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Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes

Wanli Ma

Michael Faure

IS INVESTMENT ARBITRATION AN EFFECTIVE ALTERNATIVE TO COURT LITIGATION? TOWARDS A SMART MIX OF LITIGATION AND ARBITRATION IN RESOLVING INVESTMENT DISPUTES

Wanli Ma[*] and Michael Faure[**]

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* Wanli Ma is a senior foreign legal consultant at the Beijing Representative Office of Kirkland & Ellis International LLP. During the preparation of this paper, he was a researcher at Erasmus University Rotterdam, focusing on research relating to international investment law.

** Michael Faure is a Professor of Comparative and International Environmental Law at Maastricht University. He also serves as the Academic Director of the Ius Commune Research School and the Maastricht European Institute for Transnational Legal Research (METRO). He is equally Professor of Comparative Private Law and Economics at Erasmus School of Law in Rotterdam and Academic Director of the Rotterdam Institute of Law and Economics.

INTRODUCTION

Despite the availability of multiple methods for dispute resolution, investment arbitration has largely become a prevailing weapon for foreign investors to wrestle with their host sovereign power.[1] This, however, stands in contrast with the fact that investment arbitration is a relatively novel international adjudicatory mechanism since the first investment treaty offering investment arbitration as a dispute resolution method was concluded between the Netherlands and Indonesia in 1968 and investment arbitration practices emerged even later.[2] Investment arbitration enables foreign investors to submit their disputes with host states to investor-state arbitration tribunals for resolution with no need to resort to the domestic courts of host states most of the time.[3] There are in general three forms of

1. Chaisse and Donde argue that, amidst the rising number of international investment agreements in parallel with increasing foreign direct investment flows, international arbitration remains the preferred mechanism for resolving disputes between an investor and a state. *See* Julien Chaisse & Rahul Donde, *The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific*, 51 THE INT'L LAWYER 47, 48 (2018). Likewise, Weinstein and Manukyan point out that "arbitration has been the *de facto* vehicle of choice for the resolution of investor-state disputes" for many years. Daniel Weinstein & Mushegh Manukyan, *Making Mediation More Attractive for Investor-State Disputes*, WOLTERS KLUWER: KLUWER ARB. BLOG (Mar. 26, 2019), http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/.

2. *See* INT'L CTR. FOR SETTLEMENT OF INV. DISP. (ICSID), ANN. REP. 5 (2013).

3. *See* Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 2 MEXICAN L. Rev. 199, 203 (2013).

instruments in which sovereign states specifically signal their consent to arbitrate investment disputes with foreign investors, including investment treaties or international investment agreements (IIAs), investor-state contracts, and national legislation.[4] A majority of investment arbitrations have been commenced on the basis of arbitration clauses as contained in IIAs instead of on the basis of contracts or national legislation.[5] The International Centre for Settlement of Investment Disputes (the ICSID), for all intents and purposes, is an iconic symbol of the investment arbitration system.[6] In the same vein, according to the Investment Dispute Settlement Navigator (the Navigator) operated by the United Nations Conference on Trade and Development, more than half of the known treaty-based investment arbitrations are instituted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and the associated ICSID Arbitration Rules.[7] Apart from the ICSID system, IIAs often provide foreign investors with more options of arbitration rules on which they may rely to commence investment arbitration, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[8]

While investment arbitration had a rather slow start with moderate numbers of cases registered before the ICSID in the three decades following the institution's establishment, it started to gain tremendous momentum from the late 1990s and in the new millennium.[9] According to the Navigator, the total number of known treaty-based investment arbitration cases stands at 1,229 as of mid-April 2023.[10] The exponential growth

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4. *See* JONATHAN BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 60 (Oxford Univ. Press, 1st ed. 2017).

5. *Id.* at 61.

6. *See* ICSID, 2021 ANNUAL REPORT 20 (2021). ICSID, in its own 2021 Annual Report, states that "ICSID is the premiere global institution for the resolution of investment disputes, having administered the vast majority of all known international investment cases." *Id.*

7. *Investment Dispute Settlement Navigator*, UNCTAD INV. POL'Y HUB (July 31, 2022), https://investmentpolicy.unctad.org/investment-dispute-settlement.

8. Felix O. Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States*, 13 RICH. J. GLOB. L. & BUS. 217, 239 (2014).

9. *Investment Dispute Settlement Navigator*, *supra* note 7.

10. *Id.*

of investment arbitration has been understandably accompanied by increasing concerns from all walks of life about this unique dispute resolution mechanism that often subjects the regulatory practices of sovereign states to the scrutiny of private arbitral tribunals.[11] In effect, investment arbitration has fallen victim to its own success in the sense that an all-around "legitimacy crisis" has undermined its long-term development.[12] In response, some developing countries, such as certain Latin American countries, Indonesia, and South Africa, have been rather determined to shift from investment arbitration to court litigation for the resolution of investment disputes by denouncing the ICSID Convention and terminating existing IIAs.[13] This rather extreme policy choice in the form of eliminating investment arbitration, however, might have been made without a full and accurate understanding of the ins and outs of this dispute resolution mechanism.[14]

At the same time, the investment arbitration mechanism has become an integral part of most modern IIAs over several decades of development.[15] In the light of the steady increase of investment claims before international tribunals, investment arbitration has been regarded by some as the most dominant mechanism for the resolution of investment disputes.[16] Some of them even argue that national judiciaries have been completely marginalized in investor-state dispute settlement (ISDS) by the

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11. Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 EUR. J. INT'L L. 405, 406-07 (2020).

12. Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1, 19-21 (2020).

13. Anthea Roberts, *Incremental, Systemic, and Paradigm Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 410-18 (2018).

14. *See* Charles N. Brower & Sadie Blanchard, *What's in a Meme - The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States,* 52 COLUM. J. TRANSNAT'L L. 689, 696, 700-60 (2014).

15. Schill, for example, argues that provisions on investment arbitration have become a core component of investment agreements for decades. *See* Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, E15 TASK FORCE ON INV. POL'Y (2015), https://pureuva.nl/ws/files/2512304/163092_E15_Investment_Schill_FINAL.pdf.

16. For instance, Puig argues that "investor-state arbitration becomes the dominant remedy to enforce international investment obligations." Sergio Puig, *No Right without a Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT'L L. 829, 831.

increasing recourse to investment arbitration as a result of the provision of direct and immediate access to investment arbitration.[17] Given that most IIAs provide an alternative between court litigation and investment arbitration for foreign investors,[18] we conduct our analysis with the understanding that investment arbitration is largely offered as an alternative to foreign investors. While this article equates the current design of ISDS with the fact that investment arbitration acts as a substitute for domestic courts, it is widely recognized that national judiciaries have in fact not been wiped out from the landscape of the resolution of investment disputes.[19] On the one hand, some investment agreements specify the involvement of domestic courts in the dispute resolution process by virtue of the exhaustion of the local remedies rule, the prior litigation requirement, or the fork-in-the-road clause.[20] On the other hand, empirical evidence has shown that in practice foreign investors sometimes resort to host states' courts prior to the initiation of investment claims at the international level.[21] Although foreign investors may choose domestic courts for the resolution of investment disputes in reality,[22] it does not change the fact that the current

17. *See, e.g.,* JUN XIAO, *Chinese BITs in the 21st Century: Protecting Chinese Investment*, *in* EXPANSION OF TRADE & FDI IN ASIA: STRATEGIC AND POL'Y CHALLENGES 127, 131-132 (Julien Chaisse & Philippe Gugler eds., 2009); *see also* Kinda Mohamadieh, *Investment Governance to Reverse Unjustified Privileging of Investors*, 64 DEV. 82, 84 (2021).

18. GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS 35 (2020).

19. *Id.* at 31-83.

20. August Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, 21 ASIA PAC. L. REV. 3, 10-12 (2013). The fork-in-the-road clause is defined as a clause that prohibits a foreign investor from submitting an investment dispute to a domestic court or an international tribunal if he/she has previously chosen investment arbitration or court litigation, respectively, as the method for the resolution of the relevant investment dispute. Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches*, 18 WASH. U. GLOB. STUD. L. REV. 391, 395 (2019).

21. Szilárd Gáspár-Szilágyi, *Let Us Not Forget about the Role of Domestic Courts in Settling Investor-State Disputes*, 18 L. & PRAC. INT'L CTS. & TRIBUNAL 389, 395 (2020).

22. Gáspár-Szilágyi argues that the reasons why foreign investors would rely on the domestic courts of the host state include, among others, that investors did not know about investment arbitration and its advantages, domestic

design of ISDS largely enables foreign investors to circumvent host states' courts in favor of investment arbitration.[23] The fact that foreign investors are granted the discretion to immediately start investment arbitration and domestic courts may be increasingly bypassed by these investors in proportion to the continuing rise of investment arbitrations should be enough of a cause for concern for host states.[24] Thus, investment arbitration has been considered by some as a substitute for domestic courts.[25]

While a number of reform proposals have been put on the table to tackle the legitimacy crisis of investment arbitration,[26] many of them risk oversimplifying the challenges facing ISDS by focusing on the details rather than the overall picture.[27] These proposals also often do not take into account that investment arbitration as it stands now acts as a substitute for domestic courts, thus failing to recognize the relevance of domestic courts in the overall reform of ISDS.[28] To fill in the gap in the existing investment law scholarship, this article employs a goal-based approach to conduct an effectiveness analysis of investment arbitration as an alternative to domestic courts in resolving investment disputes.[29]

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disputes are different from international ones, and other considerations, such as financial costs. *Id.* at 402-04.

23. *See* Puig, *supra* note 3, at 204-05.

24. Chaisse & Donde, *supra* note 1, at 47. *See also* 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts, Pub. Citizen (Oct. 25, 2017), https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

25. Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 395 (2018).

26. Faure & Ma, *supra* note 12, at 21-24.

27. For instance, Alvarez argues that current ISDS reform efforts focus on the ostensible inadequacies of investment arbitration but ignore the bigger threat that envisioned reforms will do nothing to address. José E Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. 253, 254 (2021).

28. *See e.g., Multilateral Investment Court Project*, EUR. COMM'N, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en (last visited Oct. 3, 2022).
For instance, the current EU approach to ISDS reform is replacing the ISA system with a permanent multilateral investment court, but it fails to give an explicit answer to the relationship between domestic courts and the proposed multilateral investment court.

29. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 225-270 (2012).

Domestic courts, in and of themselves, may be involved in ISDS at different stages to serve different roles.[30] For example, parties to investment arbitration may seek interim relief from domestic courts for reasons such as that a tribunal has not yet been constituted, a measure is directed at a third party, and/or a court-ordered measure is more efficient.[31] Once an arbitration award is issued by an investment tribunal and the debtor party declines to comply with the award, the creditor party can rely on international conventions, such as the ICSID Convention and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, requesting relevant judicial forums to recognize and enforce the award.[32] In the context of non-ICSID arbitration, which is investment arbitration that is not based on the ICSID Arbitration Rules, domestic courts at the seat of arbitration may also be called upon to review the arbitration awards rendered by investment tribunals.[33] This article does not intend to conduct a positive legal analysis of the involvement of domestic courts in ISDS nor present their multiple roles in the resolution of investment disputes. Instead, this article emphasizes that investment arbitration is designed as an alternative to court litigation and analyzes the effectiveness of investment arbitration in achieving the goals of ISDS in relation to court litigation as a competing method for resolving investment disputes. In this article, we also refrain from discussing in detail to what extent court litigation can achieve the goals of ISDS as our focus is placed on the current design of ISDS, which is concerned more with investment arbitration than with domestic courts. Nevertheless, we will argue that litigation via domestic courts has its own virtues and limitations in contributing to the realization of the goals of ISDS, and this argument will be pursued in the course of this article.

The substance of a goal-based approach for assessing the effectiveness of international adjudication can be summarized as the effectiveness of an international adjudicatory mechanism depends on the extent to which the mechanism's performance is in

30. Kaufmann-Kohler & Potestà, *supra* note 18, at 31-83.

31. *Id.* at 63-64.

32. *Id.* at 73-77. *See also* Nicole Duclos & Erin Thomas, *Enforcement of ICSID Awards in the United States*, 2 BCD INT'L ARB. REV. 373, 373-88 (2015).

33. Juan Fernández-Armesto, *Different Systems for the Annulment of Investment Awards*, 26 ICSID REV. - FOREIGN INV. L.J. 128, 136 (2011).

alignment with its predetermined goals.[34] Thus, an effectiveness analysis using a goal-based approach would shed light on whether the current design of ISDS, i.e., investment arbitration as an alternative to domestic courts, can achieve the desirable goals of ISDS. We will therefore not repeat the many criticisms that have been formulated on the ISDS in the literature,[35] but we rather take a goals-oriented approach. This will allow us to contemplate the trade-offs of investment arbitration, especially against adjudication in domestic courts. This examination of whether investment arbitration can be considered as an effective alternative to court litigation in the resolution of investment disputes contributes to the literature on the reform of ISDS by measuring the performance of investment arbitration against the goals of ISDS and by highlighting that investment arbitration currently works as a substitute for domestic courts. At the same time, this article, through conducting such an effectiveness analysis, can lay the groundwork for addressing the existing reform proposals regarding ISDS, especially those that call for the replacement of investment arbitration with domestic courts. We will analyze the specific goals of ISDS, examine why it is expected that investment arbitration will be able to fulfill those goals and subsequently critically examine whether those expectations can indeed be met.

The Introduction of this article constitutes the first step arguably necessary for any analysis of the effectiveness of an international adjudicatory mechanism—an examination of the goals of the mechanism at issue. Part I introduces the goals of ISDS in the eyes of sovereign states considering that states mandate the establishment of the dispute resolution mechanism in IIAs, and the goals as envisioned by states are more likely to strike a balance between corporate interests and the right of states to regulate.[36] Part II identifies the gap between the perceived

34. Shany, *supra* note 29, at 230.

35. *See*, *e.g.*, Michael Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 AM. U. BUS. L. REV. 429, 430-42.

36. Theoretically speaking, different stakeholders involved in the domain of cross-border capital movement would tend to envision the goals of ISDS in a way that favors their own interests the most. Starting from that assumption, foreign investors may focus on the role that ISDS can play in facilitating the resolution of their disputes with host states in a fair, efficient, and cost-effective manner. They may show little interest in whether the design of ISDS could specifically facilitate the rule-of-law development within host states. Capital importing countries, including both countries from the North and the South,

merits of investment arbitration and the reality as unveiled by empirical evidence. Part III makes an analysis of the extent to which investment arbitration can promote state compliance with the good governance standards established in the underlying IIAs. Part IV analyzes whether investment arbitration can contribute to the objectives of IIAs, including the improvement of the domestic rule of law, the promotion of cross-border capitals, the removal of any political elements in the investment disputes, and the achievement of sustainable development. Part V reveals that investment arbitration as an alternative to domestic courts to a large extent undermines the legitimacy of the overarching investment treaty regime. This article concludes by highlighting the implications of the outcome of the effectiveness analysis above for the reform of ISDS and proposing our own suggestions for the direction along which ISDS should be improved in Part VI.

I. THE GOALS OF ISDS

The application of the goal-based approach to the effectiveness analysis of the current design of ISDS, i.e., investment arbitration as an alternative to domestic courts, requires the identification of the goals of this treaty-based mechanism as the initial step. This identification process may not be straightforward, and may require some effort since IIAs generally do not spare reserved space for a dedicated illustration of the ends that ISDS is expected to achieve.[37] That, however, does not necessarily mean

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may have incentive to look beyond the expeditious settlement of investment disputes and factor in more elements, such as the increase and maintenance of capital inflows from abroad and the right to regulate across a broad spectrum of issues that stay within the parameters of state power. We believe the goals as envisioned by national states in aggregate can best represent the goals of ISDS that are compatible with the expectations of different stakeholders. That is because, in the global practice of investment treaty negotiations, both home states and host states, as well as capital importing countries and capital exporting countries, are closely involved, representing an inclusive mixture of interests and concerns of different aspects of the global community.

37. *See, e.g.,* 2012 US Model Bilateral Investment Treaty (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; *see also* Chapter 14 (Investment), in USMCA (2019), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf; *see also* Chapter 8 (Investment), in the EU-Canada Comprehensive Economic and Trade Agreement, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)#d1e2878-23-1.

that the goals of ISDS are elusive because the texts of IIAs and the treaty-based character of this adjudicatory mechanism can effectively inform the identification process.[38] Before proceeding to the analysis of the effectiveness of investment arbitration as an alternative to domestic courts using the goal-based approach, it is vital to ascertain the goals of ISDS by tapping into the texts of the readily available IIAs and the research outcomes in the existing literature.

A. Fair and Efficient Dispute Resolution

As its name implies, the primary goal of ISDS should be resolving the disputes between foreign investors and host states in a fair and efficient manner.[39] These disputes are concerned with alleged non-compliance with investment disciplines by host states, which cause harm to the economic interests of foreign investors.[40] If these disputes linger on without an effective adjudicatory mechanism, risks of deterioration of international relations, disinvestment by foreign investors, and inhibition of economic activities would intensify.[41] ISDS, unlike state-state dispute settlement which is also typically included in IIAs,[42] grants to covered investors a standing in bringing claims against host states before international investment tribunals without the espousal of their home states.[43] Fair and efficient resolution of investor-state disputes as a goal of ISDS not only conforms to legal senses and traditions,[44] but also derives support from the nature

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38. *Id.*

39. Valentina Cagnin, *Investor-State Dispute Settlement (ISDS) from a Labor Law Perspective*, 8 EUR. LAB. L.J. 217, 219 (2017).

40. Emily Osmanski, *Investor-State Dispute Settlement: Is There A Better Alternative?*, 43 BROOK. J. INT'L L. 639, 639 (2018).

41. Shany, *supra* note 29, at 245.

42. NATHALIE BERNASCONI-OSTERWALDER, STATE-STATE DISPUTE SETTLEMENT IN INVESTMENT TREATIES 1 (2014), https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

43. Arseni Matveev, *Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty*, 40 U.W. AUSTL. L. REV. 348, 349 (2015).

44. Fabricio Fortese & Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3 GRONINGEN J. INT'L L.110, 110-11. Romano and others argue that "Adjudication has been thought to be a cost-effective method for settling disputes (or solving problems)." CESARE P. R. ROMANO ET AL., *Mapping International Adjudicative Bodies, the Issues, and Players*, *in* THE OXFORD HANDBOOK OF INT'L ADJUDICATION 3, 18 (Cesare P. R. Romano et al. eds, 2013).

and substance of IIAs.[45] The 2012 US Model Bilateral Investment Treaty, for instance, recognizes "the importance of providing an effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration."[46] While some investment agreements explicitly highlight the necessity of an effective (fair and efficient) dispute resolution mechanism, most of them nonetheless seemingly stop short of specifying the goals of ISDS in the preamble or relevant provisions.[47] Despite the aforementioned absence, to the extent that dispute resolution is recognized as part of efforts to create favorable conditions for foreign investments,[48] the stress on investment protection in the preambles of IIAs justifies fair and efficient dispute resolution as a goal of ISDS.[49] The historical trajectory of the evolution of international adjudicatory mechanisms also supports the view that fair and efficient dispute resolution should be a goal envisioned by sovereign states.[50]

Fair and efficient dispute resolution, as a generalized statement of desired virtues in the process, may break down into some specific procedural and substantive characteristics that

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45. Josef C. Brada et al., *Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis*, 35 J. ECON. SURV. 34, 35 (2021).

46. 2012 US Model Bilateral Investment Treaty, *supra* note 37.

47. The exceptions which expressly refer to effective dispute resolution noted are the few BITs concluded by the United States in accordance with the 2004 U.S. Model BIT, including the US-Uruguay BIT (2005) and the US-Rwanda BIT (2008). Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, US-Uruguay, Apr. 11, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2380/download. Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, US-Rwanda, Feb. 19, 2008, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download.

48. Kohler and Stähler argue that ISDS aims to "protect foreign investors against domestic policies causing 'unjustified' harm." Wilhelm Kohler & Franck Stähler, *The Economics Of Investor Protection: ISDS versus National Treatment* 12 (CESifo Working Paper, No. 5766, 2016).

49. It is argued that "BITs traditionally stress the importance of creating favourable conditions for investments and/or investors of both parties." Marie-France Houde, *International Investment Perspectives*, OECD, 2006, at 145, http://www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf.

