MINE-GOLIA: INTEGRATED PERSPECTIVES ON THE HISTORY AND PROSPECTS OF INTERNATIONAL INVESTMENT LAW AND THE INVESTOR-STATE DISPUTE SETTLEMENT REGIME

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I. Introduction

> "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS."
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> The Economist, *The Arbitration Game*[1]

In March 2015, Canadian mining company Khan Resources Inc. won a substantial multi-million-dollar international arbitration settlement against the Government of Mongolia for the country's alleged violations of the Energy Charter Treaty and the Mongolia Foreign Investment Law.[2] The dispute involved competing claims between Mongolia and the company over the rights to and the governing standards for previously granted uranium mining concessions. Since the 1990s, Khan Resources or its predecessor company held a concession in Mongolia's northeastern Dornod province to ex-

1. *The Arbitration Game*, Economist (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game [https://perma.cc/H6G5-CNEG].

2. Khan Res. Inc. v. Government of Mong., Award on the Merits, PCA Case No. 2011-09, ¶ 451 (Perm. Ct. Arb. 2015).

ploit a uranium deposit.[3] In 2009, Mongolia passed the Nuclear Energy Law to regulate the undesirable effects of radiation on the health and livelihood of the Mongolian people.[4] The Law created a Nuclear Energy Agency requiring all uranium miners to re-register their exploration and exploitation licenses[5] and requiring the government to take a fifty-one percent stake in any domestic resource extraction project.[6] Khan Resources initiated an international arbitration case in 2011 against the country pleading breaches of the Energy Charter Treaty, Mongolia's Foreign Investment Law, and customary international law, specifically claims of unlawful expropriation and discriminatory treatment.[7] In 2015, an arbitral tribunal applying the United Nations Commission on International Trade Law (UNCITRAL) conventions ruled in favor of Khan Resources and awarded the Canadian company more than eighty million dollars in damages, plus interest, and nearly $9.1 million in other costs.[8] The ruling amounted to roughly 0.76% of Mongolia's annual gross domestic product and more than eighteen percent of the country's education budget.[9]

In response, Mongolia filed for annulment at the French court of appeal in Paris, the seat of the arbitration,[10] and Khan Resources' riposte was threats of pressuring the Canadian government to suspend aid to Mongolia and to pursue seizure of

3. *Id.* ¶¶ 43–48.

4. Nuclear Energy Law of Mongolia, art. 1.1 (2009), https://www.mrpam.gov.mn/public/pages/16/nuclear%20energy_ENG.pdf [https://perma.cc/3T6E-5PKN].

5. *Id.* art. 22.3.

6. *Id.* art. 5.2.

7. Khan Res. Inc. v. Government of Mong., Award on the Merits, PCA Case No. 2011-09, ¶¶ 99–100 (Perm. Ct. Arb. 2015).

8. All awards were in U.S. dollars. *Id.* ¶ 450.

9. According to the World Bank, Mongolia's 2015 Gross Domestic Product was $11.75 billion, *GDP (current US$) – Mongolia*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MN [https://perma.cc/S4MF-V76V] (last visited Dec. 28, 2020). According to the United Nations Educational, Scientific, and Cultural Organization, Mongolia's 2015 government expenditure on education was eighteen percent of its GDP. *Mongolia – Education and Literacy*, UNESCO INST. STAT., http://uis.unesco.org/en/country/mn [https://perma.cc/QBQ9-M255] (last visited Dec. 28, 2020).

10. Press Release, Khan Resources Inc., Mongolia Files to Annul Arbitration Award (July 15, 2015), http://legacy.khanresources.com/investors/news/150715.pdf [https://perma.cc/97NX-7STB].

Mongolia's commercial assets in the United States.[11] The legal battle between Mongolia and Khan Resources ensued for seven years before the dispute was finally settled, but the radioactive pollution from years of unregulated mining and the lasting damage to the health and livelihood of local communities endures.[12]

While the Khan Resources lawsuit is noteworthy in Central Asia, it is only one of the 1,061 known cases of treaty-based investor-dispute settlements to date.[13] The Khan Resources case particularly illustrates why international investment law, while one of the most highly developed branches of international law, remains among the most highly controversial, and explains why many have called for a fairer and more inclusive international investment regime.

International investment agreements (IIAs), which include bilateral investment treaties (BITs) and free trade agreements, are relatively modern developments. In fact, the first BIT, concluded between the Federal Republic of Germany and Pakistan, dates back only to 1959.[14] The past decades, however, have seen a "massive and sudden proliferation"[15] of IIAs: Today there exists over 3,200 signed agreements covering more than 200 states and regions.[16] The majority of these

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11. Terrence Edwards, *Mongolia Ends Fight Over $100 Million Mining License Arbitration*, REUTERS, Mar. 7, 2016, https://www.reuters.com/article/mongolia-khan-resources/update-1-mongolia-ends-fight-over-100-million-mining-license-arbitration-idUSL4N16F3QS [https://perma.cc/NJ5H-E74S].

12. *See generally Mongolia 'Is Likely to Become the World's Nuclear Dustbin'*, ASIANEWS.IT (Dec. 18, 2013), http://www.asianews.it/news-en/Mongolia-'is-likely-to-become-the-world's-nuclear-dustbin'-29846.html [https://perma.cc/SJS5-E3H6] (noting "the frequency of deformed livestock, which appears to be on the increase, particularly near uranium mines").

13. As of July 31, 2020, there are 1,061 known treaty-based ISDS cases, including 347 pending cases, 707 concluded cases, and 7 unknown cases. *Investment Dispute Settlement Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement [https://perma.cc/23F3-THL7] (last updated July 31, 2020).

14. Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627 n. 71 (1998).

15. *Id.* at 621.

16. *International Investment Agreements Navigator: Most Recent IIAs*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements#about [https://perma.cc/TV7U-R46P] (last visited Dec. 28, 2020); *International Investment Agreements Navigator: IIAs by*

agreements were concluded during the 1990s and early 2000s following the end of the Cold War, when neoliberal economics heavily influenced governments to believe that economic liberalism and foreign direct investment would bring development and prosperity.[17]

In line with their neoliberal roots, these investment treaties commit State parties to respect certain standards of investment protection for foreign investors, which include substantive treaty guarantees and provisions. One important provision is the investor-state dispute settlement (ISDS) mechanism, which creates a framework allowing foreign investors to bring treaty-based claims against States before international arbitration tribunals.[18] ISDS provisions are commonly featured in investment treaties to enhance the credibility of State parties to their treaty commitments.[19] The first known treaty-based ISDS case involved a British investor suing the government of Sri Lanka in 1987 under the provisions of the Sri Lanka-United Kingdom BIT.[20] According to a study, the rate of arbitration filings from 2011 onwards has increased to more than fifty cases per year so that by 2016, more than seven hundred arbitration judgments had been issued against almost one hundred states.[21] In a majority of these cases, arbitration was brought against the governments of developing countries.

Economy, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy [https://perma.cc/8FA3-P8PS] (last visited Dec. 28, 2020).

17. *See* Vandevelde, *supra* note 14, at 628 (noting that in the early 1990s, conclusions of BITs represented developing countries' "commitments to a liberal economic regime").

18. *See* Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 7 (OECD, Working Papers on International Investment No. 2012/02), https://www.oecd-ilibrary.org/docserver/5k8xb71nf628-en.pdf?expires=1600029745&id=id&accname=guest&checksum=8DA89942B80BC493924A5AD9F312DA76 [https://perma.cc/C2BA-2KC5] (noting that ninety-three percent of investment treaties contain ISDS provisions).

19. Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World* 12 (OECD, Working Papers on International Investment No. 2015/02), http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf [https://perma.cc/68N2-ZUD8].

20. Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 246 (1997).

21. JONATHAN BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME vi (2017).

For this and other reasons, the current international investment regime has attracted increased scrutiny since the early 2000s. A series of controversial cases—including *Metalclad v. Mexico*,[22] *Occidental Petroleum v. Ecuador*,[23] and *Chevron v. Ecuador*[24]—has focused the international community's criticism on multinational corporations for using the ISDS mechanism to privilege the protection of their revenues over legitimate local public interests in developing countries.[25] These developing countries also accuse the arbitral regime of unduly constraining the host State's sovereign regulatory power by in-

22. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

23. Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf [https://perma.cc/YEP9-5ZSL].

24. Chevron Corp. v. Republic of Ecuador, PCA Case No. 34877 (Aug. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf [https://perma.cc/G2UK-LXN5].

25. *See, e.g.*, Chris Tollefson, Metalclad v. United Mexican States *Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 MINN. J. GLOB. TRADE 183, 184–85 (2002) (observing that the impacts of the *Metalclad* decision "would be most profound in the realms of environmental protection and public health, where governments at all levels would be deterred from taking decisive and precautionary steps to protect the public interest"); Memorandum from Lori Wallach & Ben Beachy, *Occidental v. Ecuador* Award Spotlights Perils of Investor–State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award (Nov. 21, 2012), www.citizen.org/documents/oxy-v-ecuador-memo.pdf [https://perma.cc/G6JP-V6RB] ("[T]he logic that the tribunal used both to find violations of the BIT's Fair and Equitable Treatment (FET) and Indirect Expropriation obligations and to arrive at the huge penalty is perhaps even more shocking."); Letter from Donald K. Anton, Assoc. Prof. Int'l L., Australian Nat'l Univ. Coll. L., et al., to Renaud Sorieul, Sec'y, U.N. Comm'n on Int'l Trade L. (Feb. 8, 2012), https://chevroninecuador.org/assets/docs/2012-02-08-letter-to-sorieul.pdf [https://perma.cc/K4LL-Z52A] (arguing that the interim award issued by the Chevron arbitral tribunal "ordering States to interfere in private judicial proceedings between different parties is a direct violation of well settled principles of sovereignty and . . . human rights under international law"); Letter from Enrique Bernales Ballesteros, Exec. Dir., Andean Comm'n Jurist, to Ban Ki-moon, Secretary-General, U.N. (Feb. 10, 2012), https://chevroninecuador.org/assets/docs/2012-02-10-caj-letter-to-un.pdf [https://perma.cc/KV8T-WTMG] (criticizing Chevron for "forc[ing] Ecuador's government to violate international law and quash the human rights of its own citizens by essentially nullifying the result of their case after almost two decades of litigation").

terpreting the ambiguous language of investment agreements to expand foreign investors' rights to compensation and arbitrators' power to award settlements, which are then used to justify generous expansion of foreign investors' rights to challenge legitimate domestic policies and to award billions of dollars in compensation from public coffers to private wallets.[26] As the number and costs of investor-state disputes rise and frustrate sustainable national development, many countries, particularly those from the Global South, are reassessing the premise that foreign direct investment brings development.[27] Accordingly, as the emerging scholarly consensus indicates, there exists a "legitimacy crisis" within the current regime.[28]

Within the last decade, legal activists and politicians from both developing and developed countries have called for systemic reform in response. Most states believe the current ISDS system is biased against states and should be reformed to better represent their interests, and subsequently many have initiated extensive reviews of their investment treaties.[29] Several EU member States, such as France, Germany, and the Netherlands, have characterized the system as outdated and are calling for reform.[30] Other states have unilaterally terminated ex-

26. *See* Nicolás M. Perrone, *The International Investment Regime at a Crossroad: Should We Be Rethinking Foreign Investment Governance?*, INT'L INST. FOR SUSTAINABLE DEV. (Feb. 19, 2015), https://www.iisd.org/itn/2015/02/19/the-international-investment-regime-at-a-crossroad-should-we-be-rethinking-foreign-investment-governance/ [https://perma.cc/M4B9-GGKS] ("This crisis began with awards like Metalclad v. Mexico and TECMED v. Mexico, where tribunals promoted the stability of the legal and business framework while seriously constraining the policy space of host states.").

27. *See* discussion *infra* Part IV.B.

28. David Ma, *A BIT Unfair: An Illustration of the Backlash Against International Arbitration in Latin America*, J. DISP. RESOL. 571 (2012). *See also* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) ("Contentions that the international investment regime lacks legitimacy come from many directions."); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 471 (2009) ("International courts and tribunals are . . . in the unique situation of having to defend themselves on a regular basis against attacks on their legitimacy as mechanisms for resolving disputes about the scope and the limits of state sovereignty.").

29. *See* discussion *infra* Part IV.B, IV.C.

30. Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32 ICSID REV. 38, 40 (2017).

isting treaties[31] or threatened to follow Bolivia, Ecuador, and Venezuela in withdrawing from the International Centre for Settlement of Investment Disputes (ICSID) Convention.[32] A third coalition of states led by the European Union and Canada are contemplating the establishment of new publicly accountable institutions, like a permanent multilateral investment court, as an alternative to ISDS.[33] While the future direction of the investment regime is yet to be determined, there is overwhelming consensus that the system stands at a watershed moment for comprehensive reform to strike a finer balance between investor rights and local public interests.[34]

This note engages with the complexity of the legitimacy crisis within the current investment regime by presenting the case study of Mongolia and its experience with investment treaties and investor-state arbitration. This case study helps to examine the troublesome relationship between host State sovereignty, public interest regulation, and sustainable development strategy contextualized within Mongolia's specific endowments and developmental needs. Mongolia, like other nat-

31. *E.g.* Kate Cervantes-Knox & Elinor Thomas, *Ecuador Terminates 12 BITs – A Growing Trend of Reconsideration of Traditional Investment Treaties?*, DLA PIPER (May 15, 2017), https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/ [https://perma.cc/6F4F-KR7Q]; Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HERBERT SMITH FREEHILLS (Mar. 16, 2017), https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/ [https://perma.cc/9TG8-K84M].

