The Role of International Arbitration in Resolving Investment Disputes

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Abstract
Much like a tightrope walker balancing opposing ends, international arbitration distinguishes between protecting foreign investment and preserving state sovereignty. In a global landscape where capital moves faster than law, arbitration emerges as a dominant forum for adjudicating investor-state disputes. But does this mechanism uphold justice, or does it tilt toward capital at the cost of public interest? This paper critically examines the role of international arbitration in resolving investment disputes, focusing on how legal protections like expropriation safeguards and national treatment rights interact with state duties to uphold human rights, public policy, and environmental obligations. By tracing the historical development of investor-state dispute settlement frameworks (particularly through the ICSID Convention, UNCITRAL Rules & key bilateral and multilateral treaties), the study situates arbitration within broader currents of international law. Through doctrinal analysis of landmark cases and recent ESG-driven disputes, the paper explores whether arbitration mechanisms fairly balance investor claims, such as expropriation and national treatment, against state obligations rooted in public policy, human rights, and environmental sustainability. The paper further interrogates growing criticisms surrounding third-party participation and the opacity of arbitral proceedings. A key concern explored is whether human rights concerns are rendered collateral damage in the pursuit of investment protection. Also, questioning whether existing arbitration models can adapt to evolving global justice concerns without compromising their legitimacy. Ultimately, the study seeks to evaluate the practical legitimacy and normative coherence of international arbitration as a tool of global justice, not merely from the lens of economic expediency, but from the standpoint of legal responsibility and institutional fairness.

Keywords - International Investment Arbitration, Investor-State Dispute Settlement, Third Party Participation, ESG Claims, ICSID Convention, and Bilateral Investment Treaties

I. Introduction to Crossroads of Capital & Sovereignty: Puzzle of Investment Arbitration

Imagine a small island state on the brink of ecological collapse. Faced with rising sea levels and fragile marine biodiversity, its government imposes a ban on deep-sea mining to preserve its ecosystem and protect indigenous livelihoods. Within weeks, a consortium of foreign investors triggers an arbitration clause in a Bilateral Investment Treaty, alleging indirect expropriation and violation of their legitimate expectations. The dispute is now in the hands of an international arbitral tribunal, one that will decide whether sovereign environmental action amounts to a breach of investment obligations. This hypothetical scenario mirrors a growing reality in global investment governance. As states increasingly adopt bold regulatory actions in response to climate change, public health crises, or social equity mandates, they often find themselves entangled in costly legal battles with powerful investors. The mechanism meant to resolve such conflicts, International Arbitration, has become both a cornerstone of investor confidence and a subject of intense critique.

II. FROM TREATIES TO TRIBUNALS: Tracing the Historical Arc of International Investment Arbitration

2.1 From Diplomatic Espousal to Legal Individualism.

The origins of investment arbitration are rooted in the era of gunboat diplomacy and diplomatic protection, where aggrieved investors relied on their home states to espouse claims against host nations. These early mechanisms, often unilateral and coercive, lacked impartiality and legal uniformity. In the nineteenth and early twentieth centuries, foreign investment disputes were largely addressed through ad hoc commissions or mixed claims tribunals, created under specific agreements between states. A prominent example is the *Iran–United States Claims Tribunal*, established in 1981, post the 1979 Iranian Revolution, as a mechanism for binding third-party arbitration to resolve the crisis between Iran and the United States. Using modified UNICTRAL rules, the Tribunal processed over 4,000 claims, awarding over $2.5 billion for claims between private nationals and the government of both countries.[1]

[1]Professor Yarik Kryvoi, Senior Fellow in International Economic Law and Director of the Investment Treaty Forum, Georgetown Law Library (Available at: https://www.biicl.org/blog/83/international-claims-commissions- balancing-state-responsibility-and-individual-rights?cookiesset=1&ts=1745426093)

Though this tribunal arose in a unique geopolitical context, it set a precedent for neutral, institutionalized dispute resolution mechanisms, and its decisions are considered landmarks in the field of investor-state arbitration.

This shift from state-to-state diplomacy to more legalistic procedures reflected broader trends in international law. As investor confidence became tied to not merely market conditions but also to legal predictability, the demand grew for binding mechanisms that could resolve disputes without the political entanglements of state intervention.

2.2 The Rise of Bilateral Investment Treaties.

Since the latter half of the 20th century, Bilateral Investment Treaties (BITs) have emerged as key legal instruments shaping the landscape of private foreign investment.[2] As defined by the Cornell University Legal Information Institute, these treaties are international agreements that outline thelegal parameters for foreign investment by individuals and corporations of one nation in the territory of another.[3]

The earliest form of such treaties, often referred to as *Friendship, Commerce, and Navigation Treaties* (FCNs), focused primarily on creating a stable environment for economic engagement. These agreements typically obligated the host state to extend treatment to foreign investors that was at least as favorable as that given to investors from other countries, and in some cases, equal to that afforded to its own nationals.[4]

Subsequently, modern BITs evolved as a second generation of treaties, introducing more enforceable standards concerning the host state's treatment of foreign investors. These include commitments to fair and equitable treatment, safeguards against expropriation without compensation, the right to repatriate profits and capital, and assurances of full protection and security. Many BITs also incorporate national treatment clauses, requiring host states to ensure that foreign and domestic investors are treated equally under domestic laws and regulatory regimes.

