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Standing at Crossroads: The Trajectory of IIAs and ISDS and Their Projection in the Post-Pandemic Global Economy

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Table of Contents

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I. Introduction

The twentieth century was marked by global evolution in favor of economic liberalism combined with a steady decline in economic nationalism and Marxist economics.[1] Foreign Direct Investment's (FDI) potential to serve as a significant tool for many states to achieve ambitious economic progress has consequently led to a dynamic development of,[2] and reformation in, the regime of

[1] *See* Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621 (1998) [hereinafter Vandevelde, *Political Economy*], (describing the propagation and economically liberalizing goals of bilateral investment treaties, or "BITs," and explaining the terms "economic nationalism," "economic liberalism," and "Marxist economics," which this paper extensively uses).

[2] Following the categorization of the United Nations Conference on Trade and Development ("UNCTAD"), this paper categorizes "states" according to their development and economic status in three broad categories, namely: developed states, developing states, and transition states. Untill 2020, the UNCTAD had categorized transition economies separately, but has stopped since 2021. However, for the purpose of this paper, the classification of transition economies has been used for the statistics available until 2020. *See* U.N. Conference on Trade and Development, *Development Status Groups and*

International Investment Agreements (IIAs)[3] and the rise of the novel jurisprudence of Investor-State Dispute Settlement (ISDS).[4] Data available from UNCTAD shows the global FDI inflow calculated in 1970 at $13,257 million and global FDI outflow at $14,141 million had phenomenally expanded to $1,530,228 million and $1,220,432 million respectively by 2019.[5] With FDI considered an essential ingredient for economic development, states must formulate policies to attract and boost confidence in foreign investors and

Composition, (May 28, 2020) [hereinafter UNCTAD, *Development Status*], https://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf.

[3] *See* U.N. Conference on Trade and Development, International Investment Agreements Navigator: Investor Policy Hub, at Tereminology https://investmentpolicy.unctad.org/international-investment-agreements/ (last visited Jan. 10, 2020) [hereinafter UNCTAD] (defining "international investment agreements (IIAs)" to include all "bilateral investment treaties (BITs)" and "treaties with investment provisions (TIPs)"; noting a large majority of IIAs comprises BITs; further noting whereas UNCTAD has defined BITs as "agreement[s] between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory," TIPs comprise "various types of investment treaties that are not BITs" and that are mainly of three types: "1. broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter); 2. treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds); and 3. treaties that only contain 'framework' clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues.").

[4] *See* U.N. Comm'n on Int'l Trade L. ("UNCITRAL"), Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Secretariate to Working Group III, at 8-9, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.149].

[5] U.N. Conference on Trade and Development STAT, Foreign Direct Investment: Inward and Outward Flows and Stock, Annual [hereinafter UNCTAD, Foreign Direct Investment], https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740 (last visited Feb. 17, 2022). The measurement used by UNCTAD for FDI inward flow and outward flow is "US dollars at current prices in millions." *Id.*

simultaneously protect their national interest and sovereignty as host states.[6]

IIAs have arguably emerged as the most prominent weapon used by states to attract FDI through foreign investors. These treaties are instruments of public international law, and states specifically design them to enhance foreign investors' confidence in the stability of the investment environment by providing substantive guarantees as enforceable obligations upon host states.[7]

These treaties often have provisions for dispute settlement between foreign investors and host states.[8] Such mechanisms prescribed by IIAs for investor-state dispute settlement (ISDS) are a significant break from the traditional mechanism of diplomatic protections, and allow foreign investors to make claims directly against host states.[9] Currently, such ISDS mechanisms usually involve what may be termed investment treaty arbitrations (ITA), characterized by a dispute being adjudicated by ad hoc arbitral tribunals established to adjudicate specific disputes.[10]

Since the first IIA was signed in 1957, as many as 3,238 IIAs have been signed until January 2022, including 2,815 BITs and 423 TIPs,[11] whereas a total of 1,104 known treaty-based ISDS proceedings have been initiated.[12] As economies become increasingly dependent on FDI, many stakeholders of the present international investment regime

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[6] *See generally* COMM. ON INT'L & MULTINAT'L ENTERS., FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS, (Org. Econ. Coop. & Dev., 2002) [hereinafter CIME], https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.
[7] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[8] *See id.*
[9] U.N. GAOR, 50th Sess., at 3–4, U.N. Doc. A/CN.9/917 (Apr. 20, 2017) [hereinafter U.N. Doc. A/CN.9/917].
[10] *Id.*
[11] *See* UNCTAD, *supra* note 3.
[12] UNCTAD, Investment Dispute Settlement Navigator, Investment Policy Hub [hereinafter UNCTAD, Navigator], https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Feb. 17, 2022).

are concerned about the complexities and increasing amount of ISDS foreign investors are initiating.[13] `States are concerned with the rising amount of ISDS being initiated against them whereas investors are concerned with rigid and restrictive FDI policies and IIAs.[14] Such concerns have accumulated in the past few years on the global stage and have led to a call for revaluation and reformation of the ISDS regime and consequently in FDI policies and the IIA regime.[15]

Although this relatively new international investment regime has achieved phenomenal global expansion and the participation of a majority of states, it was still evolving when the COVID-19 pandemic suddenly disrupted the global economy, which has further fueled uncertainty and now warrants a completely new approach for revaluation and reformation of the regime.[16] Like other treaties, specific IIAs have been concluded subject to contextual historical, social, and political developments.[17] Changes in the sociopolitical and economic environment work as catalysts for the development of the international investment regime.[18] The development of IIAs depends

