID (established 1965 under the World Bank’s auspices), which introduced an *innovative dispute-settlement model*: for the first time, investors could bring claims directly against host States before an international arbitral tribunal, with the State’s advance consent typically given via treaty or domestic legislation. This model was a paradigm shift – it privatized and juridified the process, removing the need for the investor’s home State to intervene. Indeed, Article 27 of the ICSID Convention expressly prohibits diplomatic protection or claims in any other forum once the parties have consented to ICSID arbitration, unless the host State fails to comply with the award[[98]](#footnote-98). In effect, ICSID (and the wave of bilateral investment treaties that began in the late 1960s and proliferated in the 1980s) engineered the *decline of espousal models* by creating a direct investor–State dispute settlement (ISDS) system.

During the North–South dialogues at UNCTAD and other forums, developing countries had mixed views on this emerging ISDS architecture. On one hand, many saw voluntary arbitration as preferable to gunboat diplomacy or politicized negotiations; arbitration promised a rule-of-law approach and insulated technical legal issues from geopolitical pressure. This was consistent with the broader post-colonial push to neutralize investment conflicts, aligning with what scholars later termed the goal of “depoliticization” of investor–State disputes. On the other hand, there was understandable concern that international arbitration could become a one-sided tool – entrenching investor-friendly norms or reflecting the biases of Western legal traditions. The failed attempt in the 1970s to draft a U.N. Code of Conduct on Transnational Corporations, and simultaneous efforts by the OECD to craft multilateral investment rules (like the 1967 Draft Convention on the Protection of Foreign Property, which reiterated the Hull standard and arbitration clause), exemplified the ongoing tug-of-war in norm-setting. Ultimately, as the ideological momentum of NIEO waned in the 1980s, a pragmatic compromise took hold: many developing countries began accepting bilateral solutions (BITs with investor–State arbitration clauses) even as they remained skeptical of multilateral rules dictated by the North. This bifurcated behavior – rejecting universal standards while embracing selective treaties – has been described as “paradoxical”[[99]](#footnote-99) but can be explained by changed economic incentives and the collective-action problem (each capital-importing State individually sought to attract investment by offering protections, even if collectively they had opposed those standards in the U.N.).

The decline of diplomatic espousal was thus not an overnight revolution but a gradual erosion driven by both legal innovation and geopolitical change. By empowering investors with direct rights, ICSID and BITs aimed to remove disputes from the diplomatic realm, reducing frictions between home and host States. For example, once a BIT is in place between a developed and a developing country, an expropriation claim by an investor need not become a U.S.–India or UK–Kenya confrontation; it is handled as a legal case in arbitration, mitigating nationalist pressures. From a doctrinal viewpoint, this shift also entailed the emergence of a new corpus of “treaty-based investment law”, which began to supplant customary law and espousal practice. As Salacuse notes, by the late 1980s a dense network of BITs was forming, creating “rules for private foreign investments” in a way general international law had failed to do, given that the field previously *“had few generally accepted principles of customary international law”[[100]](#footnote-100)*. In other words, the traditional uncertainty (and politicization) of investor protection was gradually being replaced by treaty-defined standards enforceable through arbitration. The process was driven as much by developing countries’ needs (e.g. to signal a stable investment climate amid debt crises) as by developed countries’ policy, marking a shift from the confrontational North–South rhetoric of NIEO to a more pragmatic legal engagement.

By the end of the post-colonial era (late 1980s), the espousal model had largely receded for investment disputes. Major capital-exporting nations increasingly pursued investor–State arbitration provisions in their treaties as the default mechanism, and major capital-importing nations acquiesced or even competed to sign such treaties. Diplomatic protection in its classical form became a rarity in investment matters – reserved only for egregious cases or situations where no arbitral avenue existed. The North–South dialogue on investment, which began with standoff and sweeping assertions of sovereignty, thus evolved into a dialogue about *procedural frameworks*. Developing countries shifted from rejecting external adjudication in principle to carefully managing and sometimes contesting the new ISDS system from within. This set the stage for contemporary debates: having ceded the espousal-based system, States would later grapple with questions about arbitral legitimacy, regulatory autonomy, and reform of the ISDS regime. But fundamentally, the post-colonial era’s legacy was the entrenchment of legalized dispute resolution in lieu of power-oriented diplomacy – a transformation that aimed to balance investors’ rights with respect for State sovereignty, albeit with ongoing tensions about where that balance should lie.

**2.2.5 Institutional Friction and the Foundations of ICSID**

The creation of the ICSID system in 1965 stands as a landmark in the post-colonial evolution of investment law – an institutional response to the very frictions that the above subsections have described. It emerged from an initiative by the World Bank’s General Counsel, Aron Broches, who in the early 1960s canvassed States (developed and developing alike) about establishing a neutral forum to adjudicate investment disputes. The premise was that a depoliticized mechanism would benefit all sides: investors would gain a fair hearing and enforceable awards, while host States would avoid political pressures and reinforce their credibility as safe destinations for foreign investment. Yet the founding of ICSID was not without significant friction and skepticism, especially from post-colonial States concerned about sovereignty. The negotiations leading to the ICSID Convention reveal a careful balancing act: the Convention made arbitration entirely consensual (a State must specifically consent to each case, whether through a contract, legislation, or treaty clause), preserved certain sovereign prerogatives (e.g. allowing States to require local administrative remedies to be exhausted as a condition, via Art. 26, and barring any external review of awards by national courts), and included Article 27 to assuage host State fears of diplomatic intervention by making ICSID arbitration the exclusive remedy once chosen. The Preamble of the Convention encapsulates the delicate compromise – recognizing “the need for international cooperation for economic development, and the role of private international investment therein,” while also emphasizing “the possibility that from time to time disputes may arise” and that an international facility would serve “by mutual consent” to handle them in a spirit of mutual confidence[[101]](#footnote-101). In short, ICSID’s design sought to institutionalize a rules-based order for investor–State disputes that would be acceptable to newly independent States fiercely guarding their sovereignty.

When the Convention opened for signature in March 1965, initial support and opposition did not strictly follow East–West or North–South lines, but the Latin Americanresistance was notable. Only a handful of Latin American countries signed early (and even fewer ratified in the early years), largely due to the prevailing Calvo Doctrine as discussed. African and Asian post-colonial States were somewhat more receptive – many saw participation as a way to bolster their image for foreign investment and to engage with the World Bank community. Nevertheless, the 1960s context (peak of nationalizations and NIEO ferment) meant that some major decolonized nations (e.g. India, Egypt for a time, and others) were cautious, signing but not rushing to use the Centre. The ICSID system therefore began modestly: the first case was registered only in 1972 (a contract dispute against Morocco) and the early docket was sparse, reflecting that many consents to ICSID arbitration were still theoretical. It “seemed as if ICSID was bound to become a dormant and underutilised institution” in its first two decades, given multiple years in the 1970s–80s with zero cases filed[[102]](#footnote-102). This slow start can be attributed in part to the institutional friction between ICSID’s promise and the prevailing post-colonial skepticism. Many developing countries simply had not yet concluded treaties or contracts that gave consent to ICSID, and investors were likewise feeling their way in the new system. Importantly, however, the foundation was laid: by agreeing to the ICSID Convention, states established a standing framework that could be activated when political winds shifted. Prior to the mid-1990s, ICSID case filings were very infrequent (averaging fewer than 1.6 per year from 1972 to 1996). The explosion to an average of 32 cases per year by 2024. Some scholar attributed tis growth to the growing web of BITs providing consent to ICSID arbitration[[103]](#footnote-103).

The rationale behind ICSID’s foundation was grounded in legal doctrine as much as economic pragmatism. One rationale was the depoliticization principle: removing disputes from the realm of international diplomacy and power politics, and submitting them to legal adjudication. As one ICSID arbitral tribunal later noted, the essence of modern investment treaties (and ICSID’s role in them) is to insulate disputes “from political and diplomatic relations between states,” treating them instead as legal conflicts to be resolved by neutral arbitrators applying law. This fulfilled, in a sense, the Calvo ideal (no diplomatic intervention) but via an international rule-of-law mechanism rather than strict exclusivity of local courts. Another rationale was to harmonize enforcement of awards. The ICSID Convention provides that an award must be recognized and enforced by all contracting States as if it were a final judgment of their own courts (Art. 54), eliminating the need for protracted enforcement litigation and ensuring that an investor who prevails can actually recover against the State’s assets or budget. This feature responded to the concern that, even if an investor’s home State won an espousal claim or the investor won an ad hoc arbitration, enforcement could be thwarted by sovereign immunity or lack of jurisdiction. By binding States in advance to honor ICSID awards, the Convention created a powerful compliance pull – although one tempered by the Centre’s internal annulment procedure and the World Bank’s influence (the Bank, as a development lender, was seen as a guarantor of sorts for the system’s integrity).

Despite these thoughtful design elements, post-colonial tensions persisted within ICSID’s framework. Many developing countries remained wary that arbitrators (often drawn from Western legal circles) would import doctrines favoring investor rights (like full compensation, sanctity of contract, etc.) without sufficient regard to public interest or the economic conditions that had fueled nationalizations. Early ICSID cases did little to allay these fears: for example, AMCO Asia v. Indonesia (an early 1980s case) and others showed tribunals asserting broad jurisdiction and scrutinizing host State conduct closely[[104]](#footnote-104), which some developing country observers viewed as ICSID being an instrument of “capital” oversight. Meanwhile, within Latin America, the reluctance turned gradually into a backlash: by the 2000s, several countries that had joined ICSID chose to withdraw under the claim that the system unduly constrained their sovereign policy space (a reprise of post-colonial arguments in a new era).[[105]](#footnote-105) This underscores that ICSID’s foundational compromise – voluntary consent, neutrality, and finality – did not permanently resolve the deeper normative debate over who should judge investment disputes and by what law. It did, however, establish the *baseline paradigm* that endures: investor–State arbitration as the chief mechanism for resolving disputes, supplanting both gunboat diplomacy and local court exclusivity.

In evaluating the foundations of ICSID, one must appreciate its dual character as both a legal institution and a product of its era. On one side, it was an embodiment of liberal legalism, aiming to subject State–investor relations to the rule of law and thereby encourage investment flows for development – a goal plainly stated by its architects and reflected in the World Bank’s developmental mandate[[106]](#footnote-106). On the other side, ICSID was born in an atmosphere of contestation and distrust. Post-colonial states engaged in its creation because they recognized the potential benefits of a neutral forum (and many were under pressure to normalize relations with foreign investors after the upheavals of nationalization), but they also fought for safeguards in the Convention to preserve sovereignty[[107]](#footnote-107). The resulting treaty is thus a study in balance: it is at once deferential (no State is forced to arbitrate without consent) and disciplinarian (once consent is given, the process aims to be insulated from State interference). Over time, as investor–State arbitration cases proliferated (especially after the 1990s when BITs exploded in number), ICSID became more controversial, but those later developments go beyond the post-colonial era as such. For present purposes, the key point is that the post-colonial shift from colonial-era doctrines culminated in the establishment of ICSID – symbolizing a new legal order where neither imperial gunboats nor U.N. resolutions alone would govern investment relations, but rather *treaties and tribunals*.

In conclusion, the post-colonial era in international investment law was characterized by a profound reconfiguration of legal doctrine and dispute settlement mechanisms. Developing countries asserted the primacy of State sovereignty (permanent sovereignty over natural resources) and sought to recalibrate or repudiate inherited colonial norms (e.g. the Hull Rule), enshrining their views in General Assembly resolutions and regional doctrines like Calvo. This led to a temporary fragmentation of customary law and a normative stalemate between North and South. At the same time, pragmatic solutions emerged: the decline of the diplomatic espousal model and the rise of investor–State arbitration under institutions like ICSID represented a convergence of interests in depoliticizing disputes, even as they introduced new tensions regarding the impartiality and fairness of those tribunals. The legacies of this era are evident in today’s legal frameworks. Concepts born of post-colonial struggles – such as “appropriate compensation” and the continuing validity of State regulatory autonomy – still inform arbitral interpretations and academic debates (often under the banner of fair and equitable treatment or the “right to regulate”). Likewise, the wariness that marked the initial reception of ICSID has resurfaced in modern calls for reform or alternatives to the ISDS system (for instance, proposals for an investment court or regional arbitration centers, including efforts by some Latin American states to create a UNASUR arbitration centre)[[108]](#footnote-108). The post-colonial era thus laid the doctrinal foundation for the ongoing evolution of international investment law: it was the period in which the old imperial paradigm was finally dismantled, and the terms of a new, ostensibly more balanced, but still contested, regime were established.

**2.3 The Global Era and Legal Entrenchment**

**2.3.1 Explosion of BITs and the 1990s Investment Boom**

BITs proliferated at an unprecedented rate in the final decade of the twentieth century, against the backdrop of a post-Cold War investment boom. Although the first BIT – between West Germany and Pakistan in 1959 – is often cited as a milestone in investment law development[[109]](#footnote-109), the BIT program remained modest for several decades. Its transformational impact materialized only around 1990, when BITs evolved from sparse diplomatic instruments into a dense global network of binding agreements. In fact, it was only in 1990 that the defining feature of modern investment law – the investor’s direct right to invoke treaty protections through arbitration – truly came into effect, as demonstrated by the first treaty-based ISDS award in *Asian Agricultural Products v. Sri Lanka* (1990)[[110]](#footnote-110). The 1990s “roaring nineties” investment boom coincided with the ascendance of neoliberal economic policies after the Cold War, which spurred the rapid creation of a pro-investor normative framework. Thereafter, states raced to conclude BITs as part of the neoliberal drive to attract foreign capital in the 1990s. By one count, from 1959 to date states entered into nearly 3,181 BITs, out of which 2484 were signed between 1990 and 2012, making this “one of the most widely used” types of international agreement in history. [[111]](#footnote-111) The 1997s alone saw an explosion of 183 BIT signatures, earning the moniker the “roaring nineties” for foreign investment law.

Capital-exporting nations championed model BITs to expedite negotiations, exporting templates that helped standardize protections across different treaties. For example, the United States developed a model BIT in the 1980s that heavily influenced treaty practice worldwide, as many partner countries adopted similar provisions and legal language[[112]](#footnote-112). Likewise, other major capital exporters (the United Kingdom, Germany, the Netherlands, etc.) relied on prototype treaty texts, leading to a convergence in BIT content. As a result, despite being negotiated bilaterally, most BITs came to share a core set of doctrinal commitments – guarantees of fair and equitable treatment, full protection and security, compensation for expropriation, free transfer of funds, etc. – with only minor variations. Scholarship notes that the *“common structure and language”* of post-1990 BITs became virtually uniform, evidencing an extensive harmonization of investment treaty norms across jurisdictions[[113]](#footnote-113). This doctrinal convergence was so pronounced that some arbitral tribunals and commentators began to suggest that certain BIT clauses reflected general international law. For instance, a NAFTA Chapter 11 tribunal observed that BIT practice had “evolved” investor rights under customary law, even citing the 1987 US model BIT as a template for international minimum standards of treatment. In sum, the global era saw BITs entrenched as a key instrument of international economic law, converging around pro-investor doctrines and purportedly creating a more predictable transnational legal framework for investment. The rapid rise and replication of BITs in this period effected a doctrinal shift from a fragmented, contract-based regime towards a semi-unified *corpus* of treaty-based investment law.

**2.3.2 The Rise of Investor–State Dispute Settlement (ISDS)**

Hand-in-hand with the BIT boom came the entrenchment of investor–state arbitration as the regime’s linchpin. Prior to the 1990s, foreign investors relied on espousal of claims by their home state or ad hoc arbitration clauses in contracts, and ICSID – established in 1965 – remained largely dormant (ICSID’s first case was not registered until 1972). ICSID’s first arbitration (Holiday Inns v. Morocco) was registered in 1972. ICSID Case load shows only 26 case between 1965 and end of 1989, while the case load from 1990 to 2012 grow to a soaring number of 400[[114]](#footnote-114); this shows the grow of case per average from 1 case per year to 18 case per year. BITs revolutionized this landscape by embedding consent to arbitrate directly into thousands of treaties, giving investors standing to pursue claims against host states without requiring diplomatic intervention or privity of contract. This innovation – described contemporaneously as *“arbitration without privity”* – was nothing short of paradigm-shifting in international adjudication. [[115]](#footnote-115) As one commentator observed, it was *“only in 1990”* that investor-state arbitration emerged as a true right under international law, marking a dramatic departure from prior practice.[[116]](#footnote-116) Thereafter, ICSID and other arbitration forums saw an exponential uptick in cases. By the early 2000s, BIT-based disputes dominated ICSID’s docket: for example, 15 of the 19 ICSID arbitrations registered in 2002 were initiated pursuant to BIT clauses, whereas previously most ICSID cases had been based on investor-state contracts[[117]](#footnote-117). In total, ICSID handled just 32 cases in its first three decades, out of which 26 were invoked by contract clauses and only 6 were invoked by treaty clause, showing only 19% of cases. but this caseload more than tripled as BIT arbitration took hold, with 277 cases since 1995 till end of 2010, out of which only 46 cases where invoked by contract, demonstrating the fact that more than 83% of cases were invoked by treaty clause.[[118]](#footnote-118)

Procedurally and doctrinally, the inclusion of ISDS clauses in BITs became a standard (almost expected) feature, reflecting what practitioners came to call the “entrenchment” of arbitration in investment treaties. Dispute resolution provisions, typically offering consent to arbitration under ICSID or UNCITRAL Rules, were no longer isolated curiosities but rather the norm in investment agreements worldwide. This legalization of dispute settlement was heralded by its proponents as bringing much-needed predictability and neutrality to investor–host state relations. The ICSID Convention itself had been conceived as a depoliticized forum: an autonomous arbitral mechanism under the aegis of the World Bank that could replace gunboat diplomacy and political negotiation with rule-of-law adjudication. BIT drafters embraced this idea, consistently providing investors the option to submit disputes to neutral arbitration, often without requiring exhaustion of local remedies. The perceived benefits were several: a *predictable and enforceable process* (ICSID awards are internationally enforceable and immune from local court review under the ICSID Convention), and a *neutral, expert decision-maker* (arbitration before independent tribunals rather than the host’s judiciary). Contemporary policy documents stressed that ISDS would *“depoliticize”* disputes by removing them from the realm of politics and diplomacy, offering investors a fair hearing before an independent tribunal with binding results.[[119]](#footnote-119) It promised *legal certainty*: final awards enforceable worldwide, delivered through a procedure that was, in theory, swifter and more flexible than litigation.[[120]](#footnote-120) Equally important was the promise of *neutrality* – by taking disputes out of the host state’s courts and into an international forum, the system assured foreign investors that their grievances would be heard impartially, free from local bias or political interference[[121]](#footnote-121). For host states, this arrangement was supposed to depoliticize conflict by channelling investor claims into a legal process, thereby avoiding diplomatic rifts with capital-exporting nations. Thus, the global era entrenched a bargain: states offered investors direct access to international arbitration (surrendering a degree of sovereign immunity), and in return expected that neutral dispute resolution would encourage investment flows by safeguarding investors’ rights. Legally, this represented a shift towards procedural entrenchment – the idea that not only substantive standards, but also *the method of dispute resolution*, were firmly established at the treaty level. By the end of the 1990s, virtually all new BITs (and investment chapters in regional agreements) contained ISDS clauses, reflecting a near-universal doctrinal commitment to arbitral enforcement of investment protections.