The first modern BIT, signed between Germany and Pakistan in 1959, laid the groundwork for thousands more that followed.[5] A BIT is a formal agreement between two states aimed at promoting and protecting foreign direct investment (FDI) by ensuring that investors from one state receive specific standards of treatment in the territory of the other. While BITs are designed to foster economic cooperation and growth, they also empower foreign investors with the right to initiate arbitration. Investors to bypass domestic legal systems and directly seek redress before arbitration tribunals against host states, holding them accountable for violating treaty obligations. As of December 2024, there are more than 2500 BITs active in the world.[6]

2.3 ICSID and the Institutionalization of Investment Arbitration.

While BITs provided the substantive law, establishing the International Centre for Settlement of Investment Disputes (ICSID) in 1966 under the aegis of the World Bank provided a procedural backbone. The ICSID Convention (also known as the *Washington Convention*) provides two modes of dispute resolution, both conciliation (negotiation with the help of a neutral third party) and arbitration (a binding decision by a panel of experts). It has created a self-contained, neutral, and independent legal framework that insulates arbitration from domestic court interference and avoids political influence. Today, ICSID remains the most utilized forum for investor-state arbitration, having registered a total of 1022 arbitration and conciliation cases since its inception. Additional 17 were administered under other, non-ICSID procedural rules.[7] ICSID's success lies in its procedural clarity, automatic enforceability of awards under Article 54 of the Convention, and its ratification by 158 contracting states.[8]

While ICSID has dominated the landscape, alternative institutions have also played crucial roles. The United Nations Commission on International Trade Law (UNCITRAL) adopted its Arbitration Rules in 1976,[9] which allowed for greater flexibility and ad hoc arbitration. These rules have been used widely, including in arbitrations under the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty. Unlike ICSID, UNCITRAL does not

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[2] Henok Gabisa, "The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?" (2014), The International Lawyer, Vol. 48, No.2, at 157.

[3] Malcolm N. Shaw, International Law 88 (Cambridge University Press5th Ed.2003)

[4]StephenVasciannie, TheFairandEquitable Treatment Standard inInternational Investment Lawand Practice ,70 Brit. Y.B. of Int'l L. 99,113(1999).

[5] United Nations Conference on Trade and Development, New York and Geneva, Sept.17, 2009, World Investment Report: Transnational Corporations, Agricultural Production and Development, 32.

[6] Cornell Law School, Legal Information Institute. (https://www.law.cornell.edu/wex/bilateral_investment_treaty#:~:text=It%20is%20estimated%20that%20there,International%20trade%20law)

[7]ICSID releases its comprehensive statistics report twice a year, providing key insights into the caseload of the world's leading forum for resolving international investment disputes. See ICSID Caseload Statistics, Issue 2024-1, Available at: https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf)

[8] See at https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview.

[9] The adoption of 197 rules were formally recognised through United Nations General Assembly Resolution 31/98. These rules have been revised multiple times, including in 2010 and 2013, with the 2013 version incorporating the Rules on Transparency. The most recent version, adopted in 2021, includes the Expedited Arbitration Rules.

provide an administrative center, but allows parties to select institutions such as the Permanent Court of Arbitration at The Hague to administer proceedings.

Similarly, the International Chamber of Commerce (ICC) offers institutional support through its International Court of Arbitration, which handles a wider range of cross-border commercial and business disputes. Whereas ICSID or UNCITRAL are purely focused on Investor-State Disputes.

2.4 The Boom of ISDS in Free Trade Agreements and Multilateral Treaties.

Beyond BITs, investment protection provisions were increasingly embedded in Free Trade Agreements (FTAs) and Multilateral Investment Treaties. The World Investment Report 2024[10] indicates that 29 new international investment agreements (IIAs) were concluded by countries and regions in 2023. While traditional BITs were fewer than half of these treaties, most were broad economic agreements with investment provisions. The Report also highlights that over 2500 treaties are in force today, shaping the terms and treatment of foreign investments.

The North American Free Trade Agreement (NAFTA), which came into effect in 1994, was seminal in including Chapter 11 for investor-state dispute settlement.[11] Its successor, the USMCA (US-Mexico-Canada Agreement),[12] retained but narrowed these provisions, limiting access to arbitration for certain sectors and imposing more stringent procedural thresholds.[13]

The Energy Charter Treaty extended ISDS protections to energy investments across 56 signatories. However, concerns over regulatory chill and the risk of environmental backsliding have prompted several EU states[14] to exit the ECT. The European Commission has declared intra-EU ISDS clauses under the ECT incompatible with EU law, a position confirmed by the Achmea judgment (C-284/16) of the Court of Justice of the European Union in 2018.

There are various other institutions also, namely the London Court of International Arbitration, the International Centre for Dispute Resolution in New York, the Arbitration Institute of Stockholm Chamber of Commerce, Singapore International Arbitration Centre, Permanent Court of Arbitration in the Hague. The other form of arbitration conducted without the support of institutions is called Ad Hoc Arbitration, which is governed by parties' arbitration agreements.