50. Shany, *supra* note 29, at 246.

should be satisfied by adjudicatory mechanisms.[51] For instance, ensuring fairness in ISDS calls for an independent and impartial forum where decision-makers are not in thrall to either side of the disputes, especially considering that the parties involved in investor-state disputes are not on an equal footing.[52] Also, fairness should not be confined to disputing parties; instead, fairness should be extended to the much broader society, including local communities and indigenous people.[53] Thus, third-party participation should be guaranteed to ensure that public interests are not compromised in the process and that private investor interests do not unreasonably override non-economic interests.[54] Meanwhile, the competence of decision-makers, as an institutional dimension of every adjudicative process, is inextricably linked to the quality of dispute resolution.[55] Competent adjudicators with professional experience and expertise are thus indispensable for the achievement of fair and efficient resolution of investor-state disputes.[56] Furthermore, it is virtually self-

51. For instance, in their analysis of the crisis facing ISDS, Sachetim and Codeço touch upon different aspects that are related to the fairness and efficiency of the dispute resolution process. Henrique Sachetim & Rafael Codeço, *The Investor-State Dispute Settlement System Amidst Crisis, Collapse, and Reform*, 6 THE ARB. BRIEF 1, 26-32 (2019).

52. UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD/DIAE/IA/2009/11 (2010), https://unctad.org/en/docs/diaeia200911_en.pdf.

53. *See* Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 B.C. L. REV. 2791, 2799-800 (2018).

54. Schill and Djanic argue that critics of the international investment law regime are concerned that the interests of foreign investors are protected at the expense of public interests, "such as the environment, human rights, the right to health, cultural heritage, or the rights of indigenous peoples." Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REV. 29, 30 (2018).

55. Competence refers to "the ability of trials and of triers (judges and juries) to investigate, understand, and make the substantive social decisions that may come to them." Komesar argues that competence is an institutional dimension that should be taken into consideration of any discussion of the advantages and disadvantages of the adjudicative process. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 138 (1997).

56. Kaufmann-Kohler and Potestà argue that the most important individual selection criterion for qualified adjudicators, in the context of discussions of a prospective Multilateral Investment Court, concerns professional

evident that efficient ISDS should avoid exorbitant costs and lengthy proceedings.[57] In addition, efficient ISDS requires the existence of a well-functioning enforcement mechanism which commits disputing parties to the terms of the rulings made by adjudicative bodies.[58] In the absence of such an enforcement mechanism, compliance with the rulings would likely be left to the mercy of the losing party.

B. Norm Compliance

International adjudicatory mechanisms are often established through inter-state treaties, and, accordingly, these mechanisms are intended to interpret and apply the norms set out in those treaties.[59] In general terms, the work of these mechanisms is focused on monitoring the conduct of the parties to the treaty, identifying the violations of substantive norms, and issuing rulings to restore compliance and/or impose corrective measures.[60] All these efforts are supposed to promote compliance with the governing international norms, and, by doing so, to augment the credibility of the undertakings embodied therein.[61] By the same token, ISDS could be understood as a legal innovation to step up compliance by treaty parties with the norms of IIAs against which this mechanism acquires a mandate and makes sense.[62] This understanding conforms to the popular conception in the investment law scholarship that ISDS, an almost ubiquitous feature of modern investment agreements, is an enforcement

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experience and expertise. Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism For Investment Awards*, CIDS 24 (Nov. 15, 2017), https://lk-k.com/wp-content/uploads/2017/11/CIDS_Supplemental_Report.pdf.

57. Jeon argues that "A good ISDS provisions should encourage early and effective resolution, and lower the costs of managing disputes." Jayoung Jeon, *Drafting an Optimal Dispute Resolution Clause in Investment Treaties*, 4 PEKING U. TRANSNAT'L L. REV. 176, 189 (2016).

58. Jeon also argues that the investor-state dispute resolution system should be able to lead to enforceable results. *Id.* at 189-90.

59. Shany, *supra* note 29, at 244.

60. *Id.* at 245.

61. *Id.* at 244-45.

62. The obligations contained in IIAs, especially traditional investment agreements, are essentially one-way in the sense that sovereigns have obligations while investors do not. Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 139 (2019).

mechanism for international investment law.[63] IIAs create obligations for treaty parties with respect to the treatment of foreign investors and their investments, and these "external constraints and disciplines" serve to foster and reinforce values related to the principle of good governance within host states.[64] Those treaty parties may at some point, however, for one reason or another, fail to comply with the obligations set out in IIAs to which they have committed themselves.[65] Thus, as a significant enforcement mechanism for IIAs, ISDS should contribute to the promotion of compliance with investment disciplines not least by providing covered investors with an avenue to complain about any alleged misconduct of host states.[66]

The goal of inducing compliance with the underlying investment agreements is in line with the expectation of treaty parties for ISDS given that compliance is central to the role of international law in regulating international relations.[67] More specifically, reformers, particularly those in developing countries, see IIAs as powerful tools to accelerate the modernization of their legal systems, because these instruments introduce "external checks and discipline[s]" on national governance regimes which are difficult to agree upon and implement at the domestic level.[68] The effectiveness of these external checks and discipline would in turn largely depend on whether the procedural mechanisms in IIAs, particularly ISDS, would be able to induce states to

63. Gaukrodger and Gordon argue that investor-state dispute resolution is an enforcement mechanism that promotes compliance. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 10 (OECD, Working Paper No. 2012/03, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.

64. RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 32 (3rd ed. 2022).

65. Williams argues that non-compliance of treaties by states may result from their lack of ability to do so or the outcome of careful cost-benefit calculations. ZOE P. WILLIAMS, *What, When, Where and Why? Patterns in Investor-State Arbitration*, *in* RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY OPTIONS 29, 36-37 (Kavaljit Singh & Burghard Ilge eds., 2016).

66. *See, e.g.,* Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply with International Investment Law*, 38 GA. J. INT'L & COMP. L. 63, 83 (2009).

67. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1830 (2002).

68. Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 953, 971-2 (2005).

comply with treaty standards of good governance.[69] In addition, if compliance with IIAs cannot be established and sustained, the resources devoted to the negotiation and maintenance of these treaties will be reduced and their anticipated economic functions will not be implemented.[70] Non-compliance with the investment disciplines embodied in IIAs would likely lead to more negative externalities, including, among others, increased costs for dispute resolution, rising political antagonism among states, less cordial investor-state relationship, a less favorable global investment climate, and reduced cross-border capital flows.[71]

C. Facilitating the Objectives of the Investment Law Regime

Most international adjudicatory mechanisms are established to be part of their respective legal regimes, which usually comprise a specific set of treaties and, in some cases, organizations.[72] As a result, a built-in bias may arguably become a characteristic of these mechanisms in the sense that they may be expected to contribute to the attainment of the objectives of the overarching regimes from which they originated.[73] For instance, the Dispute Settlement System of the World Trade Organization (WTO), which is embedded in the complex WTO legal framework, is meant to sustain the long-term operation of the multilateral trading system and to support the realization of the goals of WTO, such as trade liberalization and facilitation.[74] It follows that ISDS, as a salient procedural element of IIAs for decades,[75] should equally, through its operation, facilitate the accomplishment of the objectives of the underlying investment law regime.[76] Nevertheless, most of the existing literature on the

69. Ryan, *supra* note 66, at 83.

70. Sykes argues that IIAs serve a dual function – to restrain host states from imposing international externalities on foreign investors and to reduce inefficient risks that uneconomically increase the cost of imported capital in host states. Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AM. J. INT'L L. 482, 485-509 (2019).

71. Bonnitcha et al., *supra* note 4, at 3. *See also* Ryan, *supra* note 66, at 81-94.

72. Shany, *supra* note 29, at 246.

73. *Id*.

74. SIVAN S. AGON, INTERNATIONAL ADJUDICATION ON TRIAL: THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT SYSTEM 67 (2019).

75. Schill, *supra* note 15, at 1.

76. Shany, *supra* note 29, at 246.

reform of ISDS seemingly fails to reveal their discussions with due regard to the overall objectives of the investment law regime.[77] On the other hand, in some more recent literature, a handful of investment law scholars have addressed the objectives of IIAs and thereby elaborated further on their visions of the future contours of ISDS.[78] Likewise, the Report of UNCITRAL Working Group III for its thirty-fifth session suggests that government representatives also urged the Group to assess ISDS comprehensively in its work to advance reforms in this regard, not least by exploring whether the mechanism was accomplishing its pre-determined goals.[79]

The stress on the goal of ISDS to advance the objectives of the investment law regime then begs the question of what precisely constitutes those objectives. First and foremost, the established view in the investment law scholarship is that IIAs should primarily serve to protect foreign investors and their investments and to promote investment flows.[80] The preambles of many

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77. Puig & Shaffer, *supra* note 25, at 368-79.

78. It is argued that IIAs and ISDS are mainly intended to advance four objectives: "(1) promote investment flows; (2) depoliticize disputes between investors and states; (3) promote the rule of law; and (4) provide compensation for certain harms to investors." Lise Johnson et al., *Investor-State Dispute Settlement: What Are We Trying To Achieve? Does ISDS Get Us There?*, COLUM. CTR. ON SUSTAINABLE INV. (Dec. 11, 2017), https://ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-achieve-does-isds-get-us-there.

79. Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, UNCITRAL A/CN.9/935, at 15 (2018).

80. Salacuse and Sullivan argue that the goals of the BIT movement include investment protection and promotion. 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, 75-79 (2005). Moreover, Fox argues that while developed countries regard BITs as a means to protect their nationals' investments overseas, developing countries sign on to these treaties for more inflows of FDI to benefit economic development. Genevieve Fox, *A Future for International Investment? Modifying BITs to Drive Economic Development*, 46 GEO. J. INT'L L. 229, 232 (2014). Roberts, however, argues that investment protection and increased foreign investment are not goals in and of themselves. *See*, *cf*., Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 376 (2015). According to Anne van Aaken, "It is not only questionable whether the (only) purpose of IIAs is the protection of investment, but also whether it is actually a purpose at all. As most preambles reveal, the protection and promotion of investment is the means to an end, the end being the maximization of welfare,

investment agreements also attest to that treaty parties desire to provide favorable conditions for investors and to stimulate the cross-border flow of capitals through the operation of IIAs.[81] In addition, a retrospective review of the investment law regime reveals that the emergence of investment agreements also aims to depoliticize international investment relations by setting out legal rules governing the regulation of foreign investments and thus alleviating the disagreement between countries, especially between developed countries and developing countries.[82] From this perspective, international investment law in general and ISDS in particular fulfills a valuable function of reducing political antagonism by subjecting international investment relations to the rule of law instead of to power politics.[83] Furthermore, the pursuit of a strengthened rule of law as an additional goal of international investment law is often mentioned in the literature.[84] Although IIAs clearly aspire to consolidate the international rule of law by committing states to a set of established legal standards of treatment of foreign investments,[85] it remains

development, or prosperity of the home and host states." Anne van Aaken, *Interpretational Methods as An Instrument of Control in International Investment Law*, 108 AM. SOC'Y INT'L L. PROC. 196, 198 (2014).

81. The preamble of the 2012 U.S. Model BIT includes a statement which reads: "Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties." 2012 U.S. Model Bilateral Investment Treaty, *supra* note 37. The preamble of the 2018 Dutch Model BIT indicates that the parties desire "to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development." The 2018 Netherlands Model Investment Agreement, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download (last visited Apr. 18, 2022).

82. Salacuse argues that the multiplication of investment agreements in part resulted from the contestation between industrialized countries and newly decolonized countries about the content of international investment law. Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155, 155 (2007).

83. STEPHAN W. SCHILL, *In Defense of International Investment Law*, *in* EUR. YEARBOOK OF INT'L ECON. L. 309, 313 (Marc Bungenberg et al. eds., 2016).

84. Johnson et al., *supra* note 78. *See also* Salacuse, *supra* note 82, at 161.

85. Stoll argues that IIAs accord protection to foreign investors by putting substantive rules and procedural remedies in place, displacing power play and uncertainty and thus becoming an important achievement of the international

less clear whether their goal likewise includes the promotion of the rule of law at the domestic level.[86]

The domestic rule of law may seem to fall outside the remit of IIAs at first glance, especially considering the cliché that these agreements are initially established as substitutes for lame and ineffective domestic regimes.[87] The opportunity that treaty parties and their investing nationals have to fall back on the legal rules and remedies in investment agreements when a violation of international investment discipline occurs, however, does not negate the states' wish to boost good governance at the domestic level.[88] For one thing, it is counter-intuitive to argue that the domestic rule of law is not in the mind of treaty negotiators if for no other reason than because, as Professor Rudolf Dolzer argues, "domestic rules applicable to foreign investors must be adjusted to accord with the obligation imposed by the international treaty."[89] For another thing, states conclude international treaties to promote inter-state cooperation, which is necessary for avoiding the imposition of negative externalities on each other and for producing public goods.[90] The investment protection orientation of investment agreements indicates that states desire to avoid negative externalities by requiring the other sides to accord due protection to their investing nationals, or, in other words, by inducing appropriate state behavior which may consist of many forms of regulation.[91] From that perspective, treaty

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rule of law. Peter-Tobias Stoll, *International Investment Law and the Rule of Law*, 9 GOETTINGEN J. INT'L L. 267, 276 (2018).

86. One of the common explanations for the emergence of IIAs is that developed countries believe that "a lower quality of governance or rule of law in less developed states presents higher political and regulatory risks to foreign investors" and the network of IIAs has been established to override the domestic legal framework of developing host states. Daniel Behn, Tarald Laudal Berge & Malcolm Langford, *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration*, 38 NW. J. INT'L L. & BUS. 333, 341 (2018).

87. Sattorova argues that "even though initially created as a substitute for lacking and ineffective domestic regimes and not intended as a catalyst of regulatory reform in host states, international investment law has subsequently developed into a mechanism that can foster positive transformation at a national level." MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? 137 (2018).

88. Dolzer, *supra* note 68, at 955.

89. *Id*.

90. ERIC A. POSNER & ALAN O. SYKES, ECON. FOUND. OF INT'L L. 63 (2013).

91. Rashmi Banga, *Do Investment Agreements Matter?*, 21 J. ECON. INTEGRATION 40, 42 (2006).

parties, as the mandate providers for IIAs, apparently aim to improve the domestic rule of law in host states at least as far as foreign investment regulation is concerned, when they conclude these agreements.[92]

D. Legitimizing the Investment Treaty Regime

Although it is often an unstated goal, international adjudicatory mechanisms are expected to operate as a legitimacy booster for the overarching treaty regimes,[93] not only because they are expected to make sure that the underlying legal norms and rules are enforceable, but their own legitimacy maps onto that of the overall architecture.[94] Since legitimacy concerns public perceptions of a specific regime and thus affects its long-term existence and efficacy, the legitimacy-conferring goal of international adjudicatory mechanisms is essential to the attainment of the ultimate goals of the associated regime.[95] In the specific case of ISDS, this goal may arguably warrant extra attention in that the investment treaty regime is being dragged down by a legitimacy crisis and some countries are tempted to exit international courts/tribunals amid the rise of nationalism and populism around the globe.[96] While an appropriate design of ISDS is clearly not a panacea for bridging the legitimacy gap,[97] the goal of enhancing the legitimacy of the underlying investment treaty regime is apparently failing with the current design of ISDS, not

92. Dolzer, *supra* note 68, at 955.

93. Shany, *supra* note 29, at 246-47.

94. *Id.*

95. *Id.* at 247.

96. VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENTS LAW AND ARBITRATION 13-17 (2018). Sornarajah argues that international investment law is one of most controversial areas in international law, where "the resolution of national, business and social interests" is illustrated. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 1-7 (2d ed. 2017). Pauwelyn and Hamilton contend that states are seeking options to exit from international courts and tribunals across all subfields of international law. Joost Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 9 J. INT'L DISP. SETTLEMENT 679, 679-83 (2018).

97. Schneiderman argues that "[N]o 'technical fix' is likely to solve the crisis." David Schneiderman, *International Investment Law's Unending Legitimization Project*, 49 LOY. U. CHI. L.J. 229, 233 (2017).

least due to the fact that the design in and of itself attracts considerable critical attention.[98]

Notwithstanding the recognition that the legitimacy of the investment treaty regime implicates a multiplicity of issues and dimensions, some salient challenges against the current design of ISDS squarely reveal the contours of some of the unresolved legitimacy concerns badgering the investment treaty regime.[99] The current design is charged with the accusations that it distorts the level playing field between economic actors,[100] that it gives short shrift to states' judicial sovereignty,[101] that it deviates from the customary practice shared by other areas of public international law,[102] and that it exposes countries, including developed countries, to an ever increasing number of international arbitration claims.[103] These concerns should be addressed in any attempt to engender positive changes to ISDS, otherwise the persistent legitimacy gap would continue to threaten the longevity and utility of the overall investment treaty regime.[104] It follows that the extent to which ISDS may contribute to the legitimacy of the overall investment treaty regime should be

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98. MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 341-488 (LONDON: KLUWER L. INT'L ED. 2010).

99. *Id*. at 189-488.

100. VID PRISLAN, *European Perspectives on The Role Of National Courts in The Resolution Of Investor-State Disputes*, *in* CHINA, THE EU & INT'L INV. L.: REFORMING INVESTOR-STATE DISP. SETTLEMENT 141, 153-54 (Yuwen Li et al. eds., 2019).

101. Grewal argues that according to the principle of judicial sovereignty, "the U.S. court system should have a first crack at getting international disputes right[.]" David S. Grewal, *Investor Protection, National Sovereignty, and The Rule of Law*, American Affairs Journal (Spring, 2018/Volume II, Number 1), https://americanaffairsjournal.org/2018/02/investor-protection-national-sovereignty-rule-law/.

102. Steffen Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law*, 1 TRANSNAT'L DISP. MGMT. S1, 7 (2016).

103. *See, e.g.,* Org. for Econ. Co-operation and Dev. [OECD], *Government Perspectives on Investor-State Dispute Settlement: A Progress Report* 4 (Dec. 14, 2012).

104. For instance, Franck argues that investment arbitration is creating uncertainty about the meaning of investor rights and public international law, rather than creating certainty for sovereign states and foreign investors. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

considered as a benchmark for an analysis of the effectiveness of investment arbitration as an alternative to domestic courts.[105]

E. Summary

It appears that the literature has particular expectations regarding ISDS. It should lead to fair and efficient dispute resolution, i.e., fair and speedy dispute resolution by competent adjudicators without exorbitant costs.[106] The ISDS mechanism is also expected to contribute to norm compliance and to accelerate the modernization of institutions and domestic law in host states.[107] ISDS is, moreover, considered as a salient procedural element of the investment law regime and therefore would facilitate the objectives of the investment law regime, more particularly to pursue the role of law in international investment law, rather than relying on power politics.[108] Finally, an important function of ISDS is also the legitimization of the investment treaty regime.[109] We will now, in the next sections, dissect each of those goals separately. We will first address why it is expected that investor-state arbitration as an alternative to court litigation would be able to realize those goals and subsequently analyze whether it actually contributes to those goals in practice.

II. FAIR AND EFFICIENT DISPUTE RESOLUTION: PERCEPTIONS VERSUS REALITY

A. Traditional Perceptions of Investment Arbitration: Fast, Good, and Cheap

1. A neutral and impartial forum

While criticisms of the investment arbitration mechanism have been mounting over the years and some rather radical reform proposals have been formulated as a response,[110] the investment law scholarship is understandably focused on the controversial aspects of investment arbitration and often lacks a

105. Shany, *supra* note 29, at 246-47.
106. *See supra* Part I.
107. *See supra* Part I.
108. *See supra* Part I.
109. *See supra* Part I.
110. Brower and Blanchard claim that the chief justice of Singapore called for "global regulation that effectively permits states to vet the arbitrators that investors can choose." Brower & Blanchard, *supra* note 14, at 695.

systematic analysis of the relative strengths of this mechanism versus domestic court litigation.[111] At this watershed moment for the future of ISDS, investment arbitration should be put into perspective prior to the formulation of any informed reform proposals.[112] If the broad network of IIAs and the remarkable growth of cases are valid indicators for the measurement of the success of investment arbitration,[113] it can be inferred that this mechanism should, at least in theory, demonstrate distinctive advantages in facilitating fair and efficient dispute resolution to appeal to both states and investors.[114]

Since investment arbitration "grafts public international law (as a matter of substance) onto international commercial arbitration (as a matter of procedure),"[115] the institutional advantages of investment arbitration largely mirror that of international commercial arbitration. Indeed, the defining feature and benefit of international arbitration, as invariably highlighted by the definitive monographs in this domain, is the presence of a neutral forum—"a forum for dispute resolution that does not favor either party, but affords each the opportunity to present its case to an objective and impartial tribunal."[116] For foreign investors, the most appealing property of investment arbitration should be that investment tribunals charged with the task of adjudicating investment disputes, unlike domestic courts, are not under the direct control of the host state.[117] It follows that the process of investment arbitration would not be

111. *See, e.g.,* Waibel et al., *supra* note 98, at 341-488.