[13] U.N. GAOR, *supra* note 9, at 4.
[14] *See*, *e.g.*, Lars N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treat Regime: A "Backward-Looking" Approach*, BROOKINGS INST. (Mar. 17, 2021), https://www.brookings.edu/research/reforming-the-investment-treaty-regime/ (describing investor–state tensions).
[15] Rep. U.N. Comm'n on Int'l Trade L., 50th Sess., at 43-47, U.N. Doc. A/72/17 (July 3–21, 2017).
[16] U.N. Commission on International Trade Law, International Investment Agreements Reform Accelerator, 2–3 (2020), https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf. *See also* U.N. Conference on Trade and Development, *World Investment Report 2020*, at 2–10 (2020) [hereinafter UNCTAD, *World 2020*], https://unctad.org/system/files/official-document/wir2020_en.pdf.
[17] *See* U.N. Conference on Trade and Development, *World Investment Report 2015*, at 121–25 (2015) [hereinafter UNCTAD, *World 2015*], https://unctad.org/system/files/official-document/wir2015_en.pdf.
[18] U.N. Conference on Trade and Development, *Inv. Pol'y Framework for Sustainable Dev.*, 13 (2015) [hereinafter UNCTAD, IPFSD], https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf.

upon attracting FDI and maintaining its flow. Considering the current role of FDI in the global economy, it has become important to understand the dynamic evolution that has led to the present-day IIA and ISDS regime. It has thus become imperative to analyze this regime's dynamic development from a sociopolitical and economic perspective and consider the necessity of any suitable reforms considering the projected future and relevant objectives.

A. History and Development of the Current Regime

"International investment agreements (IIAs)—like most other treaties—are a product of the time when they are negotiated."[19]

Even though trade and commercial practices have been prevalent, developing, and restructuring for a considerable amount of time, the effect of these practices on economic development was quite limited but grew steadily with major changes implemented in the twentieth century with an aim to develop a more sustainable global economy.[20] Evidently, the origin of the present international investment regime lies in the second half of the twentieth century, but its earliest conceptualization can be traced back to the eighteenth century with bilateral treaties of "Friendship, Commerce[,] and Navigation" between states to establish commercial relations.[21] These treaties included provisions that protect property of nationals of other contracting states, compensation for expropriation, and rights to engage in certain business activities.[22] It is pertinent to note that until the first half of the twentieth century, customary international law (CIL) was the principle source of

[19] UNCTAD, *World 2015*, *supra* note 16, at 121.
[20] *See id.* at 121–25.
[21] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158 (2005) [hereinafter Vandevalde, *Brief History*].
[22] *Id.* at 158–59.

international legal rules governing foreign investments.[23] This caused major differences of opinion amongst states regarding standards of treatment, and provided impractical remedies for disputes ranging from espousal to military force.[24]

However, by the turn of the twentieth century, the world experienced an unsettling blend of industrialism, colonialism, and domestic economic inequality that resulted in a dangerous combination that had already achieved its peak and was looking forward to its inevitable downfall.[25] The global mass was dissatisfied with the socioeconomic structure passed down from the nineteenth century and still characterized by powerful states having industrial economies dependent on the exploitation of natural and human resources of either their colonies or the vast natural and human resources held by them, combined with many states still being led by ancient monarchies and concentration of power and wealth among a select few leading to a vast economic disparity.[26] The economies were largely based on a capitalist structure, but many people were eager to reorganize under the new economic and political concepts of socialism and communism, aiming to create more equal societies addressing the issues created by capitalism.[27] Although the voice of dissent was the loudest in the colonies, which had for multiple centuries experienced

[23] *Id.* at 159–60.
[24] *Id.* at 159–161.
[25] *See* Branko Milanovic, *Inequality, Imperialism, and the First World War*, PROMARKET (Jan. 3, 2018), https://promarket.org/2018/01/03/inequality-imperialism-first-world-war/; *see also* A. P. Thornton, *Colonialism*, 17 INT'L J. 335, 335–357 (1962); Carl Strikwerda, *World War I in the History of Globalization*, 42 HIST. REFLECTIONS/RÉFLEXIONS HISTORIQUES 112 (2016).
[26] Strikwerda, *supra* note 25, at 112.
[27] *See* Thornton, *supra* note 25, at 349–50; *see also* William Henry Chamberlin, *Making the Collective Man in Soviet Russia*, *in How We Got Here: The Rise of the Modern Order*, 49 FOREIGN AFFS. 7, 14–16 (2012); Gideon Rose, *Making Modernity Work: The Reconciliation of Capitalism and Democracy*, 91 FOREIGN AFFS. 3, 3–6 (2012). *See generally* MICHAEL REIMAN, ABOUT RUSSIA, ITS REVOLUTIONS, ITS DEVELOPMENT AND ITS PRESENT (2016).

exploitation of human and natural resources by their powerful colonizers, dissent was also heard from within the powerful states resulting from the ever-growing economic disparity and concentration of power among a few individuals.[28] As dissatisfaction peaked, the first half of the twentieth century was marked by a rise in global turmoil characterized by two world wars, the Great Depression, numerous political upheavals, vast economic inequality, civil wars, and most importantly, the decolonization leading to the birth of several new states.[29]

After the turmoil of the first half of the twentieth century was settled, the world found itself in the midst of war-torn economies and newly formed states after the steady and long overdue process of decolonization.[30] Although the world was eager to mutually grow with a stable international economic cooperation, the challenges were far from over. The conflicts among the states following the principles of economic liberalism, which favored a free capitalist market, economic nationalism, which believed in aligning the economic policy to serve its political policy, and economic Marxism, following principles of communism and a critique of liberalism, divided the global economy.[31]

Many states still reviving from the turmoil of the first half of twentieth century or centuries of exploitation over the hands of their colonizers, tilted more towards socialistic or communist principles with elements of

[28] *See generally* Milanovic, *supra* note 25; Thornton, *supra* note 25; Strikwerda, *supra* note 25; Chamberlin, *supra* note 27; Rose, *supra* note 27.
[29] *See generally* Milanovic, *supra* note 25; Thornton, *supra* note 25; Strikwerda, *supra* note 25; Chamberlin, *supra* note 27; Rose, *supra* note 27.
[30] Off. Historian, *Decolonization of Asia and Africa, 1945–1960*, U.S. DEP'T STATE, https://history.state.gov/milestones/1945-1952/asia-and-africa#:~:text=Between%201945%20and%201960%2C%20three,from%20their%20European%20colonial%20rulers.&text=Decolonization%20was%20often%20affected%20by,the%20evolution%20of%20that%20competition (last visited Feb. 15, 2022).
[31] *See* Vandevelde, *Political Economy*, *supra* note 1.