2.5 Shifts and Strains: Contemporary Challenges to Historical Trajectories.

While the proliferation of BITs and multilateral ISDS frameworks aimed to stabilize investment flows, they have simultaneously exposed deep tensions. The cases like Philip Morris[15] and Vattenfall[16] exemplify how public interest regulations can clash with treaty-based investor claims. The perceived asymmetry in these disputes, where states defend collective welfare while investors assert private rights, has galvanized a growing chorus of critiques. Simultaneously, the 2016 Indian Model BIT[17] marked a recalibration of state strategy, excluding expansive interpretations of investor protections and mandating the exhaustion of domestic remedies before arbitration. The EU, too, has proposed a Multilateral Investment Court to replace ad hoc tribunals with a standing mechanism aimed at greater consistency and legitimacy.

As this historical journey reveals, investment arbitration has evolved from politicized protectionism to juridical sophistication, but not without controversy. Each reform or institutional innovation has emerged in response to

[10] World Investment Report 2024 | UN Trade and Development (UNCTAD) (Available at: https://unctad.org/ publication/world-investment-report-2024)

[11] Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/ 2413/download.

[12] USMCA went into effect on July 1, 2020, is a free trade agreement that replaces NAFTA

[13] Chapter 14 of USMCA outlines the ISDS framework. It is a step away from traditional ISDS, with more stringent requirements for tribunal members and potential limitations on the scope of arbitration. (Available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf)

[14] EU, UK and several member states like France, Germany and Spain have withdrawn from ECT due to its incompatibility with climate and energy transition goals and its outdated ISDS mechanism. See https://caneurope. org/energy-charter-treaty-modernisation-adopted/#:~:text=In%20the%20last%20couple%20of,face%20of%20the%20climate%20crisis.

[15] *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7). The arbitral tribunal dismissed Philip Morris' claims, upholding Uruguay's right to implement tobacco control measures like large graphic health warnings and the "single presentation requirement" for cigarette packaging. The tribunal affirmed that public health measures do not violate international investment law.

[16] *Vattenfall AB and Others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12). Vattenfall, a Swedish energy company, initiated international arbitration against Germany due to environmental restrictions imposed on a proposed coal-fired power plant and Germany's nuclear phase-out policy. Vattenfall sought compensation for damages, arguing that the restrictions and policy made their investments uneconomical and violated the Energy Charter Treaty.

[17] This Model BIT is a template designed to guide India's negotiations of investment treaties with other countries. It aims to balance investor protection with India's sovereign right to regulate in public interest. It replaced the previous framework and became effective from April 2017.(https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf)

shifting geopolitical, economic, and normative realities. Whether this trajectory will culminate in convergence or *fragmentation* remains a matter of contemporary debate.

III. LEGAL INFRASTRUCTURE & INTERPRETIVE POWER: Understanding the frameworks of International Institutions

Imagine an investor in a Nordic energy company pouring billions into solar infrastructure in an emerging African economy. Years into the project, the host state, citing a sudden public interest concern or political realignment, pulls out of its commitments, leaving the investor stranded and capital locked. Where does one go for redress when sovereignty itself seems to be on trial? This question doesn't have a single answer, but rather a sophisticated and evolving legal ecosystem. The world of investment arbitration is not ad hoc or improvised; it is undergirded by a network of international treaties, institutional mandates, and enforcement conventions. These structures transform private grievances into globally recognized legal claims.

3.1 Who Decides? Arbitrator and Their Role.

Unlike domestic courts, where judges are appointed through constitutional or statutory mechanisms, arbitrators are typically chosen by the disputing parties. Each party has the right to appoint one arbitrator, and the third arbitrator is chosen through agreement of the two party-nominated arbitrators. There are no significant restrictions on who can serve as arbitrators, and ICSID requires that arbitrators must have "recognised competence in the field of law, commerce, industry or finance".[18]

However, Henok Gabisa highlights two distinct problems with the appointment of arbitrators.[19] First, human rights norms may be outside the scope of the arbitrator's expertise.[20] Most BIT arbitrators have commercial backgrounds and are not familiar with matters pertaining to human rights-related laws.[21] Even if a tribunal found it appropriate to address a human rights-related matter, the arbitrators may not be fully versed in how to proceed. Conversely, many human rights experts would similarly lack the necessary expertise in international investment law to serve as an arbitrator in BIT arbitration.

The second issue Gabisa talks about is that the realm of international investment arbitrators is a relatively small, close community, and understandably, these specialized arbitrators are concerned with "the securing of their next appointment to a tribunal". Consequently, it is safe to assume that their actions must ensure that corporations and investors will want them to serve as arbitrators in the future.[22] In this small community, to obtain future employment, arbitrators must make a "display of commercial probity and their loyalty to the values of multinational business."[23] This will have a substantial drawback on the advocacy of international human rights standards in the sphere of the bilateral investment dispute settlement process

Moreover, while this appointment of arbitrators by parties to disputes allows for specialization and expertise, it has also led to concerns about repeat appointments, lack of diversity, and conflicts of interest. In many ICSID and UNCITRAL cases, arbitrators with corporate backgrounds are seen to dominate the panels. Some arbitrators have been accused of rendering pro-investor decisions in one case and then acting as counsel for investors in another, creating what scholars have called a "double-hat" problem. This blurred boundary between a neutral adjudicator & investor advocate undermines public confidence in the arbitration process.