32. Karan Kalia, *Denunciation of ICSID: Does It Really Mean No ICSID Arbitration?*, U. PA. J. INT'L L. ONLINE PUBL'NS (Apr. 4, 2017), http://pennjil.com/denunciation-of-icsid-does-it-really-mean-no-icsid-arbitration/ [https://perma.cc/QS2D-UCHE].

33. Robert Howse, *Designing a Multilateral Investment Court: Issues and Options*, 36 Y.B. EUR. L. 209, 209 (2018).

34. James X. Zhan, *International Investment Rule-Making: Trends, Challenges and Way Forward*, *in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 17, 20 (Kavaljit Singh & Burghard Ilge eds., 2016). *See also* Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, E15 INITIATIVE (July 2015), https://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/ [https://perma.cc/3JSR-HKSP] (noting the "growing consensus about the need for ISDS reform," the main objective of which should be "[e]nsuring policy space and reaffirming state control over the system").

ural resource-rich countries, is heavily influenced by the current international investment regime, but, unlike its peer nations, remains underrepresented in legal literature. The country's eventual choice—whether to reform, abolish, or abandon the international investment regime—may indicate the direction that other similarly situated countries will take and may influence how Central Asia, a region of growing commercial potential and strategic importance, engages with current and future international investment regimes. In an attempt to stimulate new ideas that address the systemic shortcomings of the current investment regime, this note clarifies the historical and ideological origins of the regime and argues that only gradual systemic reform can bring the system in line with the sustainable development imperative.[35]

Part II of this note explores the history of international investment governance from both the mainstream narrative and the critical perspective. Part III examines the institutional limitations of the current investment regime and the ISDS mechanism. Part IV investigates the legitimacy crisis confronting the investment regime and reviews the reforms currently adopted by states and international institutions. Part V delves into Mongolia's experience with investment treaties and investor-state arbitration and analyzes potential reforms to target some of the challenges. The final section concludes with suggestions that may be useful for reform of the current investment regime and for deciding the future of globalization.

II. Historical Origins and Evolution of Foreign Investment Governance

A. *The History of International Investment Regime: A Mainstream Narrative*

The mainstream view describes the emergence and development of the current international investment regime as a result of the perceived alignment of interests between capital-exporting and capital-importing States.[36] Prior to the BIT era,

35. Zhan, *supra* note 34, at 20.

36. *See* Jeanrique Fahner & Kate Miles, *The Contested History of International Investment Law*, 17 Int'l Cmty. L. Rev. 373, 377 (2015) ("In neo-liberal accounts, the current investment protection regime is presented as a voluntary commitment to international standards by states seeking to expand the flow of capital between them.").

capital-exporting and capital-importing countries disagreed on the content of customary international law with regard to investment. The sweeping nationalization campaigns in Africa, Latin America, Asia, and communist Eastern Europe stemmed from the disagreements that these differing interpretations fostered.[37] In the face of legal uncertainty, capital-exporting countries were hesitant to engage in foreign direct investment without sufficient legal guarantees. Under this view, ISDS is a "voluntary commitment to international standards by states seeking to expand the flow of capital between them" and reduce previous political and legal barriers impeding common development.[38]

By the end of the Cold War, the attitudes of many developing countries towards foreign investment changed as countries embracing state ownership lagged behind those welcoming foreign investment.[39] Unlike in the 1970s and 1980s, "when capital-exporting and capital-importing countries were irreconcilably divided about the establishment of a New International Economic Order" (NIEO),[40] in the late 1980s the emerging economies of Eastern and Central Europe, Latin America, Africa, and Asia "actively sought foreign capital to finance their development."[41] Some scholars call this a dramatic transformation and believe that it "represents a substantial feat of international law-making."[42] Many countries in emerging markets entered into BITs with industrialized States in hopes of receiving capital and technology to advance their development, and they did so at an accelerated pace; the "grand bargain," so-termed, was "a promise of protection of capital in return for the prospect of more capital in the future."[43] Scholars who view this shift optimistically assume that the conclusion of a treaty requires a bargained-for benefit by both parties, and

37. *Id.*
38. *Id.* at 377–78.
39. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 468 (2d ed. 2008).
40. Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 5 (Stephan Schill ed., 2010).
41. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 74 (2005).
42. *Id.* at 75.
43. *Id.* at 77.

they have therefore argued that both developing and developed countries' interests are served by the new investment regime.[44] Developed States sought enforceable assurances that their capital could be invested safely and securely in developing countries, while developing countries provided such assurances in hopes of encouraging further influx of foreign capital.

The mainstream view further regards the establishment of the ICSID, an independent institution of the World Bank Group, as an attempt to make investment disputes less political and more legal, transforming them into cases that can be solved by arbitration in a neutral international forum.[45] Under this framework, the conclusion of BITs eliminated legal uncertainties and disagreements regarding host State obligations toward foreign investments.[46]

B. *The History of International Investment Regime: A Critical Perspective*

The alternative critical view formed in the years subsequent to the end of the Cold War, as the field of international law took a "turn to history" and initiated the critical reevaluation of the "ideas, figures, structures, and theories embedded in the origins of international law."[47] Critical scholars adopted third world approaches to international law[48] and explored its colonial origins, the complicity of certain liberal internationalist legal ideologies with imperialism, and international law's mission to "civilize" societies into modernity.[49] The findings of

44. *See id.* at 76–77 ("In the process of reforming their economies to foster private enterprise, some developing countries have realized that creating favorable conditions for foreign investment can be integral to their success.").

45. *See* Fahner & Miles, *supra* note 36, at 377–78.

46. *Id.* at 378.

47. Martin Clark, *Ambivalence, Anxieties / Adaptations, Advances: Conceptual History and International Law*, 31 LEIDEN J. INT'L L. 747, 749 (2018).

48. *E.g.,* B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, *in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47 (Antony Anghie et. al. eds., 2003).

49. *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001) ("Modern international law was born from the impulse to 'civilize' late nineteenth-century attitudes towards race and society."); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005) (arguing that

these scholars demand new frameworks to reconcile and repair historical global injustices.[50]

The critical perspective is equally applicable to understanding the legal developments forming the basis of modern international investment law. While mainstream investment law scholars see the "anachronistic and obsolete" past as bearing no relationship to the meaning and content of customary international law and contemporary BITs,[51] the progressive Canadian legal scholar David Schneiderman sees this view as "strategic denial."[52] Canadian legal scholar Gus Van Harten also observes that while each investment treaty arbitration claim is unique, they originate from a common ancestry following "in the wake of foreign invasion and occupation."[53] Similarly, Cambridge scholar Kate Miles illustrates that the historical origins of the international investment regime's commercial, social, and political context are inseparable from its current character and controversies.[54]

In contrast to the mainstream view, Miles argues that the history of international investment law began prior to its modern reemergence in 1959. She points to the period between

"colonialism was central to the development of international law, and that sovereignty doctrine emerged out of the colonial encounter"); LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850 (2016) (exploring how the British Empire used international law to "reorder" the world); David Kennedy, *Primitive Legal Scholarship*, 27 HARVARD INT'L L.J. 1 (1986) (arguing that early Western international legal scholarship arose out of Christian morality and ideas of civility); JENNIFER PITTS, BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE (2018) (arguing that the effect of international law was to "entrench asymmetries of power in legal form and to render difference from the West (that is, Western Europe and its white settler colonies) as moral and legal inferiority").

50. Juan Pablo Scarfi, *Assessing the Historical and Imperial Turn in International Law*, OXFORD UNIV. PRESS BLOG (June 12, 2017), https://blog.oup.com/2017/06/historical-turn-international-law/ [https://perma.cc/2GPN-W44X].

51. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 5 (2012).

52. David Schneiderman, *Kate Miles, The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*, 25 EUR. J. INT'L L. 942, 942 (2014) (book review).

53. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 17 (2007).

54. *See* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 1 (2013).

the seventeenth and nineteenth centuries as the true origin of the current regime, which is steeped in imperial norms,[55] and suggests that the development of the investment regime is "inextricably linked with colonialism, oppressive protection of commercial interests, and military intervention."[56]

During the age of imperial expansion in the seventeenth century, European nations granted sovereign rights and privileges to certain trading companies, including the British and French East India Companies and the Dutch West India Company, and pursued state interests through the activities of these commercial entities.[57] With their delegated sovereign powers, these trading companies entered into treaties as foreign investors, administered settlements, and engaged in military conquest on behalf of their monarchs,[58] as the early European kings shaped international law to protect their delegated agents.[59] This delegated authority from state to investor went far beyond the modern rules of diplomatic protection, ultimately yielding "a relationship of interdependency and an intermingling of the functions of state and investor."[60] Major European trading companies, in addition to merging imperialist and commercial objectives, actively developed international legal doctrines favorable to their needs.[61] Tellingly, Hugo Grotius, father of modern international law, was a legal advisor to the Dutch East India Company. In fact, several of his most significant works, including *De Jure Praedae* [*On the Law of Prize and Booty*] and *Mare Liberum* [*The Freedom of the Seas*] legitimized the activities of trading companies.[62] Therefore, the conventional myth of impartial and value-neutral laws is, according to Miles, better understood as representing the real interests of capital-exporting States and their nationals.[63]

Later European States further merged state power with investor prerogatives by imposing reciprocal arrangements protecting their nationals abroad upon other regions around the

55. *Id.* at 2.
56. *Id.* at 21.
57. *Id.* at 33–34.
58. *Id.* at 34.
59. *Id.* at 34–35.
60. *Id.* at 33.
61. *Id.* at 35.
62. *Id.*
63. MILES, *supra* note 54, at 86–87.

world.[64] As Antony Anghie explains, international investment law was "animated by the civilizing mission"[65] that constantly drew the boundary between civilized and uncivilized (or barbarian) nations. This framework gave civilized nations the prerogative to expel uncivilized nations from the international order until they agreed to act in a civilized manner—e.g., grant trading companies the right to trade without impediment—and to invite them back when they did.[66] In certain instances, political control and military force would be the ultimate guarantees on property held abroad by nationals of these Western States.[67]

By the beginning of the 1860s, Latin American States became dissatisfied with existing international investment rules. These Latin American countries, fearing that the "institution of diplomatic protection might be employed as a tool of economic and political imperialism,"[68] advocated for a position now known as the Calvo Doctrine, whereby the "alien agrees to waive the right of diplomatic protection and to resort for redress of any grievances exclusively to the local judicial remedies."[69] The Calvo Doctrine sought explicitly to reduce the ever-present threat of investor dispute-triggered diplomatic or military interventions and maintained that aliens should be granted no greater rights than citizens of the host country.[70] Unsurprisingly, many European nations denied this doctrine and insisted upon their understanding of international law.[71]

64. *Id.* at 21.

65. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 739 (2006).

66. *See id.* at 747 ("Third world sovereignty, then, at least to the extent that it was shaped by international institutions, and by Western states acting through international institutions, was created in a way that could continue to serve Western interests."); PITTS, *supra* note 49, at 37 (2018) (pointing out "the nineteenth-century claim that nations had to reach a certain standard of civilization before they could be admitted to the family of nations").

67. MILES, *supra* note 54, at 21.

68. DONALD R. SHEA, CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 5 (1955).

69. *Id.* at 5–6.

70. MILES, *supra* note 54, at 50–51.

71. *See id.* at 51 ("Britain and the United States took the view that a Calvo Clause did not in any way affect their rights and duties under international law . . . .").

Throughout the twentieth century, shifts in global political conditions supported Third World efforts to resist the perceived imperialist nature of prevailing systems of foreign investment. In the States of the Eastern Bloc and Latin America, land was nationalized without compensating foreign investors.[72] The Marxist perspective on foreign investment regarded the nationalization of alien property as an integral component of a nation's right to self-determination and therefore denied any international legal rules governing alien property.[73] In particular, Mexico and other Latin American countries proclaimed adherence to the "social function of property" principle, which contended that private property is derivative of a State's continuing right to enforce and transmit ownership, so that nationalization and redistribution did not require prior, prompt, or full compensation.[74] Post-colonial States, under the NIEO project, advocated for international recognition of "permanent sovereignty of every State over its natural resources,"[75] and for the adoption of a Charter of Economic Rights and Duties of States.[76] All these proposals sought to obtain legally binding commitments by industrialized and developed countries to certain economic rights and duties beneficial to developing economies.

However, Western States refused to recognize the norm-setting and rule-creating potential of these proposals under international law. Instead, the doctrines of acquired rights, internationalized contracts, and the modern BIT were advanced as efforts to develop a systemic, enduring investment protection regime.[77] The creation of the ICSID Convention, which is claimed to favor foreign investors and developed states, in the 1960s by the capital-exporting States was one additional component of this protection regime.[78] Despite claims of neutral-

72. *Id.* at 74–75.

73. *See* Frank Przetacznik, *The Basic Collective Human Right to Self Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 71 (1990) (noting that Stalin considered economic life to be part of a nation and defined self-determination as the right of a nation to "arrange its life according to its own will").

74. LOWENFELD, *supra* note 39, at 471–73.

75. G.A. Res. 3201 (S-VI), at 4 (May 1, 1974).

76. G.A. Res. 3281 (XXIX), at 50 (Dec. 12, 1974).

77. MILES, *supra* note 54, at 80–84.

78. *See* Robin Broad, *Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corpo-*

ity and objectivity, critical scholars view the ICSID dispute settlement framework and the underlying substantive rules of international investment law as elements of a deeply embedded political framework which "maintain[s] the level of investor protection . . . built up during the colonial area."[79]

III. Institutional Limitations of the Investment Regime and ISDS Mechanism

A. *Multilateral Consensus Versus Bilateral Investment Treaty*

As Swedish economist Anders Åslund notes, while global trade and investment are increasingly integrated, the absence of a multilateral agreement on foreign direct investment is "a gaping hole" in the current global economic architecture.[80] Attempts to negotiate such an agreement were initiated more than seventy years ago,[81] but even with extensive discussion from 1970 to 1998,[82] no formal agreement was ever reached.