Autarky. [32] Problems were far worse for the newly independent states which still had visible countless scars left by their former colonizers, combined with a baseless poverty-stricken domestic economy and infested with illiteracy and lack of finances which had only served the purposes of their former colonizers.[33] It was clear that their fight for the top would start from the very bottom. Being colonized and ruled for several years, their definition of development was inspired by the very portrayal of their colonizers who had continuously exploited them for years.[34]

The new underdeveloped states of Asia, Africa, and Latin America prioritized promoting economic nationalism by developing their domestic economies through restricting outward investment and protecting and developing economic resources available to their states.[35] On the other hand, with the end of World War II and emergence of the victorious USSR, the spread of communist political and economic ideas–the hardline critique of economic liberalist ideas–became inevitable. [36] The neo-Marxists of the twentieth century developed the dependency theory of foreign investment which regarded foreign investment as "neocolonialism" because it subjects local economies to foreign control and promotes their underdevelopment. [37] This theory favored state interference in the economy to more equally distribute wealth and screen out the foreign investment if they were found not to contribute in state's

[32] *See*, *e.g.*, Thornton, *supra* note 25, at 336-37. *See also* Leon Trotsky, *Nationalism and Economic Life*, *in How We Got Here*, *supra* note 27, at 32-34; Philip E. Mosely, *Communist Policy and the Third World,* 28 REV. POLITICS 210 (1966).
[33] *See* Thornton, *supra* note 25, at 342–43.
[34] Matthew D. Fails & Jonathan Krieckhaus, *Colonialism, Property Rights and the Modern World Income Distribution*, 40 BRIT. J. POL. SCI. 487–508 (2010).
[35] *See* Vandevelde, *Political Economy*, *supra* note 1, at 622–23.
[36] *Id.*
[37] *See id*.

developmental objective and, in some cases, expropriating the foreign investment.[38]

Multiple states in Eastern Europe, Asia, Africa, and Latin America—who were facing poverty and economic disparity, and either still overcoming colonialism's effects or ravaged by World War II—believed communism was the best socio-political and economic policy.[39] This made achieving a stable international cooperative global economy impossible. Yet, the second half of the twentieth century (beginning after World War II) oversaw dynamic changes in the development of the present regime of international legal rules governing foreign investments.[40] Development of the present international investment regime from 1945 to present can be divided into the following six broad categories:

1. Era of Institutional Conceptualization (1945–1950)

Even though this postwar period is not marked by any significant FDI flow, it played an important role in introducing various structural- and institutional-based reforms that set the ball rolling for the present international investment regime and a dynamic global economy.[41] As the end of World War II was in sight, the Allied states started establishing the new postwar international monetary and economic order to preserve global economic prosperity and peace by focusing on two critical aspects of expanding international trade and creating a functioning global

[38] *Id*.
[39] *See id*. *See also* Mosely, *supra* note 32, at § 3.
[40] Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMPAR. L.Q. 588, 588–89 (1988).
[41] *See* Department of Economic and Social Affairs, *World Economic and Social Survey 2017*, U.N. (July 13, 2017) [hereinafter "*Survey 2017*"], https://www.un.org/development/desa/publications/wess-2017.html. *See also* Henry Morgenthau Jr., *Bretton Woods and International Cooperation*, 23 FOREIGN AFF. 182–94 (1945); UNCTAD, *World 2015*, *supra* note 17 at 121–25.

monitory system.[42] The Bretton Woods Conference, attended by delegates of 44 states in 1944, established the International Monetary Fund (IMF) and International Bank for Reconstruction and Development, which proved to be a big step because it provided collaboration and consultation on international investment and monetary issues.[43]

Soon thereafter, to supplement its other building stones like the Bretton Woods Institutions (1944), the United Nations (1945), and the General Agreement on Tariffs and Trade (1947), an ambitious United Nations Conference for Trade and Employment drew up the Havana Charter on March 24, 1948, to promote the expansion of the production, exchange, and consumption of goods and for the formation of the International Trade Organization (ITO).[44] Fifty-three nations signed the charter and agreed to cooperate with one another and with the United Nations in the "fields of trade and employment and to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."[45] Interestingly, chapter VIII of the Havana Charter also prescribes for settlement of disputes for the members like consultation and arbitration and references the executive board of the ITO, the ITO conference, and the International Court of Justice that was formulated under Chapter XIV of the UN Charter signed on June 26, 1945.[46] The Havana Charter was the first attempt at multilateral investment rules, but with the absence of the Union of Soviet Socialist Republics (USSR) and the majority of the

[42] *See* Department of Economic and Social Affairs, *World Economic and Social Survey 2017*, U.N. (July 13, 2017), https://www.un.org/development/desa/publications/wess-2017.html. *See also* Morgenthau, *supra* note 41; UNCTAD, *World 2015*, *supra* note 17, at 121–25.
[43] *See* Morgenthau, *supra* note at 41.
[44] U.N. Conference on Trade and Employment, *Final Act and Related Documents*, 5, E/CONF.2/78 (Mar. 24, 1948) [hereinafter UNCTE, E/CONF.2/78].
[45] *Id.* at 5–7, 14.
[46] *Id.* at 88–90; U.N. Charter art. 92.

communist rule states.[47] It also demonstrated the split between the market economies following economic liberalism (that recognized private property) and the states following communism or Marxist Economies (that did not recognize private property).[48] With respect to investment negotiations, the developed, developing, and socialist states could not agree on the interpretation of customary international law and the content of an international minimum standard of treatment of foreign investors.[49]

However, the Charter could never be implemented because the member states did not deposit the instrument of acceptance with the U.N. secretary general within Article 104 of the Charter's prescribed time limit.[50] The Havana Charter was an ambitious attempt, which could have established a strong base of the Global Trade and International Investment at the initial stage, that consequently leading to economic development in the postwar era (considering the Charter's exceptions to free trade rule, which favored the poor new states, the ITO might have been a more attractive organization for the underdeveloped states to join and would also have helped to address the global inequalities).[51]

Even though the ambitious Havana Charter was unenforceable, it successfully established the intent of the states to establish and structure a stable, multilateral, open, and liberal world economy, away from the policies of