3.2 The Institutions: ICSID, UNCITRAL and Beyond.

ICSID and the Treaty-Bound Courtroom- Established in 1966 under the aegis of the World Bank, it remains the most iconic and frequently utilized institution for investor-state arbitration. Its jurisdiction arises when both the investor's home country and the host country are parties to the ICSID Convention and have consented to arbitration. The ICSID framework is distinctive in offering a self-contained process, insulated from national court interference. It also ensures enforceability of awards in any member country as though they were final judgments of that nation's highest court. However, ICSID has not been immune to criticisms: its lack of appeal mechanisms, opacity, and perceived investor

[18] Tony Cole, Arbitrator Appointments in Investment Arbitration: Why Expressed Views on Points of Law Should be Challengeable, 1 Investment Treaty News Q. 13,14 (2010) (Available at: http://www.iisd.org/itn/2010/09/23_arbitrator-appointments-in-investment-arbitration-why-expressed-views-ochallengeable-2/)

[19] Henok Gabisa, "The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?" (2014), The International Lawyer, Vol. 48, No.2, at 166.

[20] Efraim Chalamish, The Future of Bilateral Investment Treaties: A de-Facto Multilateral Agreement?, 34 Brook. J.Int'l L. 304, at 352-54 (2009).

[21] Marc Jacob, International Investment Agreements and Human Rights ,INEF Research Paper Series Human Rights, Corporate Responsibility and Sustainable Development (2010), at 25.

[22] See Megan Wells Sheffer, Bilateral Investment Treaties: A Friend or Foe to Human Rights 39 Denv. J. Int'L L. &Pol'y 483 (2011).

[23] *Id.*

bias remain contentious. Nevertheless, it endures as a pivotal player in the global dispute resolution architecture, largely because it marries procedural certainty with international enforceability.

UNCITRAL & the Flexibility of AdHoc Arbitration-While ICSID provides institutional support, many investors and states choose arbitration under the UNCITRAL Arbitration Rules. Unlike the former, it offers a flexible and customizable procedure, often conducted under the supervision of arbitral institutions like the Permanent Court of Arbitration or even on a purely ad hoc basis. This flexibility appeals to parties desiring procedural autonomy, but it also brings challenges, particularly in ensuring uniformity, handling transparency concerns, and enforcing awards in jurisdictions that may not fully support or understand the ad hoc structure. Nevertheless, UNCITRAL remains a key pillar in the legal scaffolding of investment arbitration, especially in disputes involving states that have not ratified ICSID.

BITs, FTAs, and the Rise of Investor Rights- At the core of most arbitration claims lie BITs and, increasingly, FTAs with investment chapters. BITs act as pre-agreed contracts between states, granting foreign investors rights such as fair and equitable treatment, protection against expropriation, national treatment, and most-favored-nation status. Unlike earlier generations of commercial treaties that primarily governed trade and customs, modern BITs create justiciable obligations directly enforceable by private investors against states. FTAs, such as NAFTA (and its successor, USMCA), have taken this further by embedding ISDS mechanisms within broader economic partnerships, making investor protection a vital plank of international economic diplomacy. Yet, this proliferation has created a "spaghetti bowl" of overlapping treaties, sometimes leading to forum shopping, contradictory rulings, and regulatory chill, where states hesitate to enact public-interest regulations, fearing arbitral backlash.

European Commission's Model Clauses and the Winds of Change- In September 2023, proposed model BIT clauses for negotiations between EU member states and third countries,[24] marking a significant departure from the status quo. These clauses emphasize sustainability, transparency, and the right of states to regulate, particularly in areas like public health, environment, and digital governance. This development is not merely bureaucratic tinkering; it is a normative shift. The EU's approach aims to recalibrate the balance between investor protection and state regulatory autonomy, reflecting broader global concerns about the ethical legitimacy of investment arbitration. It signals that investment law is no longer just about profit security; it is increasingly about normative coherence with public policy.

The New York Convention: From Award to Enforcement- No arbitration mechanism can function meaningfully without enforceability. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958, provides the enforcement backbone of international arbitration. It requires domestic courts in over 170 signatory countries to recognize and enforce foreign arbitral awards, subject to limited exceptions such as public policy or lack of due process.[25] This treaty has transformed arbitration into a truly global mechanism by bridging the gap between private dispute resolution and public legal systems. It has also incentivized states to treat international arbitral awards seriously, even when the underlying dispute involves sensitive issues like national legislation or human rights.

3.3 Adjudication Process: Rules, Remedies and Realities.

The process of adjudicating investment disputes is both technical and discretionary. BITs and other investment agreements often contain broad standards such as 'fair and equitable treatment' or 'protection against indirect expropriation', which leave room for interpretation. Arbitrators wield substantial power in construing these clauses, often without considering local legal traditions or social contexts. The remedies awarded are usually monetary, massive compensations that states must pay from public funds. Rarely do these rulings include non-pecuniary relief, such as changes in law or policy, even when public welfare is at stake. This raises concerns that arbitration serves economic interests more effectively than justice or reform.

3.3.1 Investor Grounds: Protection of Capital Across Borders.

a. *National Treatment (NT) and Most Favoured Nation (MFN) Clauses.*

These clauses protect investors from discrimination, NT ensures foreign investors are treated no less favorably than domestic investors in like circumstances, while MFN guarantees foreign investors are treated no less favorably than investors from any other country, also in like circumstances. These clauses aim to provide a level playing field for foreign investors and prevent host states from favoring domestic or third-party investors. A US oil company successfully argued that its treatment by the Ecuadorian government violated the MFN standard, referencing more favorable terms given to another foreign investor.[26] Such

[24] Investment Treaty News (Available at- https://www.iisd.org/itn/2024/01/13/european-commission-publishes- model-bit-clauses-between-eu-member-states-and-third-countries/)

[25] See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) at https://www.newyorkconvention.org/english. Also See https://uncitral.un.org/sites/uncitral.un.org/ files/media-documents/uncitral/en/new-york-convention-e.pdf.