**2.3.3 The Depoliticization Narrative and Global Investment Protection**

The rise of ISDS was accompanied by a dominant narrative extolling the *depoliticization* of investment disputes. According to this narrative – advanced by institutions like the World Bank and many Western scholars – allowing investors to pursue legal remedies directly would remove conflicts from the political realm and place them in a neutral adjudicatory setting. Proponents argued that this mechanism benefited all parties: investors could vindicate their rights without resorting to gunboat diplomacy or lobbying their home governments, and host states could avoid political pressure and adjudicate disputes according to law rather than power dynamics.[[122]](#footnote-122) In theory, “depoliticization” meant that an investor’s claim of expropriation or unfair treatment would be resolved by independent arbitrators applying agreed legal standards, rather than by diplomatic protection or coercive tactics. This was portrayed as a progressive step that would **de-politicize and juridify** investor–state relations, thereby fostering a stable investment climate governed by the rule of law. Indeed, the preamble of the ICSID Convention and much early BIT practice were explicit in aiming to *“create effective means of settling disputes”* so as to promote international investment through confidence in the legal process.[[123]](#footnote-123)

Critical scholars and practitioners from the Global South, however, have interrogated this depoliticization narrative and exposed its ideological underpinnings. Third World Approaches to International Law (TWAIL) writers in particular argue that the ostensible *neutrality* of ISDS masks an inherent bias: the system elevates investor rights above sovereign prerogatives and public interest, entrenching what is effectively an **investor-centric regime**.[[124]](#footnote-124) Muthucumaraswamy Sornarajah[[125]](#footnote-125), a leading TWAIL scholar, describes the BIT/ISDS regime of the 1990s as a *“highly political project of rules”* constructed *“under the guise of depoliticization and economic development”* – in his view, the regime claimed to be neutral and technocratic but in fact primarily served multinational corporate interests and Western capital-exporting states. Sornarajah argues that the BIT-centric investment protection regime of the 1990s was fundamentally *imbalanced* and driven by hegemonic interests. He notes that the *“normative structure of investment protection”* created in that era was *“detrimental to global community interests in the protection of the environment and human rights as well as to the interests of the people of the developing world”*, being tailored instead to the preferences of capital-exporting powers. Moreover, he contends that *“under the guise of depoliticization and economic development, a highly political project of rules favourable to multinational corporations was accomplished through investment treaties and investment arbitration.”* In Sornarajah’s view, the purported neutrality of the regime concealed an exercise in power – akin to an “imperial” enterprise – imposing Western liberal economic norms on developing countries while trumping counter-narratives like the NIEO.[[126]](#footnote-126)

Far from being apolitical, the international investment law framework is seen by such critics as a continuation of global power asymmetries: a one-sided system in which capital-importing states (often developing countries) surrendered sovereign regulatory powers in exchange for promises of investment, while investors (often from developed states) gained enforceable rights without corresponding responsibilities. Notably, unlike other international regimes that balance rights and duties, investment treaties impose obligations almost exclusively on host states. Investors are granted standing and substantive protections, but bear no international law duties; their home states likewise have no obligations to restrain or supervise investor conduct. This asymmetry has been highlighted as a structural bias. As one historical analysis observes, when modern BITs and the ICSID Convention were formulated, *“the responsibility of host states for the treatment of foreign investors was transformed into investors’ rights, whereas the responsibility of investors (or their home states) for investors’ conduct was not comparably internationalized.”[[127]](#footnote-127)* Schill et al[[128]](#footnote-128) argue that, contemporary investment law is “one-sided” – it internationalizes only the responsibility of host states, granting rights to investors, without balancing obligations for investors (e.g. to comply with local laws or not engage in abusive practices) on a similar international plane.

In other words, “depoliticization” meant protecting investors from politicized state action, but it did not prevent investors from invoking politics or influence on their own advantage, nor did it create legal accountability for investors’ misdeeds.

Furthermore, TWAIL and other critical scholars draw parallels to the colonial era. The investment protection regime, they argue, revives the old paradigm of an *“international minimum standard”* (historically championed by colonial powers to safeguard their nationals abroad) imposed on weaker states. It is noted that in the 1960s and 70s, developing countries had resisted this approach by asserting the Calvo Doctrine and the New International Economic Order, which emphasized sovereign control and domestic adjudication of foreign investment disputes. The BIT/ISDS explosion of the 1990s effectively bypassed those efforts by enshrining external arbitration and stringent investor rights in hundreds of treaties. The result, as Weghmann and Hall[[129]](#footnote-129) observe, was a normative order *“detrimental to global community interests”*, including sustainable development goals, environmental protection, and human rights, as well as to the developmental policy space of host states in the Global South. By prioritizing the protection of foreign capital, the regime risked undermining legitimate regulatory and distributive aims – a critique often framed as **“investor primacy”** or **regulatory chill**.[[130]](#footnote-130) In practical terms, developing countries found that measures taken in the public interest (for example, health regulations, environmental conservation efforts, or economic reforms in times of crisis) could be challenged and nullified by arbitral tribunals on the basis of BIT obligations. The *depoliticization* narrative would suggest that such outcomes are simply the fair application of agreed rules by neutral arbitrators; the critical counter-narrative responds that those rules and arbitral processes themselves reflect a narrow set of interests and values, largely excluding the voices and concerns of the communities and governments most affected.

In summary, while the global era’s champions depicted ISDS as a neutral mechanism to depoliticize investment relations and provide *“protection without politics,”* critical scholarship has unmasked the politics inherent in that very move. The legal entrenchment of investor protections is seen as having shifted power significantly toward investors, often at the expense of host state sovereignty and other societal interests. The depoliticization narrative, though influential in legitimizing the system, remains hotly contested – especially by scholars and states who view the regime as a vehicle for entrenching neoliberal economic priorities under the facade of impartial law.

**2.3.4 Key Institutional Anchors: ICSID, MIGA, and UNCTAD**

The rapid globalization of investment law in the 1990s did not occur in a vacuum; it was buttressed by several key international institutions that provided crucial support and legitimacy to the emerging regime. Three multilateral bodies in particular – **ICSID**, **MIGA**, and **UNCTAD** – acted as institutional anchors, each reinforcing the investment protection framework in distinct ways.

**2.3.4.1. ICSID**

As noted, ICSID was established in 1965 by the World Bank as a dedicated forum for the arbitration of investment disputes. For two decades its role was limited, but with the advent of BITs, ICSID became the *de facto* court of investment law. The ICSID Convention’s design itself facilitated the entrenchment of legal formalism: its architect, Aron Broches (then General Counsel of the World Bank), deliberately crafted ICSID as a procedural mechanism, focusing only on dispute settlement procedures and explicitly *not* addressing substantive investment protections in the convention text[[131]](#footnote-131). This strategy of isolating procedure from substance was instrumental in gaining broad acceptance – states with otherwise divergent views on investment standards could agree on ICSID as a neutral arbitration framework. The World Bank’s consultative approach (soliciting input from states but largely guiding the drafting process technocratically) helped avoid ideological disputes and secure rapid ratification of the Convention[[132]](#footnote-132). By the 1990s, a majority of capital-importing and exporting states had joined ICSID, providing a ready-made judicial infrastructure to enforce the burgeoning network of BIT rights. In this sense, ICSID served as the **legal cornerstone** of the global investment regime: it supplied the dispute resolution machinery that gave “teeth” to BIT obligations[[133]](#footnote-133), and its affiliation with the World Bank lent the enterprise credibility and managerial support. The Centre’s caseload and published arbitral awards also gradually built up a body of quasi-precedent and jurisprudence constante, contributing to systemic legal entrenchment. In short, ICSID underpinned the regime by ensuring that investor rights could be effectively adjudicated and enforced on a multilateral basis, thereby advancing the predictability and neutrality valued by capital-exporting states.

**2.3.4.2. MIGA (Multilateral Investment Guarantee Agency)**

A lesser-known but significant pillar of the era’s investment architecture is MIGA. Created in 1988 as part of the World Bank Group, MIGA’s mandate is to encourage foreign direct investment into developing countries by offering political risk insurance and guarantees to investors and lenders[[134]](#footnote-134). MIGA covers risks such as expropriation, currency inconvertibility, political violence, and breach of contract by governments[[135]](#footnote-135). Its establishment reflected the same policy impulse that drove BIT proliferation – the desire to mitigate non-commercial risks for investors and thus incentivize investment flows. By the late 1980s, many states and development institutions recognized that *perceived risk* was a major barrier to investment in developing markets; MIGA was the multilateral answer, complementing BITs and national investment insurance schemes[[136]](#footnote-136). MIGA became an **institutional anchor** by providing an additional layer of security: an investor insured with MIGA could be compensated promptly for losses caused by political acts, and MIGA would then have subrogation rights to pursue claims (potentially via ICSID arbitration, since the MIGA Convention requires member states to consent to ICSID arbitration of disputes with MIGA)[[137]](#footnote-137). In this manner, MIGA reinforced the investment protection system both financially and legally[[138]](#footnote-138). Financially, it gave comfort to investors (particularly medium-sized companies and infrastructure investors) that losses would be covered, effectively underwriting the political risk that BITs sought to reduce through legal commitments. Legally, MIGA’s presence signaled World Bank and developed-state endorsement of the norms of investor protection; it institutionalized the idea that protecting investments against political risk was a shared international goal[[139]](#footnote-139). Interestingly, some observers initially speculated that if multilateral insurance like MIGA became widely available, states might see less need to sign BITs (since investors would rely on insurance rather than legal claims)[[140]](#footnote-140).<sup>11</sup> In practice, however, BITs and MIGA grew in tandem – both tools became part of a comprehensive strategy to facilitate and secure foreign investments. In sum, MIGA anchored the regime by lowering the real and perceived risk of investing abroad, thereby complementing the legal guarantees offered by BITs and the dispute resolution offered by ICSID.

**2.3.4.3.UNCTAD**

UNCTAD, a U.N. body traditionally associated with championing developing countries’ trade and development interests, played a somewhat paradoxical but pivotal role in consolidating the investment law system. During the 1970s, UNCTAD had been a forum for calls for a New International Economic Order and greater sovereignty over natural resources; yet in the 1990s, UNCTAD emerged as the primary source of research, policy analysis, and technical assistance on international investment agreements (IIAs), including BITs. It became, in effect, the **knowledge hub** of the investment regime. UNCTAD systematically tracked the surge in BITs, publishing statistical reports and analysis that highlighted the rapid growth and key trends of investment treaties (for example, UNCTAD’s series of compendia: *Bilateral Investment Treaties 1959–1999* and **periodic reports on IIAs**).[[141]](#footnote-141) By cataloguing BIT signings, compiling treaty texts, and disseminating information on common treaty provisions, UNCTAD helped “entrench” the norm that BITs were a standard component of countries’ investment policy toolkit. Its publications in the **UNCTAD Series on International Investment Agreements** provided comparative surveys of treaty practice and clarified the content of obligations like Fair and Equitable Treatment, Most-Favored-Nation treatment, and expropriation. This had a harmonizing influence: developing countries often relied on UNCTAD’s guidance and technical assistance when negotiating new BITs, which tended to perpetuate the prevailing models and doctrinal formulations. Moreover, UNCTAD’s statistical work – e.g. its annual *World Investment Reports* – reinforced the perception of a link between signing BITs and attracting foreign investment, thereby encouraging states to join the BIT wave. In these ways, UNCTAD functioned as an **institutional anchor** by offering a multilateral imprimatur and repository of knowledge for the investment law regime. It convened intergovernmental discussions on investment frameworks, provided a platform (albeit within the development community) where the new norms were acknowledged and disseminated, and in the 2000s it even began to facilitate dialogue on reform of the system.[[142]](#footnote-142) Thus, alongside ICSID’s legal machinery and MIGA’s insurance backstop[[143]](#footnote-143), UNCTAD’s role in data-gathering and policy dialogue helped **legitimate and globalize** the investment protection regime during the 1990s, embedding it within the broader international economic governance landscape.[[144]](#footnote-144)

**2.3.5 Early Signs of Backlash and Frictions over Treaty Commitments**

By the early 2000s, even as the investment treaty regime was reaching its apex in terms of participation and usage, signs of a nascent backlash began to surface. The very features that had been lauded as strengths – strong investor rights enforceable via arbitration – gave rise to concerns about fairness, legitimacy, and sovereign policy space. As the number of ISDS cases climbed (over 1092 (918 invoked by treaty) known cases by 2012, up from essentially zero two decades earlier)[[145]](#footnote-145). Sates and stakeholders started to experience and observe outcomes that troubled them. Arbitral tribunals were rendering awards that, in some instances, ordered governments to pay massive compensation for regulations enacted in the public interest (for example, environmental protections, public health measures, or financial crisis responses). A series of claims under NAFTA Chapter 11 in the late 1990s and early 2000s – such as *Metalclad v. Mexico[[146]](#footnote-146)* (over environmental permit denial) and *Methanex v. USA[[147]](#footnote-147)* (challenging a ban on toxic fuel additives) – drew substantial public attention and criticism, highlighting the potential of investment treaties to constrain domestic regulatory autonomy[[148]](#footnote-148). Similarly, Argentina faced a wave of BIT claims in the aftermath of its 2001 financial crisis, with tribunals—such as in *CMS Gas Transmission Co v Argentina*, *LG&E Energy Corp v Argentina*, *Enron Corp v Argentina*, *Siemens AG v Argentina*, and *Azurix Corp v Argentina*—rendering controversial awards that often prioritized investor rights over the state’s emergency economic measures.[[149]](#footnote-149). These high-profile disputes underscored a core criticism: BITs could impose **significant constraints on states’ “right to regulate”** in the public interest, yet the treaties contained few checks on investor conduct or avenues for holding investors accountable.

Academically and in policy circles, the discussion shifted to what came to be called the “legitimacy crisis” of investment arbitration. Observers noted several systemic problems. First, there were **concerns about consistency and correctness of arbitral decisions**: different tribunals interpreting similar treaty language reached inconsistent conclusions, and there was no appellate body or mechanism to correct errors, raising doubts about the coherence of the law[[150]](#footnote-150). Second, **questions arose regarding the independence and impartiality of arbitrators**. Unlike judges, arbitrators are often practicing lawyers and may serve in different roles in different cases, leading to perceptions of conflict of interest or “issue bias.” The recurrent appointment of a small cadre of arbitrators (many from Western states) to multiple tribunals also fueled perceptions of an inner circle and potential pro-investor leanings, given that investors choose one arbitrator and must agree on the presiding arbitrator[[151]](#footnote-151). Challenges to arbitrators for alleged bias became more frequent, and civil society groups published reports accusing certain arbitrators of systematically favoring investors – casting doubt on the neutrality of the process. Third, **the lack of transparency** in ISDS came under fire. Until the mid-2000s, many arbitration proceedings were confidential, and even the existence of a case or the text of an award could be kept secret. This was in tension with the fact that these disputes often involved public funds and regulatory measures. Calls for greater openness (public hearings, publication of documents, and participation of amici curiae) grew louder as stakeholders demanded accountability for tribunals deciding issues with broad societal impact[[152]](#footnote-152). Fourth, **costs and duration** of ISDS proceedings escalated. Arbitrations routinely lasted 3–5 years and entailed millions of dollars in legal fees and arbitrator expenses, prompting criticism that the process was too expensive and inaccessible particularly for smaller states (and certainly for affected third parties or communities, who had no standing at all)[[153]](#footnote-153). All these issues – inconsistency, arbitrator bias, opacity, and cost/duration – fed a perception that the system was not living up to its promises of neutrality and efficiency, thereby undermining its legitimacy.

Developing countries were the first to voice open opposition. By the late 2000s, a handful of states took dramatic action: withdrawals from ICSID and termination of BITs. Bolivia (2007)[[154]](#footnote-154) became the first state to denounce the ICSID Convention, followed by Ecuador (2009)[[155]](#footnote-155) and Venezuela (2012)[[156]](#footnote-156), each expressing dissatisfaction with the arbitral decisions rendered against them and the constraints imposed by investment treaties[[157]](#footnote-157). Several Latin American nations also let numerous BITs lapse or actively terminated them (for example, Ecuador in 2017 terminated all its remaining BITs after an audit commission found the treaties undermined national interests)[[158]](#footnote-158). Outside Latin America, other states exhibited backlash symptoms: South Africa undertook a review of its BITs and allowed many to expire in the early 2010s[[159]](#footnote-159), India in 2015 issued notices to terminate or renegotiate dozens of BITs after being hit with costly claims[[160]](#footnote-160), and Indonesia similarly moved to terminate BITs[[161]](#footnote-161). These actions reflected a growing anxiety that the “grand bargain” of BITs – offering investor protections to attract investment – had come at too high a price in terms of legal and political risks.