[47] UNCTE, E/CONF.2/78, *supra* note 44, at 5–7 (signatories to the charter includes Czechoslovakia where the Communist Party seized power after the coup in February 1948).
[48] UNCTAD, *World 2015*, *supra* note 17, at 122. *See also* Vandevelde, *Political Economy*, *supra* note 1.
[49] UNCTAD, *World 2015*, *supra* note 17, at 122.
[50] UNCTE, E/CONF.2/78, *supra* note 44, at 95.
[51] *See* Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948*, 25 INT'L HIST. REV. 282 (2003).

autarky.[52] Another landmark development in promotion of international trade at a global level came with the signing of the General Agreement on Tariffs and Trade (1947), which focused on reduction of trade barriers and tariffs and eliminating the discrimination in international commerce.[53]

2. Era of Evolution (1951–1964)

The era of the institutional conceptualization's materialization was characterized by redevelopment of the war-torn economies along with addressing the issues of poverty and underdevelopment of the new independent states of Asia, Africa, and Latin America.[54] In 1952, as the new economic order started taking its shape, *United Kingdom v. Iran* exposed significant limitations to the protections afforded to foreign investors by a host state under Customary International Law (CIL), which consequently pushed for reformation towards IIAs and led selective IIAs being concluded between states as the new instruments for achieving the global economy's objective.[55]

The 1957 Treaty of Rome was the first TIP which established the European Economic Community and provided the freedom of establishment and free movement of capital as European Integration's core pillars.[56] Soon thereafter, in 1959, the first BIT was signed between Germany and Pakistan.[57] The establishment of the Organization for Economic Co-operation and Development (OECD), its Code on Capital Movements and Code on Current Invisible Operations of 1961 (which promoted liberalization of international trade in goods and services

[52] *See* William Diebold, *Reflections on the International Trade Organization,* 14 N. ILL. U.L. REV. 335 (1994).
[53] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
[54] *See Survey 2017*, *supra* note 41, at 49–70.
[55] *See* Anglo Iranian Oil Co. (U.K. v. Iran), Judgement on preliminary objection on jurisdiction, 1952 I.C.J. 93 (July 22, 1952); *see also* UNCTAD, *World 2015*, *supra* note 17, at 121–22.
[56] *See* UNCTAD, *supra* note 3.
[57] *Id.*

along with the progressive freedom of capital movements) were additional significant developments in this era which focused on economic liberalization.[58]

During the era's progression, a total of thirty-six IIAs were signed, including thirty-three BITs and three TIPs.[59] Although these early IIAs afforded foreign investors weak protection afforded by a host state, they focused on protection against expropriation and nationalization, which were perceived as the main risks for investors from developed countries investing in developing countries.[60] Despite relatively few investment protections and lack of ISDS provisions these IIAs, and specifically the BITs, emerged as the new types of instruments signed between a developed and developing state.[61]

Further developments during this era include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as The New York Convention (1958), which focused on the recognition and enforcement of foreign arbitral award;[62] United Nations Resolution on Permanent Sovereignty over Natural Resources, arguably the most important development towards strengthening the sovereignty of the state and investor's responsibilities, recognized the people and state's rights to permanent sovereignty over their natural wealth and resources and focused on their economic independence to exercise their right in the interest of national development.[63]

3. Era of Contradiction (1965–1989)

With the constant change in the global economy and the states' socio-political structure along with the developing

[58] OECD, *OECD Codes of Liberalisation: User's Guide* (2019), www.oecd.org/investment/codes.htm.
[59] *See* UNCTAD, *supra* note 3.
[60] *See* UNCTAD, *World 2015*, *supra* note 17, at 122.
[61] *See id.* at 121.
[62] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3 U.S.T. 2517.
[63] G.A. Res. 1803, (Dec. 14, 1962).

states' ambition to achieve the aims of development in consonance with their political objectives, multiple states started realizing the significance and contribution of FDI for economic development strategies.[64] However, the differences between the economic and political ideologies still prevailed during this period. The Marxist economies, led by the Soviet Union and many other developing states, which followed economic nationalism principles—still suspicious of foreign investments—continued to stay away from the liberal IIA regime.[65]

Events like the foreign oil companies' nationalization by Libya's government in 1974, which, without warning, revised the concession's deeds entered into with foreign oil companies, shocked developed countries' foreign investors, and prominently highlighted the threat of foreign-investment nationalization and expropriation by developing states which were motivated by a conflict arising out of socio political ideologies against economic liberalism and neocolonialism, and which focused on the significance of the protections granted under the new instruments of IIAs.[66] Accordingly, significant development in the IIA regime was observed in this era with better protection afforded by the host state to foreign investors through increasing the inclusion of ISDS provisions.[67] The earliest known inclusion of ISDS provisions in a BIT was between Indonesia and Netherlands in 1968 as well as the earliest publicly known example of a treaty based ISDS case—i.e., *APPL v. Sri Lanka* initiated in 1987 under the Sri Lanka-United Kingdom BIT (1980)—both marked this era.[68]

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[64] *See* UNCTAD, *World 2015*, *supra* note 17.
[65] *Id.*
[66] Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).
[67] *See* UNCTAD, *World 2015*, *supra* note 17.
[68] *See id*. *See also* UNCTAD, Navigator, *supra* note 12.