[26] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.

clauses essentially allow investors to 'import' better protections from other treaties, flattening asymmetries across the treaty landscape. However, tribunals have increasingly scrutinized this use, wary of turning it into a tool of treaty shopping.

b. *Expropriation: Direct, Indirect, and Creeping.*

Expropriation, in the context of international law, refers to a state taking over private property, whether directly or indirectly. Direct expropriation involves a clear and explicit transfer of ownership, while indirect expropriation occurs through state actions that substantially affect the value or use of property, even without a direct transfer of ownership. Creeping expropriation is a type of indirect expropriation that occurs gradually through a series of actions, each of which might not be an expropriation in itself, but cumulatively destroys the value of the investment. Direct expropriation, where a state nationalizes a foreign-owned asset, is rare today. What investors more frequently allege is indirect or creeping expropriation. In Guatemala,[27] the tribunal ruled in favour of the investor who alleged that regulatory changes in electricity pricing destroyed the profitability of its investment, amounting to expropriation. The tribunal had to walk a fine line: distinguishing legitimate state regulation from actions tantamount to a covert seizure of value.

c. *Fair and Equitable Treatment (FET): A Clause of Many Contours.*

FET clauses are the Swiss Army knives of investment law: versatile, ambiguous, and frequently litigated. Investors use it to challenge measures that, while not discriminatory or confiscatory per se, violate their legitimate expectations or upset regulatory stability. It is a standard of protection that ensures foreign investors are treated with fairness and equity by the host state. In Philip case,[28] the tobacco giant claimed that Uruguay's anti-smoking legislation violated FET by undermining its brand value and business model. The tribunal, however, sided with Uruguay, holding that public health considerations justified the regulation. This case stands as a landmark for balancing private commercial expectations with evolving public norms, especially in sectors under intense societal scrutiny.

3.3.2 State Grounds: Governance, Not Just Guarantees.

States are not passive actors in these disputes. Increasingly, they assert their sovereign right to regulate in areas of vital public concern. This section explores how governments push back against investor claims using legal doctrines grounded in public interest and international law.

a. *Public Health and Environmental Protection.*

In the Vattenfall case,[29] Germany countered that the phase-out was a sovereign decision in the interest of environmental safety and nuclear risk mitigation. Environmental and public health defenses are now routine in investment cases, especially in sectors such as extractives, energy, and agriculture. They often put long-term societal welfare against short-term investor gain, and tribunals must grapple with whether state measures were genuinely protective or veiled acts of discrimination.

b. *Human Rights and Indigenous Protection.*

In Breek Creek case,[30] the Peruvian government revoked a mining license after mass protests by indigenous communities, citing violations of indigenous consultation rights under ILO Convention 169. The investor argued that the revocation lacked a legal basis and harmed its investment. Here, the tribunal recognized the state's duty to respect indigenous rights, though it also awarded partial damages to the investor. Cases like this underscore how human rights, once marginal in arbitration, are now emerging as legitimate defenses against investment claims, particularly when disputes intersect with land, culture, or identity.

c. *National Security and Public Morals.*

Though rarely invoked in earlier decades, the national security exception is gaining prominence, particularly in the digital age. In CC/Devas case,[31] the Indian government canceled a satellite leasing agreement, citing

[27] TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23)

[28] *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7).

[29] *Vattenfall AB and Others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12).

[30] *Breek Creek Minning Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21)

[31] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (I)*, PCA Case No. 2013-09.

This case refers to a dispute over the cancellation of a satellite leasing agreement between Antrix Corporation (the commercial arm of ISRO) and Devas Multimedia. In 2011, the Indian government terminated the agreement, citing national security concerns and the need to reallocate the S-band spectrum. Devas Multimedia claimed that the cancellation violated the India-Mauritius Bilateral Investment Promotion and Protection Agreement (BIPA). The ICC International Court of Arbitration ruled in favor of Devas Multimedia, ordering Antrix to pay damages, but this decision faced challenges in the Indian courts. The Delhi HC and the India's SC upheld the decision to wind up Devas Multimedia, finding it had been incorporated fraudulently. This decision was

threats to national security. The tribunal found in favor of the investor, but the case reignited debate over how far national security can be used as a shield in investment arbitration. Other cases involving data localization laws, pharmaceutical regulation, or energy infrastructure similarly test the boundaries of public morals and critical infrastructure exceptions. These grounds remain controversial; some see them as essential safeguards, others as pretexts for economic nationalism.

This chapter has unpacked the architecture and operation of investment arbitration, highlighting both its legal sophistication and normative fragilities. While the system has undeniably brought coherence to transnational investment disputes, it has also magnified inequities between private capital and sovereign regulation. The next chapter will move from rules to real-world tensions, as we examine landmark case studies that have shaped, sometimes skewed, this fragile balance.