Importantly, even **capital-exporting (developed) states** began acknowledging criticisms. The United States and Canada, for instance, revised their model BITs and FTA investment chapters by the mid-2000s to address some legitimacy concerns that had arisen under NAFTA. The U.S. 2004 Model BIT (and its 2012 revision) introduced more precise language and exceptions aimed at preserving regulatory space – including provisions on transparency, amicus briefs, and clauses safeguarding public welfare measures (e.g. general exceptions for health and environmental regulation)[[162]](#footnote-162). This represented a significant doctrinal adjustment: whereas first-generation BITs of the 1990s were short, broadly drafted, and almost exclusively pro-investor, the new models (BIT “2.0”) were longer and somewhat more balanced, carving out room for legitimate state measures and clarifying that nondiscriminatory regulation (such as for public safety) would not normally constitute indirect expropriation[[163]](#footnote-163). Likewise, the inclusion of provisions on arbitrator ethics and the move toward making proceedings more open (seen in the UNCITRAL Transparency Rules of 2013 and the Mauritius Convention on Transparency 2014) were responses to the backlash, aiming to shore up procedural legitimacy.[[164]](#footnote-164)

By 2010, the term “backlash” had entered the lexicon of investment law discussions,[[165]](#footnote-165) capturing the pushback from states, academics, and civil society against what was perceived as an overreaching system. This early backlash was not a wholesale rejection of investment treaties – indeed, many states continued to sign new agreements throughout the 2000s – but it signaled a new phase of introspection and contestation. Issues of **fairness and equilibrium** came to the forefront: how to rebalance a regime that critics argued was too heavily tilted in favor of investors. The frictions over treaty commitments also gave rise to new ideas for reform, ranging from incremental fixes (e.g. refining treaty language, improving arbitrator rules) to systemic changes (e.g. appellate mechanisms, multilateral investment courts, or even replacing ISDS with state–state or local dispute resolution). These debates would intensify in the 2010s, but the roots of reform were planted in the early signs of backlash from the global era itself. States and other actors began to recognize that the **legal entrenchment** achieved in the 1990s – the very success of creating a binding global regime – meant that investment law could significantly impinge on domestic governance, and that without adjustment, the regime’s legitimacy and sustainability were in question. The next chapter of investment law would thus grapple with the challenge of reconciling investor protection with states’ sovereign right to regulate, a challenge made unavoidable by the events of the global era and the ensuing crisis of confidence in the system.

**2.4. The Era of Contestation and Reform**

## **2.4.1. Legitimacy Crisis and the Global ISDS Backlash**

Growing critiques of fairness, transparency, and asymmetry

In recent years, the ISDS system has faced an unprecedented crisis of legitimacy. What was once hailed as a neutral framework for protecting investments has increasingly been criticized by states, civil society, and scholars as lacking in fundamental fairness and accountability. Susan Franck warned as early as 2005 of a “legitimacy crisis” in investment arbitration driven by inconsistent and unpredictable decisions that risked “privatizing public international law” through ad hoc adjudication[[166]](#footnote-166). By the 2010s, this academic concern had ignited into a palpable global backlash. A chorus of states from the Global South and beyond openly rebelled against the ISDS status quo. For example, Bolivia, Ecuador, and Venezuela **withdrew from the ICSID Convention**, repudiating the World Bank’s arbitral forum amid claims that it was biased against host states and encroached on sovereignty[[167]](#footnote-167). Other governments moved to curtail or recalibrate their investment treaty commitments. South Africa undertook to terminate or renegotiate its first-generation bilateral investment treaties (BITs) after finding they unduly constrained domestic policy space, and even developed economies showed misgivings – Australia announced it would cease including ISDS in trade agreements (a policy later reversed by a subsequent government)[[168]](#footnote-168). These state actions were accompanied by sharpening public critiques of the system’s integrity. In a 2012 speech, Singapore’s Attorney-General (later Chief Justice) captured the mood by cautioning that investor–State arbitration “has the potential to constrain the exercise of domestic public authority in a manner and to a degree perhaps not seen since the colonial era.” He further suggested that some arbitrators might feel pressure to **rule in favor of investors from powerful capital-exporting countries** as “the ‘price’ that has to be paid” to gain entry into an elite club of international arbitrators – a striking charge of perceived bias at the heart of the ISDS regime[[169]](#footnote-169). Such frank scepticism from policymakers and jurists reflects how profoundly the legitimacy of ISDS has been called into question.The growing critiques coalescing around this “legitimacy crisis” focus on three interrelated concerns: fairness, transparency, and asymmetry.

**2.4.1.1. Fairness**

Fairness objections are both substantive and procedural. At the substantive level, critics argue that outcomes of arbitral cases have been unpredictable and inconsistent, undermining the rule-of-law values that an adjudicatory system should uphold. Because investment tribunals are not bound by strict precedent, similar cases have occasionally yielded conflicting interpretations of treaty standards. This lack of coherence and determinacy has, as Franck observed, “raised the specter of a legitimacy crisis” by eroding confidence that like cases will be treated alike[[170]](#footnote-170). Uncertainty in the law not only generates perceptions of unfairness but also invites the concern that arbitrators enjoy excessive discretion without adequate checks. Procedurally, a persistent critique is that the ISDS system is structurally tilted in Favor of investors, casting doubt on its neutrality. Unlike domestic courts, arbitration allows investors to effectively choose a forum (through treaty shopping) and select one of the arbitrators, and the pool of arbitrators is relatively small – raising fears of an inner circle predisposed toward investor interests. Some analysts and officials have even alleged an implicit bias: tribunals, it is said, may be more sympathetic to corporate claimants or more harsh toward developing-state respondents, whether due to conscious ideology or the subtle incentives of a system where arbitrators and law firms profit from investor claims.[[171]](#footnote-171) Empirical evidence, however, complicates the narrative of one-way bias. Studies of decided cases do not show a blanket win-rate advantage for investors. In fact, historically **states have won more ISDS cases than investors** – one comprehensive study found investors succeeded on roughly 35% of claims, with the majority of cases ending in wins for the state (or dismissals), and even when investors do prevail, the average damages awarded are relatively modest compared to the amounts claimed[[172]](#footnote-172). Such findings suggest that outright pro-investor bias is not borne out in aggregate outcomes. Nonetheless, the persistence of high-profile claims and occasional large awards against states – especially in sensitive areas like environmental regulation or public health – fuels the perception of unfairness. The spectre of “regulatory chill” looms large in this context: critics contend that the mere threat of a massive arbitral award may dissuade governments from enacting bona fide regulations in the public interest (for instance, anti-smoking measures or environmental protections), which in their view skews the system against the public good[[173]](#footnote-173). Even if empirical data show states often winning, the chilling effect hypothesis and the conspicuous ability of foreign investors to seek compensation for regulatory measures contribute to a feeling that ISDS panels judge sovereign conduct by standards that may be unjust or unrealistic. Fairness, in short, is questioned when the adjudicative process and its outcomes seem to prioritize private economic rights over democratic governance needs.

**2.4.1.2. Transparency**

The second major critique driving the legitimacy crisis is a lack of **transparency**. Investment arbitration originated in the commercial arbitration model of dispute resolution, which traditionally operated behind closed doors. For many years, ISDS cases – despite frequently involving matters of public importance – were conducted with minimal public transparency. Hearings were usually held in camera, documents and pleadings were confidential, and non-parties (such as communities affected by a challenged regulation, media, or civil society groups) had no access or input. This opaque process stood in stark contrast to domestic judicial proceedings or other international courts where openness is a hallmark of legitimacy. By the early 2000s, lack of transparency had become a prominent complaint. Opaque arbitration not only offended democratic principles (since taxpayers may ultimately foot the bill for state liability) but also meant that development of consistent jurisprudence was hampered by many awards remaining undisclosed[[174]](#footnote-174). Responding to these criticisms, the international community has taken steps to **open up ISDS**. Notably, in 2014 the UNCITRAL promulgated its Transparency Rules, which established requirements for open hearings and publication of key documents in investor–State cases under UNCITRAL Arbitration Rules. To give these new norms broader effect, the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (known as the Mauritius Convention) was adopted, creating a mechanism for states to apply the transparency rules to their existing investment treaties[[175]](#footnote-175). The Mauritius Convention’s preamble pointedly recognizes “the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved”*[[176]](#footnote-176)*. This marked an acknowledgment by states that ISDS is not a purely private matter, but one with significant public ramifications warranting openness[[177]](#footnote-177). In a similar vein, modern investment treaties – for example, recent free trade agreements and models by states like Canada and the EU – now routinely include transparency clauses mandating public access to documents and hearings, and permitting submissions by interested third parties (amicus curiae)[[178]](#footnote-178). Greater transparency is intended to improve both the fairness and perceived legitimacy of the system: it enables public scrutiny of arbitrators’ reasoning and allows stakeholders to feel their voices can be heard, thereby addressing the earlier criticism that secretive arbitration lacked representation of those affected. While full implementation is ongoing, these reforms have gone some distance to blunt the transparency critique that helped spark the ISDS backlash.

**2.4.1.2. Asymmetry**

Underpinning many fairness and transparency issues is the fundamental **asymmetry** of the classical BIT-based ISDS system. Unlike most judicial or arbitral frameworks which apply reciprocally, investment treaties create one-way rights: **only foreign investors can bring claims** directly against states for treaty breaches, not vice versa.

States have obligations to protect investors, but investors themselves bear no equivalent legal obligations toward the host state or its citizens under the treaty. This structural one-sidedness – a deliberate design to depoliticize investment disputes by empowering investors – has increasingly been criticized as an imbalance at the core of ISDS. Gus Van Harten and Martin Loughlin, in their seminal work, argue that modern investment arbitration amounts to a form of **“global administrative law”** in which sovereign regulatory conduct is effectively overseen by supranational adjudicators without the safeguards that domestic legal systems afford[[179]](#footnote-179). Four features of the system highlight this imbalance: First, investors can bypass domestic courts entirely (no requirement to exhaust local remedies before resorting to international arbitration), further, investors can claim monetary damages for government measures (creating potent pressure on public finances), Third, arbitral awards are enforceable against states in national courts around the world (under ICSID and New York Convention regimes), and finally, investors may engage in **forum-shopping** – structuring investments through jurisdictions with favorable treaties to secure access to ISDS forums[[180]](#footnote-180). Taken together, these traits mean that a host state’s public authority is constrained in an unprecedented way: regulatory decisions are subject to review by ad hoc international tribunals whose authority stems from broadly-worded treaties rather than a domestic constitutional mandate. The asymmetry is not merely that the investor has the procedural initiative, but that the usual balances of **rights and responsibilities** are skewed. An investor who may have caused harm or contributed to a dispute has no treaty-based duty to pursue local remedies or to heed local law, yet the state can be held internationally liable for perfectly general regulatory acts that affect the investor. This dynamic has led commentators to describe the regime as “a significant and powerful manifestation of global administrative law” – investment arbitrators, in effect, act as global administrative judges reviewing state acts for compliance with investor protections, but operating outside the domestic public law system that would normally hold such judges accountable[[181]](#footnote-181). For critics, this one-directional enforcement of investment rights produces an inherent **asymmetry of power**: capital-exporting states (and their investors) originally crafted these treaties to secure strong protections, and it is often investors from developed nations enforcing claims against developing countries[[182]](#footnote-182). The result, according to skeptics like Van Harten, is a system whose legitimacy deficit is structural – **a system by investors, for investors**, embedded within public international law[[183]](#footnote-183).

Faced with these accumulating critiques of fairness, transparency and asymmetry, the international investment regime finds itself at a crossroads. The “backlash” against ISDS has propelled a range of reform initiatives, from incremental fixes to radical overhauls. On one side, **defenders of the existing system** dispute the portrayal of ISDS as illegitimate and caution against overreaction. Judge Charles N. Brower – a prominent arbitrator and outspoken critic of the reform movement – argues that many of the popular critiques are based on misinformation and exaggeration. In his view, investment arbitration has been miscast by “memes” of one-sidedness and inefficacy. Brower and others point out that **investor–State arbitration can benefit developing countries** by depoliticizing disputes and encouraging foreign investment, and they maintain that the overall record of awards has been **even-handed** rather than favoring investors systematically. They note that transparency has already improved markedly within the arbitral process, and that states retain ample **regulatory leeway** under contemporary treaty standards (including exceptions for public welfare and the tightening of substantive clauses like fair and equitable treatment in newer treaties) [[184]](#footnote-184). From this perspective, the narrative of a broken system is overblown. Indeed, Brower warns that some reform proposals – especially those seeking to **“re-statify”** dispute settlement by returning control to states – would politicize the process and undermine its neutrality[[185]](#footnote-185). Suggestions such as empowering states to appoint a standing investment court or to issue binding joint treaty interpretations after disputes arise are, according to these proponents, steps that risk substituting political expediency for the rule of law. They contend that the existing arbitral model, while imperfect, has generally functioned **legitimately and efficiently**, delivering justice in a depoliticized forum. Nevertheless, even staunch defenders acknowledge the need to address some public concerns to shore up the system’s credibility (for instance, by refining arbitrator ethics rules to combat any perception of conflict of interest, and by establishing more consistency through mechanisms like an appellate review or improved treaty drafting). On the other side of the debate, reformists argue that only significant structural change can restore legitimacy – whether through a multilateral investment court, an appellate body, or incorporating investor obligations and state counterclaims to rebalance asymmetries. The very fact that such systemic reforms are being earnestly discussed in UNCITRAL and ICSID forums today underscores that the **legitimacy crisis in ISDS is real** and recognized, even if there is no consensus on its causes or cures. In sum, the global backlash against ISDS, borne out of concerns over fairness, transparency and asymmetry, has forced a moment of reckoning. It has spurred a critical re-examination of the regime’s premises and prompted a search for innovations that can reconcile investor protection with the sovereign right of states to regulate in the public interest. The future of international investment law will hinge on how – and how effectively – these legitimacy concerns are addressed in the years ahead.

**2.4.2. Shifting Treaty Practice: Carve-outs, Safeguards, and Exclusions**  
*Right to regulate, public interest protections, procedural reform*

In the wake of a legitimacy crisis in investor–State arbitration, states have recalibrated their treaty practices to preserve regulatory autonomy. Recent international investment agreements (IIAs) depart from the laissez-faire BIT model of the 1990s, instead incorporating explicit safeguards for the “right to regulate” in the public interest. UNCTAD reports that an overwhelming majority of new IIAs signed in 2020–2023 include provisions reserving policy space for health, safety, environmental protection and other public welfare objectives.[[186]](#footnote-186) Likewise, scholarly surveys confirm that modern treaty language is “constantly evolving to protect and expand the scope of States’ regulatory autonomy,”[[187]](#footnote-187) a clear response to criticism that earlier treaties unduly constrained sovereign prerogatives. States now routinely insert clauses – in preambles and operative text – reaffirming that nothing in the treaty shall prevent the adoption of bona fide regulatory measures. For example, the EU–Canada CETA (2016) provides that the parties “reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity.”[[188]](#footnote-188) It further clarifies that a measure’s mere adverse effect on an investor’s expectations (or profits) does not equate to a treaty breach.[[189]](#footnote-189) This type of clause codifies the police-powers principle (long recognized in arbitral jurisprudence) into treaty obligations, signaling to tribunals that reasonable, non-discriminatory regulations for legitimate aims will not engage State liability. In tandem, states have tightened vague substantive standards: many recent treaties circumscribe the Fair and Equitable Treatment obligation to a closed list of egregious misconduct and include annexes on expropriation stipulating that non-discriminatory regulatory actions do not amount to indirect expropriation except in rare circumstances.[[190]](#footnote-190) These drafting innovations aim to pre-empt tribunals from second-guessing public-interest regulation and to align investor rights with a State’s continuing right (and duty) to regulate for the general welfare[[191]](#footnote-191).

**2.4.2.1. Public Interest Clauses and Sectoral Carve-outs**

Beyond general “right to regulate” affirmations, new treaties increasingly contain carve-outs and exceptions safeguarding specific public interests. General exception clauses – often inspired by Article XX GATT – allow measures “necessary” to protect public morals, public health, safety or environmental conservation, even if such measures would otherwise breach investment obligations.[[192]](#footnote-192) Such clauses operate as an affirmative defence: if the State demonstrates the challenged measure falls within a listed public-interest objective and meets any stipulated necessity or non-discrimination test, the treaty breach is nullified and no liability attaches.[[193]](#footnote-193) In practice, general exceptions and related provisions can apply across an entire treaty or be limited to certain chapters or obligations[[194]](#footnote-194). Treaties vary in approach: some embed a general exceptions article within the investment chapter, while others incorporate by reference the general exceptions of WTO agreements.[[195]](#footnote-195) The common thread is an effort to “hard-wire” policy flexibility into IIAs, rather than relying on tribunals’ implied deference. Notably, states have also adopted **targeted carve-outs** for particularly sensitive regulatory domains. One prominent example is the Trans-Pacific Partnership (TPP) tobacco carve-out: a first-of-its-kind provision that permits any TPP Party to deny the benefits of ISDS with respect to claims challenging its tobacco control measures.[[196]](#footnote-196) This carve-out, hailed as a breakthrough in balancing public health and investment law, effectively strips tribunals of jurisdiction over tobacco-related regulatory disputes – a reaction to high-profile arbitration claims against tobacco regulations in the 2010s. Inspired by such innovations, commentators have advocated analogous carve-outs for emerging global priorities like climate change. Paine and Sheargold (2023) [[197]](#footnote-197), for instance, propose a broad “climate change carve-out” to immunize bona fide climate mitigation measures (e.g. coal phase-outs) from investor claims. Under their model, whether a measure qualifies would be determined jointly by the treaty parties’ environmental authorities or by an ad hoc state–state tribunal with climate expertise, rather than by investor–State arbitrators.[[198]](#footnote-198) While no current IIA yet contains an express climate carve-out, recent treaties do emphasize sustainable development and Paris Agreement commitments, and the use of general exceptions for environmental measures is becoming standard.[[199]](#footnote-199) In addition, IIAs now commonly include “no lowered standards” clauses whereby parties pledge not to weaken environmental or labor laws to attract investment. This helps ensure that investment promotion does not come at the expense of health and environmental protections.[[200]](#footnote-200) Taken together, public interest safeguards – general exceptions, specific carve-outs, and non-relaxation clauses – seek to realign investment law with other imperatives, acknowledging that investment protection should not thwart legitimate efforts to protect people and planet.