112. Alvarez, *supra* note 27, at 254-58.

113. Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 INT'L L. 273, 275-276 (2013).

114. *See* Anne van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1, 7-8 (2008).

115. Anthea Roberts, *Divergence between Investment and Commercial Arbitration*, 106 AM. SOC'Y INT'L L. PROC. 297, 297 (2012).

116. GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 9-10 (2d ed. 2015). *See also* BLACKABY NIGEL ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 28-29 (6th ed. 2015).

117. Bonnitcha and others argue that the neutrality of investment arbitration is theoretically appealing for foreign investors for at least two reasons: first, it avoids the upsetting possibility that the judiciary of the host state is not independent from other branches of power or that judicial corruption is rampant; second, it avoids the situation that domestic courts of the host state may treaty foreign individuals or entities unfavorably. Bonnitcha et al., *supra* note 4, at 86.

spoiled or distorted by assorted self-serving actions and measures taken by the host state, including the imposition of pressures on domestic judges or the initiation of opportunistic legislative changes to undermine the position of the foreign investor.[118]

Meanwhile, investment tribunals are not restricted by the possible hurdles for investment claims created by domestic constitutional and/or legislative framework; thus they provide for a more definite forum for the review of a broader span of administrative and legislative acts that are alleged to unduly interfere with private interests.[119] In addition, as investment agreements have made no efforts to discriminate between national judiciaries from other branches of power, contemporary international investment law empowers foreign investors to challenge judicial acts by invoking certain standards of treatment, including the provisions that are related to "expropriation, fair and equitable treatment and . . . the obligation to ensure effective means of asserting claims."[120] In the practice of investment arbitration, claims against domestic courts account for a notable portion of all investment claims at the international level, underlining the necessity of investment arbitration in pursuing fairness by granting foreign investors effective protection against judicial misconduct.[121] Perhaps more importantly, while domestic legal orders may fail to guarantee foreign investors the protection that rivals treaty standards, investment tribunals are well-positioned to apply investment treaty norms although domestic laws are in many cases a non-negligible element.[122] Thus, investment tribunals may have the upper hand in assuring foreign investors

118. Ph.D. dissertation, Vid Prislan, Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors, Leiden Univ. 425-26 (Jun. 27, 2019) (on file with Leiden University).

119. *Id*.

120. Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT'L & COMP. L.Q. 223, 223 (2012).

121. Williams, *supra* note 65, at 32.

122. Böckstiegel argues that while public international law provides the fundamental legal framework for investment arbitration, national law as a substantive law may be involved in several ways in the arbitral process. Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today*?, 28 J. OF THE LONDON CT. OF INT'L ARB. 577, 579-580 (2012).

of fairness in the adjudicative process from the perspective of applicable law.[123]

In addition, unlike domestic judges who are invariably employees of the host state, investment arbitrators are usually selected by the investor and the state as disputing parties.[124] In a typical investment arbitration case, the constitution of an arbitral tribunal of three members is usually achieved in the following way: each disputing party is permitted to select an arbitrator, and the chair arbitrator will be determined by an appointing authority, or less frequently, selected upon the agreement of both disputing parties.[125] For foreign investors, the possibility of engaging in the process of selecting who will decide their disputes is both appealing and reassuring and constitutes one of the justifications for their general preference for investment arbitration over domestic litigation.[126] Therefore, if domestic judges can in any sense be understood as the agents of the host state, the party-appointment system adopted in investment arbitration bolsters procedural fairness by making sure that both the investor and the state are represented in the investment tribunal in a certain way.[127] In addition, as Bruce Benson argues, the veto power usually enjoyed by disputing parties in the selection process of arbitrators indicates that those selected decision-makers are likely to be unbiased and less corruptible,[128] which would, in turn, significantly contribute to the fairness of the dispute resolution process since arbitrators are a core element of international arbitration.[129]

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123. As argued by Ratner, "it is still unclear whether States change their domestic laws in response to IIL, or to completed or pending IIAs in particular." Steven R Ratner, *International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows*, 21 J. World INV. & Trade 7, 8 (2020).

124. Schill, *supra* note 83, at 320.

125. Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PA. J. INT'L L. 431, 442 (2014).

126. Giorgetti argues that "[p]arties to international investment arbitration consistently indicate party-appointment as a strong reason to prefer arbitration to litigation." *Id.* at 443.

127. *See id.* at 442-43.

128. BRUCE L. BENSON, *Arbitration*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION V. 5 159, 184-85 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

129. *See* Catherine A. Rogers, *The International Arbitrator Information Project: An Idea Whose Time Has Come*, WOLTERS KLUWER: KLUWER AR. BLOG

2. Institutional advantages

Apart from the presumptive outstanding neutrality and impartiality of investment arbitrators, other notable institutional aspects exist to militate in favor of investment arbitration in terms of the fair and efficient resolution of investor-state disputes.

The first aspect relates to the incentive structure of investment arbitrators. The economic approach to arbitral decision-making posits that arbitrators are utility maximizers in the same way as public judges.[130] Nevertheless, unlike public judges who are entitled to a secure stream of income regardless of the number of cases that are handled by them, arbitrators only get compensation from disputing parties once a dispute is submitted to them for arbitration.[131] Thus, while public judges are largely immune from market pressure, arbitrators are incentivized to compete with each other to stay in the business.[132] One may further argue that income is not the only factor in an arbitrator's utility function, as he or she may also have interests in developing their professional reputation along the process to increase the chance of re-election to arbitral tribunals in the future and to boost his or her career in other spheres, whether as a private counsel or an academic.[133] The interests of arbitrators in consolidating their market positions and improving their images within and outside the arbitration community would conceivably incentivize these arbitrators to increase the quality of their decision-making (in terms of accuracy and efficiency) and to observe professional ethos, such as dispensing with bias and favoritism, to preserve their own reputation that is usually held dear.[134]

(Aug. 9, 2012), http://arbitrationblog.kluwerarbitration.com/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/.

130. *See* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1260-61 (2005).

131. *See* Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 559 (2003).

132. Cooter argues that "some private judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service." Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983).

133. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47, 65-66 (2010).

134. *Id.*

Second, in contrast to public judges who are usually randomly assigned to cases, the selection of decision-makers in arbitration is to a large extent dictated by disputing parties.[135] The difference in the appointment process partially causes the situation that, whereas public judges are often generalists in the domestic courts of many countries,[136] arbitration provides for a specialized dispute resolution forum where decision-makers are often experts in a particular field.[137] Thus, in the context of investment arbitration, industry experts who are genuinely familiar with foreign investment-related matters can be appointed as arbitrators.[138] These arbitrators are often expected to have expertise in international public law and/or specific industry knowledge, such as technical issues that are related to the development of foreign investment projects.[139] The specialization of investment arbitrators suggests that the efficiency of the arbitration process would be increased largely because disputing parties do not have to provide as much information to these arbitrators as they would to a non-specialized judge or jury to avoid an error in decisions.[140] That resonated with what Posner sees as an attractive feature of arbitration: "a lower error rate than juries."[141]

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135. Susan D. Franck, *The Role of International Arbitrators*, 12 I.L.S.A. J. INT'L & COMP. L. 499, 509 (2006).

136. Wood argues that "[j]udges in most other countries are often staggered by the breadth of the American federal judge's writ." Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1756 (1997).

137. Drahozal & Hylton, *supra* note 131, at 558.

138. Indlekofer argues that since experts from the field where the dispute occurred in can be appointed to arbitral tribunals, "international arbitration can thus respond to the specialization of international law very effectively." MANUEL INDLEKOFER, INTERNATIONAL ARBITRATION AND THE PERMANENT COURT OF ARBITRATION 220-21 (2013).

139. Böckstiegel argues that, in practice, "many arbitrators of commercial arbitration do not feel comfortable or are not chosen by the parties as investment arbitrators, and vice versa, many experts of international law selected for investment arbitration are not active in commercial arbitration." Böckstiegel, *supra* note 122, at 582.

140. According to Benson, "[s]pecialization by arbiters selected for their expertise and reputation means that arbitration typically is a faster, less formal, and less expensive procedure than litigation, in part because the parties do not have to provide as much information to the arbitrator to avoid an error in judgement as they would to a non-specialized judge or jury." Bruce L. Benson, *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J.L. & ECON. 91, 94 (1999).

141. Posner, *supra* note 130, at 1261.

Third, procedural flexibility is a salient feature of arbitration, indicating that the arbitral process could be more efficient than national court proceedings.[142] That is because in arbitration disputing parties are generally granted considerable autonomy to avoid assorted "technical formalities" common to judicial processes and to arrange procedural matters based on the particularities of their disputes.[143] This extensive party autonomy is only subject to the mandatory procedural requirements spelt out in the applicable arbitration rules and the underlying investment agreement.[144] Parties may, for instance, adjust the overall timetable for dispute resolution to their specific needs upon agreement, or they may decide the manners in which facts and evidence are presented, or determine the frequency and duration of hearings.[145] They may also be spared from the heavy burden of extensive documentation,[146] further saving financial and time costs involved in the dispute resolution process.

Fourth, the efficiency of the arbitral process would be further improved by the institutional characteristic that arbitral decisions made by international tribunals are generally exempt from extensive appellate review.[147] The general unavailability of an appeals procedure is both descriptive of ICSID and non-ICSID arbitration,[148] indicating that the putative higher arbitration costs and more frequent procedural delays associated with appellate review are largely avoided in investment arbitration.[149]

Fifth, standing in marked contrast to the absence of a dynamic international system for the recognition and enforcement of foreign judgments,[150] investment arbitration is particularly known for its relatively efficient institutional arrangements in

142. Born argues that an objective and perceived advantage of international arbitration is the enhancement of party autonomy and procedural flexibility. Born, *supra* note 116, at 13.

143. *Id.* at 14.

144. Bonnitcha et al., *supra* note 4, at 68.

145. Born, *supra* note 116, at 14.

146. Jeon, *supra* note 57, at 195.

147. Born, *supra* note 116, at 14-15.

148. Li claims that "the finality of investor-state arbitral awards has been historically honoured by both States and investors." Fenghua Li, *The Divergence of Post-Award Remedies in ICSID and Non-ICSID Arbitration*, 4 CHINESE J. COMPAR. L. 98, 98-99 (2016).

149. Born argues that "Dispensing with appellate review significantly reduces litigation costs and delays." Born, *supra* note 116, at 13.

150. *Id.* at 9-10.

guaranteeing the enforceability of both ICSID and non-ICSID awards.[151] Parallel with the fact that ICSID awards enjoy a particular high level of enforceability as a result of the far-reaching membership of the ICSID Convention, the New York Convention governing the enforcement of non-ICSID awards largely makes certain that these investment awards could be enforced across much of the globe with efficiency and effectiveness as well.[152]

B. Rising Concerns over Unfairness and Inefficiency

The traditional perception that investment arbitration is more promising in bringing fair and efficient dispute resolution, however, has been increasingly under critical scrutiny in recent years not least due to the emergence of some empirical evidence that suggests the inverse.[153]

1. Neutrality versus financial incentives

To begin with, the perceived neutrality of arbitrators has been tarnished by both the party appointment system and the arbitrator remuneration system characteristic of investment arbitration.[154] Owing to disputing parties being granted the right to appoint their own representatives to an investment tribunal, investment (ICSID) arbitrators are said to be largely divided into two categories: "many have either 'a pro-investor' reputation or 'a pro-state' outlook."[155] The partisan ideology of party-appointed arbitrators may arguably, in turn, undermine the overall perceived integrity of an investment tribunal to adjudicate the dispute according to the facts and applicable rules immune from

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151. Bungenberg & Reinisch argue that "[a]lthough enforcement under the ICSID Convention has the advantage that the awards do not have to withstand a review by the executing State, the New York Convention is considered as an effective and established enforcement mechanism as well." Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, EUR. Y.B. INT'L ECON. L. 155, 158 (2019). *See also* Kaufmann-Kohler & Potestà, *supra* note 18, at 73-77.

152. Bungenberg & Reinisch, *supra* note 151, at 156-158.

153. Jeon argues that "arbitration's expected advantage in efficiency has been challenged by many international arbitration practitioners." Jeon, *supra* note 57, at 195.

154. Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 781, 791(2015).

155. *Id.* at 781.

affiliation bias.[156] In the meantime, investment arbitrators are much better rewarded for their work in comparison to non-governmental WTO panelists and these arbitrators are remunerated by disputing parties themselves instead of the public pocket.[157] Thus, there is an inherent risk that the adjudicative pattern of investment arbitrators may be influenced by financial incentives,[158] particularly considering that what these arbitrators may get paid is higher where the dispute at hand goes beyond the threshold of jurisdiction and reaches the merit phase.[159] Although whether and to what extent these financial incentives would result in a pro-investor bias is unclear from an empirical perspective,[160] what actually matters, as Brown argues, "is the *perception* of the impacts of such financial incentives."[161]

2. Lacking appellate review and a one-stop forum

Besides, while the finality of arbitral decisions may at times reduce the overall arbitration costs and the duration of arbitral proceedings, the lack of an appeals system indicates that errors in arbitral decisions concerning the determination of facts and the application of law generally cannot be corrected.[162] If the defeated party does not have effective remedies in the face of a flawed arbitral decision, fairness to disputing parties in the

156. *Id*. at 781-82.

157. Pauwelyn found that the daily paycheck of ICSID arbitrators is "more than 4.5 times as much as what nongovernmental WTO panelists get paid, and governmental panelists get nothing." *Id*. at 791. Brown states that "the disputing parties themselves pay the remuneration of the adjudicators in the current ISDS system." Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID REV. 673, 679 (2017). Puig argues that the financial incentives of ICSID appointments are significant. Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 398 (2014).

158. Brown, *supra* note 157, at 679.

159. According to Pauwelyn, "ICSID arbitrators are compensated U.S. $3,000 per day worked on the case." Pauwelyn, *supra* note 154, at 791.

160. Puig found that some arbitrators with private background consider ICSID work "*pro bono*" and refuse to take many cases. Puig, *supra* note 157, at 398.

161. Brown, *supra* note 157, at 679.

162. Sardinha argues that the one-kick-at-the-can character of investment arbitration has been criticized by commentators as there is a "lack of review for error of law in annulment under the ICSID Convention and judicial review (non-ICSID) processes." Elsa Sardinha, *The Impetus for the Creation of An Appellate Mechanism*, 32 ICSID REV. 503, 504 (2017).

arbitral process is bound to be overshadowed.[163] Meanwhile, the absence of appellate review would also be likely to decrease the efficiency of dispute resolution by creating "an environment which fosters prolonged litigation after awards are issued."[164] For instance, with regard to the annulment procedure in ICSID arbitration, "parties are not limited to one request for annulment, thus heightening the inefficiency of the arbitration process."[165] Posner likewise concluded that the efficiency advantage of arbitration offered by the specialization of arbitrators is at least in part counterbalanced as disputing parties cannot appeal against arbitration awards.[166] A related point is that no appellate review definitively confirms accounts of the alleged "many inconsistencies and contradictions" in investment arbitration jurisprudence,[167] further complicating the determination of whether and how often fairness is actually guaranteed in the arbitral process.

Furthermore, investment arbitration, more often than not, fails to operate as a one-stop forum for dispute resolution, adding further suspicion to its ability to materialize genuine efficiency.[168] For one thing, in most cases, investment tribunals have not found themselves in a position to hear counterclaims filed by host states, citing either the lack of jurisdiction or inadmissibility.[169] The blunt rejection of counterclaims indicates that host states usually have to seek relief in their own courts or via other avenues, which could not only increase the expenditure of time and money but also lead to inconsistent decisions.[170] For another thing, given that investment arbitration is removed

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163. *Id*.

164. Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of*?, 7 PEPP. DISP. RESOL. L.J. 269, 282 (2007).

165. *Id*. at 284.

166. Posner, *supra* note 130, at 1261.

167. Puig & Shaffer, *supra* note 25, at 396.

168. Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216, 218 (2012).

169. Arnaud de Nanteuil, *Counterclaims in Investment Arbitration: Old Questions, New Answers*?, 17 L. & PRAC. INT'L CTS. & TRIB. 374, 377 (2018). Veenstra-Kjos found that counterclaims filed by host states would be heard by investment tribunals only if (1) they fall into the jurisdiction of the investment tribunal; and (2) they have adequate connection with the investor's claim. Hege E. Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4 TRANSNAT'L DISP. MGMT. 1, 46-47 (July 2007).

170. Veenstra-Kjos, *supra* note 169, at 7.

from the general public and access costs to the arbitral procedure are high, other stakeholders implicated by investment disputes, such as wronged host state citizens, are not easily able to raise their own claims in the arbitral process.[171] Conceivably, investment-related disputes would be likely to drag on as these stakeholders whose access to the arbitral procedure was denied or limited would strive to seek relief before other available forums, such as domestic courts, pending arbitration or after investment awards were issued.[172]

3. Lacking knowledge of domestic law

In addition, investment arbitrators may often lack an *ex ante* understanding of the sophistication of the domestic legal order of the host state,[173] which could decrease the efficiency of the

171. Puig & Shaffer, *supra* note 25, at 397.

172. Kube argues that, in *Chevron v. Ecuador*, third-party "participation was not granted, despite a high level of public interest, not least because of a broad media coverage and international mobilization." VIVIAN KUBE, EU HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW AND PARTICIPATION: OPERATIONALIZING THE EU FOREIGN POLICY OBJECTIVE TO GLOBAL HUMAN RIGHTS PROTECTION 185 (Markus Krajewski et al. eds., 2019). Desierto argues that "While plaintiffs (indigenous people) are mired in multiple litigations and arbitrations around the world to seek accountability from either Chevron and its affiliates or their own government in Ecuador, there is virtually no dedicated State, Inter-State, regional, or public-private partnership cooperative efforts to try and achieve environmental restoration in the affected 4,400 square kilometers of the Amazon." Diane Desierto, *From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investor's Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims*, Eur. J. of Int'l L.: TALK! Blog (Sept. 13, 2018), https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/.

173. According to Hepburn, investment arbitrators are usually appointed for their expertise in international law rather than domestic law, and as such, they should not be expected to know their way around anything about the legal order of the respondent state or that of any other relevant jurisdiction in relation to the dispute at hand. In essence, investment arbitrators are called upon to adjudicate issues of a legal system that could be significantly different from the one that they are familiar with. JARROD HEPBURN, DOMESTIC LAW IN INTERNATIONAL INVESTMENT ARBITRATION 108-09 (1st ed. 2017). Article 39 of the ICSID Convention provides that: "The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute . . . ." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 39, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter

arbitral procedure as extra time and attention would be required from these arbitrators to fill the knowledge gap.[174] As a matter of fact, domestic law-related issues are often unavoidable in the adjudication of investment disputes for the simple reason that foreign investments are regulated by the laws of the host state.[175] In practice, "ICSID tribunals have frequently found national law primarily to apply on account of consideration of host state sovereignty."[176] Some commentators thus even regard investment tribunals not only as "agents of international law" but also that of the national legal system of the host state.[177] Nonetheless, in light of the often limited expertise of investment arbitrators in the particular legal regime of the respondent state, the efficient performance of the investment tribunal in interpreting and applying national laws with precision should be questionable.[178]

4. Compliance and enforcement

Moreover, concerns over inefficiency of investment arbitration have extended further to the post-award phase as "some problems have arisen with compliance with both ICSID and non-ICSID awards" in recent years.[179] The issuance of large awards by investment tribunals, such as the one of the value of US$50 billion rendered against Russia in the *Yukos* case, would aggravate the risk that the defeated state would not voluntarily comply with the award, especially when the monetary value is extremely high relative to the amount of the inbound investment

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The ICSID Convention]. Menon argues that privately funded investment tribunals usually consist of foreign nationals. Sundaresh Menon, Att'y Gen., Sing., Keynote Address at the ICCA 2012 Congress in Singapore: International Arbitration: The Coming of a New Age for Asia, 9 (June 11, 2012) (transcript available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf).