IV. PRECEDENTS, PRESSURES & PUBLIC GOOD
Reading Jurisprudence through Landmark Cases

In the theater of international investment law, landmark cases are more than just legal disputes: they are battlegrounds of ideology, case studies in sovereignty, and precedents that ripple through policy rooms and courtrooms across the world. These cases reflect the broader tensions explored throughout this paper: the uneasy balance between protecting investor confidence and preserving public governance space.

4.1 Landmark Cases

a. Philip Morris v. Uruguay (2016): When Cigarettes Meet Sovereignty.[32]

In 2016, a high-stakes drama unfolded between tobacco giant Philip Morris and the small Latin American state of Uruguay. The company challenged Uruguay's anti-smoking regulations, particularly its mandate for graphic warning labels and restriction on brand variants, as violations of the FET standard and an act of indirect expropriation under the Switzerland-Uruguay BIT. But Uruguay's defense was equally compelling. Backed by global public health advocates and even the World Health Organization, it argued that the regulations were vital for reducing smoking-related deaths. The ICSID tribunal sided with Uruguay, emphasizing the right of states to regulate for public health, and found that investor expectations must yield when public interests are at stake. This case set a transformative precedent that *regulatory measures aimed at protecting health can override the profit-driven expectations of foreign investors*, a message especially resonant for states pursuing bold public health policies without fear of arbitration backlash.

b. Metalclad v. Mexico (2000): Green Fences and Legal Boundaries.[33]

Two decades before Philip Morris, another narrative was quietly shaping the contours of environmental regulation in investment law. In the U.S., waste management company Metalclad accused Mexican local authorities of arbitrarily denying permits for a hazardous waste landfill, despite federal approval. The ICSID tribunal found Mexico in breach of the Expropriation clause under NAFTA, reasoning that the local denial effectively destroyed the company's economic expectations. This ruling alarmed environmentalists and state regulators alike. It signaled that local environmental decisions could carry heavy international liabilities, especially when they interfered with foreign investors' operations. The Metalclad case remains a cautionary tale: a blueprint for how local regulatory discretion can collide with international treaty obligations, and how even well-intentioned environmental policies might trigger claims if not backed by a coherent national strategy.

c. Vattenfall v. Germany (2012): Climate Policy in the Dock.[34]

The transition from nuclear to renewable energy is a cornerstone of modern climate governance. Yet, when Germany expedited its nuclear phase-out following the Fukushima disaster, it found itself sued by Swedish energy giant Vattenfall under the Energy Charter Treaty. The investor claimed that the policy change rendered its existing investments unviable, constituting indirect expropriation and a breach of legitimate expectations. Germany defended the move as a matter of national environmental and energy policy, grounded in democratic process and public interest. Although the case ended in a settlement, it raised urgent questions about how much regulatory risk investors must bear in an era of climate urgency and whether tribunals are equipped to

viewed as a retaliatory measure by Devas and its investors, who argued that it was aimed at preventing them from enforcing the arbitration awards.

[32] *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7)
[33] *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1)
[34] Vattenfall AB and others v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12.

adjudicate such sweeping transformations. The Vattenfall dispute has since become emblematic of the legal frictions inherent in the green transition.

d. White Industries v. India (2011): A Wake-Up Call for Emerging Economies.[35]

For India, White Industries was more than just a defeat, it was a revelation. The Australian mining company filed a claim under the India-Australia BIT, alleging denial of justice due to excessive judicial delays in enforcing a commercial award in Indian courts. The tribunal agreed, finding India in breach of the Effective Means of Justice standard. While the compensation awarded was modest, the political consequences were significant. India adopted a new Model BIT in 2016 that introduced stricter clauses on investor obligations and a narrowed scope of ISDS. This case exemplifies how even seemingly minor claims can catalyze policy overhauls, especially in states navigating the dual imperatives of attracting investment and safeguarding their adjudicatory sovereignty.

4.2 Recent Trends: The Landscape in 2025

a. Energy Transition Minerals v. Greenland.

The Energy Transition Minerals (an Australian company) files an arbitration case against the Government of Greenland, seeking confirmation of its rights to the Kvanefjeld rare earths project or compensation for damages. The arbitration was initiated after a ban on uranium extraction was imposed in 2021. GMAS filed its Statement of Claim on July 19, 2023. The arbitration seeks either confirmation of GMAS's right to mine or USD 11.5 billion in compensation, which is nearly four times Greenland's annual GDP. This ongoing dispute will likely test whether investor protections can accommodate the prerogative of states to shift their developmental trajectories in response to ecological and social values.

***b.* AVZ Minerals v. Democratic Republic of Congo.**[36]

In another 2025 dispute, AVZ Minerals won a legal case against the Democratic Republic of Congo (DRC) over the Manono lithium project. An ICC tribunal ordered the DRC's state-owned mining entity, Cominière, to pay €39.12 million for breaching joint venture agreements. This decision stemmed after DRC revoked its mining rights, citing irregularities in licensing and community opposition. The state argued that the revocation stemmed from anti-corruption reforms and local consultations. How tribunals approach these factors could shape future investor behavior in resource-rich but governance-challenged jurisdictions.

While investment protections remain important, they cannot come at the cost of democratic governance, environmental integrity, or judicial autonomy. The arc of investment arbitration appears to be bending, slowly but decisively, toward a more balanced, rule-bound, and legitimacy-conscious future.