**2.4.2.2. Exclusions for Taxation, Financial Stability, and Security**

A further aspect of modern treaty practice is the exclusion of certain regulatory domains entirely from treaty coverage or from ISDS jurisdiction. Chief among these are taxation and financial regulatory measures. Because tax policy is often governed by separate tax treaties and implicates core sovereign revenue functions, IIAs typically carve out taxation measures from their scope (or from expropriation provisions) except in narrowly defined circumstances. Many treaties stipulate that alleged expropriation via taxation must first be referred to state-to-state consultations (between tax authorities) and will only proceed to arbitration if the states agree.[[201]](#footnote-201) Similarly, **prudential measures** in the financial sector are shielded: investment chapters frequently provide that nothing in the treaty prevents a party from adopting measures for prudential reasons, such as protecting depositors, maintaining the integrity of the financial system or preserving monetary stability.[[202]](#footnote-202) These clauses, found in a growing share of IIAs, reflect lessons from financial crises – governments insist on latitude to avert or respond to banking failures without incurring investment claims. Security exceptions (also known as non-precluded measures clauses) are another ubiquitous exclusion. They allow a party to deviate from treaty obligations for the protection of its essential security interests or in times of war, peace and public order emergencies. Such clauses, present even in many older BITs, have been further refined in recent agreements to cover a broader set of emergency measures.[[203]](#footnote-203) In sum, modern treaties enumerate carve-outs for taxation, financial regulation, and emergency actions as a belt-and-braces means of preserving sovereign space. As one comprehensive study observes, the inclusion of taxation, prudential and anti-corruption clauses has “significantly grown” in recent IIAs, demonstrating states’ determination to fence off key regulatory areas from investor challenge.[[204]](#footnote-204) These exclusions complement the general public-interest exceptions discussed above, collectively delineating the boundaries of investor protections so that core sovereign functions remain inviolate. See table 1 for the frequency of right- to-regulate language for post 2018 BITs.

Table 1. Frequency of right-to-regulate language (2018-2020)

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**2.4.2.3. Procedural Reforms: Transparency, Amicus Curiae, and Appellate Mechanisms**

In tandem with substantive safeguards, states have pursued procedural reforms to address concerns of transparency, legitimacy and consistency in ISDS. Historically, investment arbitration was criticized for secrecy – cases were often conducted behind closed doors, with limited public access to submissions or hearings, even when the dispute concerned public health or environmental policy.[[205]](#footnote-205) Over the past decade, this has changed markedly. New treaties frequently incorporate or reference the UNCITRAL Transparency Rules (2014) and many impose transparency obligations directly: requiring public notice of disputes, publication of key documents (pleadings, awards), and open hearings where feasible. Civil society and other stakeholders are also given a voice through amicus curiae submissions, which arbitral tribunals may accept to bring public interest perspectives into the proceedings.[[206]](#footnote-206) These transparency and participation measures, now common in modern IIAs and institutional rules, aim to remedy the “lack of transparency, public accountability and consistency” long cited by ISDS critics.[[207]](#footnote-207) Greater openness not only bolsters the perceived legitimacy of outcomes but allows non-disputing treaty Parties to intervene with authoritative interpretations to guide tribunals and safeguard regulatory intent. Procedural innovation extends to the structure of ISDS itself. A frequent critique of the traditional system is the absence of an appellate mechanism to correct legal errors or ensure coherent jurisprudence – unlike, for example, the WTO system which benefits from an Appellate Body.[[208]](#footnote-208) States have begun to respond. Notably, the European Union has spearheaded a two-tier “investment court” model in its recent treaties (such as CETA and the EU–Vietnam Investment Protection Agreement). In these agreements, ad hoc arbitration is replaced by a standing tribunal of first instance and a permanent appellate tribunal, composed of judges meeting high qualification and ethics requirements and appointed by the states for fixed terms. [[209]](#footnote-209) This appellate review aims to foster consistency and rectify erroneous awards, directly addressing the legitimacy deficit. Other reform-minded states and organizations (including UNCITRAL’s Working Group III) are debating a multilateral appeals mechanism or a global investment court to institutionalize such changes across the system[[210]](#footnote-210). While negotiations continue, many states have already inserted treaty language contemplating a future appellate body or opting in to one once established. In addition to creating appeals, some states have narrowed or conditioned consent to ISDS in the first place. For example, a number of recent treaties limit the range of claims that investors can submit to arbitration (carving out certain policy measures from challenge), require investors to exhaust local remedies before resorting to ISDS, or omit ISDS entirely in favour of domestic courts or state–state dispute settlement.[[211]](#footnote-211) These procedural recalibrations – transparency, amicus participation, appellate review, and recalibrated dispute mechanisms – all reflect an effort to rebalance the system in light of public interest concerns. They represent a move away from the model of unfettered investor access to secret arbitration, towards a more accountable and court-like regime for investment disputes.

In summary, the shifting treaty practice of the past decade represents a concerted attempt to safeguard the **right to regulate** and embed **public interest protections** at the heart of investment law. Carve-outs, exceptions and exclusions now delineate the contours of investor rights, carving away matters of taxation, financial stability, health, environment, and other essential domains from the ambit of investor–State claims. Procedural reforms are injecting transparency, inclusiveness, and the possibility of appellate oversight into a process once criticized as opaque and one-sided. These developments are gradually addressing the imbalance of the old BIT era, seeking a more sustainable equilibrium between investment protection and regulatory sovereignty. Nonetheless, it must be noted that these innovations largely characterize **new** treaties; hundreds of older “first-generation” BITs with broad investor rights and sparse safeguards remain in force worldwide. Such legacy treaties – covering roughly half of global FDI stock¹⁷ – continue to generate disputes and arbitral awards under the old rules, underscoring the need for ongoing reform. Many states have accordingly begun terminating or renegotiating outdated agreements, but this is a piecemeal process.[[212]](#footnote-212) The emergence of carve-outs, safeguards and exclusions in modern drafting, however, marks a paradigm shift. It signifies that states, as arbiters of the investment regime’s evolution, are reclaiming policy space and explicitly reasserting that investment protection must not come at the cost of their sovereign right to regulate in the public interest.

**2.4.3. New Models and Regional Responses**  
*EU Investment Court System, USMCA, African Continental approaches*

In response to mounting criticisms of the traditional Investor–State Dispute Settlement (ISDS) system, various regions have developed distinctive reform models tailored to their particular priorities, legal traditions, and policy objectives. This section examines three significant regional responses: the European Union’s shift toward a judicialized model through the Investment Court System (ICS) and Multilateral Investment Court (MIC) initiative; North America’s move to scale back ISDS under the USMCA; and Africa’s collective and national responses emphasizing sovereignty and sustainable development, exemplified by South Africa’s bilateral treaty reforms and the continental approach through the AfCFTA Investment Protocol. Each model demonstrates differing strategic approaches, reflecting diverse concerns about legitimacy, sovereignty, and regulatory autonomy in the evolving landscape of international investment law.

***2.4.3.1 The EU Investment Court System (ICS) and the Multilateral Investment Court (MIC)***  
In response to widespread criticism of the traditional investor–State arbitration model, the European Union has spearheaded a shift toward a court-like mechanism for investment disputes. In 2015, the European Commission proposed an “Investment Court System” (ICS) to replace the ad hoc ISDS process in all ongoing and future EU agreements.[[213]](#footnote-213) The ICS, first incorporated in treaties such as CETA and the EU–Vietnam FTA, features a **permanent two-tier tribunal** (a first-instance tribunal and an appellate tribunal) staffed by **publicly appointed judges**, rather than party-appointed arbitrators. This permanent court-like structure is designed to enhance the **impartiality, consistency, and transparency** of adjudication, addressing concerns about arbitrator bias and inconsistent awards[[214]](#footnote-214). Under the ICS, states retain the authority to regulate in the public interest and the proceedings are more transparent and subject to ethical standards (judges are bound by a code of conduct)[[215]](#footnote-215). Another notable innovation is that the ICS curtails investors’ ability to forum-shop or bring expansive claims: for instance, claims are limited to certain treaty breaches (such as discrimination or fundamental due process violations), and provisions affirm the **right to regulate** to pursue legitimate public policy objectives. The EU’s introduction of the ICS was a political response to restore public trust in investment protection mechanisms – an attempt to reframe ISDS from a private arbitration paradigm to a form of **public international adjudication**.[[216]](#footnote-216) Some observers note that the ICS blurs the line between arbitration and judicial settlement: it has been described as a “hybrid” system, or a “semi-permanent quasi-judicial” tribunal, because while it resembles a court with judges and an appeals process, its decisions (styled as “awards”) still rely on enforcement via international arbitration conventions (ICSID or New York Convention) rather than an autonomous judiciary[[217]](#footnote-217). Notwithstanding such debates, the ICS represented a **paradigm shift** in investment dispute resolution, with the EU effectively abandoning the classical investor–State arbitration model in favour of a court-like approach.

Building on the bilateral ICS, the EU and like-minded States (notably Canada) have also promoted the creation of a **Multilateral Investment Court (MIC)** as a comprehensive reform at the global level. Article 8.29 of CETA[[218]](#footnote-218) explicitly commits the EU and Canada to pursue the establishment of a permanent multilateral investment tribunal with an appellate mechanism, which would eventually replace the bilateral ICS in CETA. In line with this mandate, the EU introduced its MIC project to the UNCITRAL Working Group III on ISDS reform in 2017[[219]](#footnote-219). The envisioned MIC closely mirrors the ICS model: a **standing international court** composed of first-instance and appellate judges appointed by States, operating transparently and rendering final, binding decisions. The MIC proposal is meant to **“multilateralize” the EU’s preferred architecture** for investment dispute settlement, extending the court model to all international investment agreements willing to opt in. Proponents argue that a single permanent court could address ISDS ills by guaranteeing consistent case law and a neutral, treaty-based bench of adjudicators[[220]](#footnote-220). By 2025, negotiations on the MIC were ongoing in UNCITRAL’s Working Group III, with the EU and several States actively supporting a draft treaty for a Multilateral Court[[221]](#footnote-221). However, the MIC project faces **divergent views among States**. Some countries, including many developing countries, remain cautious or skeptical of transplanting the court model globally. Critics note that simply replacing arbitrators with judges may not resolve deeper legitimacy concerns, and they caution against a one-size-fits-all system that could sideline regional or alternative reforms. Notably, a 2024 study warned that the MIC might perpetuate existing power imbalances if designed mainly through a Eurocentric lens.[[222]](#footnote-222) Nevertheless, the EU’s push for the MIC underscores a significant trend in investment law: a move away from decentralised arbitral tribunals toward a **centralised judicial model** for investor–State disputes, reflecting a broader paradigm shift towards public law adjudication of investment disputes[[223]](#footnote-223).

***2.4.3.2 The USMCA’s Narrowing and Partial Removal of ISDS Mechanisms***

In North America, an opposite approach to ISDS reform has unfolded. The United States–Mexico–Canada Agreement (USMCA), which entered into force in 2020 as the successor to NAFTA, **significantly scales back investor–State arbitration** compared to its predecessor. Under NAFTA’s Chapter 11[[224]](#footnote-224), investors of any of the three parties could bring claims against the others, but USMCA **eliminated** this mechanism for certain party relationships and imposed new limitations where ISDS remains. Notably, **Canada and the United States have removed ISDS entirely in their mutual investment relations**: the USMCA provides no investor–State arbitration between U.S. and Canadian investors at all (beyond a short three-year sunset period for “legacy” NAFTA cases)[[225]](#footnote-225). Hence, a Canadian investor in the US, or an American investor in Canada, must now rely on domestic courts or state-to-state proceedings for any investment grievances, marking a sharp departure from NAFTA’s regime.

For investments between the United States and Mexico, the USMCA retains a form of ISDS in a **much-narrowed scope**. Investors from the US and Mexico still have access to arbitration under specific annexes (principally Annex 14-D), but only subject to **restrictive procedural and substantive conditions**. A pivotal new requirement is the **exhaustion (or at least significant prior resort) of local remedies**: an investor must first litigate the dispute in the host State’s courts or administrative bodies and wait **30 months** (or until a final judgment) before pursuing ISDS under USMCA.[[226]](#footnote-226) This is an unprecedented requirement in U.S. investment treaties, as NAFTA and past agreements allowed investors to go directly to arbitration (upon waiving local claims[[227]](#footnote-227)) without any obligation to use host State courts. Substantively, the US–Mexico ISDS mechanism is limited to certain claim types. Under Annex 14-D, claims for breach of **national treatment, most-favoured-nation treatment, or direct expropriation** may proceed to arbitration, whereas claims for indirect expropriation or breach of the minimum standard of treatment (fair and equitable treatment) are either excluded or subject to additional constraints – except in narrow circumstances (such as if the investment is under a government contract in a covered sector, addressed in a further Annex). Moreover, the USMCA tightened arbitrator qualifications and ethics rules, forbidding the “double-hatting” practice (arbitrators serving as counsel in other cases) and mandating compliance with the IBA Guidelines on Conflicts of Interest.[[228]](#footnote-228) **Transparency** in proceedings is also enhanced, reflecting modern standards.[[229]](#footnote-229) The Trump Administration’s drive behind these changes was largely ideological, fuelled by a view that ISDS *in toto* infringed on national sovereignty and could encourage outsourcing.[[230]](#footnote-230) While the complete ISDS removal for Canada–US was a political compromise (and has been lauded in Canada, which had faced numerous NAFTA claims), critics note the asymmetry that American investors in Mexico still enjoy an international forum (albeit narrowed) whereas investors in Canada do not. Overall, USMCA’s investment chapter represents a **major retrenchment of investor–State arbitration**: it preserves the mechanism only in a limited, highly conditioned form between the US and Mexico, effectively **returning most North American investment disputes to domestic courts or inter-State processes**. This shift exemplifies one path of ISDS reform – **partial disengagement** – in contrast to the EU’s institutional overhaul. The USMCA model has prompted questions about its impact on investor confidence and whether domestic courts can adequately fill the role of neutral fora. Some predict a greater reliance on **state-to-state dispute resolution** (USMCA’s Chapter 31, analogous to the WTO model) for significant claims involving the US, and the use of other agreements (like the CPTPP) for disputes between Mexico and Canada, in the absence of ISDS between them[[231]](#footnote-231).

***2.4.3.3 African Responses: South Africa’s BIT Reforms and the AfCFTA Investment Protocol***  
Across Africa, a distinctive regional response to the legitimacy crisis of ISDS has taken shape, marked by a turn toward **sovereignty-oriented reforms** and collective initiatives. Several African states have reassessed and recalibrated their investment treaty policies, seeking to balance investor protection with host State regulatory space and to assert greater control over dispute settlement. A leading example is **South Africa’s overhaul of its bilateral investment treaties (BITs)** and domestic law. Following the end of apartheid, South Africa had entered into numerous European-style BITs in the 1990s, but by the 2010s it grew critical of the constraints posed by these treaties (especially after high-profile disputes).[[232]](#footnote-232) After a comprehensive review, South Africa opted to **terminate the bulk of its BITs** and replace investor–State arbitration with domestic legal remedies.[[233]](#footnote-233) Between 2012 and 2014, South Africa **unilaterally cancelled nine BITs with European countries**, and subsequently terminated others (including its BIT with Argentina in 2017, and further BITs in 2019 and 2021).[[234]](#footnote-234) These terminations reflected the view that traditional ISDS unduly limited South Africa’s policy space and that disputes should be “re-nationalized” under domestic jurisdiction. To solidify this policy, South Africa enacted the **Protection of Investment Act 2015** (in force from 2018), which pointedly **excludes investor–State international arbitration** in favour of national processes. Section 13 of this Act provides that foreign investors may **not** submit disputes against the South African government to international arbitration (absent special consent); investors are limited to seeking redress in South African courts, under South African law.[[235]](#footnote-235) Even if the government were to agree to arbitrate with an investor’s home State (inter-State arbitration), the Act requires that the foreign investor **first exhaust domestic remedies** before any international proceeding can occur. In effect, South Africa has returned to a **Calvo-inspired approach**, placing foreign investors on the same footing as local investors under domestic jurisdiction and rejecting the automatic recourse to external tribunals. The Act also replaces typical BIT standards with analogous domestic standards (for example, a guarantee of “fair administrative treatment” in lieu of the vague fair and equitable treatment (FET) standard)[[236]](#footnote-236). South Africa’s bold reforms have been influential in African and global discussions, showcasing one model of **asserting domestic sovereignty** over investment disputes. Tanzania subsequently followed a similar path: in 2017–2018, it enacted several laws—including the **Natural Wealth and Resources (Permanent Sovereignty) Act 2017**, the **Natural Wealth and Resources (Review and Re‑Negotiation of Unconscionable Terms) Act 2017**, and amendments to the **Public–Private Partnerships Act 2018**—that restrict the use of international arbitration in natural resource and PPP sectors, mandating instead recourse to domestic judicial bodies.[[237]](#footnote-237) These reforms reflected a conscious intent to decolonize investment dispute resolution, heighten state oversight over natural resource projects, and protect regulatory autonomy.[[238]](#footnote-238) They took the leap to demonstrate that a country can withdraw from legacy ISDS structures and still attract investment, provided a stable domestic legal framework is offered.[[239]](#footnote-239) Observers note that South Africa’s stance was pioneering and aligns with calls from Third World Approaches to International Law (TWAIL) scholars to recalibrate the investment regime in favour of host state sovereignty.[[240]](#footnote-240)