One explanation for the failure to reach an agreement could be that economically powerful States have historically benefited from the asymmetric structure of the global investment regime, preferring bilateral investment arbitration over multilateral consensus.[83] Yet while there is some evidence for this explanation, it may not be sufficient. Disagreements on foreign investment rules have existed since the nineteenth century, and they occur not only between developing and developed countries, but also among developed nations.[84] Indeed, many attempts led by developed countries toward a multilateral consensus have failed. The Bretton Woods Conference draft treaty on both foreign investment and trade matters was rejected by the United States at the time.[85] In the 1960s and then 1990s, two initiatives within the global North to sur-

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ration Suing El Salvador, 36 U. Pa. J. Int'l L. 851 (2015) (establishing "significant ICSID bias in favor of corporations and commercial interests").

79. Miles, *supra* note 54, at 88.

80. Anders Åslund, *The World Needs a Multilateral Investment Agreement* 1 (Peterson Inst. for Int'l Econ., Policy Brief No. 13-1, 2013).

81. Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 Fordham Int'l L.J. 275, 275 (2000).

82. Åslund, *supra* note 80, at 1.

83. Perrone, *supra* note 26.

84. *Id.*

85. *Id.*

mount the ideological divisions between North and South floundered as negotiations for a multilateral agreement on foreign investment within the Organization for Economic Co-operation and Development (OECD), viewed then as an ideal forum, failed.[86] Therefore, the matter is not as simple as disagreement between the global North and South on protections for foreign investment.[87]

While there may be many explanations for the failure of multilateral action, one consequence of the absence of a multilateral investment agreement is that vast networks of overlapping BITs govern many aspects of foreign investment, which inevitably present practical problems. Chief among them in the current regime is that foreign investors can initiate dispute resolutions against the host State, but host States cannot initiate arbitration against investors.[88] Consequently, the regime is unable to self-regulate the general problems left in the wake of multinational corporate activity, which may aggravate financial crises and complicate, even inhibit, effective regulatory policymaking. These challenges are discussed regularly in global forums, including the International Monetary Fund and the World Health Organization, but none have the institutional connections with the global investment regime necessary to effect change.[89] International investment tribunals, which do have the institutional wherewithal, frame conflicts along the principles of traditional commercial arbitration as limited between parties[90] and therefore neither address larger policy questions nor the complaints of local populations.[91] Accordingly, there is emerging consensus that the existing institutional structure of the international investment regime is una-

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* Muthucumaraswamy Sornarajah, *A Justice-Based Regime for Foreign Investment Protection and the Counsel of the Osgoode Hall Statement*, 3 GLOB. POL'Y 463, 464 (2012) ("It would not be unfair to suggest that the law that was made was driven by greed, not by the needs of humanity."). *But see* Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 648 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf [https://perma.cc/GYZ3-K7T3] (confirming that the right to water is a human right under international law).

ble to accommodate the new field of global cooperation on sustainable development.

B. *ISDS as a Challenge to State Sovereignty and Local Needs*

One area of reform under debate considers the extra-territorial legal privileges private investors exercise against host State within the current ISDS system. Presently, private investors may take legal action against host States outside of the State's own legal system directly before international arbitration tribunals. The purpose behind this design reflects the original idea that protecting foreign investment from arbitrary host State power required direct means to safeguard the principles of rule of law, such as fair and equitable treatment (FET), non-discrimination, and protection from expropriation without compensation.[92]

Taylor St. John, in a historical institutionalist explanation of the creation of the investor-state arbitration system, seeks to dispel conventional narratives that cast the current ISDS system as emerging from corporate greed or investor lobbying. Instead, St. John proposes that the current system is a product of the time when it was established.[93] After the Second World War, many international officials were motivated by two beliefs: (1) that the rule of law could peacefully resolve disputes and (2) that rich societies had an imperative to facilitate development in poorer countries through law.[94] Consequently, the model investor-state clauses they drafted were designed for development by facilitated capital movement, which would be backed by the World Bank's reputation and guaranteed under the ICSID brand of rules, which required States' consent.[95]

The architects and other proponents of the investment treaty regime justified the ISDS mechanism on the basis that it would shield developing countries from the broader political

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92. *See* Ayelet Banai, *Is Investor-State Arbitration Unfair? A Freedom-Based Perspective*, 10 GLOBAL JUST.: THEORY PRAC. RHETORIC 57, 58 (2017).

93. *See* TAYLOR ST. JOHN, THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES 4 (2018) (arguing that investors only developed a preference for "treaties with investor-state arbitration" once those treaties already existed).

94. *Id.*

95. *Id.* at 7–8.

and diplomatic considerations of developed States,[96] reduce the risk of investment and thereby facilitate foreign investment in countries with weak legal and judicial systems,[97] serve as a neutral forum for the resolution of investment claims against host governments,[98] and ensure fairness and the rule of law in resolving investment disputes by removing the bias and unreliability of domestic courts.

Current opponents of the ISDS mechanism question these justifications directly in their critiques of investor-state arbitration. Many prominent justifications for the treaty-based investment law regime have been shown empirically to be "groundless or, at least, open to serious doubt."[99] First, critics raise the empirical fact that diplomatic engagement remains important for investor-state settlement and therefore question the ability of investment arbitration to de-politicize investment disputes.[100] Second, they question whether inclusion of the ISDS clause actually catalyzes investment, to say nothing of doubts they maintain about whether importing foreign investment is desirable as a development strategy. Robert Howse recalls the three basic premises that have been posited for how

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96. *See, e.g.*, O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011 649, 692 (2011) (explaining that BITs "help weak states by insulating them from the political pressure of stronger states whose nationals believe they have been injured"); Antonio R. Parra, *The Convention and Centre for Settlement of Investment Disputes*, 374 RECUEIL DES COURS 313 (2014) (positing that the architects of the investment treaty regime believed the best way to depoliticize investment disputes was to allow foreign investors to file international claims directly against the host state, without the involvement of their home government).

97. *See, e.g.*, Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 2–3 (John M. Olin Program L. & Econ., Working Paper No. 235, 2005), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1397&context=law_and_economics [https://perma.cc/SH2D-BH3Q] (arguing that a private right of action for damages is the most effective way to reduce investment risk).

98. Zhan, *supra* note 34, at 23.

99. Gus Van Harten, *A Critique of Investment Treaties*, *in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 41, 41 (Kavaljit Singh & Burghard Ilge eds., 2016).

100. *See, e.g.*, Geoffrey Gertz et al., *Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?*, 107 WORLD DEV. 239, 240 (2018) (finding "no evidence that diplomatic intervention is less likely in disputes where American investors have access to investment treaty arbitration than in those disputes where investors lack such access").

BITs support development through incentivizing foreign investment: (1) additional investment boosts economic growth and development; (2) treaty protection incentivizes additional investment; and (3) treaty protection is cost-effective compared to other state incentives for foreign investment.[101] To date, all three premises have been contested empirically, and no effective correlation between signing investment treaties and promoting investment flows has been established.[102] In some studies, BITs are, at best, one factor among many required to create a favorable investment climate for foreign investors in the host country.[103]

Finally, critics of ISDS challenge the argument that investment arbitration ensures fairness and the rule of law in resolving investment disputes. A key argument they assert is that ISDS is not a true judicial process because the mechanism is governed by for-profit private arbitration, which resolves one-way claims of foreign investors against host States for substantial sums of public money through a privileged process.[104] If a tribunal rules against a particular public policy brought before it, there is no accountable standard to limit the tribunal in setting awards consisting of host State taxpayer money to foreign investors. Many modern multinational corporations equal their host states in terms of economic size, meaning they may

101. Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework* 14 (IILJ Working Paper, Paper No. 2017/1, 2017), https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf [https://perma.cc/9CUJ-MWX7].

102. *See, e.g.*, Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009–2010 539, 539 (2010) (arguing that the evidence that investment treaties are actually effective at increasing investment flows is inconclusive because "the vast majority of multinationals do not appear to take BITs into account when determining where—and how much—to invest abroad"); Van Harten, *supra* note 99, at 43 ("Different studies have found and failed to find connections between the treaties and investment flows. This mixed evidentiary record demonstrates in part the limitations of quantitative legal research but also that there is at best conflicting evidence that investment treaties actually encourage foreign investment . . . .").

103. U.N. CONF. ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, at xi, UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009).

104. Zhan, *supra* note 34, at 23–24.

bring claims that can seriously impact public budgets.[105] Tribunal awards can easily amount to several percent of a country's GDP and are sometimes equivalent to annual public budgets for education or public health services.[106] In the case of *Occidental Petroleum v. Ecuador*, for example, the initial award totaled more than $1.7 billion plus interest[107]—roughly the equivalent of "9% of Ecuador's 2012 annual budget, 59% of the country's 2012 annual budget for education and 135% of the country's annual healthcare budget."[108] In *Gabriel Mining v. Romania*, a case which involved the Romanian government refusing a permit for a highly controversial and environmentally damaging gold excavation project, a Toronto-listed mining company claimed damages amounting to four billion dollars, about two percent of Romania's GDP and half of the country's annual health budget.[109] Even when host governments win, they are often ordered to pay for a share of the tribunal's costs, which can range from an average of eight million dollars to over thirty million dollars in some cases.[110] The mere filing of an arbitration case can thus chill policymak-

105. Bart-Jaap Verbeek, *The Limitations of the UNCITRAL Process on ISDS Reform*, CTR. FOR RES. ON MULTINATIONAL CORPS. (SOMO) (Oct. 30, 2018), https://www.somo.nl/the-limitations-of-the-uncitral-process-on-isds-reform/ [https://perma.cc/AF8L-4LPG].

106. ROELINE KNOTTNERUS & CECILIA OLIVET, MONGOLIA'S EXPERIENCE WITH INVESTMENT TREATIES AND ARBITRATION CASES 3 (2016), https://www.tni.org/files/publication-downloads/mongolia_paper.pdf [https://perma.cc/GPV9-DQW6]; *supra* note 9 and accompanying text.

107. Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf [https://perma.cc/UN6Y-9X3W].

108. Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, ¶ 25 (Sept. 30, 2013).

109. CORPORATE EUR. OBSERVATORY ET AL., GOLD-DIGGING THROUGH INVESTOR-STATE LAWSUITS: CANADIAN MINING CORPORATION SUES TO FORCE ROMANIANS TO ACCEPT TOXIC ROSIA MONTANĂ GOLDMINE 6 (2015), https://corporateeurope.org/sites/default/files/attachments/gold_digging_with_investor_state_lawsuits.pdf [https://perma.cc/L66A-3F6Z].

110. *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 19 (OECD Working Papers on Int'l Inv., Paper No. 2012/03, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf [https://perma.cc/P5DT-LZU7].

ing—even if the government expects to win.[111] Therefore, claimants hold a systemic advantage over those host States who face arbitral review and steep monetary penalties.[112]

Current investor-state arbitration also faces the controversy of the revolving door between arbitrators and corporate lawyers, which transforms the judicial process of the ISDS mechanism into a business fraught with conflicts of interest.[113] Presently, investment tribunals consist of three unelected and unaccountable arbitrators, some of whom shuffle perennially between the roles of judge and lawyer[114]—a duality that would more than raise eyebrows in most legal systems. Furthermore, tribunals follow neither precedent nor the opinions of host States, and their rulings cannot be appealed on the merits.[115] Arbitrators often interpret the broad, ambiguous language of ISDS clauses in treaties in ways to expand investors' rights to compensation and arbitrators' power to award it. For instance, in *Abaclat v. Argentina*, arbitrators permitted a class action by a group of investors,[116] an unprecedented move by an investment tribunal. In *White Industries v. India*, the tribunal held that delay in enforcing an arbitration award, which the tribunal deemed protected by treaty, created additional ground for relief.[117] These interpretations favor neoliberal viewpoints

111. Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 607 (Chester Brown & Kate Miles eds., 2011); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 178–87 (2013).

112. *See* Gus Van Harten, *Is It Time to Redesign or Terminate Investor-State Arbitration?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Apr. 11, 2017), https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration [https://perma.cc/JY8B-QSMB].

113. *Id.*

114. *Id.*

115. Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement* 4, 8 (OECD Working Papers on International Investment 2006/01, 2006), https://www.oecd.org/china/WP-2006_1.pdf [https://perma.cc/8MTS-HALM].

116. *See generally* Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/9GTG-HUEB].