V. FRICTIONS & FAULTLINESS:
Interrogating Criticisms and Systemic Challenges in ISDS

International arbitration under the ISDS regime, once hailed as a sophisticated shield for foreign investments, today stands at a moral and institutional crossroads. Its defenders cite efficiency and neutrality. Its critics question legitimacy and fairness. As arbitration claims have grown in volume, value, and visibility, so too have the voices demanding reform. Beneath the procedural elegance of ISDS lies a web of structural frictions, some long-standing, others newly emergent, which compel us to question not only how justice is delivered, but for whom.

Arbitrator Independence & Concern for Bias - One of the oldest shadows over ISDS is the arbitrator's dual role as adjudicator and repeat player. In contrast to judges with fixed tenures and public accountability, arbitrators are often selected from a relatively small pool of elite professionals who rotate between roles as counsel, arbitrators, and even experts in different disputes. While their expertise is undeniable, such overlaps give rise to concerns over systemic bias, especially in favor of repeat corporate clients. Some critics argue this creates an echo chamber where precedent and practice are shaped not by disinterested judges but by interconnected commercial elites.

Human Rights as Collateral? Sovereign Duties under Global Norms -The human rights critique of ISDS cuts deeper than sovereignty; it targets the ideological hierarchy within arbitration, where investor rights often trump social and environmental obligations. Consider the Breek *Creek* case, where a Canadian company was awarded compensation despite strong indigenous opposition and protests in the Puno region. The Peruvian government revoked the license, citing indigenous consultation norms, but the tribunal ruled that the revocation breached investor protections under the Canada-Peru FTA. This case, among others, highlights a recurring pattern: the marginalization of human rights, labor protections, and indigenous law in arbitral reasoning. While some tribunals now admit amicus curiae briefs and mention human rights law in passing, rarely do such norms substantively influence the outcome. The ISDS framework

[35] White Industries Australia Ltd v India, Final award, IIC 529 (2011).
[36] *AVZ International Pty Ltd., Dathcom Mining SA, and Green Lithium Holdings Pte Ltd. v. Democratic Republic of Congo*, ICSID Case No. ARB/23/20.

continues to prioritize economic interests over ethical obligations, raising foundational questions about the purpose and public value of arbitration.

Lack of Transparency: A Private Court for Public Matters- Despite the high public stakes involved, ranging from tax policy to environmental regulation, many ISDS proceedings are conducted behind closed doors. Confidentiality clauses, limited public disclosure, and restricted third-party access have led critics to label ISDS as an "opaque justice system for the global elite". While institutions like ICSID and UNCITRAL have introduced reforms, such as publishing awards or permitting third-party submissions, the default remains secrecy. A justice system handling billion-dollar claims against sovereigns cannot afford to operate in twilight. Transparency is not just about legitimacy, it is about democratic accountability.

Inconsistency in Arbitral Awards: Predictability Lost - Despite efforts to harmonize BIT interpretations, inconsistency remains a persistent challenge. Tribunals adjudicating on similar treaty language and similar fact patterns have reached divergent conclusions. For example, in the *CMS v. Argentina* case,[37] the tribunal rejected Argentina's plea of economic necessity. Yet in *LG&E v. Argentina*,[38] a different tribunal upheld the same defense under the same circumstances. Such unpredictability undermines the legitimacy of ISDS and confuses state behavior; should they regulate or retreat? This jurisprudential dissonance, without a centralized appellate mechanism, raises fundamental questions about coherence and reliability in international investment law. For affected states and future investors alike, uncertainty breeds both strategic litigation and policy paralysis.

Third-Party Participation and Speculative Claims - The inclusion of amicus curiae has been proposed as a modest step toward democratizing ISDS. While some tribunals now permit third-party briefs, their legal standing remains minimal. Tribunals are not bound to consider these submissions, and often regard them as peripheral to the core investor-state dispute. Equally concerning is the rise of third-party funding (TPF) and speculative claims. Such funding arrangements amplified concerns over arbitration becoming a commercial gamble rather than a justice-oriented process. These trends raise ethical and structural questions: Can ISDS serve justice when its very access is monetized?

Compensation and Damages: Quantum Over Justice? -A recurring criticism lies in the magnitude and methodology of damage awards. In many cases, tribunals award compensation far exceeding the amount of actual investment, relying on speculative calculations about lost future profits. Such decisions provoke an existential dilemma: Should state treasuries, and by extension public services, bear the cost of perceived profit losses? Critics argue for rethinking the quantum and criteria for compensation, balancing economic restitution with policy space and fiscal equity.

The criticisms dissected above are not merely abstract, they form the faultlines of legitimacy in the ISDS regime. From tribunals' structural biases to their limited public accountability, the system now stands at a reformist inflection point. Proposals include the establishment of a Multilateral Investment Court, reforming arbitrator appointment processes, standardizing damages methodologies, and enhancing participatory frameworks for affected communities. The UNCITRAL Working Group III and the European Commission's initiatives are steps toward reconciling these tensions. But the deeper question remains: Can a system designed to protect capital be reimagined to uphold public values? If ISDS is to endure, it must not only enforce treaty obligations, but it must reflect the evolving ethos of international law, where sovereignty, sustainability, and social justice are not trade-offs, but imperatives.