At the continental level, the **African Union** has pursued a coordinated response through the investment protocol of the new **African Continental Free Trade Area (AfCFTA)**. The AfCFTA, agreed in 2018, aims to create a single market including investment, and its **Protocol on Investment** (concluded in 2023) embodies Africa’s reformed approach to investment governance. This Protocol seeks to **harmonize and update the fragmented network of investment instruments in Africa**.[[241]](#footnote-241) It builds on prior regional efforts (and on templates like the Pan-African Investment Code of 2016) to craft a unified framework that balances investment promotion with sustainable development and regulatory autonomy.[[242]](#footnote-242) Significantly, the AfCFTA Investment Protocol **departs from the old BIT paradigm** in several ways. First, it will *supersede intra-African BITs*: the Protocol mandates that African Union member states **terminate existing inter-se African BITs within five years**, and refrain from entering new BITs with each other.[[243]](#footnote-243) This bold step will eliminate the “spaghetti bowl” of overlapping BIT obligations among African states in favor of one coherent regime under AfCFTA. Second, the Protocol places heavy emphasis on **dispute prevention and local remedies**. It obliges State Parties to establish national focal points to handle investor grievances and attempt amicable resolution (through consultations, mediation, etc.) at an early stage. Only if such efforts fail may a dispute proceed to formal arbitration, and even then the design of investor–State procedures is carefully constrained. Indeed, the Protocol provides that the detailed **investor–State dispute settlement (ISDS) mechanism will be set out in a separate annex**, to be negotiated within a year of the Protocol’s adoption.[[244]](#footnote-244) This deferred approach allowed African states to agree on the broad architecture (and substantive principles) first, while leaving procedural specifics for further consultation – indicating caution and a desire for consensus on ISDS. It is anticipated, however, that the ISDS annex will reflect innovations already suggested during the drafting. For example, numerous African stakeholders have advocated for requiring **exhaustion of local remedies** (or at least substantial use of local courts) before an investor can escalate a claim to AfCFTA arbitration. Such a rule, echoing the approach of South Africa’s law, is seen as a way to ensure respect for domestic judicial sovereignty while still permitting arbitration as a last resort if local justice is unavailable or ineffective. This “multi-tiered” dispute resolution model – local courts first, international arbitration second – is viewed as a **compromise** that could mitigate political opposition to ISDS by giving host states the first chance to resolve issues. It is notable that the **exhaustion requirement** has already been reintroduced in some recent African investment agreements and models, signalling a broader continental trend. Alongside this, the AfCFTA Protocol explicitly **preserves State–State dispute settlement**: disputes about the interpretation or application of the investment obligations between States Parties will be handled under the AfCFTA’s general dispute settlement mechanism (a WTO-style state-to-state tribunal system), and a State may espouse a claim on behalf of its investor through **diplomatic protection** if needed.[[245]](#footnote-245) This ensures that **inter-State control** is an option, reflecting skepticism toward unchecked investor-driven claims. Additionally, the AfCFTA approach incorporates **novel obligations for investors** – a notable shift from traditional BITs which only bind states. The Protocol contains provisions on **Investor Responsibilities and Investor Liability**, authorizing states (and even affected communities) to hold investors accountable for wrongdoing. For instance, Article 47 allows civil actions against investors in their home state’s courts for harm caused in the host state[[246]](#footnote-246). Such clauses seek to balance rights with duties and deter investors from engaging in abusive conduct, aligning with calls for greater corporate accountability in international investment law. The Protocol also underscores sustainable development objectives and the importance of investors contributing positively to host economies – again a departure from older BITs that focused narrowly on protection.

In sum, the African regional response exemplified by the AfCFTA Investment Protocol is one of **controlled engagement with ISDS**: rather than outright rejection, it envisions a reformed dispute settlement system that is **Africa-centric and state-controlled**. By requiring prior local recourse, insisting on transparency and public interest considerations, and providing for **flexible, multi-tier dispute resolution**, the AfCFTA model aims to resolve disputes in a manner that respects African legal systems and developmental priorities. This approach, together with pioneering national reforms like South Africa’s, indicates an emerging “African school” of investment law – one that seeks to **recalibrate the imbalance** of the past regime and ensure that investment protection does not come at the expense of host States’ sovereignty and public policy space. It remains to be seen how the implementation of the AfCFTA regime will unfold (the Protocol must be ratified and the ISDS Annex agreed), but it is clear that Africa’s contribution to the ISDS reform discourse is both significant and distinct, prioritizing **systemic reform and regional coherence** over adherence to the status quo.

**2.4.4 Multilateral Reform Initiatives**

*UNCITRAL Working Group III, UNCTAD’s Reform Agenda*

International investment law’s procedural framework has faced extensive criticism in recent years, prompting two major multilateral reform tracks. The first is the effort at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII) to address Investor–State Dispute Settlement (ISDS) concerns. The second is the reform agenda spearheaded by the United Nations Conference on Trade and Development (UNCTAD), which has set out options and guidance for over a decade. Both initiatives seek to restore legitimacy and balance to ISDS, albeit through different roles – UNCITRAL by state-driven treaty reform negotiations, and UNCTAD by policy analysis and consensus-building. This section reviews developments under WGIII’s reform process and UNCTAD’s contributions since 2013, highlighting how each tackles the challenges of ISDS and aims to align it with sustainable development objectives.

**2.4.4.1 UNCITRAL Working Group III Reform Process**

UNCITRAL’s WGIII was entrusted in 2017 with a broad mandate to work on the possible reform of ISDS. The Working Group adopted a three-phase approach: first identifying concerns with the current ISDS regime, then determining whether reforms were desirable, and finally developing concrete reform options.[[247]](#footnote-247) By 2018–2019, WGIII had thoroughly canvassed criticisms of ISDS, including perceived legitimacy deficits, contradictions between arbitral awards, difficulties in correcting erroneous decisions, and arbitrators’ impartiality.[[248]](#footnote-248) The consensus was that maintaining the status quo was untenable[[249]](#footnote-249) amid mounting criticism of the existing system, prompting multilateral efforts toward comprehensive reform.[[250]](#footnote-250)

A centrepiece of WGIII’s reform is the proposal for a standing multilateral investment court to replace ad hoc arbitration. The European Union (EU), supported by Canada and other States, proposed a "Standing Mechanism" featuring first-instance and appellate tribunals, with members appointed by treaty parties for fixed terms.[[251]](#footnote-251) A detailed draft statute has been produced, outlining the institutional structure, appointment and tenure of judges, and appellate review procedures.[[252]](#footnote-252) The court aims to address issues of consistency, impartiality, and accountability in ISDS. Several recent treaties, including the EU’s bilateral agreements, anticipate such mechanisms explicitly.[[253]](#footnote-253) While supported by many, some States, notably the United States, maintain cautious positions, preferring incremental reforms.[[254]](#footnote-254) China has also engaged actively but emphasizes gradual improvements that respect sovereignty.[[255]](#footnote-255)

In parallel, WGIII has pursued procedural innovations. A significant innovation is enabling joint treaty interpretations by treaty parties, promoting consistent treaty application.[[256]](#footnote-256) The United States, aligning with its current practice, advocates for incorporating joint interpretation provisions flexibly.[[257]](#footnote-257) Additionally, WGIII has explored enhancing transparency and third-party participation, codifying non-disputing treaty party submissions to tribunals, and developing a Draft Code of Conduct for arbitrators addressing impartiality and conflicts of interest.[[258]](#footnote-258) Furthermore, WGIII is formulating a Multilateral Instrument on ISDS Reform (MIIR), envisioned as a flexible framework convention encompassing various reform modules, allowing States selective adoption based on their needs.[[259]](#footnote-259)

**2.4.4.2 UNCTAD’s ISDS Reform Agenda**

Parallel to UNCITRAL’s WGIII negotiations, UNCTAD has provided critical intellectual groundwork and guidance for ISDS reform since 2013. UNCTAD identified five principal reform paths: (1) alternative dispute resolution, (2) tailoring the existing system through treaty amendments, (3) limiting investor access to ISDS, (4) introducing an appeals facility, and (5) establishing a standing international court.[[260]](#footnote-260) These options were presented within a broader policy context emphasizing sustainable development objectives.[[261]](#footnote-261)

In its seminal World Investment Report 2015, UNCTAD underscored ISDS’s legitimacy and consistency challenges, advocating comprehensive reforms encompassing both procedural mechanisms and substantive treaty provisions.[[262]](#footnote-262) It presented a menu of policy options, highlighting the need for States to pursue integrated, coherent reforms reflecting national development priorities and global standards.[[263]](#footnote-263) UNCTAD further developed these ideas in its Reform Package for the International Investment Regime (2018), structured around a three-phase approach: formulating new-generation treaties, modernizing old agreements, and enhancing coherence among treaties and between international and domestic investment policies.[[264]](#footnote-264) The Reform Package provides model clauses safeguarding the right to regulate, promoting responsible investment, and balancing ISDS procedures.[[265]](#footnote-265)

UNCTAD’s consistent advocacy has significantly influenced state practices and regional initiatives. By late 2010s, numerous treaties adopted provisions recommended by UNCTAD, and states had begun systematically reforming older treaties.[[266]](#footnote-266) UNCTAD’s work complements UNCITRAL's process, offering analytical resources and policy tools crucial for negotiating and implementing reforms aligned with sustainable development.[[267]](#footnote-267) Thus, UNCTAD ensures that ISDS reform remains closely linked with broader developmental goals and principles of international investment governance.

1. Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol 157, 158–59. [↑](#footnote-ref-1)
2. M R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33 Marq L Rev 205, 205–07. [↑](#footnote-ref-2)
3. Luis M. Drago, 'State Loans in Their Relation to International Policy' (1907) 1 AJIL 692, 695. [↑](#footnote-ref-3)
4. Edwin M. Borchard, 'Limitations on Coercive Protection' (1927) 21 AJIL 303, 304. [↑](#footnote-ref-4)
5. JC Sharman, ‘Power and Profit at Sea: The Rise of the West in the Making of the International System’ (2019) 43(4) *International Security* 163, 177–180. [↑](#footnote-ref-5)
6. Kris James Mitchener & Marc D. Weiden Mier, 'Empire, Public Goods, and the Roosevelt Corollary' (2005) 65 J Economic History 658, 670. [↑](#footnote-ref-6)
7. Samuel Flagg Bemis, *A Diplomatic History of the United States* (5th edn, Holt 1965) 25–29. [↑](#footnote-ref-7)
8. Borchard (n 4) 304. [↑](#footnote-ref-8)
9. Jeswald W Salacuse & Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harv Int'l LJ 67, 68. [↑](#footnote-ref-9)
10. *Mavrommatis Palestine Concessions* (Greece v UK) PCIJ Ser A No 2 (1924) 12. [↑](#footnote-ref-10)
11. *Barcelona Traction, Light and Power Co* (Belgium v Spain) [1970] ICJ Rep 3, 46–47. [↑](#footnote-ref-11)
12. Treaty of Amity and Commerce between the United States and France (signed 6 February 1778, entered into force 17 July 1778) 8 Stat 12. [↑](#footnote-ref-12)
13. Treaty of Amity and Commerce between the United States and the Netherlands (signed 8 October 1782, entered into force 23 June 1783) 8 Stat 32. [↑](#footnote-ref-13)
14. Treaty of Amity and Commerce between the United States and Sweden (signed 3 April 1783, entered into force 29 July 1783) 8 Stat 60. [↑](#footnote-ref-14)
15. Treaty of Amity and Commerce between the United States and Prussia (signed 10 September 1785, entered into force 17 May 1786) 8 Stat 84. [↑](#footnote-ref-15)
16. Treaty of Amity, Commerce, and Navigation between the United States and Great Britain (Jay Treaty) (signed 19 November 1794, entered into force 29 February 1796) 8 Stat 116. [↑](#footnote-ref-16)
17. Treaty of Friendship, Limits, and Navigation between the United States and Spain (Pinckney's Treaty) (signed 27 October 1795, entered into force 3 August 1796) 8 Stat 138. [↑](#footnote-ref-17)
18. See, e.g., Treaty of Commerce between the United States of America and Serbia (as part of the Kingdom of Yugoslavia), art I, 14 Oct 1881, 22 Stat 963. [↑](#footnote-ref-18)
19. Sarah M Alshahrani, ‘What Should We Know About the Origins of International Investment Law?’ (2020) *International Journal of Legal Information* 48(3) 122, 124–25. [↑](#footnote-ref-19)
20. Patrick Dumberry, *‘Are BITs Representing the “New” Customary International Law?’* (2010) 28 *Penn St Intl L Rev* 675, 675–76. [↑](#footnote-ref-20)
21. Lionel M Summers, 'Arbitration and Latin America' (1972) 3 Cal W Int'l LJ 1, 8. [↑](#footnote-ref-21)
22. Herman Walker Jr, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 Minn L Rev 805, 812. [↑](#footnote-ref-22)
23. M R Garcia-Mora, supra no.2, 205–07. [↑](#footnote-ref-23)
24. Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 9. [↑](#footnote-ref-24)
25. Andrew T. Guzmán, *Explaining The Popularity of Bilateral Investment Treaties:Why LDCs Sign Treaties That Hurt Them*(Jean Monnet Center Working Paper No 97‑12, 1997) Part III <https://jeanmonnetprogram.org/archive/papers/97/97-12-Contents.html> adequate, and effective compensation. [↑](#footnote-ref-25)
26. United Nations General Assembly**,** *Charter of Economic Rights and Duties of States* (adopted 12 December 1974) UNGA Res 3281 (XXIX), UN Doc A/RES/3281(XXIX), art 2(2)(c). [↑](#footnote-ref-26)
27. Resul Habyyev, *Diplomatic Protection as a Dispute Settlement Mechanism in Investor-State Arbitration, in the Light of Modern International Law* (PhD thesis, Brunel University London 2019) <http://bura.brunel.ac.uk/handle/2438/19616> [↑](#footnote-ref-27)
28. Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority* (2014) 55 *Harvard International Law Journal* 1, 44. [↑](#footnote-ref-28)
29. Leon E. Trakman, 'The ICSID Under Siege' (2012) 45 Cornell Int'l LJ 603, 610. [↑](#footnote-ref-29)
30. Lionel M Summers, supra no.21, 8. [↑](#footnote-ref-30)
31. Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Select Proc ESIL 271, 271–72. [↑](#footnote-ref-31)
32. M Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 68–70. [↑](#footnote-ref-32)
33. International Centre for Settlement of Investment Disputes (ICSID), *The Emergence of the Concepts of the Minimum Standard of Treatment* (Claimant’s Memorial, Legal Authority CL-0014, 2015) 3 <https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Amended%20Memorial/Legal%20Authorities/CL-0014.PDF> [↑](#footnote-ref-33)
34. Mujeeb Rahman Emami, *‘The Minimum Standard of Treatment in International Investment Law: Interpretation and Evolution’* (2021) 24 *South East Asia Journal of Contemporary Business, Economics and Law* 75, 75–76. [↑](#footnote-ref-34)
35. Stephen J Kobrin, ‘Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979’ (1984) 28 *International Studies Quarterly* 55, 62–63. [↑](#footnote-ref-35)
36. José E Alvarez, ‘Violations of Investor Rights Under Customary International Law’ in R Doak Bishop, James Crawford and W Michael Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd edn, Kluwer Law International 2014) 583–752. [↑](#footnote-ref-36)
37. UNGA Res 3281 (XXIX), supra no.26, para 2. See also: Jerzy Makarczyk, ‘The Charter of Economic Rights and Duties of States’ in *Principles of a New International Economic Order* (Brill 1988) 101–121. [↑](#footnote-ref-37)
38. Andrew T Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 Virginia Journal of International Law 639, 658–64. [↑](#footnote-ref-38)
39. Ibid, 658-659. See also : Jeswald W Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 Int’l Law 655, 659–662. [↑](#footnote-ref-39)
40. See Jeswald W. Salacuse, *No. 39*, 663 (« Germany, which had lost all of its foreign investments as a result of its defeat in World War II, took the lead in this new phase of bilateral treaty making … often using more flexible provisions than those found in older BITs such as the US ones »). See also: Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 49–50 (« Several Western European BITs, including those of the Netherlands, typically omitted strict ‘prompt, adequate and effective compensation’ language, allowing more flexibility »). [↑](#footnote-ref-40)
41. Robert R Wilson, 'Property-Protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 83, 85. [↑](#footnote-ref-41)
42. Ibrahim F I Shihata, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 *ICSID Review – Foreign Investment Law Journal* 1, 1–2. [↑](#footnote-ref-42)
43. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries* (2006) art 1, Practice of the ILC; UN Doc A/61/10, Commentary to art 1, p 6 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> [↑](#footnote-ref-43)
44. Rodrigo Polanco, ‘Home State Limitations on Diplomatic Protection’ in *The Return of the Home State to Investor–State Disputes* (Cambridge University Press 2019) 256–57. [↑](#footnote-ref-44)
45. Interhandel Case (Switzerland v United States of America**)** (Preliminary Objections) [1959] ICJ Rep 6, 315-316. [↑](#footnote-ref-45)
46. Zachary Mollengarden, ‘The Utility of Futility: Local Remedies Rules in International Investment Law’ (2019) 58 *Harvard International Law Journal* 403, 430–32. [↑](#footnote-ref-46)
47. Lionel M Summers, supra no.21, 8. [↑](#footnote-ref-47)
48. Kris James Mitchener and Marc D Weidenmier, *supra no.6*, 670 — explaining that prior to 1913, creditor powers commonly resorted to naval blockades and military interventions to compel debt repayment and protect investor interests. [↑](#footnote-ref-48)
49. Luis M. Drago, supra no.3, 695. [↑](#footnote-ref-49)
50. President Theodore Roosevelt, *Fourth Annual Message to Congress (State of the Union), 6 December 1904*, cited in *Milestones: Roosevelt Corollary to the Monroe Doctrine* (Office of the Historian, US Department of State, 2008) [↑](#footnote-ref-50)
51. The United States took charge of Dominican Republic customs‑houses… out of the revenues which shall be collected in all the custom‑houses… the United States Government shall deliver … monthly payments … to the Dominican Government,” under the Roosevelt Corollary model. See: *Fourth Annual Message to Congress*, 6 December 1904, Office of the Historian, Department of State, detailing plans for U.S. fiscal oversight and customs receivership in the Dominican Republic following debt crises. [↑](#footnote-ref-51)
52. In 1912, the U.S. intervened in Nicaragua… by landing 100 Marines aboard the USS Annapolis to protect American lives and property, followed by further reinforcements to secure strategic infrastructure. See: *U.S. Intervention in Nicaragua, 1911/1912*, Office of the Historian, U.S. Department of State, describing military deployments to safeguard U.S. banking and property interests. [↑](#footnote-ref-52)
53. The United States took charge of Dominican Republic customs‑houses… out of the revenues which shall be collected in all the custom‑houses… the United States Government shall deliver … monthly payments … to the Dominican Government,” under the Roosevelt Corollary model. See: *U.S. Invasion and Occupation of Haiti, 1915–34*, Office of the Historian, Department of State: detailing the financial takeover and prolonged military administration of Haiti to protect creditor and U.S. interests. [↑](#footnote-ref-53)
54. Kris James Mitchener & Marc D. Weidenmier, supra no.5, 670. [↑](#footnote-ref-54)
55. United States Department of State, *Milestones: Good Neighbor Policy (1921–1936)* [https://history.state.gov/milestones/1921-1936/good-neighbor accessed 18 July 2025](https://history.state.gov/milestones/1921-1936/good-neighbor%20accessed%2018%20July%202025). See also: Ashley S Deeks, ‘Consent to the Use of Force and International Law Supremacy’ (2013) 54(1) *International Law Studies* 1. [↑](#footnote-ref-55)
56. United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4). (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…”), codifying the norm against coercive debt enforcement [↑](#footnote-ref-56)
57. Kenneth J Vandevelde, *The First Bilateral Investment Treaties: U.S. Friendship, Commerce and Navigation Treaties in the Truman Administration* (PhD thesis, University of California, San Diego 2012) <https://escholarship.org/uc/item/1640x3p0> accessed 18 July 2025. [↑](#footnote-ref-57)
58. Ajitesh Mohan and Ajay Mohan, ‘Havana Charter: A Critical Assessment’ (2009) *SSRN* https://ssrn.com/abstract=1501277 accessed 18 July 2025 — noting that the Charter, though never ratified, "affirmed the rights of investors to fair treatment" and provided a precursor to bilateral investment treaties. See also: Riyaz Dattu, ‘A Journey from Havana to Paris: The Fifty‑Year Quest for the Elusive Multilateral Agreement on Investment’ (2000) 24(1–2) *Fordham International Law Journal* 13. [↑](#footnote-ref-58)
59. Herman Walker Jr, supra no.22, 812. [↑](#footnote-ref-59)
60. Robert R Wilson, supra no.41, 85. [↑](#footnote-ref-60)
61. Coyle, John F. and Yackee, Jason W., Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts (May 5, 2016). 49 Arizona State Law Journal 61 (2017), UNC Legal Studies Research Paper No. 2776279, Univ. of Wisconsin Legal Studies Research Paper No. 1382, Available at SSRN: <https://ssrn.com/abstract=2776279>, 86–87 (showing that U.S. FCN treaties included provisions such as “fair and equitable treatment,” “most constant protection and security,” and expropriation guarantees, but relied on State-to-State dispute settlement before bodies like the ICJ, citing ELSI and related precedents). See also *Islamic Republic of Iran v United States of America (Oil Platforms)* [2003] ICJ Rep 161 (affirming that the 1955 U.S.–Iran Treaty of Amity provided for ICJ jurisdiction over certain disputes between the Parties). in *Oil Platforms (Iran v. U.S.)*, the Court affirmed jurisdiction under the Treaty and ruled on substantive issues concerning applicable treaty protections and exceptions. [↑](#footnote-ref-61)
62. John F Coyle and Jason W Yackee, ibid., 75. [↑](#footnote-ref-62)
63. Venzke, Ingo and Günther, Philipp, International Investment Protection Made in Germany? On the Domestic and Foreign Policy Dynamics Behind the First BITs (September 7, 2022). European Journal of International Law (forthcoming), Amsterdam Law School Research Paper No. 2022-23, Amsterdam Center for International Law No. 2022-12, Available at SSRN: <https://ssrn.com/abstract=4212601> [↑](#footnote-ref-63)
64. Ibid, 1-5. [↑](#footnote-ref-64)
65. Jeswald W Salacuse, supra no.39, 678. [↑](#footnote-ref-65)
66. Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments (the **first BIT signed by the United States**) (signed 11 March 1982, entered into force 27 June 1992) 1066 UNTS 219; Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments (signed 27 October 1982, entered into force 30 May 1991) 1985 UNTS 259. [↑](#footnote-ref-66)
67. UN General Assembly Resolution 1803 (XVII) (14 December 1962**)**, ‘Permanent Sovereignty over Natural Resources’, para. 4. [↑](#footnote-ref-67)
68. UN General Assembly Resolution 3281 (XXIX), supra no.26, Article 2(2)(c). The NIEO Declaration is UNGA Res. 3201 (S-VI) (1 May 1974) and the Programme of Action on the Establishment of a New International Economic Order is UNGA Res. 3202 (S-VI) (1974). Together, these instruments emphasized principles such as sovereign equality, economic self-determination, and a more equitable distribution of the benefits of commerce and development. Article 2 of the Charter affirms each State’s right to regulate foreign investment and to nationalize assets, with compensation to be determined by the State’s own laws and circumstances – reflecting developing countries’ rejection of the *Hull* standard. [↑](#footnote-ref-68)
69. Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27(5) *Third World Quarterly* 739, 748 https://www.jstor.org/stable/4017775. [↑](#footnote-ref-69)
70. Kumkum Shah, ‘Analysis of Doctrine of Permanent Sovereignty over Natural Resources’ (2019) *SSRN Electronic Journal* https://ssrn.com/abstract=3326636 accessed 18 July 2025, 2–3 (explaining that the UN resolutions on permanent sovereignty were advanced by developing and postcolonial states to challenge one-sided concession agreements and annul colonial-era legal arrangements that conflicted with their right to economic self-determination). [↑](#footnote-ref-70)
71. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 318–19 (observing that the investment regimes established by colonial powers were *“crafted”* without genuine participation from developing countries and lacked normative legitimacy, prompting post-colonial States to challenge and seek to reform the foundational doctrines of international investment law). [↑](#footnote-ref-71)
72. Ibid. 280-82. [↑](#footnote-ref-72)
73. See Thomas W. Wälde, ‘Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development’ (1978) 10 Lawyer of the Americas 265, 266-267. [↑](#footnote-ref-73)
74. Cordell Hull, U.S. Secretary of State, diplomatic note to the Government of Mexico (21 July 1938), reprinted in (1938) 32 American Journal of International Law (Supp.) 181. [↑](#footnote-ref-74)
75. see M. Sornarajah, *supra no.32,* 97–100. [↑](#footnote-ref-75)
76. Ibid. 108-9. [↑](#footnote-ref-76)
77. UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, IIA Issues Note No. 2 (June 2013). [↑](#footnote-ref-77)
78. UN General Assembly Resolution 1803 (XVII), supra note 1, paras. 4 and 5. Paragraph 4 states in part: “Nationalization, expropriation or requisitioning shall be based on grounds of public utility, security or the national interest… In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures and in accordance with international law.” It adds that disputes should be resolved by national courts, with the possibility of international arbitration or adjudication by agreement of the parties. This wording represented a compromise between developing and developed States’ views on compensation. Western States often read “appropriate compensation” together with “international law” as implying the Hull standard, whereas developing States emphasized the primacy of *“rules in force in the State”* (i.e. domestic law). [↑](#footnote-ref-78)
79. UNGA Res 3171 (XXVIII) (17 December 1973) *Permanent Sovereignty over Natural Resources* <https://digitallibrary.un.org/record/145169>. [↑](#footnote-ref-79)
80. UN General Assembly Resolution 3281 (XXIX), supra note 2, Article 2(2)(c). The exact text provides that when a State nationalizes or expropriates foreign property, “appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought…”. This represented the high-water mark of developing countries’ legislative authority claims in the U.N., explicitly rejecting any automatic international adjudication of compensation disputes and endorsing *adjudicative sovereignty*. The resolution passed with 120 votes in favour, 6 against (voting against: Belgium, Denmark, Federal Republic of Germany, Luxembourg, United Kingdom, United States), and 10 abstentions (Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain). [↑](#footnote-ref-80)
81. Julien Cantegreil, ‘The Audacity of the Texaco/Calasiatic Award: René‑Jean Dupuy and the Internationalization of Foreign Investment Law’ (2011) 22(2) European Journal of International Law 441 https://doi.org/10.1093/ejil/chr039 accessed 18 July 2025. *See also : Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya* (Award on the Merits, 19 January 1977) [Texaco v Libya Award], para 4.2, available in French at <https://jusmundi.com/en/document/decision/pdf/fr-texaco-overseas-petroleum-co-and-california-asiatic-oil-company-v-libya-sentence-arbitrale-au-fond-wednesday-19th-january-1977>; see esp para 86:

    “… - [s]ur le premier point, l’absence de force obligatoire attachée aux résolutions de l’Assemblée Générale des Nations Unies implique que celles-ci ont besoin d’être acceptées par les membres de l’Organisation pour produire des effets de droit. A cet égard, le Tribunal de céans constate que seule la résolution 1803 (XVII) du 14 décembre 1962 a été votée par une majorité d’Etats membres représentant l’ensemble des groupes qualifiés. Au contraire, les autres résolutions précitées, et notamment celles évoquées dans le mémorandum du Gouvernement libyen, n’ont été votées ou appuyées que par une majorité d’Etats ne comptant aucun des grands pays développés à économie de marché, lesquels effectuent une grande partie des échanges économiques internationaux.” [↑](#footnote-ref-81)
82. *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya*, supra note, para 85. [↑](#footnote-ref-82)
83. See, e.g., Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979) 69–85, arguing that the traditional requirement of “full” compensation was never a universal law and that the practice of Socialist and developing states had established the concept of appropriate compensation as the emerging norm. But compare *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libya* (1977) supra note, which held that Libya was bound by the terms of its petroleum concessions and general international law to pay full compensation; the award treated GA Res. 1803 as reflective of custom but accorded no binding force to Res. 3281. For commentary, see Charles N Brower and John B Tepe Jr, ‘The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law’ (1975) 9 *The International Lawyer* 7. (noting the divide between the Charter’s principles and Western legal views). [↑](#footnote-ref-83)
84. M. Sornarajah, *The Pursuit of Nationalized Property* (Martinus Nijhoff 1986) 50–55. Sornarajah observes that through collective action at the U.N., developing countries succeeded in “demonstrating that the Hull formula was not accepted as customary law”, effectively removing the prescriptive force of that rule in general international law. However, he notes that this victory was somewhat pyrrhic, as capital-exporting states shifted to bilateral treaties to impose the Hull standard contractually on a state-by-state basis (thereby circumventing the lack of a universal rule). [↑](#footnote-ref-84)
85. Haliburton Fales, ‘A Comparison of Compensation for Nationalization of Alien Property with Standards of Compensation under United States Domestic Law’ (1983) 5 *Northwestern Journal of International Law & Business* 871, 875–76 [↑](#footnote-ref-85)
86. Fritz Visser, 'The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests' (1988) 21 *Comparative and International Law Journal of Southern Africa* 76, 77–91, esp 78–80. [↑](#footnote-ref-86)
87. *Carlos Calvo, Le droit international théorique et pratique* (5th edn, Paris, 1896) vol. 1, 137–189. In practical terms, many Latin American constitutions and statutes incorporated Calvo Clauses requiring foreign investors to renounce diplomatic protection and accept local jurisdiction. See K. S. Carlston, ‘Codification of International Arbitral Procedure’ (1953) 47/2 AJIL 203-250. A famous early test of the Calvo Clause was the *North American Dredging Co.* case (US–Mexico General Claims Commission, 1926), which held that while a private waiver of diplomatic protection did not bar the espousal of a claim by the home State (since the right of diplomatic protection belongs to the State), the existence of a Calvo Clause could preclude the claim on the merits if the investor had agreed to exclusive local remedies – see (1926) IV RIAA 26, 27–39. [↑](#footnote-ref-87)
88. Montevideo Convention, supra no.24, Art. 9: “The jurisdiction of States within the limits of national territory applies equally to all the inhabitants. Nationals and foreigners are under the same protection of the laws and the national authorities and foreigners may not claim rights other or more extensive than those of nationals.” This treaty, ratified by most Latin American countries, codified the essence of Calvo Doctrine in regional international law. [↑](#footnote-ref-88)
89. Nicolás M Perrone and David Schneiderman, ‘Lost to History? Latin America and the Charter of Economic Rights and Duties of States’ in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2024) ch 22. [↑](#footnote-ref-89)
90. Katia Fach Gómez, ‘Latin America and ICSID: David versus Goliath’ (2011) 17 Law & Business Review of the Americas 195, at 200–203. The author discusses Brazil’s unique position: although Brazil signed several BITs in the 1990s, none were ratified, and Brazil remains outside ICSID. This stance has been attributed to (a) constitutional concerns over sovereignty and arbitration, and (b) a policy view that disputes can be managed through domestic law and diplomatic channels without ceding jurisdiction to international tribunals. Mexico likewise refrained from joining ICSID until the mid-2010s (it signed the Convention in 2018 after decades of non-participation), a choice once described by a Mexican scholar as both “wise and rebellious” in preserving autono. Even States that ratified ICSID – e.g. Ecuador (1997) and Bolivia (1995) – later withdrew amid perceptions that the Centre’s arbitrations unduly favoured investors (Bolivia denounced the Convention in 2007, Ecuador in 2010, Venezuela in 2012). These developments underscore the lasting influence of Calvo Doctrine sentiments in the region’s approach to investment dispute settlement. See: Nicolas Boeglin, ‘ICSID and Latin America: Criticism, Withdrawal and the Search for Alternatives’ (*Bretton Woods Project*, 3 December 2013) https://www.brettonwoodsproject.org/2013/12/icsid-latin-america/ accessed 21 July 2025. [↑](#footnote-ref-90)
91. Tom Brower, *The Tide of the Times? A Sectoral Approach to Latin America’s Resistance to the Investor-State Arbitration System* (2015) *Virginia Journal of International Law* vol 56 https://ssrn.com/abstract=2664324 accessed 21 July 2025, 4–5 [↑](#footnote-ref-91)
92. M Sornarajah, *supra no.32,* 106–108 (discussing the unilateral nature of compensation in Venezuela’s 1975 oil nationalization and Chile’s copper expropriations, and noting Latin American jurists’ reliance on domestic law as the limit of their international obligations). [↑](#footnote-ref-92)
93. Nicolás M Perrone and David Schneiderman, supra no.89, ch 22, 13–15. [↑](#footnote-ref-93)
94. Katia Fach Gómez, supra no.90, 195–198. The metaphor of “David versus Goliath” is used to describe Latin American countries’ battles against large multinational investors in ICSID cases, as well as their broader confrontation with a system perceived as dominated by Global North arbitrators and legal norms. For a historical perspective, see A. Alvarez, ‘Latin America and International Law’ (1909) 3 AJIL 269, noting the early divergence of Latin American international law doctrines (like Calvo) from European practice. In the contemporary context, Latin American initiatives such as the UNASUR proposal for a regional investment arbitration center (intended as an alternative to ICSID) and the negotiation of more balanced investment treaty provisions (e.g., in the USMCA replacing NAFTA, or Brazil’s novel Cooperation and Facilitation Investment Agreements) can be seen as modern embodiments of the region’s tradition of seeking an “exceptional” approach to foreign investment governance. [↑](#footnote-ref-94)
95. *Mavrommatis Palestine Concessions, supra no.10*, p.12: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.” [↑](#footnote-ref-95)
96. *Barcelona Traction, supra no.11,*  at 78:

    “Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national State choose not to exercise its right, no other State may do so.” [↑](#footnote-ref-96)
97. Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1916) 817–832. See also H. Steiner & D. Vagts, *Transnational Legal Problems* (2nd edn, Foundation Press 1976) 356–358, linking the evolution of diplomatic protection to colonialism and noting how frequently it was backed by force in the pre-WWII era. [↑](#footnote-ref-97)
98. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), Art. 27(1): “No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.” This provision was crucial to securing developing countries’ acceptance of ICSID – it ensured that consenting to arbitration would shield them from parallel diplomatic pressure. The Convention’s drafting history (History of the ICSID Convention, Vol. II (ICSID 1968) 844–846) shows that Latin American delegates, in particular, insisted on this clause to align ICSID with the Calvo principle (no concurrent espousal). Furthermore, Art. 26 allows a host State to require the exhaustion of local remedies as a condition of its consent to arbitration, preserving a gatekeeping role for domestic courts if the State so stipulates (though in practice many States waived this via BITs). [↑](#footnote-ref-98)
99. Andrew T. Guzman, supra no.38, 658–664. Guzman highlights the apparent inconsistency in developing States’ behavior: during the 1970s they collectively opposed strong investor protections (e.g., the Hull Rule) in multilateral fora, yet in the 1980s–90s they agreed bilaterally to even more enforceable protections (including investor–State arbitration and full compensation clauses) in BITs. He explains this by a *time-inconsistency* and collective action analysis: individually, each State had an incentive to offer protections to attract investment (especially when alternatives like foreign aid or loans waned in the 1980s debt crisis), even though as a group they would prefer not to be bound by those rules. Once some developing countries broke ranks and signed BITs, competitive pressure drove others to do the same (a “prisoner’s dilemma” scenario). See also Jeswald W. Salacuse, supra no.39, 660–663 (noting the surge of BITs and that by 1989 over 300 BITs had been concluded worldwide, largely driven by developing nations’ changing attitudes). [↑](#footnote-ref-99)
100. Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 77–78. [↑](#footnote-ref-100)
101. ICSID Convention, supra no.98, Preamble, recitals 2–7. The Preamble records that “mutual confidence” and “special consideration” should be given to the role of law in investment disputes and expresses the belief that “the availability of facilities for international arbitration or conciliation” will promote investment flows. It balances this with the caveat that none of its provisions should be construed as *“binding Contracting States in any way to submit any particular dispute to arbitration or conciliation”* without their consent. See Christoph Schreuer, *supra no.40,* 1–6. Schreuer notes that the Convention deliberately avoided any substantive rules on investment protection, confining itself to procedural mechanisms, precisely to secure broader acceptance from States with differing views on the underlying law. [↑](#footnote-ref-101)
102. International Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics (Issue 2024–2)* (World Bank Group 2024) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 21 July 2025. [↑](#footnote-ref-102)
103. Ibid. [↑](#footnote-ref-103)
104. Ibrahim F.I., Shibata. And, Antonio R., Parra, 2021, The Experience of the International Centre for Settlement of Investment Disputes, ICSID Review-Foreign Investment Law Journal, 299 at 315. [↑](#footnote-ref-104)
105. Nicolas Boeglin, supra no.90. [↑](#footnote-ref-105)
106. ICSID Convention, supra no.98, Preamble: (‘desiring to promote international investment by increasing mutual confidence of investors and host states by providing for fair and efficient settlement of investment disputes’). [↑](#footnote-ref-106)
107. Ibid. Art. 25. See also: Christoph Schreuer, *supra no.40,* 113–116 (noting that many newly independent States supported ICSID as a tool for attracting capital but insisted on safeguards to preserve sovereignty, such as the requirement of consent and exclusion of automatic diplomatic protection); see also Jeswald W Salacuse, *supra no.100,*142–143. [↑](#footnote-ref-107)
108. Gary Born, and Calaudio Salas, *“Exploring Latin America’s ICSID arbitration landscape”* (2024) https://globalarbitrationreview.com/guide/the-guide-arbitration-in-latin-america/third-edition/article/exploring-latin-americas-icsid-arbitration-landscape accessed 21 July 2025 (noting that UNASUR member states drafted a constitutive agreement for an investment disputes center in 2012 as an ICSID alternative). [↑](#footnote-ref-108)
109. *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments* (signed 25 November 1959, entered into force 28 April 1962) 457 UNTS 23. This Germany–Pakistan BIT is commonly cited as the first modern BIT, marking the beginning of the investment treaty era. [↑](#footnote-ref-109)
110. *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (ICSID Case No. ARB/87/3, Final Award, 27 June 1990) first recognized an investor’s unilateral right to sue a host state under a BIT. [↑](#footnote-ref-110)
111. UNCTAD, ‘International Investment Agreements Navigator’ (Investment Policy Hub) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 22 July 2025. [↑](#footnote-ref-111)
112. Salacuse & Sullivan, *Do BITs Really Work?*, 81-91. The authors observe that BITs negotiated in the 1990s and early 2000s display strikingly similar structures and provisions, evidencing a high degree of standardization across treaties. They note that many BITs of “more recent vintage” share *virtually uniform* language on core standards, due in part to the influence of model treaties developed by capital-exporting states. For example, the United States’ prototype BIT (1980s–1990s) and the United Kingdom’s model were emulated widely, leading to convergence in treaty content. [↑](#footnote-ref-112)
113. *Pope & Talbot Inc. v. Canada*, Award on the Merits, Phase 2 (NAFTA Chapter 11 Tribunal, 10 April 2001) para 111. The tribunal noted that NAFTA Article 1105 (minimum standard of treatment including fair and equitable treatment and full protection/security) “grew out of” the provisions of bilateral investment treaties negotiated by the United States and other countries, which were a “‘principal source’ of the general obligations of states with respect to treatment of foreign investment.” The 1987 US Model BIT was cited as particularly influential, underscoring how model BIT clauses helped shape multilateral norms. [↑](#footnote-ref-113)
114. ICSID, ‘ICSID Case Database’ (ICSID, 22 July 2025) <https://icsid.worldbank.org/cases/case-database> accessed 22 July 2025. [↑](#footnote-ref-114)
115. Jan Paulsson, *“Arbitration Without Privity”* (1995) 10 ICSID Rev 232, 256. Paulsson famously described the advent of BIT arbitration as “dramatically different from anything previously known in the international sphere,” coining the term “arbitration without privity” to emphasize that investors could initiate arbitration *ipso jure* via treaty consent, without a direct agreement with the state (ibid.). [↑](#footnote-ref-115)
116. Joost Pauwelyn, *“At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System,* How It Emerged And How It Can Be Reformed*”* (2014) 29 ICSID Rev 372, 394-408; Pauwelyn remarks that “it was only in 1990 that the defining feature of [modern] foreign investment law – private standing to invoke treaty breach – materialized,” highlighting the novelty of investor-state arbitration at that time. [↑](#footnote-ref-116)
117. ICSID, ‘ICSID Case Database’, supra no. 114. [↑](#footnote-ref-117)
118. ICSID, ibid. [↑](#footnote-ref-118)
119. UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (IIA Issues Note No. 2, United Nations 2013) 1–2. [↑](#footnote-ref-119)
120. Ibid. [↑](#footnote-ref-120)
121. Ibid. [↑](#footnote-ref-121)
122. **Ibrahim F. I. Shihata**, *“Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA”* (1986) 1 ICSID Rev 1, 11–12. See also: **Gautam Mohnaty & Alexandros-Cătălin Bakos**, *“The Depoliticization of Investment Disputes – How Deep Does the ‘Rabbit Hole’ Go?”* (2023) 33 ICSID Rev 14, 18–20 – documenting the widespread acceptance of “depoliticization” as ISDS's primary virtue and noting its dual procedural and substantive dimensions  [↑](#footnote-ref-122)
123. ICSID Convention, supra note 98, Preamble. [↑](#footnote-ref-123)
124. Antony Anghie, ‘Rethinking International Law: A TWAIL Retrospective’ (2023) 34/1 *The European Journal of International Law , 7-112.* [↑](#footnote-ref-124)
125. Sornarajah, *“Disintegration and Change”* (2020) 23 JIEL 413, at 414 and 428. [↑](#footnote-ref-125)
126. Ibid. [↑](#footnote-ref-126)
127. Stephan W. Schill, Christian J. Tams & Rainer Hofmann, *International Investment Law and History* (Edward Elgar 2018). [↑](#footnote-ref-127)
128. Ibid, 29-33. [↑](#footnote-ref-128)
129. Vera Weghmann and David Hall, ‘The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms’ (2021) 87(3) *International Review of Administrative Sciences* 618 [↑](#footnote-ref-129)
130. Stephan W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 EJIL 875, 892. [↑](#footnote-ref-130)
131. Stephan W. Schill, Christian J. Tams & Rainer Hofmann, *International Investment Law and History* (Edward Elgar 2018), Introduction at 32. [↑](#footnote-ref-131)
132. Ibid. 32-34. [↑](#footnote-ref-132)
133. Frederic G. Sourgens, ‘Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements’ (2013) 11 Santa Clara J Int’l L 335, 347 (observing that the ICSID Convention [↑](#footnote-ref-133)
134. World Bank, *History – 1982–1994: Economies in Transition and Structural Adjustment* (World Bank archival timeline)[worldbank.org](https://www.worldbank.org/en/archive/history#:~:text=countries%20to%20focus%20on%20sustainable,enhancement%20to%20investors%20and%20lenders). [↑](#footnote-ref-134)
135. International Finance Corporation (World Bank Group), **“MIGA Guarantees”** (IFC Syndications Product Note, accessed 22 July 2025) URL: <https://www.ifc.org/en/what-we-do/sector-expertise/syndicated-loans-and-mobilization/miga-guarantees>