117. *See generally* White Indus. Austl. Ltd. v. Republic of India, Final Award, ¶ 4.3.14 (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf [https://perma.cc/DA4A-9WBU].

which extend property protection beyond the degree intended in treaty negotiations.[118]

Gus Van Harten sees the ISDS mechanism as an "exceptionally powerful process" protecting foreign investors without imposing commensurate responsibilities.[119] In practice, ISDS grants these private interests special legal status far beyond the protections of other areas of international law and of domestic law in both host and home States, allowing investors to skirt host country domestic courts through extrajudicial tribunals.[120] Van Harten views ISDS as currently constituted as a "threat to democracy and sovereignty,"[121] because except for the imperative that national governments respond to a foreign investor's claim, ISDS does not recognize standing for other stakeholders affected by the claim's adjudication.[122] Van Harten suggests that if foreign investors require special international protections from incapable domestic institutions, then equivalent protections should be provided to victims of mistreatment by foreign investors in territories left unprotected by domestic institutions.[123] He argues that domestic constituencies should enjoy similar processes of international dispute resolution to enforce the rights and responsibilities of foreign investors.[124]

The deep institutional flaws of ISDS reflect the fundamental shift in the balance of global governance power from sovereign states and local communities to multinational corporations and private investors, which formally prioritizes corporate rights to protect their economic interests over the right of sovereign governments to regulate them.[125] The main benefi-

118. Sornarajah, *supra* note 91, at 465.
119. Van Harten, *supra* note 112.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. PUBLIC CITIZEN, CASE STUDIES: INVESTOR-STATE ATTACKS ON PUBLIC INTEREST POLICIES (Mar. 6, 2015), https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4-1.pdf [https://perma.cc/4R4X-6PYH]. *See also Investment Protection and Investor-to-State Dispute Settlement in EU Agreements*, at 5 (Nov. 26 2013), https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf [https://perma.cc/SXM4-BM49] (commenting that "some of the most re-

ciaries of this flawed system have been corporate giants and wealthy investors, who have gained at the substantial expense of countries and individuals who would have benefited from the very laws and regulations that ISDS deters.[126]

Additionally, exiting the ISDS framework is difficult and rescinding the rights promised to investors is costly.[127] The stability of the ISDS regime is not in the actual volume or quantity of foreign investment, but rather in the powerful and vested constituency of third-party institutions such as large legal practices devoted to international arbitration and government ministries that negotiate BITs and their private investor clients.[128] This constituency receives positive feedback in revenue and prestige from large arbitration awards, and the investor-state arbitration system becomes entrenched as expanding interpretations of public treaties stabilize institutions.[129] While host States do retain sovereignty, the accumulated commitments and vested constituencies that transform opportunities into obstacles for these governments make reversing course difficult.

IV. From Past to Present: Legitimacy Crisis and Reform

A. *ISDS as Neocolonialism?*

Perhaps the ultimate question facing the current investment regime is whether today's investment agreements will crystallize into a new form of colonialism or evolve into a new field of global cooperation on development.[130] Critical schol-

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cent cases brought by investors against states have given rise to strong public concerns," including that the current rules may be abused to prevent countries from making legitimate policy choices); Sundaresh Menon, International Arbitration: The Coming of a New Age for Asia (and Elsewhere) 9 (2012), https://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf [https://perma.cc/X4TM-ZVC5] (arguing that ISDS "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").

126. Van Harten, *supra* note 112.

127. St. John, *supra* note 93, at 22.

128. *Id.*

129. *Id.*

130. Perrone, *supra* note 26. *See also* Howard Mann, *International Investment Agreements: Building the New Colonialism?*, 97 Am. Soc'y Int'l L. Proc. 247, 248 (2003) ("The question here is whether the twentieth century saw the end of colonialism . . . or whether it saw the mutation of colonialism from a mili-

ars believe that the current ISDS system epitomizes neoliberal or neo-imperial designs which allow developed countries to continue exploiting developing countries. According to this view, investor interests are privileged over the political and regulatory powers developing states require to defend the interests of their local communities.[131] José Álvarez, in summarizing David Schneiderman, quips "[w]hen paired with the World Bank's 'good governance' approach to the rule of law, the investment regime . . . imposes a 'neoliberal rule of law' that promises predictability and certainty at the expense of democratic politics."[132] Kate Miles sees the origins of foreign investment protection laws as rooted in the commercial and political expansionism of European States, and they argue that these origins still influence current principles, structures, agreements, and dispute resolution systems today.[133] To Miles, the current regime is solely focused on investor protection and is unresponsive to investors' impact on local communities.[134] For example, public welfare regulation is deemed a treaty violation and foreign entities commodify the local environment for their own use.[135] Large multinational companies are thus "uniquely positioned to use the system to attack governmental measures aimed at advancing a development strategy, stabiliz-

tary/economic form to a legal/economic form. In other words, did colonialism really end or did the means and processes simply change?").

131. Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1151–52 (2014). *See also* Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, 17 FINNISH Y.B. INT'L L. 91, 126 (2006) ("[T]ribunals have been on the whole rather investor friendly, often explicitly stating that the object and purpose of the BIT was (only) the protection of the investor.").

132. JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 451 (2011). *See also* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 4 (2008) (recognizing that the ultimate objective of investment arbitration is to "assign[ ] to investment interests the highest possible protection").

133. MILES, *supra* note 54, at 1–2; *see* Sornarajah, *supra* note 91, at 464 (2012) ("It is as if the colonial system, with its rules favoring property protection, had not ended and that there was now global law being created to set iron-clad rules on investment protection through asymmetrical investment treaties and expansionist interpretations of their principles.").

134. MILES, *supra* note 54, at 3.

135. *Id.*

ing the financial system, promoting human rights, protecting public health and the environment, and so on."[136]

Other scholars, however, point to the waning impetus behind neoliberalism.[137] After the successive economic crises of the late 1990s and early 2000s in Asia and Latin America, regulatory control over the economy—e.g., nationalization of banks—soon became the norm.[138] In the field of international investment law in particular, host States have made increasing calls to expand the regulatory space.[139] More importantly, the international investment environment has become increasingly complex; not only does the current investment regime regulate investment protection between capital-exporting and capital-importing States, but traditionally capital-exporting States are increasingly concluding investment agreements among themselves, including the Energy Charter Treaty and the North Atlantic Free Trade Agreement (now the United States-Mexico-Canada Agreement).[140] Additionally, the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, and the Trans-Atlantic Trade and Investment Partnership (TTIP) between the European Union and the United States further illustrate this new trend.[141]

In an empirical study, scholars found that until the mid to late 1990s, investment arbitration served as a "developed vs. developing" instrument which sought to strengthen the economic interests of developed States and therefore served neocolonial purposes.[142] Since then, however, investment arbitration has incorporated a significant number of "developed vs. developed" cases.[143] States traditionally seen as dominant economies act now as both home and host States and appear

136. Van Harten, *supra* note 99, at 45.

137. *See, e.g.*, Schultz & Dupont, *supra* note 131, at 1156 (noting that the shift in investment arbitration to mostly "developed vs. developed" claims "tends to undermine the neo-colonial argument for the period after the mid-to-late 1990s").

138. Muthucumaraswamy Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3 TRADE L. & DEV. 203, 212–13 (2011).

139. *Id.* at 213.

140. ALVAREZ, *supra* note 132, at 145–46.

141. Fahner & Miles, *supra* note 36, at 380.

142. Schultz & Dupont, *supra* note 131, at 1156.

143. *Id.*

increasingly as respondents in investor-state arbitration.[144] In fact, "[a]lmost every year since 1997, investors from developed states have filed more claims against other developed states than against developing states," undermining the neocolonial categorization of the current regime after the mid to late 1990s.[145] Similarly, emerging economies have further complicated the picture by entering into investment protection agreements among themselves.[146]

Nevertheless, to Kate Miles, the emergence of so-called "South-South" BITs does not eliminate the imperial nature of the current investment regime; "international investment law actually remains a tool of imperialism, but in new hands."[147] Scholars also point out that arbitration between developed and developing countries is still very much one-sided, and that the positional shifts are not a role reversal: investors from developing countries do not file many arbitration claims against developed States.[148] Some scholars see the "small, secret, clubby" community of international arbitrators as another feature which reflects the neocolonial nature of the current investment regime.[149] Among the elite group of arbitrators who have adjudicated more than ten cases, eighty-three percent are from Western Europe and North America, regions that are traditionally capital-exporting and take charge of sixty-nine percent of ICSID cases.[150] The United Nations Conference on Trade and Development's (UNCTAD) World Investment Report finds that of the thirteen arbitrators appointed to more than thirty cases, all but one were either European or North American.[151] Consequently, Western States maintain "a tight grip" and "immense influence" over the investment arbitration

144. *See* Alvarez, *supra* note 132, at 144 (noting that the United States, Brazil, China, India, and Russia are all "leading recipients and exporters of capital").

145. Schultz & Dupont, *supra* note 131, at 1156.

146. *See* Alvarez, *supra* note 132, at 146–47 (looking at the case of China).

147. MILES, *supra* note 54, at 91.

148. Schultz & Dupont, *supra* note 131, at 1156.

149. PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM 36 (2012), https://www.tni.org/files/download/profitingfrominjustice.pdf [https://perma.cc/73PK-E9PQ].

150. *Id.*

151. U.N. CONF. TRADE & DEV., WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, at 95, U.N. Sales No. E.18.II.D.4 (2018).

system.[152] Furthermore, evidence shows that many arbitrators may have an inherent pro-corporate bias,[153] sometimes sharing the business viewpoint about the importance of protecting investors' profits.[154] Arbitrators often maintain close links with the corporate world, and several have served as board members of major multinational corporations, including many claimants who have filed cases against governments of developing nations.[155]

B. *Recalibration and Reform: Recent ISDS Developments*

States have made efforts to bridge the legitimacy gap in the current international investment regime. Some have gone to great lengths to initiate reform, though each country has reacted to the legitimacy gap in different ways: India has initiated extensive review of its investment agreements and adjusted its treaty negotiating positions,[156] while Bolivia, Ecuador, Venezuela, and South Africa have withdrawn from the regime altogether.[157] Still other states, like Peru, Chile, and Mexico, have engaged in incremental adjustment.[158]

India is a representative example of the countries who have embarked on extensive reforms, including reviewing old model BIT texts to prepare new templates for future treaties and introduce new, more protective policy measures against the costly ISDS system. The country signed many BITs in the early 1990s as part of its larger liberalization effort,[159] many of which were based on traditional European models with ill-defined substantial provisions and "few flexibility mechanisms or

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152. EBERHARDT & OLIVET, *supra* note 149, at 36.

153. *Id.* at 8.

154. *Id.* at 36.

155. *See Id.* at 39–40 (identifying arbitrators who also sat on the boards of major corporations).

156. *See Recent Developments in the International Investment Regime*, 1 UNCTAD IIA ISSUES NOTE 6 (May 2018), https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf [https://perma.cc/CS3X-NDR7] (noting that India proposed a Joint Interpretative Statement for approximately twenty-five of its investment agreements in 2016). At least 150 states have taken action to reform their international investment programs or review existing agreements. *Id.* at 3.

157. *See infra* notes 166–75 and accompanying text.

158. *See infra* notes 174–76 and accompanying text.

159. Tarald Laudal Berge, *Dispute by Design? Legalisation, Backlash and the Drafting of Investment Agreements*, INT'L STUD. Q. 1, 5 (2020).

carve-outs."[160] In mid-2012, in the wake of public outcry over a spate of investment treaty claims, India placed ongoing BIT negotiations on hold and launched a review of its investment treaties.[161] The review sought to revise India's 1993 model treaty text and provide a roadmap for the renegotiation of existing BITs.[162] After extensive review, India adopted a new model BIT in 2015 that reduced substantive obligations, set limitations on the definition of investment, and put forth an exhaustive general exceptions clause.[163] Indonesia undertook a similar review process after experiencing increasing exposure to investor claims and decreasing government regulatory space for adopting public sustainable development policies. The country has been working to formulate a new, updated BIT model for use in future negotiations to preserve its regulatory and sovereign rights.[164]

Other countries have decided to roll back their commitments to the investment regime altogether, questioning whether investment agreements necessarily attract foreign investment. Argentina became among the first of this cohort when dozens of claims were launched in response to President Eduardo Duhalde's enactment of the Public Emergency and Exchange Regime Reform Act during the 2001 financial crisis.[165] In 2007, Bolivia became the first country to denounce the ICSID Convention—ratified by more than 150 member states.[166] In 2009, following Bolivia's lead, Ecuador submitted

160. *Id.*

161. *See* Prabhash Ranjan, *India's Bilateral Investment Treaty Programme—Past, Present and Future*, *in* RETHINKING BIT: CRITICAL ISSUES AND POLICY CHOICES 107–08 (Kavaljit Singh & Burghard Ilge eds., 2016).

162. *Id.* at 109.

163. Model Text for the Indian Bilateral Investment Treaty (2015), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf [https://perma.cc/4VX2-YSLM] [hereinafter India Model BIT].

164. *See* Abdulkadir Jailani, *Indonesia's Perspective on Review of International Investment Agreements*, *in* RETHINKING BIT: CRITICAL ISSUES AND POLICY CHOICES 113, 116–18 (Kavaljit Singh & Burghard Ilge eds., 2016) (explaining Indonesia's efforts in reforming its approach to BITs).

165. Eric David Kasenetz, Note, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 709–10, 714 (2010).

166. *See generally* Marco Tulio Montanes, *Introductory Note to Bolivia's Denunciation of The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 46 I.L.M. 969 (2007) (explaining the legal and broader implications of the denunciation).

a written notice of its denunciation of the ICSID Convention to the World Bank.[167] From 2008 to 2010, Ecuador also terminated nine BITs and declared six arbitration provisions unconstitutional in its Constitutional Court, including those with China, Finland, Germany, the United Kingdom, Venezuela, and the United States.[168] Furthermore, Ecuador called for the establishment of an alternative forum for investment arbitration in the region, claiming the then-operative system was biased towards investors.[169] In 2008, Venezuela gave notice that it would terminate its BIT with the Netherlands,[170] and in 2012 it also formally denounced the ICSID Convention and withdrew from the forum.[171] South Africa, another resource-rich country, terminated its treaties with twelve countries and replaced its BIT regime with new domestic legislation aiming to balance investor rights with the State's ability to make public policy.[172] Importantly, despite these changes, these countries have not fully dismantled their BIT regimes; most of the treaty documents in question contained a survival clause stipulating that treaty provisions remain in force ten to fifteen years

167. *See* Letter from Maria Espinosa Garcés, Foreign Relations, Commerce, and Integration Minister, Ecuador, to Ana Palacio, Secretary General, ICSID (Nov. 23, 2007) (on file with author).

168. *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, 2 UNCTAD IIA ISSUES NOTE 1 n. 3 (Dec. 2010), https://unctad.org/en/Docs/webdiaeia20106_en.pdf [https://perma.cc/Y5HR-N75A].