174. Martin Jarrett, The International Validity of Domestic Law in Investment-Treaty Arbitration, XX ARB. INT'L 1, 7 (2023). *See also* Menon, *supra* note 172.

175. Böckstiegel, *supra* note 122, at 580.

176. HEGE E. KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 299 (Vaughan Lowe et al. eds., 2013).

177. *Id*.

178. Hepburn, *supra* note 173. *See also* Jarrett, *supra* note 174.

179. OECD, *supra* note 103, at 11.

in the state.[180] When voluntary compliance is not forthcoming and the pursuit of enforcement procedure becomes imperative, the high value of the award indicates that substantial costs in terms of time and money are required to collect adequate assets to meet the pecuniary obligations under the awards.[181] Therefore, enforcing an investment award against a recalcitrant state is said to be perhaps "the most difficult, lengthy, and expensive phase of an investor-state arbitration."[182]

C. Summary

Investment arbitration has, as the literature indicates, important theoretical advantages and can in principle promote fair and efficient dispute resolution.[183] Arbitrators in investment tribunals are highly specialized experts that can provide dispute resolution in an unbiased and neutral manner.[184] Moreover, specific institutional features of investment arbitration can also contribute to fair and efficient dispute resolution.[185] Arbitrators have stronger incentives than judges towards high-quality decision-making as they are not nominated for life, but subject to market pressure; parties possess a large degree of autonomy and the absence of appellate review guarantees an efficient and speedy process of decision-making.[186] The enforcement of both ICSID and non-ICSID awards also largely benefits from the expected certainty created by the ICSID Convention and the New York Convention.[187]

Notwithstanding those theoretical advantages, the reality shows that specific problems may arise with regard to investment arbitration.[188] The fact that arbitrators are party-nominated and subject to financial incentives may adversely impact their neutrality.[189] The lack of an appellate review has the

180. Jacob A. Kuipers, *Too Big To Nail: How Investor-State Arbitration Lacks An Appropriate Execution Mechanism for the Largest Awards*, 39 B. C. INT'L & COMPAR. L. REV. 417, 420-21 (2016).

181. *Id*. at 421.

182. CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 700 (1st ed. 2008).

183. *See supra* Part II.A.

184. *See supra* Part II.A.1.

185. *See supra* Part II.A.2.

186. *Id*.

187. *Id*.

188. *See supra* Part II.B.

189. *See supra* Part II.B.1.

disadvantage of no means of error correction.[190] Furthermore, since there are difficulties for states to bring counterclaims and for other stakeholders to bring relevant claims within the investment arbitration system, the overall expenditure on dispute resolution and the likelihood of inconsistent decisions could be increased.[191] Arbitrators are, moreover, specialized in investment law, but often lack knowledge on issues of domestic law, which can equally play a role in investment disputes.[192] Additionally, the ideal of an easy enforcement of awards is also increasingly challenged in reality by the often jaw-dropping financial interest at stake.[193]

Last but not least, with many of the hurdles mentioned above to the efficiency of arbitral dispute resolution in mind, the recurring accusation that investment arbitration proceedings are "notoriously drawn out and expensive" may seem a matter of course.[194] To sum up, while fairness and efficiency are traditionally perceived virtues that go with international arbitration, whether and to what extent that perception holds true in the context of investment arbitration is at best uncertain.

III. NORM COMPLIANCE: A SEEDED PLAYER WHOSE HANDS ARE TIED

A. The Unique Strengths of Investment Arbitration in Promoting Norm Compliance

1. Promoting compliance with IIAs

State compliance with substantive standards of treatment of foreign investors and their investments is central to the purpose and value of the investment treaty regime, the absence of which suggests that the network of IIAs would lose much of its substance in the global economic governance complex.[195] Considering that most of the common substantive provisions in

190. *See supra* Part II.B.2.

191. *Id*.

192. *See supra* Part II.B.3.

193. *See supra* Part II.B.4.

194. Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 355 (2004).

195. Ryan, *supra* note 66, at 66-67.

investment agreements are not couched in permissive language,[196] contracting states conceivably expect investment arbitration, as a core procedural mechanism in the investment treaty regime, to promote state compliance with the prescribed norms.[197] In the same vein, investment arbitration is widely regarded as a tool for the enforcement of states' obligations as spelled out in their IIAs.[198] But the actual performance of investment arbitration in enforcing investment treaty norms and in promoting state compliance with good governance standards in foreign investment regulation has not been fully explored thus far in the literature.[199]

From a theoretical point of view, it is safe to say that the investment arbitration mechanism has manifested itself as a seeded player in inducing contracting states to comply with investment treaty standards of good governance.[200] First and foremost, from the analysis above concerning the institutional features of investment arbitration, the conventional wisdom is that this mechanism provides for a neutral and unbiased dispute resolution forum.[201] The neutrality of arbitration indicates that the decision-makers are inclined to adjudicate investment disputes exclusively based on the facts and applicable laws instead of some dubious factors, such as political considerations or profitable strategies.[202] The neutral decision-making pattern lays the groundwork for the prospect of a higher level of state compliance with investment treaty norms given that, after all, politically

196. Sattorova asserts that "it could be argued that expropriation rules are an exception and that other investment treaty norms act as unequivocal prescriptions of good governance rather than pricing mechanisms allowing states to depart from the good governance standards in exchange for compensating the disaffected investors." Sattorova, *supra* note 87, at 117-18.

197. Gaukrodger & Gordon, *supra* note 63, at 10.

198. United Nations Conference on Trade and Development, *Investor-State Dispute Settlement*, 17, U.N. Doc. UNCTAD/DIAE/IA/2013/2 (2014) [hereinafter UNCTAD].

199. There are, however, discussions in the literature on the topic of state compliance with investment awards, which is related to state compliance with substantive commitments in investment agreements. *See, e.g.,* Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35 ICSID REV. 540, 540–94 (2020).

200. *See supra* Part II.A.

201. *Id*.

202. It is argued that investment arbitration is created as "a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations." UNCTAD, *supra* note 198, at 13.

partisan forums are not convincingly reliable in displaying loyalty to legal norms, not to mention in contributing to compliance with them.[203] Only if investment treaty norms are faithfully applied by the decision-makers can contracting states feel a greater compliance pull by these norms.[204]

2. Direct application of investment treaty norms

While many, if not most, national judiciaries are reluctant or unable to directly apply international law in domestic proceedings, investment tribunals almost always refer to investment treaty norms as a source of applicable laws,[205] particularly considering that allegations of breaches by states of treaty standards constitute the crux of many investment claims.[206] Thus, the advantage of investment arbitration in promoting state compliance with the good governance standards prescribed in IIAs becomes clear in that the direct implementation of these international instruments is a more certain way of upholding investment treaty norms.[207]

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203. Johns, Thrall and Wellhausen, for instance, argue that investment arbitration was created so that foreign investors could avoid potential bias in proceedings before domestic courts. Leslie Johns, Calvin Thrall & Rachel L. *Wellhausen, Judicial Economy and Moving Bars in International Investment Arbitration*, 15 REV. OF INT'L ORG. 923, 924 (2020).

204. Ryan, *supra* note 66, at 81–94.

205. Banifatemi argues that "by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law." YAS BANIFATEMI, *The Law Applicable in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INT'L INV. AGREEMENTS: A GUIDE TO THE KEY ISSUES 191, 204 (Katia Yannaca-Small ed., 2010). *See also* Hepburn, *supra* note 173, at 1-3.

206. It is argued that since "allegations of violations of IIA obligations typically form the crux of the investor's claim against the host State," "a tribunal is required to assess whether the respondent State's conduct is consistent with the relevant treaty provisions." UNCTAD, *supra* note 198, at 132.

207. Ratner, *supra* note 123, at 13.

Table 1: Frequency of Investment Treaty Provisions

	Investment treaties containing provision (%)
Most-favoured-nation treatment	95%
Expropriation	95%
Investor–state dispute settlement	90%
Fair and equitable treatment	90%
Free transfer of funds	80%
Full protection and security	70%
Losses sustained due to insurrection, war	70%
National treatment	60%
Arbitrary, unreasonable, and/or discriminatory treatment	45%
Umbrella clause	45%
Exceptions	10%
Performance requirements	5%

Source: Bonnitcha et al. (2017)[208]

208. Bonnitcha et al., *supra* note 4, at 94.

Table 2: Breaches of Investment Treaty Provisions Alleged and Found in Known Investment Treaty Arbitrations

	Alleged/share of 739 arbitrations	Breach found	Success rate
Fair and equitable treatment	368/50%	93	36%
Indirect expropriation	331/45%	47	20%
Full protection and security	197/27%	19	13%
Arbitrary, unreasonable, and/or discriminatory treatment	163/22%	24	19%
Umbrella clause	107/14%	13	17%
National treatment	106/14%	8	13%
Most-favoured-nation treatment	84/11%	0/21	0%/41%
Direct expropriation	81/11%	19	42%
Other	50/7%	9	22%
Free transfer of funds	27/4%	2	10%
Performance requirements	12/2%	3	30%

Note: In the 'found' column for MFN, the '0' relates to better treatment granted to the investor/investments of a third nationality other than by virtue of another investment treaty; '21' refers to better treatment based on a third investment treaty where investors used the MFN clause as a stepping stone to another substantive guarantee (on this distinction, see the following text). Success rates are calculated as a percentage of decided cases (not shown). These rates exclude settled, pending and discontinued cases, which column 1 includes.

Source: Bonnitcha et al. (2017)[209]

In practice, as shown in Table 1 and Table 2, most of the common substantive provisions on treatment of foreign investments in IIAs have been frequently invoked by foreign investors as the bases of their investment claims and then interpreted and applied by investment tribunals.[210] The most often addressed investment treaty norms in investment arbitration are those related to fair and equitable treatment; indirect expropriation; full protection and security; arbitrary, unreasonable, and/or discriminatory treatment; umbrella clauses; and national treatment.[211] While the language of many investment treaty norms is notoriously open and vague, creating considerable difficulties for their interpretation and application,[212] investment tribunals have worked out various approaches to crystallize the contents of

209. *Id.*
210. *Id.*
211. *Id.*
212. Roberts argues that "investment treaties create broad standards rather than specific rules." Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 179 (2010). Manger similarly argues that "the vague language of many IIAs makes them a poor commitment device compared to common investment contracts." MARK S. MANGER, *A Quantitative Perspective on Trends in IIA Rules*, *in* IMPROVING INT'L INV. AGREEMENTS 76, 82 (Armand de Mestral & Céline Lévesque eds., 2013).

these ambiguous norms via the broad discretion granted to them.[213] In a quantitative study of 98 ICSID arbitral decisions attempting to discern the legal reasoning pattern of ICSID tribunals, it is revealed that these tribunals privileged the reference to "legal doctrine, various forms of case law, and state practice" in their argumentation while less frequently resorted to "the context, object and purpose, preparatory work, agreement between parties to treaties, and general principles of law."[214] When it comes to the interpretation of investment treaty norms, ICSID tribunals are more likely to refer to common law instead of civil law toolkits.[215] This concurs with Richard Chen's finding that, despite the lack of appellate review and a binding precedent system, investment tribunals have routinely cited past investment awards to support their own legal reasoning since the late 1990s.[216] Thus, investment tribunals have shown encouraging potential in promoting state compliance with investment treaty norms since they have developed a rich arsenal of approaches to fill the cognitive gap left by the vagueness and ambiguity of the investment treaty language.[217]

3. Broad jurisdiction to monitor state acts

Considering that national states typically offer general consent to arbitration with foreign investors in IIAs, investment tribunals are thus granted broad jurisdiction over investment disputes arising out of the actions of a large number of public authorities,[218] which further lends a leverage to these tribunals in

213. Roberts argues that investment tribunals have "played a critical role in interpreting . . . [and] developing, investment treaty law." Roberts, *supra* note 212, at 179. According to the Organisation for Economic Co-operation and Development, as a result of the vagueness of investment treaty norms, investment tribunals are given "broad discretion to interpret and thereby determine the scope of protection they provide." OECD, *OECD Investment Policy Reviews: Cambodia* 30 (2018).

214. Ole K. Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 356–357 (2008).

215. *Id.* at 357.

216. Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L' L.J. 47, 48 (2019).

217. *See* Roberts, *supra* note 212, at 179. *See also* OECD, *supra* note 213, at 30.

218. Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV. 232, 233 (1995). Van Harten and Loughlin argue that "[a] state general consent to investment arbitration commonly entails a broad waiver of the state's customary immunity from suit before an international tribunal or before a domestic court

promoting norm compliance.[219] Unlike domestic courts, investment tribunals are not shackled by national constitutional or legislative limitations that may be put in place to intentionally thwart the effective monitoring of some forms of state acts.[220] Investment tribunals, in practice, have addressed a wide range of grievances related to the conducts or omissions of different branches of power within host states, including national and sub-national governments, legislatures at various levels, and judiciaries.[221] Special attention should be paid to the fact that judicial acts are also rather often challenged by foreign investors before investment tribunals.[222] Denial of justice, which may be defined as "an outcome of an inaccessible or preposterous judicial process which prevents the individual from obtaining the procedural and substantive protection granted by the law," has become a frequent theme to such investment claims against judicial acts.[223] In addition, it is even suggested that the misapplication of the rules of international law, including investment treaty norms, by a domestic host state's court could become a valid basis for an investment arbitration claim.[224] Thus, investment tribunals via their broad jurisdiction would be likely to contribute to the achievement of a higher-level state compliance with investment treaty norms by supposedly exerting external pressure on a wide span of public authorities within the political system of the host state.[225]

4. Binding decisions with an enforcement mechanism

Last but not least, the goal of promoting norm compliance would benefit from the institutional feature that investment tribunals are granted the power to render binding decisions with an effective enforcement mechanism in place to ensure

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that is called upon to enforce an international award." Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 128 (2006).

219. Williams, *supra* note 65, at 32.

220. Prislan, *supra* note 118, at 426.

221. Williams, *supra* note 65, at 32.

222. *Id*. at 32-33.

223. BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 234-35 (2018). *See also* Kaufmann-Kohler & Potestà, *supra* note 18, at 77-78.

224. *Id*. at 234.

225. Williams, *supra* note 65, at 32. *See also* Stoll, *supra* note 85, at 283-88.

compliance with arbitral awards.[226] Although both investment agreements and applicable arbitral rules usually provide little guidance regarding the subject of remedies in investment arbitration, investment tribunals in principle are empowered to order both non-pecuniary (primary) and pecuniary (secondary) remedies against host states.[227] Conceivably, the ability to award a smart mix of primary and secondary remedies would be likely to enable investment tribunals to restore the *status quo ante* and deter future violations of investment treaty standards.[228] While in practice primary remedies are rarely granted in investment arbitration,[229] secondary remedies like damages awards may also be effective tools to induce states to comply with investment treaty norms.[230] Indeed, a wave of narratives have emerged in the investment law scholarship arguing that, as respondent states are likely to learn a costly lesson after experiencing financial pain in the form of damages awards, these states would be simultaneously deterred from violating investment treaty norms and nudged to incorporate them into domestic law and practices.[231] Schill believes that "[using] damages as a remedy sufficiently put[s] pressure on States to comply with and incorporate the normative guidelines of investment treaties into their domestic legal order."[232] Moreover, in an attempt to figure out why states would comply with international investment law, Ryan argues that the financial liability generated by damages awards can be so daunting for countries, especially

226. For instance, Article 53(1) of the ICSID Convention stipulates that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53 ¶1, Mar. 18, 1965, 575 U.N.T.S. 159.

227. Gisele Stephens-Chu, *Is It Always All about the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration*, 30 ARB. INT'L 661, 662–68 (2014).

228. *Id*.

229. Stephens-Chu argues that "Although non-pecuniary remedies are, in principle, available under international law, the power to award such remedies against States has been sparingly used by international tribunals." *Id*. at 661.

230. Ryan, *supra* note 66, at 83–85.

231. Sattorova, *supra* note 87, at 109.

232. STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 373 (2009).

developing countries, that they would likely internalize the potential liability into their overall compliance calculus.[233] Thus, the assumption that monetary compensation awarded by investment tribunals would lead to a higher level of state compliance with investment treaty norms seems to have taken hold in the investment law literature.

B. Reality Check on Norm Compliance

Despite the presumptive potential of investment arbitration for promoting norm compliance by states, some theoretical and empirical insights nonetheless suggest that such desirable effects have not (fully) come to fruition in reality.

1. Inconsistent arbitral jurisprudence

To start with, as noted above, resulting from the fact that investment treaty norms are often phrased in open-ended and vague language, investment tribunals have accordingly acquired substantial autonomy in interpreting and applying treaty commitments, sometimes with scant regard to the original intentions of contracting states.[234] The broad discretion combined with the lack of *stare decisis* and an appeal system make for the notorious concern of inconsistency over the investment arbitral jurisprudence.[235] The inconsistent jurisprudence, in turn, indicates that states would be largely deprived of the potential benefits brought by a framework of reference with respect to their dealings with foreign investments.[236] Consequently, the high expectations in the shaping function of international investment law could fall through and states could lose their grip on the potential outcomes of their foreign investment-related regulatory

233. Ryan, *supra* note 66, at 83–85.

234. Roberts argues that the arbitral jurisprudence generated by investment tribunals "frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular." Roberts, *supra* note 212, at 179.

235. Butler and Subedi argue that a number of highly publicized arbitral decisions demonstrate the lack of consistency in investment arbitration; Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 4 NETH. INT'L L. REV. 43, 48 (2017).

236. Julian Arato, Chester Brown & Federico Ortino, *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336, 342 (2020). *See also* Franck, *supra* note 104, at 1523.

behavior at home as per investment agreements.[237] When states are confronted by rather inconsistent investment arbitral jurisprudence providing for somewhat conflicting information, the potential of investment arbitration in inducing greater norm compliance is arguably steeped in uncertainty.[238]

2. Financial incentives might not be sufficient

More importantly, the remedial design of investment arbitration seems to stand in the way of the goal of promoting norm compliance, as shown by a wealth of knowledge generated by the Law and Development literature and some emerging empirical evidence.[239] Before delving into the impact of the remedial design on the potential of investment arbitration to induce norm compliance, some clarifications have to be made as to the definition of norm compliance to facilitate further analysis.[240] Compliance is a process that takes place after the formal ratification of international treaties and "comprises ex ante internalisation of the norms contained therein as well as ex post adjustment of national legal frameworks in line with the decisions of international adjudicatory bodies."[241] In practice, investment tribunals have largely preferred to award secondary remedies, such as financial compensation, as the dominant form of redress, which involves the obligation of host states to compensate foreign investors with a certain amount of money that would restore the investors to the same or similar financial position prior to the state's violation.[242] Financial compensation, which is "backward and not forward looking" by its definition,[243] aims to "undo the harm, but not the unlawful act that caused it."[244] While (usually partial) compensation is awarded to the aggrieved investor, the

237. Burchardt argues that "the perception that international law can successfully shape the major aspects of international and transnational relations has become predominant for a certain period of time, at least from a western perspective on international law." Dana Burchardt, *The Functions of Law and Their Challenges: The Differentiated Functionality of International Law*, 20 GER. L.J. 409, 419 (2019).

238. Arato, Brown & Ortino, *supra* note 236, 348–57 (2020).

239. Sattorova, *supra* note 87, at 109.

240. *Id.* at 113.