VI. CONVERGING INTERESTS OR COLLIDING WORLDS?
Reflecting on the Contemporary Role of Investment Arbitration

In the grand architecture of global governance, investment arbitration occupies a unique and increasingly contested space. What began as a shield for investors navigating unfamiliar legal terrains has evolved into a forum where the tensions between capital and conscience, sovereignty and globalism, are laid bare. As we arrive at the final stage of this exploration, it is important not merely to summarize the path taken but to distill the core dilemmas, offer nuanced reflection, and gesture toward the way forward. The question that now animates investment arbitration is *not simply whether it works, but for whom, to what end, and at what cost*. This paper has traced the legal infrastructure underpinning ISDS, mapped the normative grounds raised by both states and investors, and scrutinized the jurisprudential trajectories of landmark cases. It has also unpacked the criticisms directed at the system: of bias,

[37] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.
US company CMS Gas, sued Argentina for violations of the US-Argentina BIT regarding measures taken during Argentina's economic crisis, which impacted CMS's investment. Tribunal partially granted CMS's claim, rejected CMS's expropriation claims, and ruled Argentina violated its obligations on fair and equitable treatment and the umbrella clause.

[38] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1.
A US investor, LG&E, sued Argentina for breaching its obligations under the US-Argentina Bilateral Investment Treaty (BIT) after Argentina implemented measures to address a financial crisis in 2001. The measures, including an Emergency Law, affected LG&E's investments in Argentine gas distribution companies. ICSID found Argentina liable as its measures did not provide FET to LG&E.

opacity, inconsistency, and democratic deficit. These debates are not marginal. They are fundamental to whether this regime can sustain its legitimacy in a rapidly shifting global order.

As states grapple with 21st-century imperatives (climate transition, digital sovereignty, human rights obligations), investment arbitration must respond to an evolving set of expectations. It is no longer enough to be legally sound; it must also be socially defensible and politically credible. The insistence on investor protections must not eclipse the equally valid claims of communities, ecosystems, and public welfare. Arbitration cannot exist in a vacuum. Yet to call for a reimagining of ISDS is not to advocate for its dismantling. Rather, it is to accept its current architecture as both indispensable and incomplete. Investment flows remain vital to economic development, especially for emerging economies. But protection cannot become entitlement, and redress cannot come at the cost of a state's right to regulate for the public good.

What, then, is the path forward? Perhaps it lies in recalibration rather than rupture. The inclusion of clauses that preserve regulatory autonomy, the promotion of transparency through public hearings and open-access documents, and the encouragement of meaningful third-party participation all point to a more democratic arbitration culture. The recent efforts by the European Commission and reform agendas at UNCITRAL Working Group III indicate that change is not just necessary, it is already underway. Still, reforms must go beyond procedural tweaks. They require a rethinking of the values that underpin investment arbitration itself. The system must evolve from a binary model of protection versus prerogative into a pluralistic forum that respects the legitimacy of both capital mobility and sovereign responsibility.

In closing, investment arbitration today stands at a critical juncture, neither to be abandoned as irredeemable nor accepted as immutable. It is, instead, a living legal system, capable of both learning and leading. Whether it ultimately converges with global public values or continues to collide with them will depend on the choices made by states, arbitral institutions, investors, and civil society alike. The world no longer expects arbitration to be perfect. But it does demand that it be just. As we conclude this exploration, the metaphor of a 'converging interest or colliding world' becomes more than literary; it encapsulates the core dilemma of our times. Can arbitration be the meeting ground of public good and private gain, or will it remain a battleground where one is too often sacrificed for the other? The answer, like the system itself, is still under construction.

REFERENCES

1. Jacquwline Nolan-Haley, "International Dispute Resolution and Access to Justice: Comparative Law Perspectives" (2020) Journal of Dispute Resolution, Vol. 2020, Issue 2 (Available at: https://scholarship.law.missouri.edu/jdr/vol2020/iss2/11)
2. Okechukwu Ejims, "International Investment Law and Indigenous Peoples: A Methodology for the Analysis of the Rights of Indigenous Peoples" (2022) Manchester Journal of International Economic Law, Vol. 19, no. 3, pp. 348-369.
3. Sandra Ann T. Joseph & Mathews Sebastian, "International Investment Arbitration in Foreign Investment Disputes" (2024), International Journal of Law Management & Humanities, vol. 7, pp. 1734-1747.
4. Erika Bihari, "International Investment Arbitration in the European Union" (2021) Acta Universitatis Sapientiae: Legal Studies, vol. 10, no. 1, pp. 21-34.
5. Stanimir A. Alexandrov, "Corruption in International Investment Arbitration" (2015) American Journal of International Law, vol. 109, no. 3, pp. 702-707.
6. Vikramaditya Khanna and Aditya Singh, "Current Trends in International Arbitration", American Bar Association, Litigation, Spring 2015, Vol. 1, No.3, Commerce, pp.41-44.
7. Camille Martini, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting" (2017), Vol. 50, No.3, pp.529-584.
8. Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration" (2010), The International and Comparative Law Quarterly, Vol. 59, No.2, pp.373-412.
9. Ernst-Ulrich Petersmann, "International Rule of Law and Constitutional Justice in International Investment and Arbitration" (2009), Indiana Journal of Global Legal Studies, Vol. 16, No.2, special issue pp.513-533.
10. Henok Gabisa, "The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?" (2014), The International Lawyer, Vol. 48, No.2, pp.153-167.