169. *See* Xavier Andrade Cadena & Marco Tulio Montanes, *Introductory Note to Ecuador's Notice Under ICSID Article 25(4)*, 47 I.L.M. 154, 157 (2008) (noting that then-President Correa declared that Ecuador will no longer be subject to regional or international bodies because they "are biased toward rich nations").

170. *International Investment Agreements Navigator: Netherlands–Venezuela, Bolivarian Republic of BIT (1991)*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2668/netherlands—-venezuela-bolivarian-republic-of-bit-1991- [https://perma.cc/26ZN-DMCU] (last visited Jan. 1, 2021).

171. *Venezuela Withdraws from ICSID*, SULLIVAN & CROMWELL LLP (Jan. 27, 2012), https://www.sullcrom.com/Venezuela-Withdraws-From-ICSID-01-27-2012/ [https://perma.cc/5QYX-WZPG].

172. *See generally* Lungelo Magubane, *Investment Protection Legislation in South Africa*, DLA PIPER (Nov. 5, 2018), https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/investment-projection-legislation-in-south-africa/ [https://perma.cc/V9K8-GDDY] (explaining South Africa's Protection of Investment Act 22 of 2015).

after the date of termination.[173] This survival clause allows investors to bring claims arising from investments made while the BIT was in force.

A final group of countries has taken a more gradual approach to reform. Peru, despite facing twenty-three investor claims to date,[174] distanced itself from the resource nationalism of its Latin American peers and instead set up domestic institutional structures to manage investment disputes.[175] Similarly, Chile and Mexico remain closely engaged with the investment regime, "albeit with greater clarifications and restrictions for the scope of key substantive provisions."[176]

International organizations have also contributed to reform efforts, both by supplementing state action and by broadening the debate on reform issues. In 2012, UNCTAD responded to challenges facing the current international investment regime by publishing the Investment Policy Framework for Sustainable Development.[177] Updated in 2015,[178] the document highlights how the current investment regime's inflexibility and lack of safeguards restrict countries' abilities to act upon unforeseen risks.[179] The framework points out how the lack of clear, detailed, and standardized language in agreements makes consistent interpretation by arbitration tribunals

173. *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties*, 2 UNCTAD, IIA ISSUES NOTE 9 (June 2017), https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf [https://perma.cc/V9K8-GDDY].

174. *Investment Dispute Settlement Navigator: Peru*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/165/peru [https://perma.cc/QU4W-X97E] (last visited Jan. 1, 2021).

175. *See* UNCTAD, BEST PRACTICES IN INVESTMENT FOR DEVELOPMENT: HOW TO PREVENT AND MANAGE INVESTOR-STATE DISPUTES: LESSONS FROM PERU 21–33 (2011), https://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf [https://perma.cc/9HXN-XSZX] (explaining Peru's State Coordination and Response System for International Investment Disputes).

176. BONNITCHA ET AL., *supra* note 21, at 228.

177. UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2012), https://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf [https://perma.cc/F4A8-HVZP].

178. UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf [https://perma.cc/NKH4-Z4ES] [hereinafter 2015 INVESTMENT POLICY FRAMEWORK].

179. *Id.* at 32.

a challenge and renders the regime unpredictable.[180] The updated document, therefore, proposes a set of strategic choices for reform that states should consider and advocates for broad reform of ISDS in new international investment agreements[181] to "ensure coherence between national policies and international law"[182] and align the international investment regime with the 2030 Agenda for Sustainable Development Goals.[183]

The landmark UNCTAD Reform Package for the International Investment Regime provides more than one hundred policy options for treaty clauses addressing five priority areas for sustainable development,[184] ten reform mechanisms that countries can use to modernize legacy treaties,[185] and guidance for ensuring overall investment policy coherence with sustainable development goals. Since 2012, over 150 countries have made efforts to devise sustainable development-oriented investment treaties in line with these suggestions.[186] In November 2019, at UNCTAD's High-Level IIA Conference, over eighty speakers from governments, regional and international organizations, businesses, civil society, and academia reviewed the state of investment treaty reform and identified paths to reform the current regime.[187]

180. *Id.* at 20.

181. *Id.* at 38–69.

182. *UN Upgrades International Investment Rules Reform Package*, UNCTAD (Oct. 25, 2018), https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1899 [https://perma.cc/U868-F43L] [hereinafter *UN Upgrades*].

183. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015). *See generally* 2015 INVESTMENT POLICY FRAMEWORK, *supra* note 178, at 49 (recognizing sustainability as a key goal).

184. These five priority areas are: safeguarding the right to regulate; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency. UNCTAD, UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME 22–24 (2018), https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf [https://perma.cc/DNJ6-XUQB].

185. *Id.* at 77–92.

186. *UN Upgrades*, *supra* note 182.

187. *High-level IIA Conference 2019*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/pages/1047/high-level-iia-conference-2019 [https://perma.cc/8289-P45J] (last visited Jan 1, 2021).

C. *When ISDS Bites the Developed World*

The backlash against the international investment regime has reduced the number of international investment agreements in force to 2,663 worldwide.[188] A recent series of cases brought against developed countries made both the developed and developing world question the legitimacy of ISDS, so that "a modified version of the Calvo Doctrine" is taking effect.[189]

The system remained vigorous so long as its inequities affected less powerful States, but as powerful States begin to suffer from regulatory restraints, they too are reconsidering some of the regime's earlier premises.[190] In 2011, Australia decided that foreign investors should only be granted national treatment and refused to privilege foreign businesses with greater legal rights.[191] The controversial case of *Philip Morris Limited v. Australia* moved the country farther away from the ISDS regime, as foreign investors challenged Australia's plain packaging tobacco legislation aimed at stymieing smoking rates.[192] The European Union has also joined the movement for reform in international investment policy. The negotiations of the TTIP and its relatively obscure ISDS provision caused Europe to question its participation in the ISDS system. Since the TTIP controversies, the European Union has addressed many of the issues in newly negotiated agreements which favor E.U. investment treaties granting foreign investors "the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, but not a higher level of protection"—a decision passed unanimously within the European Parlia-

188. *International Investment Agreements Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements#about [https://perma.cc/5PNW-2UU6] (last visited Jan. 1, 2021).

189. BONNITCHA ET AL., *supra* note 21, at 13.

190. Muthucumaraswamy Sornarajah, *Starting Anew in International Investment Law*, COLUM. FDI PERSP., July 16, 2012, at 1.

191. DEPT. OF FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (Apr. 2011), https://webarchive.nla.gov.au/awa/20110502020942/http://pandora.nla.gov.au/pan/126547/20110502-1209/www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html.

192. Press Release, Permanent Ct. Arb., Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia: Tribunal Publishes Redacted Version of Award on Jurisdiction and Admissibility (May 16, 2016), https://pcacases.com/web/sendAttach/1713 [https://perma.cc/NU8H-DKGK].

ment.[193] Germany, historically a proponent of international investment treaties, even went so far as to resist including investment arbitration in the TTIP.[194] Furthermore, the European Union actively launched efforts to replace ISDS with a multilateral investment court in new agreements, such as the Canada-European Union CETA, and potentially will move to incorporate these changes into existing agreements.[195] While this proposal is a welcome change, Van Harten warns that if ISDS is institutionalized in these new investment courts without addressing its key flaws, or if existing ISDS fora do not implement changes, then reform efforts will likely fail.[196]

The standard governance under the current investment regime first faltered when the United States, the original proponent of the investment protection system, began to retreat from its own model treaty. Since the Trade Act of 2002, the United States has applied the principle of "no greater rights" in trade and investment negotiations.[197] The Trans-Pacific Partnership negotiations also turned public opinion against the ISDS treaty provision, which progressive firebrand Senator

193. Council Regulation 912/2014, 2014 O.J. (L. 257/121).

194. Perrone, *supra* note 26.

195. *See, e.g.*, *The Multilateral Investment Court Project*, EUR. COMM'N (Dec. 21, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 [https://perma.cc/N2KS-98EX] (last updated Nov. 2020) (noting that the European Commission has been working to establish a Multilateral Investment Court since 2015); European Parliamentary Research Service , *Multilateral Investment Court: Overview of The Reform Proposals and Prospects*, at 4 (Jan. 28, 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf [https://perma.cc/4RCH-P4MC] (explaining that treaty parties may decide whether to apply the Multilateral Investment Court framework to existing treaties); MARC BUNGENBERG & AUGUST REINISCH, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT (2d ed. 2020) (noting that the "Court of Justice of the European Union decided that the ISDS mechanism provided for by the free trade agreement between the EU and Canada (CETA) is compatible with EU law").

196. Van Harten, *supra* note 112.

197. Trade Act of 2002, 19 U.S.C. § 3802(b)(3) (2002) (requiring trade negotiators to ensure "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice").

Elizabeth Warren called a "bad deal."[198] Senator Warren claimed that ISDS would "undermine U.S. sovereignty" by favoring multinational corporations and allowing them to "challenge U.S. laws—and potentially pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court."[199]

V. Foreign Investments in Mongolia: A Case Study

The energy and natural resource extractive industries—oil, gas, and mining—are among the sectors engendering the largest number of international investment disputes.[200] Existing literature largely focuses on Latin America and pays scant attention to Central Asia despite the variety of investment treaty disputes in the region. The following section discusses how foreign mining companies use the current investment regime in disputes with the government of Mongolia. Drawing on recent arbitration cases, the section critically examines the most controversial elements of investment treaties and the ISDS mechanism and illustrates how they undermine government regulation of extractive sectors to the detriment of the public interest and sustainable development.

198. *See* Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, Wash. Post (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html [https://perma.cc/F3WL-ZHE8].

199. *Id.*; *see also The U.S. –E.U. Free Trade Agreement: Tipping Over The Regulatory Barriers: Hearing Before the H. Comm. on Energy and Com., Sub-Comm. on Com., Mfg. and Trade*, 113th Cong. 21 (2013) (statement of Carroll Muffett, President and CEO, Ctr. for Int'l Env't L.) ("[T]here is no pretext for granting foreign investors superior rights to domestic firms or subjecting our judicial systems to tribunals empowered to put the American public in a lose-lose situation. The inclusion of such provisions would have a chilling effect on the future development of regulations for public health, safety and the environment in the E.U. and U.S.").

200. As of July 31, 2020, 1,061 known treaty-based ISDS cases had been lodged; among these cases, 171 cases are from the extractive industries, or more than sixteen percent of all cases, making this sector the second most disputed in international investment arbitration. *Economic Sector and Subsector*, UNCTAD Inv. Pol'y Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement [https://perma.cc/8N43-4R6Z] (last visited Jan. 2, 2021).

A. *Mine-golia*[201]

Mongolia, a landlocked Central Asian nation located between Russia and China, is the least densely populated country in the world.[202] Only 3.2 million people live in a desert steppe of almost 0.62 million square miles, an area approximately the size of Western Europe.[203] The country—a "sleepy nomadic ex-Soviet satellite"[204] —has existed at the margins of power in the international community since the fall of Chinggis Khan's empire in the fourteenth century.[205] Traditionally, it has been viewed as one of the most remote, impoverished, and backward countries in the world; one which "had known only nomadism and socialism, theocracy, and communism."[206] Rather than realign with either Russia or China after the collapse of state socialism in the 1990s, Mongolia sought to balance its relationship with its neighbors.[207] Following the advice of international financial institutions (IFIs), the country adopted a panoply of neoliberal political economy reforms required to receive financial assistance, including privatizing its vast mineral reserves.[208] The reforms brought Mongolia to international prominence as the final frontier of untapped mineral

201. Frank Langfitt, *Mineral-Rich Mongolia Rapidly Becoming "Mine-golia"*, NAT'L PUB. RADIO (May 21, 2012, 2:59 AM), https://www.npr.org/2012/05/21/152683549/mineral-rich-mongolia-rapidly-becoming-minegolia [https://perma.cc/8U9W-JAH2].

202. Jennifer Lander, *A Critical Reflection on Oyu Tolgoi and the Risk of a Resource Trap in Mongolia: Troubling the "Resource Nationalism" Frame*, 2 J. L., SOC. JUST. & GLOB. DEV. 1, 1 (2014).

203. *Mongolia*, WORLD BANK DATA, https://data.worldbank.org/country/Mongolia [https://perma.cc/F8HV-EJC2] (last visited Jan. 2, 2020); Lander, *supra* note 202, at 1.

204. Alicia Campi, *Mongolia's Quest to Balance Human Development in its Booming Mineral-Based Economy*, BROOKINGS INSTITUTION (Jan. 10, 2012), http://www.brookings.edu/research/opinions/2012/01/10-mongolia-campi [https://perma.cc/9FAX-ACPG].

205. See generally Charles R. Bawden, *Genghis Khan*, BRITANNICA, https://www.britannica.com/biography/Genghis-Khan/Legacy [https://perma.cc/W9PR-PDD5] (last updated Jan. 1, 2021) (summarizing the life and empire of Mongol ruler Genghis Khan).

206. James Anderson et al., *Competition and Privatization Amidst Weak Institutions: Evidence from Mongolia*, 38 ECON. INQUIRY 527, 527 (2000).

207. Jeffrey Reeves, *Resources, Sovereignty, and Governance: Can Mongolia Avoid the 'Resource Curse'?*, 19 ASIAN J. POL. SCI. 170, 172 (2011).