The later part of this era was also marked by the decline of economic Marxism with the Marxist economies' majority showing signs of instability caused by domestic socio-political and economical tensions which would eventually lead to liberal economic reforms amongst them.[69] Still, for the majority of this era, states like the Soviet Union, China, India, Brazil, and many other Asian and Eastern European States, preferred to stay away from the liberal economic reforms or joined the IIA regime at a later stage of this era.[70]

Among these states, China was the first communist state to introduce liberal economic reforms to attract FDI in 1978.[71] The heavy disruption and destruction in economic development caused by the cultural revolution in China (1966-1976) brought a long-term economic depression and a reduction in standard of living.[72] This economic and political fallout created a solid base for the move away from its traditional and orthodox approach.[73] Recognizing the importance and urgent requirement for Foreign Investment to re-stabilize and develop the economy in 1978 led to the introduction of reforms for economic liberalization in China to attract foreign investors—referred to as "Open Door Policy"—and further led to their first BIT with Sweden being signed in 1982.[74]

This era was also marked by successful global attempts to develop, institutionalize, and systematize international trade resulting in significant resolutions, conferences, and organizations.[75] With regard to foreign investor and host state resolutions, a significant development

[69] *See* UNCTAD, *World 2015*, *supra* note 17. *See also* Vandevelde, *Political Economy*, *supra* note 1.
[70] *See* UNCTAD, *World 2015*, *supra* note 17.
[71] Guocang Huan, *China's Open Door Policy*, 39 J. INT'L AFF. 1, 1–18 (1986).
[72] *See id.*
[73] *See id.*
[74] *See id*. *See also* UNCTAD, *supra* note 3.
[75] *See* UNCTAD, *supra* note 3.

was the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966, which provided facilities for investment dispute resolutions between investors and host states with conciliation and arbitration.[76]

In 1985, focusing on FDI outreach for developing economies and foreign investment protection against non-commercial risk, the convention establishing the Multilateral Investment Guarantee Agency (MIGA) was organized and went into effect in April 1988.[77] MIGA was established with an objective to encourage investment flow for productive purposes and particularly to the developing economies by issuing guarantees and reinsurances against non-commercial risk regarding investments, and today boasts of membership of 182 states.[78]

Besides the focus on the investor's protection, this era further emphasized the developing states' protection of sovereignty as well as the international cooperation for balanced development.[79] Although investors' obligations and state sovereignty were declared by the United Nations Resolution on Permanent Sovereignty over Natural Resources in 1961, this era also strengthened the same by the United Nations General Assembly's Declaration of the Establishment of the New Economic Order.[80] This establishment of the new international economic order was "based on equity, sovereign equality, interdependence and common interest and cooperation among all States" with a focus to "correct inequalities and redress existing injustice . . .

[76] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965-Apr. 10, 2006, 80 Stat. 344, ICSID/15.
[77] *See generally* Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, 24 I.L.M. 1605 (entered into force Apr. 12, 1988).
[78] *See id. See also* Member Countries, MULTILAT. INV. GUAR. AGENCY, https://www.miga.org/member-countries/ (last visited Mar. 3, 2022).
[79] *See* UNCTAD, *World 2015*, *supra* note 17.
[80] G.A. Res. 3201 (S-VI), (May 1, 1974).

eliminate the widening of the gap between developed and developing countries and ensure steadily accelerating economic and social development."[81]

However the most significant global development to institutionalize, systematize, and establish the legal framework for international trade and trade facilitation was the establishment of United Nations Commission on International Trade Law (UNCITRAL) in 1966.[82] To date, UNCITRAL plays an important role in developing the framework to harmonize international trade law by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key commercial law areas.[83] "In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law."[84]

Furthermore, another failed attempt to establish multilateral investment rules was launched by the United Nations, initiating negotiations on a Code of Conduct on Transnational Corporations and a Code of Conduct on the Transfer of Technology.[85] The states' failure to globally find a solution to reconcile and protect the interests of developed states regarding their investment, along with the issue of protection of sovereignty and interests of developing and socialist states and the treatment of multinational enterprises (MNEs) according to their domestic laws, led to its failure.[86] However, some success was found with the adoption of "Set of Multilaterally Agreed Equitable

[81] *Id*.
[82] *See generally* G.A. Res. 2205 (XXI), (Dec. 17, 1966).
[83] *See generally* UNCITRAL, U.N., A GUIDE TO UNCITRAL: BASIC FACTS ABOUT UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.
[84] *Id.*
[85] *See* UNCTAD, *World 2015*, *supra* note 17, at 123.
[86] *Id*.

Principles and Rules for the Control of Restrictive Business Practices" by the General Assembly in 1980.[87]

Even though this era was marked by contradictions arising from socio-political and economic reasons, states had started to identify the significance of FDI for economic development which led to the expansion of the global IIA regime to 375 IIAs including 352 BITs and 23 TIPs.[88] As per the records available, starting from 1970, the FDI inflow was recorded at $13,257 million and FDI outflow as $14,141 million, whereas, by the end of this era in 1989, the FDI inflow had significantly surged to $196,897 million and FDI outflow to $230,920 million.[89]

4. Era of Expansion (1990–2007)

As domestic discontentment grew, combined with a receding economy, the communist states with Marxist economies soon found themselves in desperate need for social, political, and economic reforms.[90] With the implementation of reforms of "Perestroika" (restructuring) and "Glasnost" (openness) in the Soviet Union,[91] focusing on social, economic, and political liberalization while interlinking socialism and democracy, followed by the historical event of the fall of the Berlin wall and the consequent reunification of Germany, it soon became clear that the presence of the Marxist economic days were numbered.[92] The subsequent chain of events led to the disintegration and dissolution of the USSR in 1991 which

[87] *Id*.
[88] *See* UNCTAD, *World 2015*, *supra* note 17.
[89] *See* UNCTAD, Foreign Direct Investment, *supra* note 5.
[90] *See* Seweryn Bialer, *The Death of Soviet Communism*, 70 FOREIGN AFFS. 166 (1991). *See also* UNCTAD, *World 2015*, *supra* note 17.
[91] *See* R. G. Gidadhubli, *Perestroika and Glasnost,* 22 ECON. & POL. WKLY. 784, 784–787 (1987).
[92] *See* Gregory v.S. McCurdy, Note, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U. J. INT'L L. & POL. 253 (1990). *See also* Floy Jeffares, *The Gentle Revolution: German Unification in Retrospect*, 20 DENV. J. INT'L L. & POL'Y 537 (1992).

marked the fall of the Marxist economies and opened the possibilities of the establishment of a global economy based on the principles of economic liberalization and free trade.[93] The fall of USSR was followed by the transition of various Marxist economies to accommodate principles of liberalization and most importantly the recognition of private property.[94] Such economies were identified by UNCTAD as transition economies.[95] As the contradiction between socio-political and economic ideologies followed by states settled down, this era was the most significant one in terms of the expansion of the FDI, IIAs and surge in ISDS regime.[96]