     MIGA offers political risk insurance covering transfer and convertibility restrictions, expropriation, breach of contract, and war/civil disturbance. [↑](#footnote-ref-135)
136. Swedish Ministry for Foreign Affairs (EGDI), ***Mitigating Risks for Foreign Investments in Least Developed Countries*** (Stockholm 2003) 37 – Accessed online: <https://eba.se/wp-content/uploads/2003/01/2003.1-Mitigating-Risks-for-Foreign-Investments-in-Least-Developed-Countries.pdf> [↑](#footnote-ref-136)
137. **Convention Establishing the Multilateral Investment Guarantee Agency** (11 October 1985, entered into force 12 April 1988) 1508 UNTS 99, art 18(b) and Annex II art 8 – Upon paying a claim MIGA is subrogated to the investor’s rights, and member states, by treaty, consent to arbitrate disputes with MIGA (under ICSID or equivalent rules). [↑](#footnote-ref-137)
138. Ibrahim F. I. Shihata, **“Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA”** (1986) 1 *ICSID Review–FILJ* 1, 9. [↑](#footnote-ref-138)
139. Swedish Ministry for Foreign Affairs (EGDI), supra note 136, 37-38. [↑](#footnote-ref-139)
140. Pieter Bekker and Akiko Ogawa, **“The Impact of BIT Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance after the ‘BIT Bang’”** (2013) 28 *ICSID Review–FILJ* 314, 314–315. See also: Lauge N. Poulsen, **“The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence”** in *Yearbook on International Investment Law & Policy 2009–2010* (OUP 2010) 539, 568. [↑](#footnote-ref-140)
141. See UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (United Nations 1998); UNCTAD, *Bilateral Investment Treaties 1959–1999* (United Nations 2000). [↑](#footnote-ref-141)
142. UNCTAD, World Investment Report 2015, (2015), 119-173. DOI: <https://doi.org/10.18356/4f5603a5-en>. See also: UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (UNCTAD 2009) 4–8. [↑](#footnote-ref-142)
143. Susan D Franck, ‘Empirically Evaluating Claims about Investment Treaty Arbitration’ (2007) 86 NCLR 1, 8–10. [↑](#footnote-ref-143)
144. Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) J Int'l Econ L 1037, 1074–1077; [↑](#footnote-ref-144)
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146. **Metalclad Corporation v United Mexican States**, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) [↑](#footnote-ref-146)
147. **Methanex Corporation v United States of America**, UNCITRAL, Final Award (3 August 2005) [↑](#footnote-ref-147)
148. Howard Mann, 'NAFTA and the Environment: Lessons from Metalclad Corporation v. United Mexican States' (2001) 13(3) Yearbook of International Environmental Law 261, 261-267. [↑](#footnote-ref-148)
149. See, for example, *CMS Gas Transmission Co v Argentine Republic* (ICSID Case No ARB/01/8), Award, 12 May 2005; *LG&E Energy Corp v Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006; *Enron Corp and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3), Award, 22 May 2007; *Siemens AG v Argentine Republic* (ICSID Case No Arb/02/8), Award, 6 February 2007; and *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006. [↑](#footnote-ref-149)
150. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions* (2005) 73 **Fordham Law Review** 1521 [↑](#footnote-ref-150)
151. Sergio Puig, *Social Capital in the Arbitration Market* (2014) 25 **European Journal of International Law** 387 . [↑](#footnote-ref-151)
152. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 57. [↑](#footnote-ref-152)
153. Giovanni Zarra, *The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?* (2018) 17 **Chinese Journal of International Law** 137. [↑](#footnote-ref-153)
154. ICSID, *“Bolivia Submits a Notice under Article 71 of the ICSID Convention”* (Press Release, 16 May 2007). [↑](#footnote-ref-154)
155. ICSID, *“Ecuador Submits a Notice under Article 71 of the ICSID Convention”* (Press Release, July 2009). [↑](#footnote-ref-155)
156. ICSID, “Venezuela Submits a Notice under Article 71 of the ICSID Convention” (Press Release, 26 January 2012). [↑](#footnote-ref-156)
157. Katia Fach Gómez, *“Latin America and ICSID: David versus Goliath”* (2011) 17 Law & Bus Rev Am 195, 195–197. [↑](#footnote-ref-157)
158. **Investment Treaty News (IISD)**, *“Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report”* (12 June 2017). [↑](#footnote-ref-158)
159. **Baker McKenzie, ‘Protection of Foreign Investments in South Africa’ (Global Arbitration News, 1 July 2020)** [**https://www.lexology.com/library/detail.aspx?g=d4b6fc79-d34a-4581-8e9a-6511bcb3b8ad**](https://www.lexology.com/library/detail.aspx?g=d4b6fc79-d34a-4581-8e9a-6511bcb3b8ad) **accessed 22 July 2025.** [↑](#footnote-ref-159)
160. **Global Arbitration Review**, ‘Investment Treaty Arbitration: Report on India’ (Insights, 2025) <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/india> accessed 22 July 2025. [↑](#footnote-ref-160)
161. **Lucas Jun Hao Wong**, ‘Indonesia’s Termination of Bilateral Investment Treaties’ (2022) 1 *SMU ASEAN Perspectives*, Paper No. 05/2022. See also : **Daniel Silva**, ‘Why Is Indonesia Terminating Its Bilateral Investment Treaties?’ *East Asia Forum* (20 September 2014) <https://eastasiaforum.org/2014/09/20/why-is-indonesia-terminating-its-bilateral-investment-treaties/> accessed 22 July 2025. [↑](#footnote-ref-161)
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164. United Nations, 'UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' (2014) <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency> accessed 22 July 2025; Mauritius Convention on Transparency (2014) https://uncitral.un.org/en/mauritius-convention-transparency accessed 22 July 2025. [↑](#footnote-ref-164)
165. Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer 2010). [↑](#footnote-ref-165)
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167. Susan D Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution' (2007) 48(4) Va J Int'l L 767, 773–790. [↑](#footnote-ref-167)
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169. Brower and Blanchard (n 168) 692 (quoting Attorney-General Sundaresh Menon, International Arbitration: The Coming of a New Age for Asia (and Elsewhere), Opening Plenary Address, ICCA Congress 2012). [↑](#footnote-ref-169)
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171. Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper, 2–4. [↑](#footnote-ref-171)
172. Susan D. Franck and Lindsey E. Wylie, ‘Predicting Outcomes in Investment Treaty Arbitration’ (2015) 65 Duke Law Journal 459, 464–65. [↑](#footnote-ref-172)
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174. **Emilie M Hafner‑Burton, Zachary C Steinert‑Threlkeld & David G Victor**, ‘Predictability versus Flexibility: Secrecy in International Investment Arbitration’ (2016) 7 *Journal of International Dispute Settlement* 161, 161–77. See also: **Sebastian Puerta & Tim R Samples**, ‘Investment Law’s Transparency Gap’ (2023) *Cornell Int’l L Journal* (working paper) 24–26; ICSID (World Bank), 'Spotlight on Transparency at ICSID' (ICSID, 2023) https://icsid.worldbank.org/news-and-events/speeches-articles/spotlight-transparency-icsid accessed 22 July 2024. [↑](#footnote-ref-174)
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181. Charles N. Brower and Sadie Blanchard (n 168) 689–90. [↑](#footnote-ref-181)
182. José E Alvarez and Kathryn Khamsi, ‘*The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*’ (IILJ Working Paper 2008/5, 21 July 2008) 6. [↑](#footnote-ref-182)
183. Gus Van Harten and Martin Loughlin (n 179) 121. [↑](#footnote-ref-183)
184. Ibid. [↑](#footnote-ref-184)
185. ibid. 765–66. [↑](#footnote-ref-185)
186. UNCTAD, *IIA Issues Note, no. 2 (Oct. 2024)* 1, 5 (noting IIAs signed in 2023 “cover new investment governance issues” while “old-generation treaties persist,” and reporting that 72% of treaties concluded 2020–2023 include explicit right-to-regulate safeguards). [↑](#footnote-ref-186)
187. Crina Baltag et al, “Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and CSR: Too Much or Too Little?” (2023) 38 ICSID Rev–FILJ 381, 382. [↑](#footnote-ref-187)
188. Comprehensive Economic and Trade Agreement (CETA) (2016) art 8.9(1); see also CETA Joint Interpretative Instrument (2017) §2 (reaffirming the EU and Canada’s understanding that the investment protections “shall not be interpreted as a commitment from Governments that regulatory frameworks will remain unchanged”). [↑](#footnote-ref-188)
189. Ibid. [↑](#footnote-ref-189)
190. UNCTAD, *IIA Issues Note, no. 2 (n 186)* 6–7 (Fig. 4) (many recent IIAs “contain reform language for five or more key provisions, including at least a circumscribed fair and equitable treatment standard and a clarified indirect expropriation clause”). E.g. USMCA (2018) Annex 14-B; 2012 US Model BIT Annex B; 2016 SADC Model BIT Annex (all stipulating that non-discriminatory regulatory actions designed to protect legitimate welfare objectives do not constitute indirect expropriation, except in rare circumstances). [↑](#footnote-ref-190)
191. Vera Korzun, “The Right to Regulate in Investor–State Arbitration: Slicing and Dicing Regulatory Carve-Outs” (2017) 50 Vand J Transnat’l L 355, 388 [↑](#footnote-ref-191)
192. See, e.g., Canada–Romania BIT (2009) art XVII(3); Australia–Peru FTA (2018) art 28.3; CPTPP (2018) art 29.1 (each containing a general exceptions clause modelled on GATT Art. XX and GATS Art. XIV). [↑](#footnote-ref-192)
193. Korzun (2017) (n 191) 394–95. In arbitral practice, however, satisfying a necessity-based exception can be demanding, as tribunals may scrutinize whether a less restrictive means was available. [↑](#footnote-ref-193)
194. Ibid. 393–94. [↑](#footnote-ref-194)
195. See n. 192. [↑](#footnote-ref-195)
196. Trans-Pacific Partnership (TPP, signed 2016) art 29.5. Under this “tobacco carve-out,” any TPP Party may elect to deny the treaty’s ISDS mechanism for claims related to its tobacco control measures. See Joshua Paine & Elizabeth Sheargold, “A Climate Change Carve-Out for Investment Treaties” (2023) 26 J Intl Econ L 285, 287 (noting the TPP tobacco carve-out was considered a major innovation). The carve-out responded to concerns that tobacco companies were using ISDS to challenge public health regulations; by withdrawing consent to arbitrate such claims, states restored regulatory sovereignty over tobacco control. [↑](#footnote-ref-196)
197. Paine & Sheargold (2023) (n 196) 288–290. (proposing a new treaty carve-out covering measures “adopted in good faith” and with a reasonable nexus to reducing greenhouse gas emissions). [↑](#footnote-ref-197)
198. Ibid. [↑](#footnote-ref-198)
199. Crina Baltag et al. (n. 187) [↑](#footnote-ref-199)
200. Ibid. 415–416. [↑](#footnote-ref-200)
201. Ibid. 412–413 (the right to regulate “is increasingly reflected in the prudential measures, taxation measures and anti-corruption clauses of IIAs”); For a recent example, the EU–Vietnam Investment Protection Agreement (2019) art 2.6 preserves each State’s right to enforce tax measures, requiring consultation between the Parties’ tax authorities before any tax-related measure can be deemed expropriatory.. [↑](#footnote-ref-201)
202. see id. at 401 (noting significant growth in the inclusion of **taxation** and **prudential** carve-outs in post-2018 treaties). Similarly, many treaties stipulate that nothing in the agreement shall limit a Party’s freedom to take **prudential measures** to ensure the stability of its financial system (e.g. CPTPP art 11.11) [↑](#footnote-ref-202)
203. Ibid. 399-405 see also: Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (signed 16 April 2018, not yet entered into force) art 18. [↑](#footnote-ref-203)
204. Ibid. see table 1 at 400. [↑](#footnote-ref-204)
205. Korzun (2017) (n 191) 359–362. [↑](#footnote-ref-205)
206. Ibid. [↑](#footnote-ref-206)
207. Id. 362, 366 (since 2014, a “number of transparency-related obligations” have been adopted: the UNCITRAL Rules on Transparency and the Mauritius Convention on Transparency, and states are “increasingly incorporat[ing] transparency provisions into their BITs and FTAs” to make ISDS “more open and accessible to the public”). These include requirements to publish documents and arbitral decisions, allow observers at hearings, and enable **amicus curiae** briefs from civil society. Many institutional arbitration rules have likewise been revised to permit greater transparency (e.g. ICSID Arbitration Rules 2022, Art. 63). [↑](#footnote-ref-207)
208. Id. 361 (the “absence of an appeals mechanism” is identified as a major shortcoming of the current ISDS regime). [↑](#footnote-ref-208)
209. The EU’s post-Lisbon approach has been to replace ad hoc arbitration with a **permanent tribunal and an appellate tribunal** in its trade agreements. See CETA (2016) Chapter 8, Section F; EU–Vietnam FTA (2019) Chapter 8 (Investment Dispute Resolution)§3. These treaties establish a standing roster of judges and a two-tier review process – an approach intended to enhance consistency and legitimacy by mirroring features of international courts. UNCITRAL Working Group III is deliberating a similar permanent multilateral investment court and appellate body, indicating a broader shift toward adjudicatory reform. [↑](#footnote-ref-209)
210. UNCITRAL Working Group III (Investor‑State Dispute Settlement Reform), *Appellate Mechanism* (UNCITRAL) https://uncitral.un.org/en/appellatemechanism accessed 23 July 2025 — noting discussions about drafting an appellate mechanism to review arbitral awards. [↑](#footnote-ref-210)
211. UNCTAD, *World Investment Report 2022* 119–122 (documenting that some new model treaties eschew investor–State arbitration or impose conditions precedent, such as exhaustion of local remedies or opt-outs for certain sectors). See also UNCTAD, *IIA Issues Note, no. 2 (Oct. 2024)* 6 (50% of IIAs signed 2020–2023 included “ISDS reform” elements – e.g. procedural improvements, limits on access for certain claims, or omission of ISDS altogether). Notable examples include the Brazil–India Cooperation and Facilitation Investment Agreement (2020) which relies on state–state dispute settlement and omits ISDS, and the USMCA (2018) which sharply curtails ISDS between the US and Canada (eliminating it entirely after a phase-out period). [↑](#footnote-ref-211)
212. UNCTAD, *IIA Issues Note, no. 2 (Oct. 2024)* 1–2. (observing that “old-generation IIAs” – many dating to the 1990s – still “cover about half of global foreign direct investment stock,” leaving developing countries especially exposed to claims under older treaties and “rendering IIA reform more urgent”). In 2020–2023, only 19% of new treaties actually replaced an older IIA; hence, the stock of outdated treaties is shrinking slowly. States have begun a coordinated reform (e.g. the EU and its Member States terminating intra-EU BITs, and various treaty upgrades via replacement or amendment), but the transitional challenge remains significant. [↑](#footnote-ref-212)
213. European Commission, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (Press Release, 16 September 2015); European Commission, *Investment in TTIP and Beyond – The Path for Reform* (Concept Paper, 5 May 2015) 5–7. The EU’s public consultation in 2014 revealed broad opposition to the existing ISDS, prompting these reforms. The European Parliament echoed these calls, demanding “a new system” with judges and an appellate mechanism in lieu of arbitral tribunals (European Parliament Resolution, 8 July 2015). CETA (2016) and subsequent EU agreements incorporate the ICS by amendment or design. [↑](#footnote-ref-213)
214. European Commission, ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA)’ (European Commission, 29 February 2016) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en> accessed 23 July 2025. [↑](#footnote-ref-214)
215. European Commission, ‘The Multilateral Investment Court project’ (European Commission, 21 December 2016) <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en> accessed 23 July 2025. [↑](#footnote-ref-215)
216. Cecilia Malmström (European Commissioner for Trade), ‘Speech: The way ahead for international investment protection’ (European Commission, 16 September 2015) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4624> accessed 23 July 2025. [↑](#footnote-ref-216)
217. See e.g. Stephan W. Schill, “The European Commission’s Proposal of an Investment Court System: Out of the Frying Pan into the Fire?” (2016) 3(1) *ICSID Review – FILJ* 1, 6–7; August Reinisch, “Will the EU’s Proposal Contribute to a More Legitimate Investor–State Dispute Settlement?” (2016) 1 *Boulder Intl LJ* 20, 25. Reinisch characterizes the ICS as a “hybrid” between arbitration and judicial dispute resolution. Similarly, C. T. Lévesque notes the ICS remains “sui generis” – retaining core adjudicative functions of ISDS despite institutional changes (Céline Lévesque, “The EU’s Investment Court System: A Canadian Perspective” (2016) University of Ottawa Legal Working Paper No. 2016-41, 3). [↑](#footnote-ref-217)
218. **Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union**, signed 30 October 2016, provisionally applied 21 September 2017, art 8.29 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22017A0114%2801%29> accessed 23 July 2025. [↑](#footnote-ref-218)
219. **European Commission**, *The Identification and Consideration of Concerns as Regards Investor to State Dispute Settlement* (Contribution to UNCITRAL Working Group III, 20 November 2017) <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/a3002620-408d-4469-8d27-4131bc3e1bb6/details> accessed 23 July 2025. [↑](#footnote-ref-219)
220. Ibid. [↑](#footnote-ref-220)
221. **European Union and its Member States**, *Comments on Draft Multilateral Instrument on ISDS Reform (A/CN.9/WG.III/WP.246)*, UNCITRAL Working Group III, February 2025 <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/259f8669-044a-49ad-b52f-dc51c10c708f/details?download=true> accessed 23 July 2025. [↑](#footnote-ref-221)
222. José Manuel Álvarez Zárate, *Ensuring a Balanced Approach for the Global South in UNCITRAL Working Group III: Permanent Multilateral Investment Court, Procedural Reforms and Equitable Representation* (Investment Policy Brief No 26, South Centre, 20 September 2024) https://www.southcentre.int/wp-content/uploads/2024/09/IPB26\_Ensuring-a-Balanced-Approach-for-the-Global-South-in-UNCITRAL-Working-Group-III\_EN.pdf accessed 23 July 2025, 2–3. [↑](#footnote-ref-222)
223. Ajoo Kim, ‘2024 in Review: ISDS Reforms – Busy Business and Progress’ (Kluwer Arbitration Blog, 21 January 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/2024-in-review-isds-reforms-busy-business-and-progress/> accessed 23 July 2025 [↑](#footnote-ref-223)
224. **North American Free Trade Agreement (NAFTA)**, signed 17 December 1992, entered into force 1 January 1994, ch 11 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2413/download> accessed 23 July 2025. [↑](#footnote-ref-224)
225. **United States–Mexico–Canada Agreement (USMCA)**, signed 30 November 2018, entered into force 1 July 2020, Annex 14‑C and Art 14.2(3) and 14.2(4) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 23 July 2025. [↑](#footnote-ref-225)
226. Ibid. Annex14.D. [↑](#footnote-ref-226)
227. North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) art 1121. [↑](#footnote-ref-227)
228. USMCA (n 225) Annex 14‑D Art 6. [↑](#footnote-ref-228)
229. Ibid. Annex 14-D art 14.D.8. [↑](#footnote-ref-229)
230. See: WITA, *Robert Lighthizer Blew Up 60 Years of Trade Policy. Nobody Knows Why* (Critical Times, 22 January 2019) <https://www.wita.org/blogs/lighthizer-blew-up-trade-policy/> accessed 24 July 2025. [↑](#footnote-ref-230)
231. Jared M. Thomas, “Dispute Resolution under USMCA: Modifications to NAFTA and the Potential Implications” (2021) 23 *Eur JL Reform* 428, 433–37. [↑](#footnote-ref-231)
232. Mohammad Mossallam, *Process Matters: South Africa’s Experience Exiting its BITs* (Global Economic Governance Programme Working Paper No 97, University of Oxford, January 2015) 7, 10–11. [↑](#footnote-ref-232)
233. Ibid 7–8. [↑](#footnote-ref-233)
234. Engela C Schlemmer, ‘Dispute Settlement in Investment-Related Matters: South Africa and the BRICS’ (2018) 112 AJIL Unbound 212, 212–213. [↑](#footnote-ref-234)
235. Protection of Investment Act 2015 (South Africa), Act no. 22 of 2015, §13. Section 13(4) provides that “[d]ispute resolution in terms of this Act does not include international arbitration” for investor–State disputes, confining investors to domestic courts or other local remedies. Section 13(5) adds that the South African government may consent to international arbitration with the investor’s home State *only* after domestic remedies are exhausted. See Schlemmer (n 234) 213. [↑](#footnote-ref-235)
236. Protection of Investment Act 2015 (South Africa) (n 235) s 6(1)–(4). [↑](#footnote-ref-236)
237. Kwadwo Sarkodie, ‘Keeping it local – Tanzania curtails investors’ recourse to international arbitration’ (Mayer Brown, 11 December 2018) <https://www.africanlawbusiness.com/expert-views/8816-keeping-it-local-tanzania-curtails-investors-recourse-to-international-arbitration/> accessed 24 July 2025; **Emma Schaafsma**and**Kemi Wood**, ‘**THE UNITED REPUBLIC OF** Tanzania proposes arbitration reforms to placate foreign investors. Will it work?’ (2020) <https://www.hsfkramer.com/notes/arbitration/2020-03/the-united-republic-of-tanzania-proposes-arbitration-reforms-to-placate-foreign-investors-will-it-work> accessed 24 July 2025. [↑](#footnote-ref-237)
238. Ndanga Kamau, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’ (2020) *Afr J Int Econ Law* 199, 203–10. [↑](#footnote-ref-238)
239. A separate study is needed to address the effect of these changes on FDI level and overall economy in South Africa. A study is done in 2019 and concludes minimal adverse effect for south Africa; see : Mmiselo Freedom Qumba, *‘South Africa’s move away from international investor‑state dispute: a breakthrough or bad omen for investment in the developing world?’* (2019) 52 S Afr Mercantile LJ 19, 35–36. [↑](#footnote-ref-239)
240. **Olufunmilola Olabode**, *A TWAIL Approach to Reforming the International Investment Regime* (WTI Working Paper No 14/2023) 4–5. [↑](#footnote-ref-240)
241. **Hogan Lovells**, *Zooming in on the Investment Protocol to the AfCFTA – A New Era for Investment Disputes Across Africa* (2023) <https://www.hoganlovells.com/en/publications/zooming-in-on-the-investment-protocol-to-the-afcfta-a-new-era-for-investment-disputes-across-africa> accessed 24 July 2025. [↑](#footnote-ref-241)
242. **SITA**, *The AfCFTA Protocol on Investment: Issues and Potential Impacts* (17 April 2023) 2–3 <https://media.odi.org/documents/ODI-PA-SITA_AfCFTA_Investment-PB-17Apr23-FINAL.pdf> accessed 24 July 2025. [↑](#footnote-ref-242)
243. *Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area* (adopted 19 February 2023, not yet in force) art 49(1)–(2). The AfCFTA Investment Protocol is one of several protocols under the AfCFTA; once in force, it will override intra-African BITs. Article 49 also requires termination of any “survival clauses” in existing BITs, and prohibits AU members from concluding new BITs with each other. The Protocol will thus consolidate investment rules at the continental level. [↑](#footnote-ref-243)
244. Ibid. Art 9.3. [↑](#footnote-ref-244)
245. Ibid. Art. 44(1)-(2). [↑](#footnote-ref-245)
246. Ibid. Art 47. [↑](#footnote-ref-246)
247. UNCITRAL, *Report of the United Nations Commission on International Trade Law: Fiftieth session (3–21 July 2017)* UN Doc A/72/17, Seventy-second session Supp No 17, para 264. [↑](#footnote-ref-247)
248. UNCITRAL, *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its Thirty‑Seventh session (New York, 1–5 April 2019)* UN Doc A/CN.9/970. [↑](#footnote-ref-248)
249. Ibid. Para 70-73. [↑](#footnote-ref-249)
250. Ibid. Para 71. [↑](#footnote-ref-250)
251. European Union and its Member States, *Submission on Possible Reform of Investor-State Dispute Settlement (ISDS): Establishment of a Standing Mechanism for the Settlement of International Investment Disputes* UNCITRAL WGIII (18 January 2019) UN Doc A/CN.9/WG.III/WP.159/Add.1, paras 4–8 https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1 accessed 24 July 2025. [↑](#footnote-ref-251)
252. UNCITRAL, *Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes* (Secretariat's Note, 19 July 2022) UN Doc A/CN.9/WG.III/WP.239, arts 3–8 (structure of tribunals), arts 9–13 (appointment and tenure of judges), and arts 14–36 (procedures including appellate review) https://undocs.org/en/A/CN.9/WG.III/WP.239 accessed 24 July 2025. [↑](#footnote-ref-252)
253. **EU–Canada Comprehensive Economic and Trade Agreement (CETA)**, Chapter 8, section F (‘Resolution of Investment Disputes between Investors and States’), arts 8.27–8.41 (establishing a permanent Investment Court System with a First Instance Tribunal and Appellate Tribunal, members appointed by Parties for fixed terms); and **EU–Vietnam Investment Protection Agreement (EVIPA)**, art 3.57 (mirroring CETA’s permanent tribunal design with standing ICS, including First Instance and Appellate Tribunal provisions) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:4373944> accessed 24 July 2025. See also: **EU–Singapore Investment Protection Agreement (IPA)** (signed 19 October 2018), arts 3.1–3.12, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22019A1114(01)> accessed 24 July 2025. [↑](#footnote-ref-253)
254. **United States**, *Comments on the Draft Multilateral Instrument on ISDS Reform (MIIR)* (16 February 2025), UN Doc A/CN.9/WG.III/WP.246/Add.1, paras 3, 7–9 ; see also Columbia Center on Sustainable Investment, *ISDS Reform Without Remedy: A Report from the 51st Session of UNCITRAL WGIII* (11 July 2025), Online: <https://ccsi.columbia.edu/news/part-i-isds-reform-without-remedy-l-report-51st-session-uncitral-wgiii> (noting U.S. objections to including “substantive” features—such as appellate review—within WG III’s mandate.) [↑](#footnote-ref-254)
255. Columbia Center on Sustainable Investment (n 254). [↑](#footnote-ref-255)
256. UNCITRAL WG III, *Possible reform of investor–State dispute settlement (ISDS): Draft provisions on procedural and cross‑cutting issues* (Secretariat Note, April 2025) UN Doc A/CN.9/WG.III/WP.253, Draft Provision 21 (on joint interpretations) [↑](#footnote-ref-256)
257. UNCITRAL WG III, *Compilation of comments on A/CN.9/WG.III/WP.248* (18 March 2025) p.4. [↑](#footnote-ref-257)
258. UNCITRAL WG III, *Draft code of conduct for arbitrators in international investment dispute resolution and commentary* (A/CN.9/1148, March 2023) arts 2 & 5 (addressing standards of impartiality and conflict of interest); see also A/CN.9/WG.III/WP.223 (draft provisions on non‑disputing party submissions). [↑](#footnote-ref-258)
259. UNCITRAL WG III, *Possible reform of investor‑State dispute settlement: Draft multilateral instrument on ISDS reform* (A/CN.9/WG.III/WP.246, April 2025) paras 1–5, 10, 15 (presenting MIIR as a modular instrument, allowing opt‑in/out of specific elements such as an appellate mechanism, transparency rules, and code of conduct). [↑](#footnote-ref-259)
260. *UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap”* (IIA Issues Note No 4, 28 May 2013) ch III (outlining the five reform paths, including a standing investment court) <https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf> accessed 24 July 2025. [↑](#footnote-ref-260)
261. *UNCTAD, Investment Policy Framework for Sustainable Development* (UNCTAD/DIAE/PCB/2012/5, August 2012) Core Principle 8 (investment protection and treatment) and accompanying guidelines (linking ISDS design options to sustainable development goals) https://unctad.org/system/files/official-document/diaepcb2012d5\_en.pdf accessed 24 July 2025. [↑](#footnote-ref-261)
262. UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (UN Publications 2015) 120–125 (addressing ISDS legitimacy, transparency, and consistency challenges) <https://unctad.org/system/files/official-document/wir2015_en.pdf> accessed 24 July 2025. [↑](#footnote-ref-262)
263. Ibid. 145–173. [↑](#footnote-ref-263)
264. UNCTAD, *UNCTAD’s Reform Package for the International Investment Regime* (UNCTAD/DIAE/PCB/2018/1, 2018) 14–16 (outlining a three-phase approach: Phase 1 – Designing sustainable treaties; Phase 2 – Modernizing existing treaties; Phase 3 – Enhancing coherence) <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-> accessed 24 July 2025. [↑](#footnote-ref-264)
265. Ibid. Annex 1, 57–69. [↑](#footnote-ref-265)
266. UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (UN Publications 2017) ch III, 97–98 (noting that “13 of the treaties reviewed limit access to ISDS; and 16 omit the umbrella clause” and recording systematic modernization efforts in IIAs) <https://unctad.org/system/files/official-document/wir2017ch3_en.pdf> accessed 24 July 2025. [↑](#footnote-ref-266)
267. UNCTAD, *IIA Issues Note No 4: Annual High-level IIA Conference – Phase 2 of IIA Reform, Geneva, 9–11 October 2017* (November 2017) 12–14. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/iia_issues_november_2017.pdf> accessed 24 July 2025. [↑](#footnote-ref-267)