208. Lander, *supra* note 202, at 1.

wealth, estimated to constitute almost seventeen percent of the world's mineral reserves in 2019.[209]

Mongolia's transition to a stable democratic political system and a market-friendly economy has been widely perceived as one of the few success stories of post-socialist transition, particularly in contrast to its Central Asian neighbors, which "have settled in the 'foggy zone' [of] post-Soviet autocrac[y]."[210] Consequently, Mongolia's status as a new resource frontier has made it a tempting target for foreign direct investment (FDI), even though it lacks infrastructure.[211] Mongolia's two most significant mineral deposits, Oyu Tolgoi (copper and gold) and Ovoot Tolgoi (coal), are located in the South Gobi Desert only one hundred kilometers from the Chinese border, a major market.[212] Mongolia therefore seemed perfectly equipped to find a competitive niche in the global economy.

B. *From Khans to Capitalists: Mongolia's Wild Ride to a Free Market Economy*

After the collapse of the Soviet Union, Mongolia turned to IFIs, particularly the International Monetary Fund, the World Bank Group, and the Asian Development Bank, to access necessary funds that the Soviet Union could no longer provide.[213] This pivot ushered in a set of neoliberal measures that reformed the state-led economy into a free market economy.[214] These IFIs provided key guidance in setting up Mongolia's governance framework and mining regime in line with their activities in other developing countries. The main products of that framework were the 1997 Minerals Law and the 1993 and 2002 Foreign Investment Laws, which, at the

209. NAT'L DEV. AGENCY, YOUR GUIDE TO INVEST IN MONGOLIA: INVESTMENT GUIDEBOOK 2019 14 (2019), http://nda.gov.mn/backend/f/2019.pdf [https://perma.cc/B463-JB3V].

210. Lander, *supra* note 202, at 1.

211. *Id.* at 11–13.

212. *Id.* at 3, 12.

213. Morris Rossabi, *Will Mongolia Ever Escape the Shadow of its Soviet Past?*, WORLD POL. REV. (Sept. 12, 2017), https://www.worldpoliticsreview.com/articles/23121/will-mongolia-ever-escape-the-shadow-of-its-soviet-past [https://perma.cc/UQD5-XRX7].

214. *See generally* MORRIS ROSSABI, MODERN MONGOLIA: FROM KHANS TO COMMISSARS TO CAPITALISTS (2005) (discussing Mongolia's reforms and how its interactions with various international organizations influenced this process).

time, were among the most attractive FDI-related laws for foreign investors.[215]

In 1991, a set of Structural Adjustment Policies imposed far-reaching austerity measures, reducing public control over resources by privatizing state assets and downsizing and decentralizing the public sector.[216] By 1995, ninety-five percent of Mongolia's public assets in livestock, trade, and services had been privatized.[217] Furthermore, the IFIs created an institutional framework facilitating FDI to capitalize on mining as a principal revenue source for Mongolia.[218] This process entailed deregulating the mining sector, broadening private property rights, and implementing a corporate-friendly fiscal policy of low tax rates and mining royalties.[219] Policies to attract FDI were accompanied by currency devaluation and price liberalization.[220] These policies made Mongolia an ideal destination for mining firms—like BHP, Ivanhoe Mines, and, later, Rio Tinto—who were attracted by Mongolia's substantial mineral wealth and low state regulatory capacity over private enterprise, among other benefits.[221] Ever since, Mongolia has relied heavily on exporting natural resources to drive economic development. Resource extraction accounts for twenty-seven percent of Mongolia's GDP, nineteen percent of its state budget, eighty-eight percent of its exports, and four percent of its workforce.[222]

Mongolia's foreign investment policies led to catastrophic social and economic consequences: hyperinflation, increased public debt, soaring unemployment, a sharp decline in living standards, severe wage reduction, and increased inequality

215. Pascale Hatcher, *The Politics of Artisanal and Small-Scale Mining in Mongolia*, 1 THIRD WORLD THEMATICS 184, 186 (2016).

216. LANDER, *supra* note 202, at 91.

217. *Id.* at 93.

218. RHODANTE AHLERS ET AL., UNDERMINING MONGOLIA: CORPORATE HOLD OVER DEVELOPMENT TRAJECTORY 12 (2020), https://www.somo.nl/wp-content/uploads/2020/02/Undermining-Mongolia-EN.pdf [https://perma.cc/R4FP-FXZQ].

219. *Id.*

220. *Id.*

221. *Id.*

222. EUR. BANK FOR RECONSTRUCTION & DEV., MINING OPERATIONS IN MONGOLIA 5–6 (Feb. 2019), https://www.ebrd.com/documents/evaluation/mining-operations-in-mongolia-approach-paper.pdf [https://perma.cc/TL5F-U98K].

and poverty, among others.[223] And yet, despite Mongolia's very liberal investment law protecting the rights and property of foreign investors and generous tax incentives (e.g. tax exemptions and tax stabilization agreements), the country failed to attract significant FDI. When inbound FDI did arrive, it only created limited and unregulated employment and contributed little to either domestic manufacturing or poverty eradication.[224] Consequently, Mongolians saw their social welfare state dismantled, a development which clashed severely with the historical precedent of communal resource use by Mongolia's largely nomadic population.[225] To add insult to injury, the extraction of natural resources caused widespread environmental destruction and social disruption.[226]

Mongolia is the story of the nature and products of globalization, including the emergent movements which later resist it. Austro-Hungarian economic historian Karl Polanyi critiques

223. *See* ROSSABI, *supra* note 214, at 49–62 (2005) (discussing privatization and "shock therapy" in the context of Mongolian reform between 1990 and 1996).

224. SANCHIR JARGALSAIKHAN, SUSTAINABLE DEV. STRATEGY INST., INVESTMENT TREATIES BETWEEN MONGOLIA AND EU STATES: IMPLICATIONS FOR MONGOLIA'S DEVELOPMENT PROJECTS 6, 8 (Jan. 14, 2016).

225. AHLERS ET AL., *supra* note 218, at 12–13.

226. *See, e.g.*, FIDANKA MCGRATH ET AL., SPIRITED AWAY—MONGOLIA'S MINING BOOM AND THE PEOPLE THAT DEVELOPMENT LEFT BEHIND (Dec. 2011), https://bankwatch.org/sites/default/files/spirited-away-mongolia-mining.pdf [https://perma.cc/Y9WY-7R5Q] (noting that mining operations caused air pollution, water depletion, resettlement issues, etc.); SUKHGEREL DUGERSUREN ET AL., WHEN THE DUST SETTLES: IMPACTS OF THE TAYAN NUUR IRON ORE MINE ON NOMADIC HERDERS' LIVES IN THE GOBI ALTAI MOUNTAINS OF MONGOLIA 2 (2014), https://bankwatch.org/sites/default/files/when-dust-settles-AltainKhuder.pdf [https://perma.cc/8VXE-S39F] (finding that the Tayan Nuur iron ore mine caused environmental and social harms to Mongolian nomadic herders, such as dust pollution, water depletion and contamination, increased risks to human and animal health, fragmentation of pasture, displacement, and intimidation and harassment); Erdenechimeg Erdenebayar et al., *Environmental Injustice and Childhood Lead Exposure in Peri-Urban (Ger) Areas of Darkhan and Erdenet, Mongolia*, 19 BMC PUB. HEALTH 163 (2019) (finding that mining operations contributed to childhood lead poisoning in Mongolia); UNICEF, MINING-RELATED IN-MIGRATION AND THE IMPACT ON CHILDREN IN MONGOLIA (2017), https://www.unicef.org/mongolia/media/826/file/Mining-related%20in-migration%20and%20the%20impact%20on%20children%20in%20Mongolia.pdf [https://perma.cc/6GRW-RTET] (noting that Mongolian children suffer "family separation due to parents working in the mines and extended periods without adult supervision").

the operation of the neoclassical dis-embedded, self-regulating market, noting the historic incapacity of markets to satisfy human needs and the social "dislocation" that results from subordinating society to the market economy.[227] Polanyi argues that the State actively constructs and maintains the market through political and legal institutions to ameliorate the effects of social "dislocation" associated with the commodification of labor and the environment, all within the framework of market exchange.[228] One line of scholarship argues that the frameworks the IFIs pushed in Asian societies advocated a particular "politics of mining" in which the State retreats in favor of private sector monitoring and regulation.[229] These neoliberal politics, which privilege global market interests, became internalized in Mongolia and elsewhere through the disciplinary mechanisms of debt financing and FDI dependence.[230] Yet there is no empirical evidence to support the assumption that FDI is beneficial for a country's development, or that liberal policies attractive to multinational corporations will necessarily have positive economic effects.[231] Indeed, the reality Mongolia faces after adopting these policies negates this hypothesis: The country feels the negative impacts of mining and the IFIs' strict adjustment policies and is unable to sufficiently benefit from the structures of the global political economy.

Under the banner of Sustainable Development Vision 2030, Mongolia seeks to diversify its economy to mitigate its boom and bust cycles. However, the nation's decades-long focus on mining and FDI-driven growth has left it with crippling

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227. *See* KARL POLANYI, THE GREAT TRANSFORMATION 36 (Beacon Press 2d ed. 2001) (1944) (arguing that economic progress is achieved at the price of social dislocation, particularly in the context of the Industrial Revolution in England).

228. *Id.* at 59–60, 71–80 (claiming that "social relations are embedded in the economic system," and that certain measures and policies are "integrated into powerful institutions designed to check the action of the market relative to labor, land, and money").

229. Pascale Hatcher, *Taming Risks in Asia: The World Bank and New Mining Regimes*, 42 J. CONTEMP. ASIA 427, 428 (2012).

230. LANDER, *supra* note 202, at 104.

231. *See* Laura Alfaro et al., *FDI, Productivity and Financial Development*, 32 WORLD ECON. 111 (2009) (discussing that evidence for FDI generating positive effects in host countries is ambiguous).

debt and huge budget deficits.[232] The national poverty rate reached 28.4% in 2018, and fifteen percent of the population sits just above the national poverty line.[233] These statistics raise serious concerns about the extent of IFIs' influence on Mongolia's development trajectory and how that may affect the wellbeing of its population in the years to come.

C. *Mine-golia and Investor-State Arbitration*

Mongolia is party to more than forty BITs,[234] and any endeavor by the Mongolian government to amend its laws or renegotiate its license contracts with mining companies to, for example, tighten environmental protection or bind foreign investors to local laws, risks challenge by foreign investors through the ISDS dispute mechanism. Many potentially beneficial policies face the chilling possibility of an ISDS challenge. These may include policies aimed at increasing domestic value added, e.g. requiring mineral commodities be processed before export; policies aimed at increasing domestic industrial development, e.g. new regulatory frameworks requiring foreign operators to contribute towards those aims; or policies aimed at directing mineral wealth toward economic diversification and environmentally and socially sustainable development.[235]

To date, five known investor-state arbitration cases have been brought against Mongolia,[236] four of which originate in the mining and extractive sector. Three cases in particular illustrate key problems within the current investment protection regime, such as the challenges ISDS interference poses to state sovereignty, regulation of the public interest, and sustainable

232. AHLERS ET AL., *supra* note 218, at 7.

233. NATIONAL STATISTICS OFFICE OF MONGOLIA & WORLD BANK, MONGOLIA POVERTY UPDATE 2018 12 (2020), http://1212.mn/BookLibrary Download.ashx?url=poverty_report_2018_ENG.pdf&ln=en] [https://perma.cc/6B2C-G4GX].

234. *Country Navigator: Mongolia*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/country-navigator/142/Mongolia [https://perma.cc/7ABJ-GETM] (last visited Jan. 2, 2021).

235. KNOTTNERUS & OLIVET, *supra* note 106, at 4.

236. These cases are: *Alstom Power v. Mongolia* (2004); *Paushok v. Mongolia* (2007); *Beijing Shougang v. Mongolia* (2010); *Khan Resources v. Mongolia* (2011); and *Munshi v. Mongolia* (2018). *Country Navigator: Mongolia*, *supra* note 234.

development. After reviewing these cases, the following section provides policy suggestions derived from historical precedent and models in other countries for Mongolia to consider as it navigates reform within the current ISDS framework. These examples may also be useful for other Central Asian nations facing similar challenges.

1. Alstom Power v. Mongolia *(2004)*

Mongolia first became a respondent State in an international investment arbitration case in March 2004, when the Italian subsidiary of the French power company Alstom filed under the terms of both the Italy-Mongolia BIT and the Energy Charter Treaty.[237] The case centered around a thermal energy station project undertaken by the Italian investor in Mongolia.[238] By March 2006, both parties had settled their dispute and discontinued arbitration.[239] While very little is known about the details of the investment claim—the filings, proceedings, and the terms of settlement are not publicly available—the fact that a settlement was reached usually means that the investor was compensated monetarily or by legal or regulatory changes to accommodate their demands. The exact concessions made by Mongolia are not known. Increasing the transparency of the claim settlements may address this one highly problematic aspect of ISDS.

2. Paushok v. Mongolia *(2007)*

In 2007, the Mongolian government became subject to another international investment arbitration case, filed this time by a Russian gold mining company.[240] KOO Golden East-Mongolia (GEM), a company controlled by Russian national Sergei Paushok, was the second largest gold mining company in Mongolia as of November 2008, with the scale of the company's operations including five open pit mines, fifty-two ex-

237. *Case Details: Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia (ICSID Case No. ARB/04/10)*, ICSID, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/04/10 [https://perma.cc/6YDR-LBK3] (last visited Jan. 2, 2021).
238. *Id.*
239. *Id.*
240. Paushok v. Government of Mong., Award on Jurisdiction and Liability, ¶¶ 1–4, 10 (Apr. 28, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf [https://perma.cc/9WGV-7WK4].

ploration and production licenses, and 1470 employees (including 700 Mongolian nationals).[241] The company extracted approximately four tons of chemically pure gold in 2006 alone, and extracted over twenty-five tons over the course of its operations in Mongolia.[242]

The claim was filed after the Mongolian Parliament introduced a new sixty-eight percent Windfall Profit Tax on any gold sales at prices exceeding five hundred dollars per ounce in May 2006,[243] when gold prices were skyrocketing. Mongolia had also made amendments to its Minerals Law, which imposed a high Foreign Workers Fee amounting to ten times the minimum monthly salary for each foreign national a mining company employed above ten percent of its workforce.[244] Mongolia's intention with these efforts was to boost the public budgets available for economic diversification and sustainable development and to protect local jobs within the mining sector.