As more states increasingly recognized the importance of FDI in terms of economic development and further with the entry of the transition economies, the race to attract foreign investors intensified amongst the states which led to formulation of favorable domestic investment and economic policies.[97] As IIAs were considered a significant instrument for attracting foreign investors, the competition to sign multiple IIAs also intensified leading to rapid global expansion of the IIA regime. The focus to attract foreign investors with most countries realizing the importance of FDI led the states to introduce more liberal reforms favorable to the foreign investors to stabilize and boost their morale.[98]

Due to the materialization of liberal reforms introduced by various states and rapid expansion of IIAs, this era saw a huge surge in global FDI flow and observed an increasing dependency of economies on FDI.[99] Potential

[93] *See* Bialer, *supra* note 90. *See also* UNCTAD, *World 2015*, *supra* note 17; Vandevelde, *Political Economy*, *supra* note 1.
[94] *See* UNCTAD, *World 2015*, *supra* note 17, at 123.
[95] *See* UNCTAD, *Development Status*, *supra* note 2.
[96] *See* UNCTAD, *World 2015*, *supra* note 17.
[97] *See* UNCTAD, *Development Status*, *supra* note 2.
[98] *See* UNCTAD, *World 2015*, *supra* note 17, at 125.
[99] *See* UNCTAD, Foreign Direct Investment, *supra* note 5.

foreign investors, who majorly belonged to the developed economies, saw new opportunities to invest in developing economies and transition economies and accordingly directed the FDI flow towards them.[100] Whereas the FDI outflow of the developed economies were recorded to have surpassed their FDI inflow, a reverse phenomenon was observed with the developing economies where FDI inflow was recorded as more than the FDI outflow.[101]

According to UNCTAD's available statistics, at the beginning of this era in 1990, the outward flow of FDI from developed economies was calculated at $230,767 million and the inward flow as $170,252 million, whereas the outward flow of FDI from developing economies was $13,108 million and the inward flow stood at $34,636 million.[102] By the end of this era in 2007, the outward flow of FDI from developed economies surged to $1,912,709 million and the inward flow to $1,373,550 million whereas, the outward flow of FDI of developing economies was calculated to $278,702 million and the inflow to $533,179 million.[103]

Recognizing developing and transition economies' potential to attract FDI, by the end of this era, there was a relative fall in the FDI inflow to the developed economy along with a relative rise in FDI inflow to the developing economies.[104] Whereas in 1990, around 83% of the global FDI inflow was attributed to developed economies and around 17% to developing economies, in 2007, the FDI inflow to the developed economies shrunk to 72% while the developing economies expanded to around 28%.[105]

With a surge in FDI inflow in the developing states and their consequent stabilization and development, by the

[100] *See* UNCTAD, *World 2015*, *supra* note 17.
[101] *See* UNCTAD, Foreign Direct Investment, *supra* note 5.
[102] *Id.*
[103] *Id.*
[104] *See id.*
[105] *Id.*

end of the era, these developing economies also expanded their FDI outflow.[106] Where in 1990, around 95% of the global FDI outflow was attributed to developed economies and around 5% to the developing economies, in 2007, the FDI outflow from developed economies shrunk to 87% and relative surge was observed in developing economies capturing around 13% of the global FDI.[107]

Furthermore, due to the tremendous surge in its flow and recognition during this era, FDI started playing a significant role in the economies which increasingly became dependent on it.[108] Whereas in 1990, the percentage ratio of global FDI inflow to the global GDP was 0.89% and the FDI outflow was 1.12%, in 2007, the same surged to 3.28% and 3.81% respectively.[109] Similarly, the recognition and dependence of the developing economies on FDI was also evident with the percentage ratio of FDI inflow to the GDP surging from 0.87% in 1990 to 3.35% in 2007.[110] However, a relatively lower increase in the percentage ratio of FDI outflow to GDP was observed from 0.35% in 1990 to around 1.81% in 2007, whereas, for the developed economies, the same surged from 1.28% in 1990 to 4.54% in 2007.[111]

As far as transition economies are concerned (which at that time were Marxist economies), not much data is available regarding any FDI outflow till 1990 with UNCTAD and had recorded FDI inflow of merely $75 million, the percentage ratio of which to GDP was only 0.01%.[112] With the USSR's fall and introduction and materialization of the liberal economic reforms, the transitional economies too, like the developing economies, become the destination of the FDI from potential global

[106] *See id.*
[107] *Id.*
[108] *See id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

investors.[113] By the end of this era, in 2007, transition economies recorded a phenomenal surge in FDI inflow to $87,233 million and an FDI outflow of $49,180 million.[114] Consequently, the percentage ratio of FDI inflow to the GDP increased to 4.83% and the percentage of FDI out flow to 2.80%.[115]

Although there was a sudden surge in the global FDI and IIA regime, many states, even after realizing the importance of FDI and introducing liberal reforms, were still cautious of the dependency of their economies on unpredictable foreign investment and opening their domestic economy to the global market's volatility.[116] The reasons varied from a neocolonial approach towards foreign investment to being overcautious of preventing the capitalist takeover of the domestic economy to balancing the domestic market and foreign investment to prevent the destruction or its takeover by the foreign investors.[117] Although the economic Marxism had fallen globally, the insecurities towards FDI still persisted within many states.[118] These insecurities had their roots connected to the past economic and political structure of those states which believed in state's control over the economy, even though to a limited extent.[119] However, this cautious approach did not prevent the expansion of IIAs globally. IIAs are now considered as a necessity for the global competition for foreign investment.[120]

From 381 BITs in 1980s, the number surged to 2,067 BITs by the end of 2000, with an average of three BITs

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[113] *See id.* *See also* UNCTAD, *World 2015*, *supra* note 17, at 123.
[114] *Id.*
[115] *Id.*
[116] *See* Vandevelde, *Political Economy*, *supra* note 1. *See also* Vandevelde, *Brief History*, *supra* note 21.
[117] *Id.*
[118] *See id*.
[119] *Id*.
[120] *See* UNCTAD, *World 2015*, *supra* note 17, at 123.

