



INVESTOR STATE ARBITRATION IN THE ERA OF ECONOMIC NATIONALISM

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Abstract

The rise of economic nationalism and the assertiveness of state sovereignty in global trade and investment regimes have been major factors in the dramatic change of the Investor-State Arbitration (ISA) environment in the past several years. In order to ensure that host nations comply to international investment agreements and bilateral investment treaties (BITs), ISA has traditionally acted as a tool to shield foreign investors from unjust treatment. A growing number of factors, including protectionist measures, reshoring efforts, and national economic interest prioritizing, have cast doubt on the impartiality, efficacy, and legality of ISA procedures. Focusing on the ways in which economic nationalism affects the creation, interpretation, and enforcement of investment treaties, this article investigates the changing dynamics between state autonomy and the protection of foreign investments. It uses important case studies and current arbitral rulings to show how investor rights conflict with public policy goals including social welfare, environmental preservation, and national security. It also evaluates changes that are now taking place inside organizations like UNCITRAL and ICSID, which aim to strike a balance between investor safeguards and more state oversight and openness. This study examines the relationship between domestic regulatory power, international arbitration, and political economy to determine if state-centered dispute mechanisms are going to replace investor-state dispute settlement (ISDS) or if ISDS can adjust to the new global order. Economic nationalism is reshaping investment arbitration, according to the results, which call for a new system that is more fair, open, and respectful of sovereignty in order to settle conflicts in the international investment ecosystem.

Keywords: Investor-State Arbitration, Economic Nationalism, ISDS, Sovereignty, International Investment Law, ICSID, UNCITRAL, Protectionism.

Introduction

Long considered to be among the most significant systems for resolving disputes between foreign investors and host governments in accordance with international investment agreements (IIAs), Investor-State Arbitration (ISA) has been given this status for a considerable amount of time. By guaranteeing that investors have the ability to seek impartial remedies in situations of expropriation, unjust treatment, or breach of treaty commitments, the International Securities Authority (ISA) was created to encourage cross-border investment. Its establishment was founded on the ideals of investment protection and legal certainty. These institutions, which include the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID), have been at the forefront of this system, providing a platform for the adjudication of complex disputes that have arisen as a result of globalization and liberalization. Nevertheless, the state of the global investment landscape

is currently undergoing a significant transformation. The return of economic nationalism, which is a policy orientation that places an emphasis on the protection of home industries, national sovereignty, and self-reliance, has started to question the basic underpinnings of the framework that governs investor-state arbitration. It is becoming increasingly common for governments all over the globe, particularly in developed and developing countries, to place a higher priority on domestic economic interests than they do on foreign investment obligations. The balance between investor protection and state regulatory authority has been disrupted as a result of this comeback, which is frequently linked to populist political movements and strategic economic realignments. Economic nationalism may be traced back to the rising distrust that people have regarding globalization and the perceived negative consequences that it has on local economies. Foreign investment is seen by many nations not just as a source of growth but also as a possible danger to national security, environmental integrity, and social welfare. This is the perspective that many states possess. As a consequence of this, governments have implemented more stringent methods for screening investments, reconsidered bilateral investment treaties (BITs), and even withdrawn from investor-state dispute resolution (ISDS) systems, which they consider to be a constraint on the flexibility of policy. Consequently, this has resulted in the emergence of significant concerns regarding the validity, justice, and long-term viability of ISA in the 21st century. Although the conflict between state sovereignty and international investment law is not a new phenomenon, the severity of this conflict has increased in recent years due to the altering power relations on a global scale. The frameworks of investment treaties have been reexamined by a number of nations, including India, South Africa, and various members of the European Union, in order to bring them into alignment with national goals. As an illustration, the Model Bilateral Investment Treaty (BIT) that India adopted in 2016 lays a large focus on the regulatory power of the state, but the European Union has called for a multilateral investment court system (MIC) as an alternative to the conventional arbitration process. At the same time, the United States of America and China have reorganized their investment policies in order to provide a stronger level of control over the participation of foreign entities in vital sectors. They have done this by claiming concerns regarding national interest and security. Given the current climate of economic nationalism, the most important question that has to be answered is whether or not investor-state arbitration can continue to be relevant as a process that is both impartial and efficient for resolving conflicts between investors and governments. On the other hand, will it be replaced by processes that are more state-centric and that place an emphasis on democratic accountability and policy space? For the purpose of addressing these problems, it is necessary to have a comprehensive knowledge of the shifting equilibrium between investment liberalization and regulatory sovereignty, as well as an evaluation of the ongoing reforms that are aimed at bringing these conflicting interests into harmony. The purpose of this study is to investigate the ways in which economic nationalism is transforming the practice of investor-state arbitration as well as the perception of it. It explores the development of the ISA throughout its history and its goals. The increased prevalence of economic nationalism and the ramifications it has for the administration of global investments. The most recent case studies that illustrate the contradiction between investor protection and public policy; reform measures at both the national and international levels that are meant to restore credibility and balance to the system respectively. The purpose of this investigation is to illustrate that the present transition in ISA does not indicate a decline but rather a reinterpretation of global investment dispute resolution. This redefinition is one that incorporates both sovereign authority and investor trust within a framework that is more equal. Essentially, investor-state arbitration is at a crossroads, where the goal of national economic self-determination must coexist with