In the arbitration proceedings, GEM claimed that these new measures constituted a breach of its rights under the Russia-Mongolia BIT and opposed the new tax and the government's new labor rules, citing a break with "legitimate expectations" and a violation of the company's right to FET and non-discrimination.[245] Mongolia raised various counterclaims concerning the unpaid windfall profit taxes and foreign worker fees as well as the foreign company's circumvention of Mongolia's tax laws.[246]

In its award, the Tribunal dismissed many of the investors' claims against Mongolia due to lack of jurisdiction.[247] In a rare victory for the respondent state, the Tribunal did not find a breach of any BIT provision with respect to the investors' main claim against the enactment and enforcement of the Windfall Profit Tax and boldly affirmed that legislative acts "are not be-

241. *Id.* ¶ 95.
242. *Id.*
243. *Id.* ¶¶ 103–04.
244. *Id.* ¶ 109; Law of Mongolia on Minerals (Revised), art. 43, http://www.jcm-mongolia.com/wp-content/uploads/2015/11/minerals.pdf [https://perma.cc/UGM4-ML96].
245. Paushok v. Government of Mong., Award on Jurisdiction and Liability ¶¶ 258, 352–53.
246. *Id.* ¶¶ 261–66.
247. *Id.* ¶¶ 427, 470, 501

yond the reach of bilateral investment treaties," meaning an investment treaty is not automatically breached because a legislative act may be considered "ill-conceived, counter-productive, or excessively burdensome."[248] The ruling upheld that in the absence of more concrete guarantees, investors are not entitled to legitimately expect the stability of Mongolia's tax regime. Notably, the Tribunal reasoned that foreign investors could not expect that tax rates would not rise and should have been aware that "significant modification of taxation levels represents a serious risk" in host States at early stages of economic and institutional development.[249] The Tribunal also dismissed claims that the foreign workers fees were excessive, discriminatory, or arbitrary.[250] However, the Tribunal did hold that the Mongolian Central Bank's seizure of GEM's gold reserves for the purpose of increasing the country's currency reserves without permission from the investors constituted a violation of the investors' entitlement to FET under the Mongolia-Russia BIT.[251] The determination of damages remains pending.[252]

Even though the Tribunal dismissed most of the investors' claims, the investment protection framework still circumvented Mongolian domestic courts, and unelected and unaccountable arbitrators may ultimately decide the legitimacy and proportionality of a sovereign State's public policy measures. Arbitrators often fail to exercise judicial self-restraint and shape international legal standards according to their vision of how the world should operate,[253] a vision which neither prioritizes public interest nor defers to the logic of host State legislators in their exercising broad discretion when interpreting treaty rules.[254]

248. *Id.* ¶ 298–99.
249. *Id.* ¶ 302.
250. *Id.* ¶¶ 363–74.
251. *Id.* ¶ 596.
252. *Id.* ¶ 597.
253. EBERHARDT & OLIVET, *supra* note 149, at 36.
254. *See* William W. Park & Guillermo Aguilar Alvarez, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 394 (2003) (noting that "arbitrators may decide differently than would national judges"); Sebastian Perry, *Arbitrators and Human Rights*, GLOB. ARB. REV. (June 13, 2011), https://globalarbitrationreview.com/arbitrators-and-human-rights [https://perma.cc/37XD-LYVB] (quoting German arbitrator Karl Heinz Böckstiegel as saying "tribunals should decide the case—no less,

3. Khan Resources v. Mongolia *(2011)*

The more recent claim of *Khan Resources v. Mongolia* awarded a uranium mining group more than eighty million dollars in 2015 for Mongolia's unlawful expropriation of the company's stake in the Dornod province in violation of the Energy Charter Treaty.[255] Damages amounted to roughly sixteen percent of Mongolia's 2015 education budget, which was already insufficient to finance teacher training and new educational programs.[256]

This case highlights the highly problematic practice of treaty-shopping in investment arbitration. In theory, the Canadian-registered Khan Resources should not have been able to file a direct ISDS claim against Mongolia because the two countries have not concluded a BIT. In practice, however, Khan Resources used its reach as a multinational corporation and filed its claim through an offshore holding company in the Netherlands.[257] In a world where multinational corporations manage their global supply chains in one country, invest in research and development in a second, and manufacture their wares in third or fourth countries, nationality is no longer clear, which makes determining which investments are to be protected under which definitions of legacy investment agreements difficult.[258] Multinational corporations then take advantage of this increased complexity to avoid government intervention.[259]

D. *Reform Recommendations*

1. *Reform of the Investment Treaty Regime*

In the past decade, many different stakeholders have proposed reforms of the current international investment regime. Among these proposals, the 2010 Osgood Hall Public Statement on International Investment Law is particularly noteworthy: The brainchild of a group of international legal scholars seeking to reorient the law towards human development and

no more. Arbitrators have not been selected to develop the law of the world").

255. KNOTTNERUS & OLIVET, *supra* note 106, at 5.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

environmental sustainability, the Public Statement expresses concern for the harm that the current international investment regime has done to public welfare.[260]

Other reforms attempt to ensure that the investment regime does not limit the scope of legitimate host State public welfare policymaking. Mongolia could implement these reforms by including policy carveouts or protections aimed at excluding certain sectors, policy objectives, or government tools from the scope of a treaty or ISDS mechanism. The 2015 China-Australia Free Trade Agreement is an example of this in practice: Both parties stipulate that certain measures will not be the subject of an ISDS claim if they are for legitimate objectives of public health, safety, the environment, public morals, or public order.[261]

The principle of reciprocity might provide another avenue to ISDS reform. Under this principle, the legal rights that foreign investors are granted must be matched by obligations that investors must discharge in their local operations, which should be integrated organically into the national sustainable development plans of the host State. Foreign investors should also be prevented from abusing their market power in the host State and should be required to comply with existing international standards, including "the anti-corruption obligations detailed by the OECD Convention, standards based on the U.N. Guiding Principles on Business and Human Rights, and other global human rights norms and standards."[262] The 2016 Draft Pan African Code provides an excellent example of investor obligations, requiring investors to (1) adhere to "socio-political obligations," including "respect for national sovereignty and observance of domestic laws, regulations and administrative practices, respect for socio-cultural values, noninterference in internal political affairs, noninterference in intergov-

260. Gus Van Harten et al., *Public Statement on the International Investment Regime*, YORK UNIV. OSGOODE HALL L. SCH. (Aug. 31, 2010), https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ [https://perma.cc/Q5YN-2A2A].

261. *See Australia–China Free Trade Agreement*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 Dec. 2015) arts. 9.11(4)–(6).

262. EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 107 (2018), http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf [https://perma.cc/C9TP-4HP3].

ernmental relations, and respect for labor rights;" (2) refrain from bribery; (3) observe corporate social responsibility obligations; (4) use natural resources in a responsible manner; and (5) observe business ethics and human rights.[263] However, it should be noted that while imposing investor obligations is a welcome first step, it may still run the risk of entrusting investment tribunals with excessive authority to determine whether investors have violated their obligations.[264]

2. *Reform of Investment Protection Beyond ISDS*

a) *Enhancing Domestic Legal Systems and Local Remedies*

To address the issue of private arbitral tribunals deciding the legitimacy and proportionality of a sovereign State's public policy measures, as illustrated in *Paushok v. Mongolia*, the domestic legal system of the host state could be designated as the means through which disputes with the host government are resolved. This form of dispute resolution can be specified in an investment treaty by including clauses that require foreign investors to exhaust local remedies before bringing their claim to an international tribunal. Under this framework, domestic judicial systems would be the "primary fora for disputes involving claims by foreign investors, and investor-state tribunals would provide an additional layer of protection against any deficiencies in domestic legal processes."[265] This design would not be completely novel—early investment treaties contained this requirement, but most modern BITs do not.[266] Brazil and

263. *See* African Union Comm'n, Draft Pan-African Investment Code, arts. 20–24 (2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf [https://perma.cc/YVZ2-DUXH].

264. AISBETT ET AL., *supra* note 262, at 106.

265. Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT'L L. 1, 7 (2015).

266. Some of the treaties that include exhaustion of local remedies clauses are: Agreement Between the Government of the Republic of Korea and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investment, S. Kor.-Indon., art. 9(2), Feb. 15, 1991; Agreement Between the Government of Romania and the Government of Republic of Turkey on the Reciprocal Promotion and Protection of Investments, art. 6(4), Jan. 24, 1991, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2986/download [https://perma.cc/VK35-3KS3]; Agreement Between the Government of the Hashemite Kingdom of

South Africa both attract significant foreign direct investment and primarily use this form of dispute resolution.[267]

One common justification for retaining ISDS is that the national court systems of host States are incapable of fairly addressing claims by foreign investors. UNCTAD has observed, however, that domestic reforms aimed at fostering sound legal institutions can remedy some of the institutional deficiencies which the ISDS mechanisms were designed to address.[268] There are several reasons why using the domestic legal system will offer both a claimant investor and a respondent government fairer access to justice. The central function of the exhaustion clause is to protect the host State's legitimate jurisdiction and the "sovereignty that States are entitled to under international law,"[269] and to avoid unnecessary encroachment by international arbitral tribunals.[270] Domestic legal systems are embedded within their societies and are thus better able to weigh the asymmetries between private investor interests and public interests such as human and environmental rights. Finally, use of domestic legal systems reduces the procedural advantages that foreign investors have over host states and other constituencies, including domestic investors, environmental

Jordan and the Government of Romania on the Mutual Promotion and Protection of Investments, art. 8(3), July 2, 1992, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1752/download [https://perma.cc/DM9R-6B2G]; Agreement Between the Government of the United Arab Emirates and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments, art. 11(2), Nov. 20, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/243/download [https://perma.cc/HX3Z-VK4U].

267. *See* Paulo Cavallo, *Learning from Brazil's Bilateral Investment Treaties*, COLUM. FDI PERSP., Jan. 27, 2020, http://ccsi.columbia.edu/files/2018/10/No-270-Cavallo-FINAL.pdf [https://perma.cc/87CM-22KD] ("Brazil became the example that a major host country does not need BITs to attract FDI if it has a strong economy and proper domestic protections for foreign investors."); PUBLIC CITIZEN, TERMINATION OF BILATERAL INVESTMENT TREATIES HAS NOT NEGATIVELY AFFECTED COUNTRIES' FOREIGN DIRECT INVESTMENT INFLOWS 2 (2018), https://www.citizen.org/wp-content/uploads/pgcw_fdi-inflows-from-bit-termination_finaldraft.pdf [https://perma.cc/TH8N-GXH8] (noting that FDI to South Africa increased after the termination of 20 BITs).

268. UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 154 (2015), https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf [https://perma.cc/9MSU-BDA8].

269. Porterfield, *supra* note 265, at 5.

270. AISBETT ET AL., *supra* note 262, at 120.

organizations, and labor unions that "lack comparable access to international dispute settlement processes."[271] These appeals to local remedies help strengthen and integrate the domestic and international standards for investor protection.[272]

Rule of law requires that legal standards be sufficiently clear so as to be understood by those subject to their rules. Encouraging the resolution of foreign investment disputes through domestic courts in host States with less developed legal systems would "promote the rule of law by helping to clarify relevant domestic legal standards" applicable to both foreign and domestic investment, including the regulatory approval procedures and criteria for granting licenses and permits for resource extraction, as well as the "rules governing the vesting of development or resource extraction rights."[273]

The exhaustion requirement would also give arbitral tribunals the benefit of domestic courts' characterization of the relevant domestic law and clarification of the factual record.[274] "Many investment disputes turn on the extent to which changes in regulatory policy interfere with an investor's 'legitimate expectations' about the value of an investment."[275] But an investor's legitimate expectations cannot be made clear without understanding the relevant facts and the legal framework in which the investment was made, and domestic courts are better suited than international investment tribunals to judge these facts and legal principles.[276]

Certain criteria must be satisfied for the exhaustion requirement to be effective. Given the tendency of arbitrators to bypass local remedies requirements, exhaustion clauses must explicate under what conditions these provisions have been satisfied.[277] In addition, an exhaustion requirement should not be limited to an unrealistically short time frame, such as the eighteen-month period provided for in some BITs.[278] For-

271. *Id.*
272. *Id.*
273. Porterfield, *supra* note 265, at 5–6.
274. Aisbett et al., *supra* note 262, at 120.
275. *Id.*
276. *Id.*
277. *Id.*
278. The exhaustion clause generally imposes a very short time for the investor to pursue their claim in the host state. For instance, "the 1983 BLEU–Rwanda BIT expressly requires exhaustion of administrative and judi-

eign investors should be required to pursue domestic remedies for a period of time reasonable to accommodate the procedures of a domestic legal system. If a time limit needs specification, it should not be shorter than the average four-year duration of investor-state proceedings, and the investor should be barred from bringing investor-state claims during this period.[279] Under the 2015 Indian Model BIT, for example, investment disputes must be submitted to host State courts or administrative bodies for at least five years to satisfy the exhaustion requirement.[280] "Any exceptions to the local remedies rule should be narrowly drafted to cover only those circumstances in which attempts to pursue local remedies would be futile."[281]

b) *Political Risk Insurance*

Recent academic writings propose various market-based solutions for investors working in risky and high-return environments to help rebalance investor rights with state sovereignty in achieving public welfare objectives. Political risk insurance is a possible answer, particularly for investors who have concerns regarding the impartiality of the host State's domestic courts or political instability.[282] In some cases, the risks covered by political risk insurance can exceed the protections

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cial remedies, but at the same time provides that the requirement 'cannot be invoked' after eighteen months from the investor's written notification of the dispute," and "[t]he 1975 France–Morocco BIT (terminated in 1999) required [exhaustion of local remedies] as a condition to ICSID arbitration, but providing that the condition would 'disappear' after two years of the date of first referral to local courts." MARTIN DIETRICH BRAUCH, IISD BEST PRACTICES SERIES: EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL INVESTMENT LAW 9–10 (2017), https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf [https://perma.cc/9BAN-YPZR].