241. *Id.*

242. Bonnitcha et al., *supra* note 4, at 75.

243. Andrés Jana, *Reparation in Investment Treaty Arbitration*, 110 AM. SOC'Y INT'L L. PROC. 288, 292 (2016).

244. *Id.* at 289.

regulations, measures, or acts that have been challenged would remain in place.[245] In other words, investment tribunals do not request respondent states to bring their measures into conformity with investment treaty norms.[246] It thus suffices to say at this stage that the heavy reliance on secondary remedies indicates that investment arbitration would likely fare badly in ex post adjustment, which is a critical parameter of norm compliance, since respondent states would not be compelled to rescind their measures or decrees that have been condemned.[247]

Moreover, the theoretical assumption mentioned above that financial compensation would incentivize states to comply with investment treaty norms lest they have to pay a large sum of money, is also at best uncertain. While this popular assumption largely rests on the effectiveness of external financial pressures, the existing legal literature on this topic has, allegedly, largely been brushed aside by investment law scholars.[248] The Law and Development literature, for instance, has leveled considerable criticisms against conditionality on financial aids as a leverage on the part of international financial institutions and developed countries to induce good governance reforms and to improve the investment climate within developing countries.[249] It often concludes that "reinforcement by reward has largely failed in attaining a genuine transformation in legal and bureaucratic systems of developing states."[250] Although reinforcement by reward is arguably a far cry from damages awards rendered by investment tribunals, the literature at least demonstrates that external financial pressure and incentives often have limitations in fostering desired legal reforms in developing countries.[251] In addition, an Organisation for Economic Co-operation and Development (OECD) study further identifies several factors that would hinder monetary sanctions in the form of damages awards from inducing states to comply with investment treaty norms.[252] First, since financial compensation would be paid by host governments if foreign investors secure a victory, the monetary

245. Bonnitcha et al., *supra* note 4, at 75.
246. Sattorova, *supra* note 87, at 118.
247. *Id*. Bonnitcha et al., *supra* note 4, at 75.
248. Sattorova, *supra* note 87, at 109.
249. *Id*. at 109–12.
250. *Id*. at 112.
251. *Id*. at 110.
252. Gaukrodger & Gordon, *supra* note 63, at 14.

incentives provided by adverse awards might not be felt by individuals or entities that are directly responsible for policy-making and law enforcement.[253] Second, countervailing forces at home, such as the capture of the regulatory process by political and economic elites, would likely offset these incentives.[254] Third, host governments may lack the requisite financial or human resources to respond to the monetary incentives.[255] Furthermore, the empirical evidence garnered by Mavluda Sattorova also suggests that "a threat of monetary sanctions is unlikely to change a host government's decision to breach an investment treaty where such breach is seen as more expedient in economic and political terms."[256] There have been cases where officials ignored the financial implications of possible adverse investment awards and chose to proceed with violations of investment treaty commitments.[257] All in all, contrary to the recurring theoretical assumption, financial compensation may often fail to provide for a sufficient incentive for host states to comply with investment treaty norms and to align their domestic legal frameworks with the good governance standards prescribed by IIAs.[258]

Contrary to the perception that financial compensation would promote norm compliance, some commentators have argued that the reliance on secondary remedies would probably have the opposite impact on the behavior of host states.[259] Brewster cogently argues that, while the award of remedies, including primary and secondary remedies, represents "punishment and community disapproval of certain behavior," financial compensation by putting price tags on treaty norms can also operate as "permission, even an entitlement, to undertake certain actions" and "a license to engage in behavior at a certain cost."[260] Conceivably, as a result of the overwhelming reliance on financial compensation as a form of redress by investment tribunals, host states would be likely to find it attractive to breach investment treaty norms if the expected benefits exceed the expected costs of the breach.[261]

253. *Id.*
254. *Id.*
255. *Id.*
256. Sattorova, *supra* note 87, at 116-17.
257. *Id.* at 117.
258. *Id. See also* Gaukrodger & Gordon, *supra* note 63, at 14.
259. Sattorova, *supra* note 87, at 116.
260. Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 271-72 (2013).
261. Sattorova, *supra* note 87, at 117.

If host states in general and the defaulting state in particular get an impression that they could "buy the right to breach" investment treaty norms by the payment of compensation, the potential of investment arbitration in promoting norm compliance will be impaired and "the rule of law will be flouted."[262]

3. Primary remedies are often impracticable

In addition, recall that from the finding that investment tribunals in theory are not restricted to the order of secondary remedies, one may wonder at this stage why the great reliance on financial compensation in investment arbitration could not easily be changed.[263] After all, it appears that primary or non-pecuniary remedies are better suited to facilitate state compliance with investment treaty norms that embody good governance standards in the field of foreign investment regulation.[264] Nevertheless, in practice, investment tribunals may often feel their hands are tied when it comes to the choice of appropriate remedies after a host state was found to have breached the commitments in an investment agreement.[265] For one thing, even if investment tribunals are allowed the discretion to order primary remedies, foreign investors could face daunting challenges in seeking the enforcement and execution of these remedies in the absence of voluntary compliance.[266] To take the self-contained ICSID system as an example, contracting states of the ICSID Convention are only required to "enforce the pecuniary obligations imposed by the award in question within their territories."[267] For another thing, the order of primary remedies by investment tribunals could be deemed as a more aggressive interference with the sovereignty of host states, further aggravating the widespread suspicion over the investment treaty regime in general and investment arbitration in particular.[268] Van Aaken

262. Stephens-Chu, *supra* note 227, at 679.
263. *Id.* at 662-68.
264. Sattorova, *supra* note 87, at 122.
265. *See* Jana, *supra* note 243, at 290–91.
266. *Id.*
267. Article 54(1) of the ICSID Convention provides that: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. . ." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54 ¶1, Mar. 18, 1965, 575 U.N.T.S. 159.
268. Jana, *supra* note 243, at 290.

argues that an investment tribunal "ordering a state to revoke a measure or ordering specific performance would infringe more on national sovereignty than a pecuniary award."[269] Thus, while both primary and secondary remedies are often available for investment tribunals to choose from in theory, the order of primary remedies is difficult to envision in practice because of enforceability issues and sovereignty concerns.[270]

C. Summary

Again, on paper, investment arbitration can play an important role in promoting norm compliance as it possesses some unique strengths.[271] The entire framework of investment arbitration fits into the IIAs and is aimed at promoting state compliance with good governance standards in foreign investment regulation.[272] Investment arbitration equally allows a direct application of investment treaty norms whereas that approach may be problematic under domestic law.[273] In investment arbitration, tribunals also have broad jurisdiction to review state acts.[274] They are not restricted by domestic constitutional or legislative rules that would limit their possibility to review legislative acts that may violate investment treaty norms.[275] Moreover, investment arbitration can render binding decisions with an effective enforcement mechanism.[276]

Even though on paper those unique features of investment arbitration could contribute to norm compliance, practice reveals that those benefits are not always realized in practice.[277] As investment tribunals often apply open-ended and vague investment treaty norms, this leads to inconsistent jurisprudence, providing conflicting information to states concerning the nature of their obligations.[278] Moreover, investment tribunals rarely use

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269. ANNE VAN AAKEN, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, *in* INT'L INV. L. AND COMPAR. PUB. L. 721, 747 (Stephan W. Schill ed., 2010).

270. Jana, *supra* note 243, at 292.

271. *See supra* Part III.A.

272. *See supra* Part III.A.1.

273. *See supra* Part III.A.2.

274. *See supra* Part III.A.3.

275. *Id.*

276. *See supra* Part III.A.4.

277. *See supra* Part III.B.

278. *See supra* Part III.B.1.

primary remedies (forcing a state to change its behavior in order to comply with the treaty obligations), but rather provide financial compensation to the aggrieved party.[279] Even though one may hope that the duty imposed on the state to compensate would lead to a behavioral change in the host state, practice reveals that this is not always the case. Investment tribunals are also often reluctant in imposing primary remedies which may also be very hard to enforce.[280] In sum, the real added value of investment arbitration to norm compliance by states is doubtful to say the least.[281]

IV. FACILITATING INVESTMENT TREATY OBJECTIVES? A MIXED PICTURE.

The investment treaty regime is supposed to achieve multiple objectives, among which are protecting foreign investment, upgrading the domestic rule of law, depoliticizing investment disputes, increasing cross-border capital flows, and facilitating sustainable development.[282] While investment arbitration has been called a defining character of the investment treaty regime,[283] whether and to what extent this procedural mechanism contributes to the realization of the objectives of the overall regime is rather controversial.[284] A systemic effectiveness analysis of investment arbitration as an alternative to domestic courts using a goal-based approach should nevertheless take into account how it could facilitate these objectives since ISDS, as an all but indispensable part of IIAs, is expected to serve the agenda of the underlying regime.[285] Recognizing that the assessment of the fulfillment of these objectives of the investment treaty regime is in itself a challenging task from an empirical perspective, the following analysis would only focus on how investment arbitration may or may not facilitate the pursuit of these ends by

279. *See supra* Part III.B.2.
280. *See supra* Part III.B.3.
281. *See supra* Part III.B.
282. *See supra* Part I.C.
283. Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT'L L. 1, 2 (2017).
284. Johnson et al., *supra* note 78.
285. Actually, ISDS is cited as a necessary means for the achievement of the objectives of the investment treaty regime. *See id. See also* Shany, *supra* note 29, at 246.

reference to some of its institutional features and some empirical evidence in this regard.

A. Perceived Values of Investment Arbitration in Facilitating Investment Treaty Objectives

1. Improving the domestic rule of law

As a corollary of the belief that international investment law is conducive to the rule of law at the domestic level, a school of thought holds that investment arbitration would improve the quality of domestic systems and institutions.[286] Franck believes that investment arbitration sets up a useful example for domestic decision-makers to improve their adjudicative fairness and neutrality and drums up "domestic support for the rule of law."[287] The desired impact, however, is perhaps more obvious in countries where advanced institutions have already put down strong roots.[288] Franck further argues that, in a "somewhat counterintuitive" way, investment arbitration would facilitate the interaction between foreign investors and the judicial institutions of host states.[289] The interaction would generate "a strong incentive to develop the rule of law in national courts and promote the integrity of the dispute resolution process."[290]

Likewise, many investment arbitrators, perhaps unsurprisingly, believe in the positive role that investment arbitration

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286. Anna Sands, *Does the Investment Treaty Regime Promote Good Governance? The Case of Mining in Santurbán, Colombia*, IISD (Dec. 19, 2020), https://www.iisd.org/itn/en/2020/12/19/does-the-investment-treaty-regime-promote-good-governance-the-case-of-mining-in-santurban-colombia-anna-sands/.

287. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 337, 367, 372 (2007).

288. *Id.*

289. Franck argues that national courts would be involved through the imposition of prior litigation before domestic courts, the enforcement of investment awards, and investment claims based on domestic law. Franck, *supra* note 287, at 368-370. Nevertheless, considering that most BITs provide foreign investors an opportunity to bypass the domestic courts of host states in favor of investment arbitration, the contention that BITs help to enhance the communication between foreign investors and the domestic courts of host states sounds somewhat counterintuitive. Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, 45 N.Y.U. J. INT'L L. & POL. 1151, 1168 (2013).

290. *Id.* at 370.

may play in promoting the domestic rule of law.[291] Investment arbitration was likened to a preventive medicine on the shelf that states do not want foreign investors to use,[292] indicating that these states would be incentivized to adhere to the good governance standards prescribed in IIAs.[293] To explain the positive impact of investment arbitration on the domestic rule of law, an influential member of the arbitral community allegedly put it in a plain, inept, and offensive way by saying that "this [investment arbitration] is a good government operation. Fucking little countries should be grateful! We are to teach them how to govern themselves."[294]

Some investment arbitrators also believe that since investment arbitration not only involves poor countries but also rich countries as defenders, they have an opportunity to highlight the kind of institutional excellency that renders the latter group of countries an attractive investment destination.[295] By doing so, the experience of rich countries as model-pupils would be shared with the developing world, providing those less developed countries with a model to be used for reference in their own legal and regulatory reforms.[296] Many proponents of investment arbitration further argue that states would be given an incentive to comply with treaty standards of good governance, which would later spill over into much wider domestic spheres and benefit domestic investors and others.[297]

In addition, as judicial misconduct is equally subject to the jurisdiction of investment tribunals, external checks could hopefully improve the quality of judicial institutions in host states.[298] It is well-established in the practice of investment arbitration that a wide span of behavior of the judicial branch can offer a valid basis for foreign investors to file investment claims against

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291. Tucker argues that most interviewees believe that investment arbitration is not only useful for its direct effects but also for the indirect effects. TODD N. TUCKER, JUDGE KNOT: POL. AND DEV. IN INT'L INV. L. 79 (Kevin Gallagher & Jayati Ghosh eds., 2018).

292. *Id.*

293. Sattorova, *supra* note 87, at 113.

294. Tucker, *supra* note 291, at 79.

295. *Id.*

296. *Id.*

297. Arguably, if states treat foreign investors more favorably, domestic investors will demand the same treatment, "leading to a virtuous cycle of improvement." *Id.*; *See also* Sattorova, *supra* note 87, at 113.

298. *See* Williams, *supra* note 65, at 32.

host states by resorting to this procedural mechanism.[299] For instance, several investment tribunals have ruled that, under certain circumstances, even domestic courts refusing the recognition and enforcement of foreign arbitration awards could constitute a violation of investment agreements through breaching the "Expropriation-clause," the "Effective Means-clause" or the "Denial of Justice-clause."[300] It may be expected that, by subjecting assorted judicial misconduct that may take place in host states to supervision from international tribunals, there could be a "race to the top" for domestic courts to adjudicate disputes impartially and fairly, instead of a "race to the bottom."[301] Should the quality of judicial institutions in host states be enhanced as a result, the overall rule of law reforms will benefit from this supervision significantly.[302]

2. Attracting foreign direct investment

In the discourse on the impact of the investment treaty regime in general and of investment arbitration in particular on investment promotion, many optimists seem to assume that extra international protection for foreign investors would attract more overseas capitals.[303] Note that most of these observations, however, do not distinguish between the impact of the investment arbitration mechanism, and that of the overall treaty regime. For instance, in the context of the formal ratification of the ICSID Convention by Chile in 1991, the then President of Chile commented that investment arbitration and bilateral investment treaties (BITs) would reduce insurance premiums to be paid by foreign investors, allowing the country to stand out in the competition for foreign capital.[304] This widespread optimism concerning the encouraging correlation between investment

299. *Id. See also* Kaufmann-Kohler & Potestà, *supra* note 18, at 77-83.

300. Claudia Priem, *International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards*, 10 N.Y.U. J.L. & BUS. 189, 189 (2013).

301. Franck, *supra* note 287, at 367.

302. Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 196–97 (2019).

303. *See*, *e.g.*, Henk L. M. Kox & Hugo Rojas-Romagosa, *How Trade and Investment Agreements Affect Bilateral Foreign Direct Investment: Results from A Structural Gravity Model*, 43 THE WORLD ECON. 3203, at 3229 (2020).

304. Bonnitcha et al., *supra* note 4, at 208-09.

arbitration and more foreign direct investment (FDI) inflows is generally attributed to a dual perception of the former.[305]

First, investment arbitration is often regarded as a substitute for the "deficient rule of law" in certain countries,[306] indicating that the unease of risk-averse foreign investors would be quelled if they are granted a private right of action at the international level.[307] Investment arbitrators often believe in the positive role that investment arbitration can play in promoting FDI flows, although they usually refer to parables instead of specific evidence.[308] By engaging in the investment arbitration mechanism, states send a signal to the investment community that they are countries closer to "Mexico" than to "Zimbabwe" in the sense that "when they lose (investment claims), they pay."[309] The "beautiful effect" is that investment arbitration would give states "the advantage of reducing the rate of return requested by new investors."[310] Second, under the assumption that investment arbitration leads to a higher level of the domestic rule of law, a more favorable environment for foreign investments is established in the host state.[311] Accordingly, the improved investment climate would strengthen investment confidence, attracting more FDI flows into the host state.[312]

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305. *See* Franck, *supra* note 287, at 365. *See generally* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Overempowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1160 (2015).

306. Schultz & Dupont, *supra* note 305, at 1160.

307. Department of Foreign Affairs and Trade of Australian Government, *Investor-State Dispute Settlement (ISDS)*, https://www.dfat.gov.au/sites/default/files/isds-faqs.pdf. *See also id.* at 1161.

308. In his book, Tucker quoted one of his interviewees, saying that "In a country where investors do not 'trust the courts,' where there is high 'political risk,' or where slum dwellers 'steal the electricity,' investors either would not invest or would require a much higher rate of return." Tucker, *supra* note 291, at 78.

309. *Id.* at 79.

310. *Id.*

311. *See* Franck, *supra* note 287, at 367-68.

312. Bonnie G. Buchanan, Quan V. Le & Meenakshi Rishi, *Foreign Direct Investment and Institutional Quality: Some Empirical Evidence*, 21 INT'L REV. OF FIN. ANALYSIS 81, 88 (2012).

3. Depoliticizing Investment Disputes

While depoliticizing investment disputes is often considered an objective of the investment treaty regime,[313] the procedural mechanism of investment arbitration has been widely acclaimed as the weapon that makes such depoliticization possible.[314] The typical account is that investment arbitration grants foreign investors legal standing before an independent international forum, thus obviating the need for the intervention from their home states to espouse their claims versus host states.[315] By doing so, the goal of depoliticization is achieved since the resolution of investment disputes would be based on pre-established investment rules instead of power politics.[316]

Indeed, the ICSID Convention expressly objects to home states giving diplomatic protection or bringing an international claim on behalf of their investing nationals if mutual consent to ICSID arbitration has been made.[317] The depoliticization of investment disputes, first and foremost, serves the interests of foreign investors because they are granted direct recourse to international remedies, leaving behind the great uncertainty generated by the

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313. Roberts, *supra* note 80, at 373. According to Tucker, many arbitrators believe that without investment agreements "gunboat diplomacy and war would proliferate." Tucker, *supra* note 291, at 80.

314. Roberts argues that depoliticization of investment disputes is achieved through the introduction of investment arbitration. Roberts, *supra* note 80, at 389. Shihata similarly argues that the establishment of ICSID "attempts in particular to 'depoliticize' the settlement of investment disputes." Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV. 1, 4 (1986).

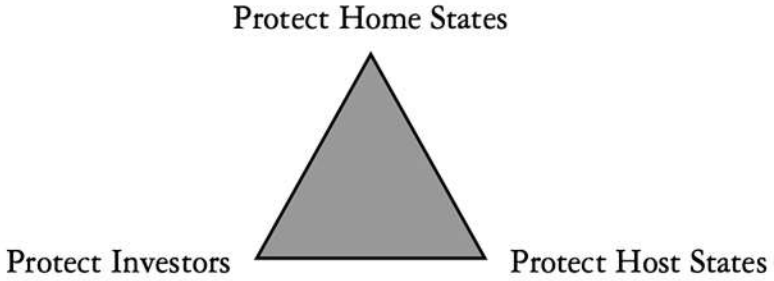
315. Preeti Bhagnani, *Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analogies*, *in* YEARBOOK ON INT'L INV. L. & POL'Y. 437, 452 (Andrea K. Bjorklund ed., 2015).

316. Schill argues that investment arbitration "entails a move from politics to law and enables the judicialization of investor-State dispute settlement." Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GER. L.J. 1083, 1088 (2011).

317. Article 27(1) of the ICSID Convention provides that: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27 ¶1, Mar. 18, 1965, 575 U.N.T.S. 159.

customary international law system of diplomatic protection.[318] In addition, as shown in Figure 1, Roberts argues the justifications for the depoliticization of investment disputes go beyond foreign investor protection to include the benefits accruing to both home states and host states.[319] Just as depoliticization spares home states from investing human and financial resources to espouse the claims of their investing nationals, host states are also correspondingly immune from unwanted diplomatic pressures imposed by foreign countries, especially by those great powers.[320]

Figure 1: The Functional Benefits of Depoliticizing Investment



Source: Roberts (2015)[321]

B. Growing Concerns over Investment Arbitration's Ability to Facilitate These Objectives

1. Adverse impacts on the domestic rule of law

Many critics have begun to question whether the investment arbitration mechanism genuinely contributes to the realization of the objectives of the investment treaty regime with emerging theories and empirical evidence contradicting the traditional optimistic tone.[322] With regard to the domestic rule of law,

318. According to Schill, under the system of diplomatic protection, "it is up to an investor's home State to espouse the claim of its national and to assert it." Schill, *supra* note 316, at 1088.

319. Roberts, *supra* note 80, at 389–91.

320. *Id.* at 390–91.

321. *Id.* at 389.