the imperatives of a stable and predictable investment climate. This is a complex situation that requires careful consideration. Is it possible for the International Securities Authority (ISA) to develop into a system that can handle the realities of economic nationalism while still maintaining the fundamental principles of international investment law? This question will be answered during the next ten years.

As a result, the continuing discussion over Investor-State Arbitration (ISA) in this age of economic nationalism is not only complicated but also significant. Not only does it constitute a challenge to the legal or procedural system, but it also reflects a more widespread ideological and structural modification to the existing order of the global economy. The conventional model of international trade relations (ISA) was constructed on the basis of the post-Cold War consensus that advocated for economic liberalization, free markets, and global interdependence. This consensus was supported by the idea that foreign investment fundamentally contributed to the growth of a nation. A increasing inclination for self-sufficiency and domestic control over strategic assets has been spurred by the pushback against globalization, notably in the aftermath of the global financial crisis that occurred in 2008 and the disruptions that were created by the COVID-19 outbreak. It is important to note that this change has substantial repercussions for the legitimacy and authority of arbitral tribunals. Those who are opposed to the International Social Agreement (ISA) contend that these processes frequently give corporate interests more weight than the regulatory prerogatives of sovereign governments, which in turn undermines democratic decision-making. These tensions are exemplified by cases such as *Philip Morris v. Uruguay* and *Vattenfall v. Germany*, in which investor claims challenged public health and environmental rules that were implemented in the interest of the nation. As the visibility of these disagreements has increased, there has been an increase in the number of requests for reform and accountability, particularly in governments where public policy issues are at the center of governance. In addition, the development of protectionist and nationalist policies has been followed by a reevaluation of the legal tools that support international trade agreements (ISA). A vast number of nations have engaged in treaty renegotiations or terminations in an effort to replace older accords with models that provide governments with a wider degree of interpretative authority. In South Africa, for instance, the bilateral investment treaties (BITs) were replaced with a domestic Protection of Investment Act (2015), which placed an emphasis on the superiority of domestic courts over international arbitration. In a similar manner, Indonesia canceled a number of bilateral investment treaties (BITs) in order to rework them so that they better match with its national interests. The transition that the European Union is making toward a Multilateral Investment Court (MIC) system, which is intended to provide openness, uniformity, and judicial monitoring, is a further illustration of the trend toward institutional reform. During this same time period, poor countries, which have traditionally been seen to be the recipients of benefits from investment arbitration, have been increasingly vocal in their evaluation of the system's fairness. They contend that the existing version of the International Securities Association (ISA) limits the policy autonomy of nations in the Global South while providing a disproportionate benefit to investors from rich countries. The disparity in negotiating power, in conjunction with the high expenses of arbitration processes, contributes to the perpetuation of negative views of unfairness. As a consequence of this, there is a rising demand for hybrid models. These models combine international monitoring with national adjudicatory involvement. Regional conflict resolution methods are also increasing in popularity. Nevertheless, understanding the emergence of economic nationalism just as a barrier to investment arbitration would be a reductionist interpretation of the phenomenon. In a number of ways, it has served

as a catalyst for change, which has resulted in a reexamination of the concepts that underpin the system. In the process of progressively evolving toward more openness, accountability, and inclusion, the global investment regime is undergoing progress. The incorporation of public interest exceptions, the guarantee of open hearings, and the establishment of norms of behavior for arbitrators are all indications of a trend toward the restoration of legitimacy rather than the complete abandonment of the process. The increased emphasis on environmentally responsible governance and sustainable development is another significant factor that is influencing the International Social Order in this period. In light of the fact that states are progressively adopting ambitious climate and sustainability targets, investment disputes are increasingly intersecting with green policies and social welfare efforts. For instance, disagreements that have arisen as a result of reforms in renewable energy in Europe or resource nationalization in Latin America provide light on the difficulties associated with striking a balance between the protection of international investors and the imperatives of local policy.