signed per week.[121] Collectively, 2,668 new IIAs were signed in this era expanding to a total of 3,079 IIAs signed.[122] In this context, the most significant development in terms of reformation in economic policy of developing states and expansion of their IIA network came from India and China—which were considered to have the most potential to attract FDI.[123] The economic reform adoption and implementation in China in the form of "Open Door Policy" in the previous era materialized during this era and set an example for the developing countries.[124] India, realizing the necessity of reforms for economic development and to integrate the Indian economy with the global economy, introduced the New Industrial Policy in June 1991 and initiated reforms of macroeconomic stabilization and structural adjustment with support from the IMF and the World Bank.[125] During this era, collectively, India and China signed a total of 175 BITs and 16 TIPs: China signing 108 BITs and 6 TIPs whereas India's share was 67 BITs and 10 TIPs.[126]

Considering the rapid expansion of international trade and its significance in the global economy, it became necessary to develop and regulate it with the aim to structuralize, systematize, and stabilize the same at the global level.[127] In this context, the most significant development was the establishment of the World Trade Organization (WTO) in 1994 as an international organization aiming to develop rules of trade between states

[121] *See* UNCTAD, *World 2015*, *supra* note 17.
[122] *See* UNCTAD, *supra* note 3.
[123] *See* UNCTAD, *World 2015*, *supra* note 17.
[124] *See* UNCTAD, Foreign Direct Investment, *supra* note 5. FDI inflow for China recorded in 1980 was $57 million, $4,366 million in 1991 and thereafter rose phenomenally to $11,008 million by 1992 and to $27,515 million by 1993.
[125] Nagesh Kumar, *Liberalisation and Changing Patterns of Foreign Direct Investments: Has India's Relative Attractiveness as a Host of FDI Improved?*, 33 ECON. & POL. WKLY. 1321, 1329 (1998).
[126] *See* UNCTAD, *supra* note 3.
[127] *Id*.

and ensure a free, predictable, and smooth flow of trade.[128] To fulfill its purpose, WTO agreements have been signed and negotiated with various states such as General Agreement on Trade and Service (GATS)[129], Agreement on Trade-Related Investment Measures (TRIMs)[130] and Trade Related Aspect of Intellectual Property Rights (TRIPs).[131] Whereas its predecessor GATT mainly dealt with trade in goods, the WTO and its various agreements covered trade in services and intellectual property and also reformed the procedures for dispute resolution.[132]

Furthermore, in 1994, the Energy Charter Treaty was signed, incorporating detailed provisions for investment and establishing the Energy Charter Conference, which today has a membership of fifty-two states consisting of developed, developing and transitional economies and various other observers.[133] Other developments in this era included the adoption of World Bank Guidelines on the Treatment of Foreign Direct Investment in 1992, the signing of the North American Free Trade Agreement in 1992

[128] *See About WTO*, WTO https://www.wto.org/english/thewto_e/thewto_e.htm#:~:text=The%20World%20Trade%20Organization%20(WTO,and%20ratified%20in%20their%20parliaments (last visited Mar. 3, 2022).
[129] *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Mar. 3, 2022).
[130] *Agreement on Trade-Related Investment Measures (TRIMs),* WTO, https://www.wto.org/english/tratop_e/invest_e/trims_e.htm (last visited Mar. 3, 2022).
[131] *Trade-Related Aspects of Intellectual Property Rights*, WTO, https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Mar. 3, 2022).
[132] *Birth of WTO: History of the Multilateral Trading System*, WTO, https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited Mar. 3, 2022).
[133] *See* UNCTAD, *supra* note 3 (for list of observers). *See also* UNCTAD, *World 2015*, *supra* note 17.

(NAFTA) and their subsequent adoption of APEC Non-Binding Investment Principles in 1994.[134]

For the foreign investors, apart from accommodating themselves in the new socio-political and economic structure of the host state, faced the primary challenges of regarding indirect and direct expropriation, fair and equitable treatment or minimum standard of treatment including denial of justice, full protection and security, arbitrary and discriminatory measures of the host states, losses incurred due to domestic instability of the host state, and many others.[135] In many cases, such challenges proved to be fatal for investments by investors in the host states and being contrary to the protections guaranteed by the host state via an underlining IIA.[136] This ultimately made the investors invoke dispute resolution clauses by the underlining BITs or various other IIAs.[137] Under these circumstances, and with an increasing global liberalization, foreign investors felt a necessity to revisit the protections guaranteed under the IIAs.[138] As the first generation IIAs provided weak protection to the investors, the majority of the states, in the midst of an intense competition to attract FDI, further enhanced the protections afforded under IIAs signed during this era and renegotiated the previous IIAs to fulfill this objective.[139] As a corollary, a simultaneous surge occurred in the ISDS in this era.[140] As per the data available in public domain, 290 ISDS were initiated by the investors against the host states through the protections and dispute resolution clauses provided by the underlining IIAs.[141]

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[134] *See* UNCTAD, *World 2015*, *supra* note 17.
[135] *See* UNCTAD, Navigator, *supra* note 12.
[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *See* UNCTAD, *World 2015*, *supra* note 17.
[140] *See* UNCTAD, Navigator, *supra* note 12.
[141] *See id.*

Soon, a majority of the states found themselves at the defensive side of the ISDS proceedings with the investors claiming huge amounts as damages before arbitral tribunals, while questioning the policies and actions or non-compliance of the obligations as agreed upon by those states and mentioned in the underlining IIAs.[142] As per the data available in public domain, eighty-seven of the ISDS initiated during this era were decided in favor of the investors, while ninety-two were decided in favor of the states.[143] Furthermore, seventy-six cases were settled while five cases were decided in favor of neither of the parties (liability found by the tribunal but no damages awarded).[144] Surprisingly, four cases are still pending; with the oldest case being *AES v. Argentina* under the Argentina-United States of America BIT (1991) pending since 2002, while twenty-three cases were discontinued.[145]