322. *See, e.g.,* Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on A State's Regulatory Autonomy Involving the Public Interest*, 23

investment arbitration as a substitute for domestic courts could lead to deterioration instead of progress, especially in those countries where the rule of law principle has not put down strong roots.[323] The adverse impact of investment arbitration in this regard is usually attributed to two aspects by those critics.[324]

On the one hand, the ready access to international remedies provided for foreign investors and the exorbitant costs of arbitral proceedings might lead to "regulatory chill," indicating that some states could retreat from legitimate policy decisions in return for the saving of arbitration costs.[325] If this is the case, issues of public interest, such as necessary legislative reforms to protect the environment, would give way to the private interests of foreign investors.[326] There are no prizes for guessing that, by privileging a small group of businesses at the cost of the welfare of the general public,[327] investment arbitration as a substitute for domestic court litigation would encroach upon the rule of law doctrine.[328] This argument, however, should be read with the caveat that the existence and the extent of regulatory chill caused by investment arbitration is subject to fierce debates.[329]

AM. REV. OF INT'L ARB. 245, 266; *See also* Johannes Schwarzer, *Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone*, CEP (2018), https://www.cepweb.org/wp-content/uploads/2018/09/CEP-Policy-Brief-ISDS-1.pdf.

323. *See* Kinda Mohamadieh, *Investment Governance to Reverse Unjustified Privileging of Investors*, 64 NAT'L LIBR. FOR MED. 82, 84–85 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8056094/.

324. *See id*. *See also* Bijlmaker, *supra* note 322, at 266.

325. *See* Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat*, 3 W. J. LEGAL STUD. 25, 1 (2013).

326. *Id.*

327. Bijlmaker, *supra* note 322, at 266.

328. According to the United Nations, the principle of the rule of law requires "equality before the law." *What Is the Rule of Law*, U.N., https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (last visited Mar. 11, 2023).

329. Tienhaara argues that "as long as there is any ambiguity in the substantive provisions of investment agreements – allowing cases to play out over several years, cost millions, and leave governments uncertain about outcomes – there will be policy delays" in the cause of combating climate change. Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENV'T L. 229, 250 (2018); *see also* Berge and Berger argue that their study "indicates that ISDS cases do not systematically lead to chilling of regulatory activity across countries–at least in the field of environmental regulation. Tarald L. Berge & Axel

Although the analysis above shows that executing officials sometimes do not respond to the financial costs imposed on national states, the very possibility that public interests and the rule of law would be sacrificed as a result of investment arbitration is concerning enough.[330]

On the other hand, certain literature argues that investment arbitration would have an overall negative impact on the development of the rule of law in host states by marginalizing domestic judicial institutions and reducing the incentives to invest more in institutional quality.[331] The central pillar of this argument is that foreign investors are enabled to circumvent domestic courts with ease for the greener pastures of investment arbitration, thus reducing the interaction between these investors and the judicial institutions within host states and lowering the incentives of key stakeholders to push forward with institutional reforms.[332] In his seminal study on the impact of BITs on the domestic institutions of host states, Tom Ginsburg argues that the quality of judicial institutions is "a political outcome that requires political coalition to establish and maintain."[333] Indeed, according to him, both foreign investors and host states play a significant role in promoting judicial independence.[334] Given the availability of ready access to investment arbitration, foreign investors would have "reduced incentives" to "press for improved domestic systems of investor-state dispute resolution."[335] This argument apparently assumes that foreign investors would assertively advocate institutional reforms after investing capital

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Berger, *Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation*, at 22, https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_78.pdf (last visited Apr. 20, 2022).

330. Gaukrodger & Gordon, *supra* note 63, at 14; *see also* Bijlmaker, *supra* note 322, at 266.

331. Ginsburg argues that "the presence of international alternatives to adjudicatory or regulatory bodies may *reduce* local institutional quality under certain conditions." Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. OF L. & ECON. 107, 122–123 (2005).

332. Guthrie, *supra* note 289, at 1169–70.

333. Ginsburg, *supra* note 331, at 119.

334. *Id.*

335. OECD, *supra* note 103, at 12.

and that foreign investors are able to engender changes to the rule of law development in host states.[336]

In the meantime, those who view investment arbitration as a threat to the domestic rule of law argue that since this arbitral regime acts as a substitute for the deficiencies of domestic judicial procedures, host states would have less pressure and incentives to invest in judicial capacity-building.[337] Ginsburg also noted that the performance on a rule of law metric declined over the years after a BIT was signed, providing some preliminary empirical evidence for his argument that investment arbitration may help perpetuate poor judicial institutions by allowing powerful actors, i.e., foreign investors, to exit.[338]

2. Investment arbitration does not promote or maintain FDI

Apart from that investment arbitration might be detrimental to the development of the domestic rule of law, many commentators believe that this mechanism does little to help attract foreign investments and may even reduce FDI stocks in host states. This is certainly related to the fact that the overarching investment treaty regime *per se* has been challenged in recent years because quantitative studies on the impact of the regime on FDI flows into developing countries have shown mixed results.[339]

In an organized review of thirty-five published quantitative studies on this topic, Bonnitcha and others revealed that although a majority of these studies found that "investment treaties have a positive and statistically significant impact on inward FDI in at least some circumstances," a sizeable minority found that signing BITs is not likely to increase FDI inflows.[340] Likewise, although many proponents of investment arbitration insist that such dispute resolution method can help to attract

336. Guthrie, *supra* note 289, at 1169–71.

337. Guthrie argues that the ready access to investment arbitration provided for foreign investors "leaves courts with 'insufficient incentives to compete with the global alternatives'." *Id*. at 1171. *See also* Ginsburg, *supra* note 331, at 119.

338. Ginsburg, *supra* note 331, at 121.

339. Bonnitcha et al., *supra* note 4, at 159.

340. *Id.* at 159, 179-80.

FDI,[341] some emerging empirical studies seem to suggest different if not contradictory results.[342]

In a study that aims to establish the impact of IIAs on FDI flows and purports to improve previous studies which treated these agreements as "black boxes" or an indivisible whole, Berger and others found that, unlike liberal admission rules which promote bilateral FDI, investment arbitration seems to play only a minor role.[343] The same group of researchers further argue, in another publication, that a stricter form of investment arbitration-related clauses does "not necessarily result in higher FDI inflows so that the effectiveness of BITs as a credible commitment device remains elusive."[344] In a more recent econometric analysis, Shiro Armstrong and Luke Nottage argue that, counter-intuitively in their own words, while BITs in general bring more FDI flows from OECD countries to their partner host countries, stronger ISDS provisions in BITs tend to make such positive effects smaller rather than larger.[345] If this study faithfully reflects the dynamics between investment arbitration, IIAs, and FDI in reality, critics may argue that investment arbitration does not contribute much to encouraging FDI activities as anticipated since BITs with weaker ISDS provisions may carry more benefits in increasing FDI flows.[346]

On top of that, investment arbitration may not lead to increased inward FDI in capital-importing countries as arbitration of investment disputes might even pose risks to the maintenance of foreign investments. Indeed, referring investment disputes to

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341. Okpe argues that "investment treaty arbitration mechanisms attract FDI" because the substantive commitments in IIAs are incomplete without the procedural mechanism. Felix O. Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States*, 13 RICH. J. GLOB. L. & BUS. 217, 249 (2014).

342. *See, e.g.,* Axel Berger et al., *Do Trade And Investment Agreements Lead to More FDI? Accounting for Key Provisions inside the Black Box*, KIEL INST. FOR WORLD ECON, 17, https://www.files.ethz.ch/isn/121223/kwp_1647.pdf (last visited on Apr. 20, 2022); *see also* Shiro Armstrong & Luke Nottage, *The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis*, No. 16/74, SYDNEY L. SCH., at 1, 24 (2016).

343. Berger et al., *supra* note 342, at 17.

344. Axel Berger et al., *More Stringent BITs, Less Ambiguous Effects on FDI? Not A Bit!* 1 (World Trade Org., Econ. Rsch. & Stat. Div., Staff Working Paper ERSD-2010-10, 2010).

345. Armstrong & Nottage, *supra* note 342, at 24.

346. *Id.*

investment tribunals will, "in almost all cases, *result in a severance of the links between the two parties* [emphasis added]," namely the foreign investor and the host state.[347] This indicates that investor-state relationships will be almost irreversibly damaged after investment arbitral proceedings and that the foreign capitals concerned, if applicable, will very likely be diverted from the respondent host state.[348] In the same vein, Allee and Peinhardt argue that while BITs may bring more FDI into contracting states, "governments suffer notable losses of FDI when they are taken before ICSID and suffer even greater losses when they lose an ICSID dispute."[349] This finding conforms to Hindelang's observation that the heavy reliance of investment tribunals on financial compensation is not consistent with the overall aim of state parties to IIAs to "establish and maintain *long term* and *stable* investment relations [emphasis added]."[350] To the extent that investment arbitration ends the amicable relationship between foreign investors and host states and creates bad precedents for both parties,[351] the FDI stocks in a given host economy could be reduced as a result of divestment in response to investment arbitral proceedings.[352] Conceivably, the scale of this negative impact would in turn depend on such factors as the overall economic size of the relevant foreign investor and the value of the foreign investments made by the investor in the host economy. All in all, investment arbitration might severely damage investor-state relationships and deprive host states, especially those from the developing world, of precious investment opportunities.[353]

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347. UNCTAD, *supra* note 52, at 19.

348. According to Burgstaller and Zarowna, once a foreign investor initiates investment arbitration claiming that an applicable investment treaty has been violated, the investor often "either no longer owns or controls its protected investment or is no longer incentivized to maintain it." *See* Markus Burgstaller & Agnieszka Zarowna, *Effects of Disposal of Investments on Claims in Investment Arbitration*, 36 J. OF INT'L ARB. 231, 231 (2019).

349. Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401, 401 (2011).

350. Steffen Hindelang, *Restitution and Compensation: Reconstructing the Relationship in Investment Treaty Law*, SOC. SCI. RSCH. NETWORK, 2 & 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525065 (Nov. 16, 2011).

351. UNCTAD, *supra* note 52, at 19.

352. *Id*. at 5. *See also* Allee & Peinhardt, *supra* note 349, at 401.

353. Hindelang, *supra* note 350, at 22. *See also* Alle & Peinhardt, *supra* note 349, at 401-02.

3. Negative impact on sustainable development

Some commentators have also expressed their concerns as to the potential negative impact of investment arbitration on the pursuit of sustainable development goals which is either implicitly or expressly integrated into IIAs.[354] While few would doubt that FDI bears significant influence on the realization of sustainable development goals,[355] whether investment tribunals are the most appropriate venue for the deliberation and determination of sustainable development issues remains controversial.[356] Nonetheless, the reality is that investment tribunals have been increasingly faced with investment disputes that implicate sustainable development issues,[357] indicating that their decisions could more broadly influence the achievement of sustainable development in host states. The question of how investment arbitration may impact the objective of promoting sustainable development in host states then becomes practically relevant.[358] While many investment tribunals undeniably considered the sustainable development agenda, such as environmental issues,[359] concerns over investment arbitration in terms of its impact on the achievement of sustainable development are not groundless.[360]

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354. *See, e.g.*, Frank Emmert & Begaiym Esenkulova, *Why Can't We Be Friends? Protecting Investors While Also Protecting Legitimate Public Interests and the Sustainable Development of Host Countries in Investor-State Arbitration*, 48 TEX. J. BUS. L. 1, 20 (2019).

355. Afrin argues that many times FDI "can be seen as contradictory forces against sustainable development." *See* Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Least-Developed Countries*, 10 ANN. SURV. INT'L & COMP. L. 215, 218 (2004).

356. Agata Ferreira, *When Sustainable Development Meets International Investment*, 17 ECON. & ENV'T STUD. 235, 253 (2017).

357. For instance, in a blog posted in 2017, Parlett and Ewad revealed that "[m]ore than 60 investment disputes filed since 2012 have had some environmental impact." Kate Parlett & Sara Ewad, *Protection of the Environment in Investment Arbitration – A Double-Edged Sword*, WOLTERS KLUWER: KLUWER ARB. BLOG (Aug. 22, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/.

358. *See* Emmert & Esenkulova, *supra* note 354, at 12–13.

359. Beharry and Kuritzky argue that investment "tribunals consider environmental issues as factual rather than legal matters." Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 402 (2013).

360. Emmert & Esenkulova, *supra* note 354, at 19.

First, recall that, from the analysis above regarding the potential negative impact of investment arbitration on the domestic rule of law, some countries under certain circumstances might retreat from optimal regulation of public interest issues for fear of investment arbitral proceedings.[361] Thus, insofar as regulatory chill is felt by host governments, investment arbitration could deter domestic legitimate policy decisions that would have served the sustainable development agenda.[362] In other words, a host state's regulators would probably not be able to "advance the important objective of sustainable development, which calls for local participation, environmental stewardship and economic development in a way that is beneficial to both present and future generations."[363]

Second, investment arbitral jurisprudence shows that investment tribunals have responded to similar sustainable development matters with inconsistent decisions showing that there is not any agreed set of standards or criteria in place to guide arbitral review of these matters.[364] The inconsistent arbitral jurisprudence suggests that perhaps not all investment tribunals have appropriately addressed sustainable development issues in the context of investment disputes.[365]

Third, the investment arbitration mechanism is lightly regulated in most IIAs according to some OECD studies, creating a risk that sustainable development concerns might not be taken into account by those in charge of interpreting and applying these treaties.[366] To give an example, although third-party participation has been increasingly embraced by investment arbitration recently,[367] it is not commonly allowed by investment

361. *See* Brown, *supra* note 325, at 25.

362. Tienhaara, *supra* note 329, at 233–39.

363. Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 963 (2007).

364. Ferreira, *supra* note 356, at 253.

365. *Id.* at 238.

366. *See* Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey,* 25–26, (Org. for Econ. Corp. & Dev., OECD Working Papers on Int'l Inv. 2014).

367. Beharry & Kuritzky, *supra* note 359, at 414. Butler argues that "the practice of accepting such [amicus] submissions in investment disputes is relatively novel." Nicolette Butler, *Non-Disputing Party Participation in ICSID Disputes: Faux Amici?*, 66 NETH. INT'L L. REV. 143, 146 (2019).

tribunals.[368] Third-party participation, however, could play a key role in bringing "scientific or technical points, other facts, or laws to the attention of" investment tribunals.[369] The expertise from specialized non-governmental organizations, for instance, can assist investment tribunals in making informed decisions in cases where both parties provide conflicting scientific evidence to support their own positions.[370] Alas, limited opportunities of third-party participation in investment arbitral proceedings might lead to a discouraging outcome that investment tribunals would be deprived of the precious opportunity to leverage the knowledge and expertise of third parties to decide on sustainable development-related issues.[371]

Fourth, considering that sustainable development concerns are only included in more recently concluded IIAs and broader sustainable development law has not been integrated into the normative framework of international investment law, there is a notable risk that the sustainable development agenda would only have a limited influence on the adjudication of investment disputes.[372] Indeed, Ferreira argues that, in the practice of arbitration of investment disputes, sustainable development merely remains as "an additional consideration, which parties evoke in the hope that it will add weight to their claims."[373]

C. Summary

Again, on paper investment arbitration could have great value in facilitating treaty objectives.[374] One important aspect is that

368. Simões argues that since investment arbitration is modelled after commercial arbitration, third-party participation is normally not allowed by tribunals in investment arbitral proceedings. Fernando Dias Simões, *Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration*, 42 N.C. J. INT'L L. 791, 795–96 (2017).

369. Beharry & Kuritzky, *supra* note 359, at 415.

370. *Id*. at 416.

371. According to Butler, non-disputing third parties may through amicus curiae, provide courts or tribunals with "different information, expertise or insight to that provided by the parties themselves." Butler, *supra* note 367, at 145–47. Born and Forrest, however, argue that "although still not a routine occurrence, *amicus* participation is more frequent in investment arbitrations than most other types of proceedings before international and national courts." Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34 ICSID REV. 626, 631.

372. Ferreira, *supra* note 356, at 253.

373. *Id*.

374. *See supra* Part IV.A.

the investment arbitration system is expected to promote the domestic rule of law and lead to institutional changes at the domestic level.[375] Domestic courts could race to the top, thereby increasing the quality of judicial institutions. Investment arbitration is also meant as a mechanism which depoliticizes investment disputes, and as a result would stimulate FDI, working as a trust builder for investors.[376]

But these expectations are not always met in practice.[377] It is doubtful that investment arbitration indeed improves the domestic rule of law.[378] In fact, investment arbitration could even lead to such a fear of excessive arbitration costs creating a regulatory chill and restricting necessary legislative reforms, for example, aiming at environmental protection.[379] Moreover, the empirical evidence does not lend strong support to the assumption that investment arbitration would support FDI.[380] Some empirical evidence even counter-intuitively shows that investment arbitration functions *de facto* as an obstruction rather than as a driver of FDI flows.[381] Finally, there is increasing concern that investment arbitration would negatively affect sustainable development.[382] There is a serious risk that sustainable development concerns might not be taken into account in arbitral decisions interpreting treaty obligations.[383] In sum, it is equally doubtful that investment arbitration in practice can facilitate the investment treaty objectives.[384]

V. INVESTMENT ARBITRATION AS A DUBIOUS LEGITIMACY BOOSTER

While supporters and opponents of the present investment treaty regime may diverge in their opinions on many issues, they seemingly have achieved a consensus that the notion of legitimacy is significant for its maintenance and development.[385]

375. See *supra* Part IV.A.1.
376. See *supra* Part IV.A.2–3.
377. *See supra* Part IV.B.
378. *See supra* Part IV.B.1.
379. *See supra* Part IV.B.1.
380. *See supra* Part IV.B.2.
381. *See supra* Part IV.B.2.
382. *See supra* Part IV.B.3.
383. *See supra* Part IV.B.3.
384. *See supra* Part IV.B.
385. Galán argues that the investment law literature commonly regards legitimacy as the requisite condition for the "success" and "longevity" of the

Actually, in the light of a large body of literature highlighting all the loopholes of international investment law, investment arbitration may seem to stand in the way of the legitimacy-enhancement process of the underlying treaty regime at first sight.[386] That perception, however, does not accurately nor fully reflect the genuine dynamics between the operation of investment arbitration and the ebb and flow of the legitimacy of the overarching treaty regime where this procedural mechanism is normatively rooted.[387]

A. Theoretical Contribution to the Legitimacy of the Investment Treaty Regime

1. Enhancing the credibility of investment treaty commitments

Arbitration of investment disputes, as a private enforcement mechanism for investment agreements,[388] has been hailed as a revolutionary innovation in international investment law.[389] To a great extent, investment arbitration lends more credibility to the substantive treaty commitments contained in investment agreements made by contracting states versus foreign investors.[390] Not least due to the increased credibility engendered by investment arbitration, international investment law has scored success insofar as the network of investment agreements has been steadily expanded, and known investment arbitration cases have surged in the past two decades or so.[391] In the meantime, investment arbitration has contributed to "enhancing the

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investment treaty regime. *See* Alexis Galán, *The Search for Legitimacy in International Law: The Case of the Investment Regime*, 43 FORDHAM INT'L L.J. 79, 81 (2019).

386. For more details on the legitimacy gaps of investment arbitration, *see* Thomas Dietz, Marius Dotzauer & Edward S. Cohen, *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26 REV. OF INT'L POL. ECON. 749, 756-58 (2019).

387. *See generally*, 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, 471-498 (2009).

388. *See* STEPHAN W. SCHILL, *Private Enforcement of International Investment Law: Why We Need Investor Standing*, *in BIT Dispute Settlement*, *in The Backlash against Investment Arbitration: Perceptions and Reality* 29, 31 (Michael Waibel et al. eds., 2010).

389. Salacuse & Sullivan, *supra* note 80, at 88.

390. Schill, *supra* note 388, at 48.

391. Van Aaken, *supra* note 114, at 8-9.

rule of law in investor-state relations," upholding one of the fundamental normative values of the investment treaty regime.[392]

2. Offering neutral dispute resolution to investors

Perhaps more importantly, investment arbitration offers foreign investors what they would see as a neutral, independent, and impartial venue to have their grievances against host state authorities resolved.[393] It is safe to say that among all the relevant constituencies that the investment treaty regime concerns, the expectations of foreign investors have been most successfully met thus far, largely because of the available opportunity to arbitrate investment disputes.[394] According to Ryan, the extent to which the expectations of the participants in the international investment regime have been satisfied has a significant influence over the long-term legitimacy and stability of international investment law.[395] Thus, by serving the interests of a group of important stakeholders, such as developed countries and foreign investors, investment arbitration makes some, albeit non-quantifiable, contribution to the legitimacy of the overarching treaty regime.[396]

B. Aggravating the Legitimacy Crisis Facing the Investment Treaty Regime

1. Disregard of public interest

As much broader private and public interests are involved in investor-state relations, investment arbitration acting as a substitute for domestic courts could pose significant challenges to the legitimacy of the investment treaty regime.[397] To begin with, as mentioned above, the investment arbitration mechanism has been under attack from many quarters of the society for a number of points of contention.[398] All these accusations against investment arbitration, such as the lack of predictability and

392. Schill, *supra* note 15, at 1.

393. Bonnitcha et al., *supra* note 4, at 86.

394. *See* Christopher M. Ryan, *Meeting Expectations: Assessing the Long-term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 745 (2008).