In this way, economic nationalism may function as both a restraint and a facilitator, offering protection for national interests while simultaneously supporting the recalibration of investment rules to more accurately reflect local and global sustainability concerns. Furthermore, geopolitical changes, such as trade wars, regional integration projects, and the decoupling of global supply chains, have added an additional degree of complexity to the situation. As a means of achieving economic resilience and geopolitical influence, states are increasingly employing investment policy as a strategic instrument. The distinctions between judicial adjudication and policy discussion are becoming increasingly blurry as a result of the fact that arbitration processes are increasingly impacted by larger political and economic factors. The ability of investor-state arbitration to adjust to this different climate will determine whether or not it will continue to exist in the future. Reform initiatives by the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the United Nations Conference on Trade and Development (UNCTAD) underscore the need for a more balanced framework—one that guarantees predictability for investors while respecting the regulatory authority of states. Through the promotion of procedural fairness, the reduction of costs, and the protection of the ability of governments to pursue legitimate public policy goals, these measures aim to rebuild trust in the International Securities Authority (ISA). In conclusion, the dynamic relationship between economic nationalism and investor protection brings to light a fundamental dilemma about the function and path that international economic law should take in the 21st century. It is important to consider whether the system should continue to place a high priority on the sanctity of investment treaties or if it should adapt to acknowledge the sovereign power of states to redefine their economic destinies. It is possible that the solution rests in the development of a hybrid model of arbitration, which is a model that combines the advantages of international adjudication with the adaptability of local government. In the next parts of this article, we will go deeper into these features, including tracking the historical history of ISA, examining the role of economic nationalism across regions, and evaluating reform trajectories that might potentially reshape conflict settlement systems for the coming decades. The purpose of this investigation is to provide light on the current state of Investor-State Arbitration, which is at a critical juncture. This is a time when the pursuit of national economic self-determination and the maintenance of a rules-based investment system must coincide in order to form the future of global economic governance.

Discriminatory problems in investment treaties and practice

In the context of investment arbitration, questions are raised regarding the possibility of prejudice on three separate levels. To begin, there is a contention that investment arbitration does not provide a balance between domestic and international investors, but rather encourages foreign corporations to dominate the market. This is a claim that is occasionally made. Earlier, it was noted that investment arbitration was designed to defend private market actors from discrimination in foreign jurisdictions that have deficiencies in observing the rule of law. Without any larger thinking and with the same ideological foundation, investment arbitration invaded industrialized nations that had democratic institutions that were well-established and powerful judicial bodies that were independent. Furthermore, in these instances, domestic competitors working in the exact same industry and market are typically encountered by external investors from other countries. As a result of foreign investors taking use of a privileged method that was not open to their local competitors or to competitors from other nations that had not concluded an investment treaty with the host state, societal and political problems have arisen. When investment arbitration is implemented as a method for providing foreign investors with an equal position, it calls into question the sufficiency of domestic procedures that have been built to ensure that all market and social actors are treated in an equal manner. Investment arbitration goes beyond the principles of equal treatment and gives an unfair competitive advantage to the foreign firm when it is conducted in a domestic court system that is independent and ensures that all market participants will be treated in the same manner and that the proceedings will be fair. Certain investment treaties have evolved into vehicles that are given special attention for specific investors under certain circumstances. In point of fact, the principle of indirect expropriation, which was adopted by arbitral courts, ensures that there is a legal foundation for claims that go beyond the scope that is granted by the majority of domestic legal systems. Domestic rules typically include restrictions on a state's culpability in the event that domestic legal acts are revised. This is true in both emerging nations and established countries. At the same time, such constraints are not satisfied in the practice of investment arbitration, which has universally acknowledged the full compensation concept ever since the *Factory at Chorzów* case. Second, it is asserted that investment arbitration is advantageous to market participants who are affluent and have a great deal of knowledge. While the first aspect of discriminatory considerations refers to the benefits that are offered to foreign investors in comparison to their local competitors, the second aspect is concerned with the disparity that exists between "big" or "wealthy" investors and "small" or "impoverished" investors. There is no longer a connection between this dimension and the singular stereotype of an all-powerful state acting against a helpless person who is existing on its territory. In the current scenario, there is also the possibility of a situation in which a multinational firm may be in a considerably stronger position on the international stage than a developing nation that it is challenging. The issue of small and medium-sized business owners being excluded from investment arbitration is another issue that is addressed by this legislation. Through the use of treaty shopping, global market players are able to gain an edge against responder governments and smaller rivals. Not only is it possible to pick a subsidiary that is based in a state that has the most favorable investment treaty with a respondent state, but this option is only available to those who manage a firm that operates on a global scale. This strategy is highlighted by the case of *Philip Morris v. Australia*, in which the parent company's subsidiary, Philip Morris Asia Limited, which is based in Hong Kong, launched legal action against Australia in order to explain the validity of a bilateral treaty between Hong Kong and Australia that was signed in 1993. In addition to being a danger to the governments that are hosting investments, it also provides an edge over competitors that are smaller.