279. Porterfield, *supra* note 265, at 11.

280. India Model BIT, *supra* note 163, art. 15.2.

281. Porterfield, *supra* note 265, at 11.

282. *See generally* Robert Ginsburg, *Political Risk Insurance and Bilateral Investment Treaties: Making the Connection*, 14 J. WORLD INV. & TRADE 943, 976 (2013) ("The long tenor of cross-border projects exposes investors not only to shifts in policy by incumbent host governments but also to subsequent regimes that often win elections based on campaign promises to sever preexisting ties with foreign investors.").

offered by ISDS in a BIT.[283] There are different types of political risk insurance, including government sponsored insurance, insurance backed by international bodies, such as the Multilateral Investment Guarantee Agency (a member of the World Bank Group), and private insurance.[284] It protects foreign investors who wish to underwrite any costs that may be incurred as a result of political changes within the host state by providing them with financial compensation for at least some of the same risks covered under investment treaties, including unfair or discriminatory treatment or expropriation.[285] Political insurance institutions use political and legal mechanisms to press states into complying with their commitments to investors.

There recently appears to be a renewed interest in returning to market mechanisms. In renegotiating NAFTA, for example, U.S. Trade Representative Robert Lighthizer contended that U.S. investors should rely on political risk insurance if they are concerned about investment risk.[286] This option is especially viable for large investors that bring the most successful ISDS claims, as they are better positioned to purchase political risk insurance.[287] Given that not all political

283. *See* Valentin Jentsch, *The Role of Bilateral Investment Treaties (BITs) in Switzerland: Importance and Alternatives from an Entrepreneurial Perspective* 3–5 (Univ. St. Gallen L. Sch., Working Paper No. 2009-02, 2009) (listing risks covered by political risk insurance and additional areas of coverage).

284. *See generally* Lauge Skovgaard Poulsen, *Political Risk Insurance and Bilateral Investment Treaties: A View from Below*, COLUM. FDI PERSP., Aug. 2, 2010, at 1–3, http://ccsi.columbia.edu/files/2014/01/FDI_27.pdf [https://perma.cc/S98K-QVM7] (reviewing the different forms of political risk insurance in relation to BITs).

285. Kenneth W. Hansen, *Managing Political Risks in Emerging Market Investment*, 18 TRANSNAT'L LAW. 77, 78–79 (2004).

286. Phil Levy, *Critique of NAFTA Provision Highlights Team Trump's Misconceptions on Investment Abroad*, FORBES (Oct. 23, 2017), https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/?sh=7c26b8e370b4 [https://perma.cc/5JFA-BUS2].

287. *See* Gus Van Harten & Pavel Malysheuski, *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants* 1 (Osgoode Legal Stud., Research Paper No. 14, 2016), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?refererHTtps://www.google.com/&httpsredir=1&article=1136&context=olsrps [https://perma.cc/WZ23-2ZYH] (finding that "companies with over USD1 billion in annual revenue and individuals with over USD100 million in net wealth received about 94.5% of the aggregate compensation (93.5% if pre-award interest is included) ordered by first-instance ISDS tribunals").

risk policies provide the same financial remuneration as a successful claim in the current ISDS process, it is often suggested that investors use both ISDS and political risk insurance to insulate their investments from political risks.[288]

c) *Increasing Transparency, Independence, and Accountability*

Another ISDS reform should focus on increasing the transparency of arbitral proceedings and awards to tackle the issues seen in *Alstom Power v. Mongolia* and *Khan Resources v. Mongolia*. Transparency is essential to ensure citizens' rights to access information, give people a voice in issues that interest and affect them, and guarantee public confidence in the fairness of the dispute resolution process. The current ISDS regime retains many features of "blanket confidentiality," meaning that the existence of a case, the identity of the arbitrators, and the text of issues, arguments, and awards are all unavailable to the public.[289] The lack of any mechanism for public participation raises profound concerns in cases where private and unelected tribunals adjudicate public law and policy and issue internationally enforceable orders and awards for vast amounts of public funds. Under the current regime, much of the important information in any given case is known only to arbitrators, clients, and counsel. Accordingly, an auditor general or legislature, let alone other policymakers, the media, civil society, or the affected citizens, may be "unable even to identify important decisions affecting their government."[290] This secrecy can have the effect of creating private law known only to insiders and preventing those who are affected by the dispute from obtaining the information required to scrutinize such awards, which is particularly significant in cases when arbitral tribunals evaluate government regulatory decisions of public importance.[291] This is quite different from the "open nature of international dispute settlement in other commercial and non-commercial areas where government conduct is

288. *See* Ginsburg, *supra* note 282, at 943 (explaining how companies contemplate a combination of both tools to mitigate exposures to political perils).

289. Gus Van Harten, *A Total Lack of Transparency*, ISDS PLATFORM (Oct. 24, 2011), http://isds.bilaterals.org/?a-total-lack-of-transparency&lang=en [https://perma.cc/5HVH-M5SA].

290. *Id.*

291. AISBETT ET AL., *supra* note 262, at 121.

at issue, including at the World Trade Organization, the International Court of Justice, and in human rights bodies."[292]

For states like Mongolia to ensure transparency in the different stages of the arbitration process, they can directly incorporate transparency provisions in their investment treaties to amend, clarify, or complete preexisting institutional arbitration rules.[293] These clauses may also be included to ensure that the rules on transparency are binding on the disputing parties and may not be derogated from. For instance, states in their model agreements can require the treaty parties to provide the public with information about the commencement of proceedings; such a provision exists in the 2004 U.S. Model BIT.[294] Also, investment agreements can explicitly require that certain documents and final decisions and awards be made public,[295] allow open hearings,[296] and accept amicus briefs from non-parties.[297] Exceptions to transparency would apply

292. NATHALIE BERNASCONI-OSTERWALDER & LISE JOHNSON, TRANSPARENCY IN THE DISPUTE SETTLEMENT PROCESS: COUNTRY BEST PRACTICES 1 (2011), https://www.iisd.org/system/files/publications/transparency_dispute_settlement_processes.pdf [https://perma.cc/QM34-CCGV].

293. *Id.* at 2.

294. U.S. Model Bilateral Investment Treaty, art. 29(1), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/N5Y8-N3AT] [hereinafter U.S. Model BIT].

295. *See, e.g.*, Australia-Chile Free Trade Agreement, art. 10.22(1)(a)-(e), Austl.-Chile, July 30, 2008, 2694 U.N.T.S. 3 [hereinafter Australia-Chile FTA] (requiring that the respondent shall make various documents available to the public, including notices of intent and arbitration; pleadings; memorials; briefs, minutes or transcripts of hearings; orders, awards, and decisions of the tribunal); U.S. Model BIT, *supra* note 294, art. 29(1)(e) (stating that respondent shall make "orders, awards, and decisions of the tribunal" publicly available).

296. *See, e.g.,* Canada-Columbia Free Trade Agreement, art. 830(2), Can.-Colom., Nov. 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng [https://perma.cc/9VR7-PYNC] ("Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information.").

297. *See, e.g.*, Australia-Chile FTA, *supra* note 295, art. 10.20(2) ("The tribunal shall have the authority to accept and consider *amicus curiae* written submissions that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party.").

to the protection of confidential business information, state secrets, national security, or other privileged or protected information.[298]

Additionally, a number of reforms can be adopted to further strengthen the independence and accountability of an international system for settling investment disputes. One possible solution is to create an arbitrator selection system under which arbitrators will be selected from a "roster of permanent arbitrators, under tenure for a given number of years, that would help insulate arbitrators from economic and political pressures."[299] Alternatively, institutions could appoint all arbitrators, solving the issue of party-appointments and preventing arbitrators from "also serving as counsel in investment treaty arbitrations for a certain period of time."[300]

d) *Curbing Investment Treaty Shopping*

To address the issue of treaty shopping that occurred in *Khan Resources v. Mongolia*, states can redefine investors in their treaty agreements through renegotiating their existing investment treaties. States may abandon the place of incorporation requirement and instead define the investor's corporate nationality by requiring a legal entity to have substantial business activity, its seat, or a genuine link to the state to qualify as an investor under the investment agreements.[301] For example, in 2008 Venezuela terminated and started to renegotiate its BIT with the Netherlands, whose extensive definitions of investment and investor/national in its BITs have encouraged treaty

298. BERNASCONI-OSTERWALDER & JOHNSON, *supra* note 292, at 12–14.

299. NATHALIE BERNASCONI-OSTERWALDER & DIANA ROSERT, INVESTMENT TREATY ARBITRATION: OPPORTUNITIES TO REFORM ARBITRAL RULES AND PROCESSES 15 (2014), https://www.iisd.org/system/files/meterial/investment_treaty_arbitration.pdf [https://perma.cc/U4K3-V4AH].

300. *Id.*

301. *See, e.g.*, The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, art. 1(d)), Arg.-Qatar, Nov. 26, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3706/argentina—-qatar-bit-2016- [https://perma.cc/84KQ-4Y29] (clarifying that "a company formed under the legislation of such Contracting Party shall not be deemed an 'investor' under this treaty where it does not conduct substantial business activities within the territory of such Contracting Party").

shopping.[302] However, this straightforward solution is not without costs, as renegotiating a BIT can be time consuming and burdensome.[303] An alternative solution to treaty shopping would be the inclusion of denial of benefits clauses in investment agreements. Rather than including requirements in the treaty definition of an investor, denial of benefits clauses entitle the host State to refuse the benefits of the treaty to a shell company that has no substantial business activities in the country under whose laws it is legally constituted.[304] While the discussion of the denial of benefits clause can be traced back to the 1950s, these clauses are more relevant today than ever before, and they are increasingly included in BITs,[305] model BITs,[306] FTAs, and other treaties.[307]

VI. Conclusion

Historically, developing countries and states in transition have been presented with "take-it-or-leave-it" investment treaty offers from developed countries and major capital exporters. In theory, these treaties protect foreign investors from undue

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302. Zeynep Tekin, Comment, *International Investment Law and Treaty Shopping Through Corporate Nationality Structuring*, U. Pa. J. Int'l L. Online (Apr. 16, 2017), https://pennjil.com/international-investment-law-and-treaty-shopping-through-corporate-nationality-structuring/ [https://perma.cc/ME7G-3PAF].

303. *Id.*

304. Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Bus. L.J. 225, 302 (2015).

305. Agreement Between the Hashemite Kingdom of Jordan and the Republic of Austria for the Promotion and Protection of Investments, art. 10, Austria-Jordan, Jan. 23, 2001, 2175 U.N.T.S 155; Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, art. 21, Isr.-Japan, Feb. 1, 2017, https://www.mofa.go.jp/files/000224705.pdf [https://perma.cc/ZQ78-BNEC].

306. U.S. Model BIT, *supra* note 294, art. 17; Agreement Between Canada and _____ for the Promotion and Protection of Investments, art. 19, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download [https://perma.cc/H8Q9-TDZN].

307. North American Free Trade Agreement, art. 1113, Dec. 17, 1992, 32 I.L.M. 289 (1993); Central America-United States Free Trade Agreement, art. 10.12, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [https://perma.cc/K5J9-6WDF]; Energy Charter Treaty, art. 17, Dec. 17, 1994, 2080 U.N.T.S. 95.

host State influence, but in practice they privilege foreign investors' interests over those of the host State. That incongruity has precipitated a legitimacy crisis within the current investment regime, as the imbalance between public rights and private interests within legacy BIT frameworks imposes increasingly higher costs on sovereign state action. As the number of investor claims against sovereign states grows, public policy decision making is paralyzed and regulations across a wide array of functions—from taxation to tobacco-package requirements to hazardous waste disposal—are impaired. The current system's failure to balance the rights and responsibilities of foreign investors is a result of vague treaty terms, lack of transparency within the arbitration process, systemic loopholes in the globalized supply chain allowing investors to treaty-shop in investment arbitration, and conflicts of interest. These deficiencies have produced substantial monetary settlements for foreign investors who bring claims against host States, restricting the host State's ability to regulate effectively.

The "perverse shift in bargaining power" toward powerful private actors, such as multinational corporations has the potential to create "uncertain but potentially crippling public liabilities."[308] Certain states and international organizations, such as India, Indonesia, some EU member States, and Latin American countries, have already made strides towards reforming the current international investment regime. Mongolia is but one of many states yet to join this reform endeavor.

Thus far, reform efforts have yet to produce a better functioning investment regime, and institutional and systematic reforms—both substantive and procedural—are sorely needed so that the values of sustainable development laid out in the Osgood Hall Public Statement can be implemented. The ongoing backlash against the current investment regime offers not only an opportunity to address the shortcomings of the regime, but also an opportunity to usher in a new era of economic engagement to promote sustainable development on a global scale.

Of course, problems of legitimacy do not "dissipate over time" and "securing and maintaining legitimacy . . . requires

308. Van Harten, *supra* note 99, at 50.

continuous work."[309] These warnings are as appropriate for the current investment regime as they are for the future of globalization, as mounting inequality and injustice will only fan the flames of political unrest and other disasters.

309. David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 LOY. U. CHI. L.J. 229, 229 (2017).