395. *Id.* at 761.

396. *Id.* at 742-45.

397. *See* Dietz, Dotzauer & Cohen, *supra* note 386, at 750.

398. *Id.* at 756–58.

transparency, would tend to undermine the legitimacy of both the procedural mechanism *per se* and the overarching treaty regime, even if some of these accusations are not necessarily supported by solid empirical evidence.[399] Among these recurring criticisms against investment arbitration, probably the alleged encroachment on public interests threatens the legitimacy of the investment treaty regime the most.[400]

While investment disputes typically go beyond the private interests of foreign investors and entail high-stakes decision-making, investment arbitration is largely modeled on how disputes between private parties are resolved in commercial arbitration.[401] Thus, investment arbitration conceptually suffers from "a tension between its public governance functions and its set-up as a private dispute settlement mechanism."[402] That, in turn, prompts a searching query which is concerned less about whether investment arbitration via the decision-making of stand-alone arbitral tribunals erodes public interests in reality, than whether such high-stakes disputes, which often have a public nature, should be submitted to private decision-makers in the first place.[403] After all, as Robert Cooter convincingly argues, "private judges should be allowed, or encouraged, to decide disputes which are truly private in the sense that the effects of the decision do not reach beyond the disputants, but public judges should have exclusive responsibility for cases such as class actions whose effects are diffuse."[404] This line of thinking challenges not only the appropriateness of private tribunals as a venue for ISDS, but also the overall legitimacy of the investment treaty regime which is known for the iconic status of investment arbitration.

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399. *Id*. at 750.

400. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 358 (2017).

401. Schill, *supra* note 15, at 3.

402. *Id*.

403. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 285 (2010).

404. Cooter, *supra* note 132, at 108.

2. Doubt over the benefits of IIAs

In view of the overwhelming reliance of investment tribunals on financial compensation as the form of redress, host states would normally not be requested to rescind conduct or legislation that has been found to be in violation of an investment treaty obligation.[405] Thus, if investment arbitration acts as a substitute for domestic courts, a number of questions with respect to the long-term impact of the investment treaty regime would arise. Can IIAs effectively discipline host state behavior towards foreign investors? Do IIAs engender positive changes to the investment climate in developing countries? Would IIAs promote more FDI flows across the globe in the long run by increasing investment confidence? Given that investment tribunals are not as well-positioned to grant primary remedies as domestic courts, channeling investment disputes immediately to arbitral tribunals would not be likely to provide soothing answers for these crucial questions.[406] For this reason, an increasing number of stakeholders would probably start to question the necessity of the investment treaty regime in the long term, the process of which arguably has already gained tremendous momentum in the light of the recent BIT-termination movement[407] and plentiful critical assessments in academia.[408]

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405. *See* Jana, *supra* note 243, at 290–91.

406. *See id.*

407. For instance, upon the purported findings that most of its BITs were not compatible with its domestic foreign investment policy or even constitutional mandate and that there was no direct link between the existence of BIT and the increase of FDI inflows, South Africa formally started to terminate the BITs previously signed with other economies in 2013. Likewise, Indonesia also terminated a slew of BITs and would rely on domestic law and customary international law before the conclusion of new investment agreements come into place. *See* Sonia E. Rolland, *The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries*, 49 LOY. U. CHI. L.J. 387, 393-95 (2017).

408. Chung argues that "there are signs that the BIT regime may actually diminish the overall welfare of developing countries" and "the unequal obligations and upcoming flood of litigation … have put developing countries in a dilemma." Chung, *supra* note 363, at 962. *See also* Bonnitcha concludes that although the evidence overall suggests that "investment treaties probably do lead to a modest increase in some types of FDI to developing countries," other perceived benefits of such treaties had not been supported by hard empirical evidence. JONATHAN BONNITCHA, ASSESSING THE IMPACTS OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE 15 (The Int'l Inst. for Sustainable Dev., 2017). In addition, Chen also derives a conclusion that "A number of empirical

3. Dissatisfaction in host states

Furthermore, substituting investment arbitration for domestic courts imposes significant financial and sovereignty costs on states, increasing the possibility that more states would elect to exit the investment treaty regime over time as a response.[409] Indeed, what seems to anchor the involvement of most developing countries in the network of IIAs is not adherence to political ideals, but the belief that these instruments carry the potential to encourage more inward FDI.[410] Many of these countries allegedly failed to prudently consider the costs and benefits of different substantive and procedural commitments at the time when they concluded IIAs with their developed counterparts.[411] Accordingly, Paulsson mused in 1995 that states did not appreciate the implications of the obligations that they undertook as part of investment agreements.[412] Likewise, Poulsen argues that "it was not until a country was hit by the claim itself, the potency of the treaties became apparent."[413]

It is safe to say that the more host states are exposed to investment arbitration cases, the deeper they would feel the sting of the procedural mechanism.[414] Indeed, granting foreign investors direct access to investment arbitration would likely accelerate the growth of investment arbitration cases, subjecting states to jaw-dropping expenditure, such as arbitration costs and legal fees, and incremental sovereignty costs, such as limitations on regulatory freedom and the marginalization of domestic courts.[415] These ever-increasing financial and sovereignty costs

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studies have found that BITs do not actually succeed in increasing foreign direct investment ("FDI"), while other studies have found at most a modest impact;" *see* Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 549 (2017).

409. Roberts argues that whether states would exit from the investment treaty regime "depends on an ongoing assessment of pros and cons, the balance or perception of which may change over time." Roberts, *supra* note 212, at 192.

410. Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1, 11 (2014).

411. *Id*. at 12.

412. Paulsson, *supra* note 218, at 257.

413. Poulsen, *supra* note 410, at 12.

414. *See id*.

415. A. SARAVANAN & S.R.SUBRAMANIAN, ROLE OF DOMESTIC COURTS IN THE SETTLEMENT OF INVESTOR-STATE DISPUTES: THE INDIAN SCENARIO 1 (SPRINGER) (2020). Christoph Schreuer, *The Future of Investment Arbitration*, *in* LOOKING

would then markedly change a host state's ongoing cost-benefit analysis with respect to the membership of the investment treaty regime.[416] Assuming that host states are utility maximizers, they would retreat from the regime if they feel the costs incurred exceed the expected benefits.[417]

At present, if investment arbitration is kept as a substitute for litigation via domestic courts, there would be little doubt that investment treaty claims against host states at the international level will continue to rise unless these states effectively withdraw themselves from the arbitration system or even the investment treaty regime.[418] The expected rise is apparently related to a host of factors, such as the increase of FDI activities, the growing awareness of investment arbitration within the investor community, and the emergence of unexpected crises.[419] For instance, against the background of the outbreak of COVID-19, elite law firms have begun to alert their clients to the possibility of challenging government measures via investment arbitration in a bid to safeguard their business interests.[420] Meanwhile, some commentators have called for states to temporarily withdraw consent to investment arbitration until multilateral solutions are found, such as exempting all COVID-19-related measures from investment arbitration or clarifying the application of necessity defenses according to international law, to

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TO THE FUTURE: ESSAYS ON INT'L L. IN HONOR OF W. MICHAEL REISMAN, 787, 789 (Mahnoush H. Arsanjani et al. eds., 2011).

416. Van Aaken, *supra* note 114, at 26.

417. Van Aaken argues that "States will only participate in the system if the expected costs of constraining its (regulatory) sovereignty through BITs and State contracts will deliver expected (net) benefits." *Id.* at 16.

418. For example, in 2021 a record 66 new arbitration cases were registered under the ICSID Convention, while the number in 2020 was 58. *ICSID Releases 2021 Caseload Statistics*, ICSID (Feb. 7, 2022), https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-2021-caseload-statistics.

419. Valentina Vadi, *Crisis, Continuity, and Change in International Investment Law and Arbitration*, 42 MICH. J. INT'L L. 321, 323-24 (2021).

420. Mikhail Vishnyakov, *COVID-19 and Investment Treaty Protections: State Aid Needs to Be Granted On a 'Fair and Equitable' Basis*, LINKLATERS, (Apr. 14, 2020), https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/covid19-and-investment-treaty-protections-state (last visited on Apr. 20, 2022). Emmanuel Gaillard et al., *COVID-19 & International Investment Protection*, SHEARMAN & STERLING (Apr. 14, 2020), https://www.shearman.com/perspectives/2020/04/covid-19-international-investment-protection.

minimize the risks for states across the world.[421] All in all, investment arbitration as a substitute for domestic courts would very likely lead to uncontrollable growth of investment arbitration, augmenting the risk that more states would probably exit the investment treaty regime altogether.[422]

4. Reverse discrimination

In addition, investment arbitration as an alternative to domestic courts would also leave a mark on the legitimacy of the investment treaty regime by creating the image that a regime that purports to do justice to a particular group of stakeholders does so by virtue of reverse discrimination.[423] In his analysis of the reasons for preferring resort to domestic courts over investment arbitration, Professor Leon Trakman argues that foreign investors should not receive preferential treatment in comparison to domestic investors.[424] According to Trakman, such preferential treatment accorded to foreign investors would be unfair, given that multinational companies used to receive privileges from less developed countries, which put local companies in those countries in an unfavorable position.[425] According to the neoclassical model of markets, "competitive equality among producers—within and between industries— will lead to the most efficient organization of production."[426] If all companies, regardless of

421. Nathalie Bernasconi-Osterwalder et al., *Protecting against Investor-State Claims amidst COVID-19: A Call to Action for Government*, INT'L INST. FOR SUSTAINABLE DEV., (Apr. 2020), https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf.

422. *See* Van Aaken, *supra* note 114, at 26.

423. Stiglitz argues that "The real danger of the bilateral investment agreements is that they introduce an element of reverse discrimination: Foreign firms are treated more favorably, with greater protections, than domestic firms." Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. UNIV. INT'L L. REV. 451, 549 (2008).

424. Leon E. Trakman, *Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo*, 35 U.N.S.W. L. J. 979, 994 (2012).

425. *Id*.

426. Bonnitcha argues that such a model bases on some simplifying assumptions, such as "perfect information about investment opportunities, zero transaction costs and no externalities to production that are not reflected in prices." Jonathan Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections*, *in* EVOLUTION IN INV. TREATY L. & ARB. 117, 125 (Chester Brown & Kate Miles eds., 2011).

foreign ownership, are treated with the same level of legal protections, competitive equality would be achieved in general.[427] Nevertheless, if some firms are granted some rights which are not equally enjoyed by their competitors, the market would be distorted and an inefficient use of resources would come up.[428] As a result, these privileged firms would earn higher profits and gain competitive advantages over more efficient market players.[429]

Bonnitcha and others argue that investment arbitration apparently grants foreign firms "preferential procedural rights" that are not enjoyed by their local and foreign competitors.[430] This extra layer of procedural protection accorded to foreign investors would be likely to reduce efficiency.[431] Some of those who disagree with this argument may assert that the substantive treaty commitments are equally aimed to confer preferential treatment upon foreign investors since the genesis of the investment treaty regime itself is based on investor protection.[432] Nevertheless, despite the rarity of empirical research in this regard, those substantive treaty obligations, such as the full protection and security standard, do not necessarily accord better treatment to covered investors than the treatment of domestic investors under the national legal system.[433]

Other opponents of investment arbitration instead may invoke the economic theorem of the "second best" to justify the preferential treatment of foreign investors via investment arbitration, citing that these investors are discriminated against in the judiciaries of host states.[434] After all, the said economic theorem establishes that "when there is a market distortion, additional

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427. *Id*.

428. Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 478 (2000).

429. Bonnitcha, *supra* note 426, at 125.

430. Bonnitcha et al., *supra* note 4, at 153.

431. Bonnitcha and others argue that "[a]ll other things being equal, granting preferential rights to foreign investors of particular nationalities – 'reverse discrimination' – reduces efficiency." *Id.* at 152.

432. *See* Catharine Titi, *The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties*, RTA EXCH. (Nov. 2018), https://e15initiative.org/wp-content/uploads/2015/09/ictsd_-_the_evolution_of_substantive_investment_protections_in_recent_trade_and_investment_treaties_-_titi.pdf.

433. Bonnitcha et al., *supra* note 4, at 153.

434. *Id.* at 153-54.

corrective distortions can increase efficiency."[435] This counter-argument that foreign investors are treated worse than domestic investors by the judiciaries of host states, however, is mainly supported by anecdotal evidence instead of empirical evidence.[436] In addition, some countries, such as Nigeria, have set up "preferential procedures for foreign investors" in their court systems.[437] A study using the World Bank survey data concluded that, compared to domestic investors, foreign corporations are *more* likely to see the judiciaries of host states as "fair, impartial, and uncorrupt" and *no more or less* likely to encounter obstacles created by such judiciaries to their daily operations.[438] Thus, the claim that the procedural mechanism of investment arbitration creates unequal market positions between covered investors and their local and foreign competitors in the host state is not without some merit.

At the same time, given that investment arbitration has become an extremely costly dispute resolution service, this procedural mechanism arguably serves mainly the interests of those economically powerful multinational corporations instead of less well-capitalized companies.[439] Not surprisingly, it is noted that "corporations that take part in the system economically dwarf smaller states."[440] In a study to discern the beneficiaries of investment arbitration, Van Harten established that extra-large companies, super wealthy individuals, and large companies have financially benefited the most from the mechanism while small and medium companies have been modest winners.[441] While any inference from these findings has to be made with caution since the disparity of financial gains between the "bigger" and the "smaller" companies could be a result of mixed

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435. *Id.* at 154. Richard Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. OF ECON. STUD. 11, 12 (1956).

436. Bonnitcha et al., *supra* note 4, at 154.

437. *Id.*

438. *Id.*

439. Boon argues that "while the system is open to small investors, those small investors must still have large claims to make arbitration worthwhile." Kristen E. Boon, *Investment Treaty Arbitration: Making a Place for Small Claims*, 19 J. WORLD INV. & TRADE 667, 668 (2018).

440. Sergio Puig & Anton Strezhnev, *The David Effect and ISDS*, 28 EUR. J. INT'L L 731., 758 (2017).

441. Gus van Harten, *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants,* 13 (Osgoode Hall L. Sch., Osgoode Legal Studies Research Paper No. 14, 2016).

variables, the findings themselves seem to corroborate the claim that access to investment arbitration is more or less a privilege for multinational companies.[442]

On top of all the competitive inequality arguably created by investment arbitration, let us not forget that non-disputing parties whose interests could be implicated in investment disputes more often than not cannot get their voices heard in the arbitral process. To sum up, by claiming justice for foreign investors while seemingly creating more injustice in the process, one may question whether investment arbitration is "the jewel in the crown" or "a rotten apple" for the legitimacy of the overarching investment treaty regime.

5. A departure from international law practice

Investment arbitration as a substitute for domestic courts indicates that foreign investors are granted direct access to international remedies, thus casting a cloud over the legitimacy of the investment treaty regime by creating an iconic procedural mechanism which is not in line with the practice of other branches of international law.[443] According to Cesare Romano, dispute resolution procedures before international courts and tribunals cannot be activated directly and immediately in most cases, and international remedies are contingent in the sense that their availability is conditioned upon the exhaustion of local remedies.[444] In the same vein, Mattias Kumm argues that, to preserve the legitimacy of international law, the principle of subsidiarity, which underpins European constitutionalism, "ought to be an internal feature of international law as well."[445] In the field of dispute resolution, the principle of subsidiarity, which is related to the so-called "jurisdictional legitimacy," makes it difficult for international remedies to work as an alternative to domestic remedies on the assumption that "instruments for

442. *Id*.

443. Shaw argues that "Customary international law provides that before international proceedings are instituted or claims or representations made, the remedies provided by the local state should have been exhausted." MALCOLM N. SHAW, INT'L LAW 620 (8th ed., 2017).

444. Cesare P. Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, INT'L COURTS & THE DEV. OF INT'L L. 561, 563 (Nerina Boschiero et al. eds., 2013).

445. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework Analysis*, 15 EUR. J. INT'L L 907, 921 (2004).

holding accountable national actors are generally highly developed" in those well-established constitutional democracies.[446]

Indeed, the departure of investment arbitration from the established practice of other branches of international law has attracted blistering criticism, especially when a comparison is drawn between an investor's procedural right under an investment treaty with an individual's under a human right treaty.[447] Considering that victims of human rights violations have to resort to domestic courts before filing a claim with a human rights court, it is hard to explain why foreign investors should have direct and immediate access to international remedies.[448] After all, in a normative sense, property rights, which are certainly a crucial component of human rights, do not appear to deserve more vigorous protection than broader human rights, such as the right to liberty and security, freedom of expression and freedom of assembly and association.[449]

In addition, those who believe that international responsibility of a state arises only after all existing appropriate and effective domestic remedies are exhausted without success would also challenge investment arbitration working as a substitute for domestic courts.[450] If direct and immediate access to investment

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446. *Id*. at 920–24.

447. Kube argues that the procedural privilege of foreign investors of direct access to international remedies has attracted sharp criticisms. Kube, *supra* note 172, at 191. Reiner and Schreuer argue that while "the necessity to exhaust local remedies is the rule" in the context of human rights law, that does not apply to investment law. CLARA REINER & CHRISTOPH SCHREUER, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INT'L INV. L. AND ARB. 82, 94–95 (Pierre-Marie Dupuy et al. eds., 2009).

448. Kube, *supra* note 172, at 191.

449. *See generally*, Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISP. SETTLEMENT 277, 278-79 (2015); Nicholas J. Diamond & Kabir A.N. Duggal, *Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?*, 53 CASE W. RES. J. INT'L L. 117, 137-40 (2021); Alessandra Arcuri, Francesco Montanaro & Federica Violi, *Proposal for a Human Rights-Compatible International Investment Agreement: Arbitration for All*, OHCHR, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission2.pdf (last visited Oct. 5, 2022).

450. Shaw argues that a theoretical debate exists surrounding "whether the principle of exhaustion of local remedies is a substantive or procedural rule or some form of hybrid concept." Shaw, *supra* note 443, at 620. D'Ascoli and Scherr argue that supporters of the rule of exhaustion of local remedies as a rule of substance believes that international responsibility of a state is conditioned upon "the prior necessity for the individual to employ all the remedies

arbitration is granted, a paradox would conceivably arise within the investment treaty regime. On the one hand, by subjecting judicial misconduct to the jurisdiction of investment tribunals, the regime recognizes that the judicial branch is an example of sovereignty.[451] On the other hand, foreign investors may bypass domestic courts in favor of international remedies, depriving sovereign states of the opportunity to activate a critical national organ to achieve self-correction.[452] In sum, considering that international investment law does not operate in isolation from other branches of international law, the inconsistency between investment arbitration acting as a substitute for domestic courts and the established international law practice in terms of the relationship between domestic remedies and international remedies would undermine the legitimacy of the investment treaty regime over time.

C. Summary

Given that investment arbitration is essentially embedded in the network of investment agreements, this mechanism is expected to enhance the legitimacy of the underlying investment treaty regime instead of the opposite situation.[453] The existence of investment arbitration as a dispute resolution mechanism in IIAs tends to make national states' commitments to investor protection more credible, especially in the eyes of foreign investors and capital-exporting countries.[454] Moreover, as investment tribunals are not subject to the direct control of any domestic public authorities, investment arbitration would boost the investor group's confidence in the investment treaty regime as it may benefit from what foreign investors see as a more neutral and reliable dispute resolution mechanism.[455]

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available under internal law." Silvia D'Ascoli & Kathrin M. Scherr, *The Rule of Prior Exhaustion of Local Remedies in the Context of Human Rights Protection*, 16 THE ITALIAN YEARBOOK OF INT'L L. 117, 119 (Bendetto Conforti et al. eds. 2006).

451. Williams, *supra* note 65, at 32.

452. *See* Chang-fa Lo, *Past and Future of Mediation for Investment Disputes: The Case for the Asia-Pacific Regional Mediation Organization (ARMO)*, *in* HANDBOOK OF INT'L INV. L. AND POL'Y 787, 792 (Julien Chaisse, Leïla Choukroune & Sufian Jusoh eds., 2021).