There is a connection between the nature of this method of conflict resolution and the third facet of discrimination in investment arbitration. The forum known as investment arbitration was established for the purpose of investors challenging states. In every instance, investors are the ones who make requests, and states are the ones who invariably answer. In a few instances, states will file counterclaims, but in most situations, these will also fail²⁶. Without a doubt, the only instances in which a state is successful in investment arbitration are those in which the claim is unsuccessful. Recent worldwide processes have raised the question of whether or not this paradigm is suitable for the societal requirements that are now in place. There have been well-known instances in which local communities have been damaged or abused by multinational corporations or the local subsidiaries of those same corporations. It is not uncommon for businesses to reap the benefits of the assistance of local governments, which help to maintain peace in smaller areas. In situations like these, the rule of law may be undermined not just by local governments but also by multinational corporations that get backing from the government (often in the form of local subsidiaries), which is detrimental to the general welfare. In circumstances where domestic courts lack independence, foreign courts have, for the most part, declined (on a variety of legal reasons) to impose broad protection for people of other countries. It is also possible that the European Court of Human Rights will prove to be an improper forum for a variety of compelling reasons. For the sake of reestablishing social justice, the modified model of investment dispute settlement appears to be the most appropriate foundation here. Alternatively, social dissatisfaction will eventually lead to the emergence of radical movements.

Historical foundations and objectives of ISA

Treaty-based protections (BITs and IIAs) and ad hoc or institutional arbitration (most notably ICSID) were intended to reduce political risk, lock in commitments, and attract cross-border capital by offering neutral, enforceable dispute resolution outside of domestic courts. Classical accounts of international arbitration (ISA) emphasize its origins in the liberal order that emerged after the war. The contemporary institutional literature, on the other hand, makes the point that the system has never been static; procedural and substantive rules vary as parties and institutions adapt to new forces. One example of this is the recent set of amendments made by ICSID to improve disclosure and procedural norms.

Critiques: legitimacy, asymmetry, and the public interest

Scholars of public law, development professionals, and critical investment law have all contributed to the body of literature that suggests that the International Social Security Administration (ISA) has legitimacy flaws. There is a cluster of criticisms that can be broken down into three categories: (a) the International Securities Association (ISA) may give investor rights precedence over the regulatory autonomy of states and public policy goals (health, environment, and national security); (b) bargaining and enforcement asymmetries favor investors from countries that export capital; and (c) high costs and inconsistent awards undermine predictability and access to justice for smaller states. These criticisms are echoed by editorials and practitioner sources, which also note the ways in which economic nationalism (and political resistance to globalization) has reinforced them, leading some governments to withdraw from treaties or renegotiate existing ones.

Case law illustrating investor–state tension with public policy

Studies, both empirical and doctrinal, typically make use of specific landmark instances in order to demonstrate the areas in which ISA overlaps with fundamental public-interest legislation. *Philip Morris v. Uruguay* and *Vattenfall v. Germany* are two cases that have received a lot of attention and analysis. The former case was eventually dismissed by the tribunal, which upheld public-health regulations, while the latter case revealed a clash between energy policy shifts and investor expectations in accordance with the Energy Charter Treaty and other similar documents. These cases are frequently mentioned in policy arguments regarding whether or not the International Securities Authority (ISA) ought to defer more to valid domestic regulation. They are extensively included in the literature as examples of how tribunals deal with regulatory space, proportionality, and the public interest.

State-level responses: treaty revision, termination, and domestic alternatives

The way in which nations have responded to what they perceive to be limits imposed by previous BITs is the subject of an expanding corpus of research. The termination or denunciation of bilateral investment treaties (BITs), the introduction of modernized model BITs that emphasize regulatory space (for example, India's 2016/2018 model texts and later bespoke approaches), and the legislative substitution of domestic protection regimes (for example, South Africa's Protection of Investment Act, which eliminates recourse to international arbitration and relocates disputes to domestic courts or mediation processes) are all examples of approaches that are frequently used. The results of comparative studies reveal a substantial amount of variation: some states are attempting to maintain investor trust while simultaneously expanding public policy carve-outs, while other governments are completely rejecting investor-state arbitration in favor of national adjudication methods. Researchers who are examining the growth of economic nationalism in investment law have found that these policy actions are essential to their investigation.