453. *See supra* Part V.A.

454. *See supra* Part V.A.1.

455. *See supra* Part V.A.2.

A closer look at investment arbitration as a substitute for domestic courts, however, would reveal that the current design of ISDS may further exacerbate the legitimacy crisis facing the investment treaty regime.[456] In view of the high stakes commonly associated with investment disputes, putting these disputes in the hands of arbitrators (private judges) risks subordinating public welfare to corporate interests.[457] By marginalizing domestic courts in the process of resolving investor-state disputes, many may start to doubt whether and to what extent IIAs could bring expected benefits to the society at large.[458] Furthermore, granting foreign investors direct and immediate access to international remedies would increase the financial and sovereignty costs for host states, which in turn add up to the growing discontent of these countries with the investment treaty regime, especially considering that the benefits of the regime are not without controversy.[459] Heavy reliance on investment arbitration would also probably reinforce the impression that the investment treaty regime via its costly dispute resolution mechanism entails reverse discrimination.[460] Meanwhile, allowing foreign investors to bypass domestic remedies for direct and immediate access to international remedies also largely deviates from the common practice of other branches of international law.[461]

To sum up, while investment arbitration acting as a substitute for domestic courts may satisfy the preference of a specific group of stakeholders in the global investment community, namely foreign investors, it may lend ammunition to those questioning the legitimacy of the investment treaty regime rather than quelling the rather widespread skepticism.[462]

VI. CONCLUSION: TOWARDS A SMART MIX

Despite the more complicated reality of the dynamics between investment tribunals and domestic courts, investment arbitration acting as a substitute for domestic courts is an apt representation of ISDS as it stands now. Investment arbitration, after

456. *See supra* Part V.B.
457. *See supra* Part V.B.1.
458. *See supra* Part V.B.2.
459. *See supra* Part V.B.3.
460. *See supra* Part V.B.4.
461. *See supra* Part V.B.5.
462. *See supra* Part V.B.

the inaction in the initial decades since its inception,[463] and the exponential growth since around the new millennium, has become a core proposition with significant impact for the further development of the investment treaty regime.[464] Driven by the consensus that investment arbitration has demonstrated a number of flaws in practice,[465] the international community has taken actions to reform the dispute resolution mechanism in the hope that it will become more constructive. For instance, at its fiftieth session, UNCITRAL conferred "a broad, open-ended, and problem-driven mandate" upon Working Group III to assess the criticisms against ISDS and come up with reform proposals.[466] In addition, the ICSID Administrative Council approved an amendment of ICSID Arbitration Rules in March 2022, which aims, among others, to improve the efficiency of arbitration proceedings, reduce time and costs of ICSID arbitration, enhance public access to ICSID orders and awards, and require the disclosure of third-party funding.[467]

While these remedial actions are encouraging news since they contain the potential to improve the investment arbitration system, whether and, if so, to what extent they can offer an effective solution to the predicament of ISDS is largely uncertain. That uncertainty derives not least from the fact that these changes generally failed to take into account a fundamental characteristic of ISDS,[468] i.e., investment arbitration currently acting as a

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463. Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 885-86 (2007).

464. *See* Alschner, *supra* note 283.

465. *But see* Brower & Blanchard, *supra* note 14, at 696.

466. Malcolm Langford et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. WORLD INV. & TRADE 167, 170 (2020).

467. ICSID, *ICSID Administrative Council Approves Amendment of ICSID Rules*, (Mar. 21, 2020), https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules.

468. 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, 12. For instance, in its meeting in Vienna in November 2018, UNCITRAL Working Group III identified six areas of concern about ISDS to be addressed in any reform process: (i) excessive legal costs, (ii) lengthy arbitration proceedings, (iii) inconsistency of arbitration awards, (iv) accuracy and correctness of decisions, (v) the lack of diversity among decision-makers, and (vi) the independence and impartiality of decision-makers. Secretariat of the U.N. Comm'n on

substitute for domestic courts, thus leaving domestic courts in the host states largely out of the reform process. Nevertheless, as around six decades have elapsed since the entry into force of the ICSID Convention, the landscape of global FDI flows has changed significantly and the domestic courts that give way to investment arbitration have included those both in the developed world and the developing world.[469] Thus, the time is ripe to reconsider whether investment arbitration is so advantageous for the global investment community that it should be kept as a substitute for litigation via domestic courts in the current circumstances. That, in turn, prompts an assessment of the effectiveness of investment arbitration as an alternative to domestic courts by measuring its performance against the goals of ISDS both from theoretical and empirical points of view. We believe that, by doing so, we not only capture the procedural deficiencies that have received considerable exposure in the literature to date, but also reveal the much less discussed impact of the current design of ISDS on the achievement of its predetermined goals.

Given that there is a growing consensus on the need for the reform of the present mechanism, it may not come as a surprise that an institutional analysis using a goal-based approach reveals that investment arbitration as an alternative to domestic courts does not seem to be a meritorious policy option that effectively advances the goals of ISDS. To start with, investment arbitration shares the advantages in facilitating fair and efficient dispute resolution that are also ascribed to commercial arbitration, among which are perceived neutrality, specialized decision-makers, procedural flexibility, and an effective enforcement

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Int'l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS)*, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018).

469. Roberts noted that an increasing number of countries are becoming capital exporters as well as capital importers, such as the United States and China. This indicates that, under the current design of ISDS, not only Chinese domestic courts but also US domestic courts are often bypassed by foreign investors due to the direct and immediate access to investment arbitration granted to foreign investors. Note, though, that there is not a bilateral investment treaty between the United States and China or any other trade agreement including the ISA mechanism to which both the United States and China are signing parties, meaning US investors in China and Chinese investors in the US are not entitled to launch treaty-based investment arbitration against the Chinese government and the US government, respectively. Roberts, *supra* note 80, at 358.

mechanism. Nevertheless, arguments could also be made to show that, in reality, investment arbitration does not necessarily ensure fairness and efficiency in the arbitral process. Such arguments include that investment arbitrators may have a built-in pro-investor bias, that investment tribunals fail to provide for a single forum for dispute resolution, that those arbitrators may lack a sophisticated understanding of relevant domestic legal orders, and so on.[470]

Moreover, investment arbitration could, at first glance, be viewed as a seeded player in promoting state compliance with investment treaty norms from a number of perspectives; however, it may turn out to have done little for the realization of this crucial goal, if not to generate some negative impact on state compliance records. One of the main reasons is that while some may expect monetary sanctions to effectively deter host states from non-compliance with investment disciplines, financial compensation may instead merely put "price tags" onto state actions that violate investment treaty obligations.[471] The fact that investment tribunals are not in a good position to award primary remedies also casts doubt over the ability of investment arbitration to promote state compliance with treaty commitments.[472] Furthermore, the traditional optimistic perception that investment arbitration could contribute to the achievement of the objectives of the investment treaty regime, such as the improvement of the domestic rule of law and the increase of FDI flows, has been increasingly contradicted by critical assessments and empirical evidence. While investment arbitration arguably generates a certain and positive impact on the depoliticization of investment relationships, investment arbitration in the current form could pose challenges to the sustainable development of host states.[473] In addition, when it comes to safeguarding the legitimacy of the overarching investment treaty regime, investment arbitration as a substitute for domestic courts seems to bring with it systemic risks. Apart from other legitimacy-related concerns, more countries would probably leave the investment treaty regime entirely in response to the significant financial

470. *See supra* Part II.B.
471. *See supra* Part III.B.
472. *See supra* Part III.B.
473. *See supra* Part IV.

and sovereignty costs imposed upon them by a continuous surge of investment arbitration cases.[474]

With that said, we cannot deny that investment arbitration has its own unique advantages over domestic courts in advancing the goals of ISDS. For example, investment arbitration is indeed largely independent from the sphere of influence of national public authorities, which is an element that promises a fair dispute resolution process.[475] This is especially the case given that the development of the court system is not evenly spread across the world, and the domestic courts of those countries lacking a good record of the respect for the rule-of-law may be biased and corrupt in their handling of certain disputes.[476] Compared with domestic courts, investment tribunals are also entitled to exercising jurisdiction over a broader scope of state actions, which include the acts of the legislative and judicial branches of the government in a host state.[477] Owing to the existence of investment arbitration, the home states of foreign investors would at least have less incentive to interfere in the resolution of investor-state disputes, thus to some extent depoliticizing the resolution process of those disputes.[478] In addition, investment arbitration also bolsters the credibility of treaty obligations contained in IIAs as far as foreign investors are concerned in that these investors are granted access to international remedies which they may see as insulated from the manipulation of the public authorities in the host state.[479] Therefore, investment arbitration as an innovative mechanism for the resolution of investment disputes should not be abandoned altogether; instead, the ongoing coordinated efforts at the international level to find solutions to what are widely believed to be the flaws of investment arbitration should, and must, continue. The problem is, however, the current design of ISDS, or, in other words, investment arbitration acting as a substitute for domestic

474. *See supra* Part V.

475. *See supra* Part II.A.1.

476. *See* WORLD JUST. REP., RULE OF LAW INDEX 22-23, 29 (2021).

477. *See supra* Part III.A.3.

478. *See supra* Part IV.A.3. An empirical study by Gertz and others, however, has shown that there was no evidence that "an investment treaty makes a substantial difference to how strongly the US government applies diplomatic pressure to resolve investment disputes." Geoffrey Gertz et al., *Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?* 22 (Univ. of Oxford, GEG Working Paper No. 137, 2018).

479. *See supra* Parts V.A.1–2.

courts does not advance the predetermined goals of ISDS as expected, and changes, thus, must be made in this regard.

Since investment arbitration working as an alternative to domestic courts cannot deliver the expected benefits in advancing the goals of ISDS, a natural inference to be drawn is that investment arbitration should be coupled with litigation via domestic courts as an updated form of ISDS. While litigation via domestic courts alone is also far from being the optimal choice for the achievement of the goals of ISDS, mandating court litigation as the first line of defense, and investment arbitration as the second, would very likely lead to an improved institutional design. That is largely because such an institutional design will capitalize on the unique advantages of court litigation while at the same time obviating its disadvantages by mostly keeping the benefits of investment arbitration in place.

To start off, investment arbitration working as a complement to court litigation, or the complement model, will take into consideration that host states with both a developed legal regime and a robust court system are increasingly involved in investment arbitration.[480] The quality of the domestic courts of those host states should feed into the overall calculations of the relative trade-offs of court litigation and investment arbitration in terms of facilitating the fair and efficient resolution of investment disputes. Other institutional advantages unique to domestic courts, such as the public judges' expertise and knowledge in the field of domestic law and the readiness of domestic courts to allow counterclaims and third-party participation, would likely improve the efficiency of the dispute resolution process. Even if court litigation fails to put a stop to a specific investor-state dispute, investment tribunals in the following arbitration proceeding would benefit from the presentation of facts and the domestic law analysis made by the domestic judges. Most importantly, the complement model makes sure that, if foreign investors are not satisfied with court judgments or they think the court proceedings were corrupted, they still have the opportunity to launch investment arbitration as a further remedy.

Since domestic courts are in a better position than investment tribunals to award primary remedies, the complement model keeps the unique advantages of primary remedies in promoting state compliance with investment treaty obligations. While

480. Schultz & Dupont, *supra* note 305, at 1155–56

investment tribunals overwhelmingly rely on monetary remedies which have apparent limitations in inducing both *ex ante* and *ex post* compliance,[481] under the complement model, domestic courts may be engaged to grant primary remedies when the judges deem it appropriate to undo the effects of violations.[482] That effectively means, in addition to the financial compensation that foreign investors may receive, that violation of an administrative decree or legal document issued by host state authorities, for instance, can also be revoked. Moreover, the complement model avoids the scenario in which domestic courts are marginalized in the resolution of investment disputes, since even those powerful and wealthy foreign investors would have to submit their disputes with public authorities to the domestic courts of host states before arbitration proceedings may be initiated (if there is any need). Therefore, such foreign investors would not lose the incentive to push for the improvement of legislation and the judicial reform in host states, while public authorities would have more incentive to upgrade the court system assuming they are eager to keep net inflows of foreign capital.[483]

Furthermore, within the complement model, as a result of the precedent proceedings at domestic courts, foreign investors may only have to engage a specific public authority and avoid targeting a sovereign country. Thus, a lesser degree of tension and antagonism between the foreign investor and the host state can be reasonably expected, reducing the risk of capital flight in the middle or upon the completion of the dispute resolution process. In addition, given that domestic judges may have more incentive to consider the sustainable development goals against the pursuit of economic interest and that third-party participation is usually more certain at domestic court proceedings,[484] the

481. See *supra* Part III.B.2.

482. *See* Van Aaken, *supra* note 269, at 749.

483. For instance, Long and others argue in an empirical study that foreign investment has contributed to the improvement of the institutional environment in China through the years" and that "Chinese domestic firms located in regions with a higher level of FDI tend to enjoy a lower level of tax and fee burdens, less arbitrariness in such burdens, as well as better legal protection." Cheryl Long et al., *Institutional Impact of Foreign Direct Investment in China*, 66 WORLD DEV. 31, 31, 45 (2015).

484. Columbia Center on Sustainable Development et al., *Third Party Rights in Investor-State Dispute Settlement: Options for Reform* (Jul. 15, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf.

complement model is more likely to facilitate the goal of the investment regime in achieving sustainable development, which means economic development is not achieved at the cost of other concerns of public interest.

When it comes to the maintenance and enhancement of the legitimacy of the underlying investment treaty regime, it is even clearer that the complement model is a better institutional choice than investment arbitration acting as a substitute for domestic courts. By virtue of the involvement of public judges from domestic courts under ordinary circumstances, the complement model avoids leaving the impression that investment disputes, which almost invariably involve public interest, are completely left in the hands of private judges (arbitrators) while the local community is underrepresented in arbitration proceedings. At the same time, under the complement model, the court system of host states would not be reduced to marginalization and primary remedies would be more likely to be used. It follows that the concern over the impact of the investment treaty regime on the development of the rule-of-law and the investment climate of developing host states should be alleviated.

More importantly, while the complement model allows for arbitration proceedings as a follow-up procedure, court proceedings, especially those commenced within host states featuring a developed judicial system, may be expected to work as a sieve to reduce the list of investment arbitration cases. The sovereignty and financial costs for national states are thus lower than if foreign investors are granted direct and immediate access to investment arbitration. Moreover, despite the fact that the complement model does not completely level the playing field between domestic investors and foreign investors, it at least reduces the adverse position of domestic investors in this regard by requiring foreign investors to equally undergo domestic court proceedings. The complement model, in addition, would also align the institutional design of ISDS with the dispute resolution practice of other branches of international law, which ceases to convey the wrong impression that corporate interests are superior to, for instance, other fundamental human rights.

Despite the aforementioned institutional advantages ascribed to the complement model, fulfilling its utmost value apparently requires a smart mix of litigation via domestic courts and investment arbitration proceedings. This article is not intended to construct such a smart mix by addressing all the details that could

be possibly envisaged. Some preliminary sketches, however, can already be made for any attempt to upgrade the current design of ISDS towards the more constructive complement model. First and foremost, a smart mix should be consistently applied to the investment treaty-making practice of national states, indicating that developed states should not adopt a bifurcated approach, by ditching investment arbitration in IIAs with other developed states while adopting the complementary model or even the current design of ISDS in IIAs with developing countries.[485] That is because such a bifurcated approach would likely backfire one day with developing countries also distancing themselves from investment arbitration in their IIAs a likely outcome, as these countries would gradually learn from the ensuing investment arbitration practice that the pattern of claimant and respondent in investment arbitration is increasingly skewed towards investors from the developed world versus countries from the developing world.

There should also be an exit mechanism allowing foreign investors to proceed to investment arbitration should court proceedings fail to resolve investment disputes at issue. While the exhaustion of local remedies is a customary rule of international law and was commonly found in the IIAs drafted during the 1970s and 1980s,[486] this rule does not align with the purpose of a smart mix of court litigation and investment arbitration. Recognizing the low efficiency that could be representative of the court systems of certain host states and the delay tactics that could be adopted by local public authorities, the revival of the exhaustion of local remedies rule would risk dragging out the court proceedings and condemn foreign investors to an unjustifiably disadvantageous position. Therefore, a fine balance

485. For instance, in Chapter 14 of the United States-Mexico-Canada Agreement, the United States apparently adopted a bifurcated approach in designing the ISDS mechanism. The investment arbitration system is eliminated between Canada and the United States, meaning "Canadian investors in the United States will need to resolve any investor-state disputes within US court system, and vice versa." However, investment arbitration is kept between Mexico and the United States with the procedural requirements tightened for most covered investments. Jerry L. Lai, *A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms*, 35 EMORY INT'L L. REV. 259, 281–84 (2021).

486. Zachary Mollengarden, *The Utility of Futility: Local Remedies Rules in International Investment Law*, 58 VA. J. INT'L L. 403, 405 (2019); *see also* Porterfield, *supra* note 468, at 3 (2015).

should be achieved between leaving domestic judges a reasonable period of time to address investment disputes and preventing court proceedings from being unduly lengthy. While such a balancing point is elusive, it is not unattainable. In investment treaty-making practice, national states should comprehensively evaluate a host of factors, such as the constitutional and legal framework and the judicial capacity of the states involved, to determine the maximum period of time left to court proceedings. If domestic courts cannot render judgments within the prescribed period of time or if foreign investors are not satisfied with the outcome, they may then commence the subsequent arbitration proceedings. In the meantime, when foreign investors could put forward compelling evidence to show that litigation via domestic courts was not available, they should still be entitled to the right to bypass the requisite court proceedings.

To achieve a smart mix of court litigation and investment arbitration as an updated form of ISDS, more work should be done to ensure that the overall efficiency is guaranteed since an extra layer of procedure is introduced. To avoid the possibility that court litigation might descend to formalism and wealthy investors would launch investment arbitration anyway, specific mechanisms should be established to prevent the frivolous initiation of investment arbitration, such as the requirement of security for costs and the enforcement of the "costs follow the event" principle.[487] For those developing countries and the least developed countries genuinely lacking the required resources to cope with investment arbitration, an advisory center may be established to provide them with the necessary legal assistance.[488] On the other hand, the efficiency and quality of the decision-making of domestic judges should be improved by, for example, establishing dedicated investment law tribunals, assigning judges specialized in investment law and familiar with relevant

487. In an empirical study, Hodgson and others found out that there has been a gradual shift in the investment arbitration practice from the "pay your own way" principle towards "costs follow the event" principle when it comes to the apportionment of arbitration costs. To establish a smart mix of court litigation and investment arbitration, the "costs follow the event" principle should be upheld to deter any unnecessary follow-up procedure. MATTHEW HODGSON ET AL., 2021 EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION 16 (2021), https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.

488. *See, e.g.,* Karl P. Sauvant, *An Advisory Centre on International Investment Law: Key Features*, 17 U. SAINT. THOMAS L. J. 354, 370–72 (2021).

economic sectors, as well as recommending the direct application of investment treaty provisions or their domestic law counterparts. If the dispute resolution proceeds to the arbitration phase, the efficiency could be further boosted by encouraging the communication between investment tribunals and court judges. For instance, as inspired by the limitation of WTO appeals to issues of law,[489] investment tribunals may rely on the factual presentation made by public judges in the preceding court proceedings, except where the disputing parties disagree. Furthermore, investment arbitrators should also be encouraged to refer to court judgments, if any, for proper domestic law analysis, unless they have compelling reasons not to do so.

All in all, an analysis of the effectiveness of the current design of ISDS relying on a goal-based approach reveals that investment arbitration acting as a substitute for domestic courts is not an ideal institutional choice because it cannot meet the expected goals of ISDS. The combination of court litigation and investment arbitration, however, holds more promise for fulfilling these goals. That surely does not mean that any casual combination of the two dispute resolution methods would be appropriate; instead, only a smart mix of court litigation and investment arbitration would bring results. The transition from the current design of ISDS to the complement model, coupled with the ongoing reform of investment arbitration *per se*, would be most likely to double the chance of salvaging ISDS in crisis. By contrast, focusing on one side while ignoring the other is not likely to bring a beneficial outcome.

489. Tania Voon & Alan Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, 40 J. WORLD TRADE 239, 239 (2006).