Multilateral and institutional reform efforts

Two distinct but complementary reform paths are documented in the literature. The first is procedural and institutional in nature (ICSID's 2022 rule revisions, which will boost openness and arbitrator disclosure; wider requests to cut costs and improve efficiency). The second is systemic and multilateral: the United Nations Commission on International Trade Law Working Group III has advanced proposals that range from the modernization of procedures to the establishment of standing mechanisms (including a proposed Multilateral Investment Court or standing appellate/first-instance body) and an advisory center to assist states. Academic commentary highlights both the promise and the political difficulty of multilateral reform. While many delegations advocate for stronger safeguards for state regulatory autonomy and more consistent jurisprudence, the process of negotiating a binding multilateral instrument faces significant divergence between states that export capital and states that import capital.

Synthesis and research gaps

Out of all of these different literatures, a few consistent ideas emerge. To begin, economic nationalism has not resulted in a consistent reaction but rather a spectrum of responses. These responses range from the recalibration of treaty wording (with the goal of preserving investment flows but extending state policy space) to the complete withdrawal of the treaty and the substitution of domestic legislation. The second point is that although efforts to reform are converging on similar goals, such as openness,

impartiality, cost reduction, and a clearer respect to genuine public interest regulation, institutional change is slow and politically disputed. Third, empirical research on outcomes (such as how changes to treaties or domestic alternatives effect foreign direct investment (FDI) inflows, the frequency of litigation, or regulatory choices) continues to be incomplete and frequently country-specific. Important gaps remain for future research and for this paper to address: (a) systematic empirical comparisons of investor behavior under modernized BITs versus terminated/renegotiated frameworks; (b) measurement of whether procedural reforms (ICSID, UNCITRAL) have actually altered tribunal decisions favoring greater deference to public policy; and (c) assessment of how geopolitical shifts (supply-chain realignment, strategic investment screening) interact with investment dispute incidence.

Conclusion

As a reaction to economic nationalism and the restoration of state sovereignty in global economic governance, Investor-State Arbitration (ISA) is experiencing a significant transition. Investment conflicts were meant to be depoliticized and investors wanted legal certainty; yet, ISA, which was once seen as a pillar of the free international order, is now under unprecedented scrutiny. A new assessment of the proper balance of justice, legitimacy, and accountability in international investment relations is necessary in light of the fact that the limits of state sovereignty and investor protection have been redrawn by the rise of nationalism. This development is not an outright rejection of arbitration, as shown in the literature and in recent case law, but rather an appeal for a readjustment. To entice foreign investment, states are more hesitant to give up policy space and the power to regulate for the public benefit, whether it social welfare, national security, or environmental preservation. Consequently, both bilateral and multilateral frameworks are undergoing fundamental changes due to the reevaluation of the long-established imbalance between powerful investors and host nations. There is a growing trend toward a more open, equitable, and sovereignty-aware arbitration system, as shown in recent reforms at ICSID and UNCITRAL as well as new initiatives by nations like South Africa, India, and the EU. Proposals for a Multilateral Investment Court (MIC), stricter ethical requirements for arbitrators, more transparency in procedures, and exceptions for the public interest are all part of these changes. In a more politically aggressive and varied world, a one-size-fits-all model of arbitration is no longer viable, and these adjustments seek to restore faith in the system while simultaneously acknowledging this. Environmental imperatives, internal political forces, and geopolitical realignments all work together to make it impossible for ISA to function independently of larger global trends. Despite its reputation as a protectionist ideology, economic nationalism presents a chance to rethink investment legislation from a sustainable development perspective. This requires acknowledging that social inclusion, industrial diversity, and climate resilience are all valid public policy goals that are essential to the stability of investments over the long run. Finally, investor-state arbitration faces new obstacles and possibilities in the age of economic nationalism. The system's long-standing reputation for prejudice, opacity, and imbalance is a significant obstacle. On the other hand, we may seize the opportunity by creating investment treaties and dispute processes that are more in line with the modern world, where economic fairness, global interdependence, and national sovereignty all coexist. To what extent ISA is able to adjust to these changing dynamics will determine its fate. Maintaining governments' authority to pursue lawful regulatory objectives while providing investors with certainty and impartiality is essential for a long-term arbitration model. Redesigning investor-state arbitration such that it promotes fair globalization and helps bring democratic rule and economic integration into harmony should be the priority, not its elimination.

Within this shifting paradigm, Investor-State Arbitration faces a choice: it either stick to the failed tenets of neoliberal dogma or transform into a mechanism that really represents the spirit of mutual regard among independent nations and international investors. International investment law's legitimacy and longevity in the twenty-first century will be decided by the road it takes.

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