5. Era of Revision (2008–2019)

Starting from 2007, the expansion of IIA and FDI regime started slowing down as various loopholes were uncovered in the prevailing international investment regime, leading to increasingly desperate calls to revisit the issues of this novel jurisprudence.[146] As multiple prevailing issues in the regime were recognized, states grew more impatient and therefore this era was characterized by identification of the issues of the IIA rulemaking and multiple efforts to address and reorganize the same.[147]

The global financial crisis that surfaced in 2008 resulted in a sudden downfall of both the inward and outward

[142] *Id.*
[143] *See id.*
[144] *See id.*
[145] *See id.* (out of the 290 cases initiated during this era, details of 3 are not available with UNCTAD).
[146] *See* UNCTAD, *World 2015*, *supra* note 17.
[147] *See* UNCTAD, Navigator, *supra* note 12.

flow of global FDI.[148] In 2008, the global FDI inflow fell to 1,490,066 million from 1,891,708 million in the previous year, and the global FDI outflow to 1,712,738 million from 2,170,461 million, respectively.[149] Initially, the crisis had a direct impact on the FDI inflow of the developed states as the developing and transitional states still projected a growth of FDI inflow.[150] From $522,392 million in 2007 to $578,020 million in 2008, the developing states continued the trend of an expanding FDI inflow, but experienced a fall in 2009 by dropping to $ 460,252 million.[151] Similarly, the transitional economies also continued the trend of expansion of FDI inflow in 2008 being recorded at $117,733 million from $87,233 million in 2007, but plummeting down to $61,840 million in 2009.[152] Consequently, the percentage ratio of FDI inflow to the global GDP also fell from 3.77% in 2007 to 2.72% in 2008 and further to 1.98% in 2009.[153] The global economic crisis had also touched upon the long running insecurity of developing economies to increase their dependency and exposing their economies to highly volatile FDI.[154] Although maintaining the trend of the expansion of FDI in 2008, as mentioned hereinabove, the percentage ratio of FDI inflow to the GDP of developing economies had still dropped from being 3.32% in 2007 to 3.15% in 2008 and further to 2.55% in 2009.[155] The economic crises emphasized on desperate need to strengthen the regulatory framework of the economy, including investment.[156]

Another issue that had raised many eyebrows were the proceedings of ISDS that had proliferated multifold

[148] *See* UNCTAD, *World 2015*, *supra* note 17. *See also* UNCTAD, Foreign Direct Investment, *supra* note 5.
[149] *See* UNCTAD, Foreign Direct Investment, *supra* note 5.
[150] *Id.*
[151] *See id.*
[152] *See id.*
[153] *See id.*
[154] *Id.*
[155] *See id.*
[156] *See* UNCTAD, *World 2015*, *supra* note 17.

during this era. Both developing and developed states saw a number of ISDS cases being initiated by investors which were now increasingly becoming complex and involved more difficult questions of law evaluating the thin line between regulatory permitted activities of the state and acts of illegal interference with rights of the investors for which the investors are to be compensated.[157] In a span of twelve years, the relationship between the investors and host states became far more complex as both the developed and developing states saw a staggering surge in ISDS with 739 new cases being initiated between 2008-2019.[158] This figure was just less than thrice the number of new cases initiated in the previous era, which was limited to 290 cases between 1990–2007.[159] It was perceived that the foreign investors were questioning the actions of the states taken in the interest of the economy of the host state and took advantage of the liberally drafted IIAs to invoke the ISDS to be adjudicated by a tribunal which lacked transparency and accountability. [160] Other critics also pointed out inconsistences in the awards; appointments, independence and impartiality of members of the tribunals; lack of accountability of the members of the tribunals; lack of corrective mechanisms; etc. [161] The significance and increasing dependency of the global economy on FDI , the multiple issues of the ISDS regime, and the rising complexities and amount of compensation sought by the investors and awarded by arbitral tribunal in many high profile cases could not be ignored and was raising many eyebrows. [162] Soon thereafter, countries like the United States and Canada adopted a more transparent model which

[157] *See id.*
[158] UNCTAD, Navigator, *supra* note 12.
[159] *See id.*
[160] *See* Gabrielle Kaufmann-Kohler & Michele Potesà, *Investor-State Dispute Settlement and National Courts*, EUR. Y.B. ON INT'L ECON. L. (2020).
[161] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[162] UNCTAD, *World 2015*, *supra* note 17.

involved open hearings, publication of documents, and the ability of a non-disputing party to submit an amicus curie brief to the tribunal.[163] Critics also point out foreign investors are treated more favorably than domestic investors, where the foreign investors, without exhausting the domestic remedies available to them, could initiate ISDS proceedings before the tribunal members who were appointed on an ad-hoc basis and review the states' actions and policies.[164]

IIAs also stopped expanding. States started to doubt the feasibility of broadly drafted IIAs as a tool to facilitate FDI.[165] Conservatives in many states pointed out the issues of the IIA and FDI regime and compared the foreign investment to a neocolonialist tool of the developed capitalist states.[166] Critics also blamed the liberal economic policies which adversely affected the domestic markets and exposed the same to the highly volatile foreign markets.[167] In this era, states restructured their IIAs because the financial crisis demonstrated the dangers domestic economies exposed to a vulnerable and volatile global market and uncovered the complexities of ISDS and domestic relationships with foreign investors.[168] The competition to sign IIAs and attract foreign investment slowed down and states became reluctant to sign the liberally drafted IIAs which were prevalent in the previous era.[169] States began reevaluating the benefits of the IIA regime compared to its cost and its alignment with their future goals.[170] As the confidence in IIA eroded, only 642 IIAs were signed (which included 494 BITs and 148 TIPs) while a staggering number

[163] *Id.*
[164] Kaufmann-Kohler & Potesà, *supra* note 160, at 8.
[165] *Id.* at 15–16.
[166] Vandevelde, *Brief History*, *supra* note 21, at 166.
[167] *Id.* at 166–67.
[168] UNCTAD, *World 2015*, *supra* note 17, at 124.
[169] *Id.*
[170] *Id.*

of 270 IIAs were terminated during this era.[171] Facing mounting pressure to address the issues, many states grew restless and opted for radical steps, including renouncing ICSID membership, terminating IIAs, and announcing a moratorium on negotiations of future IIAs.[172]

Recognizing the strong backlash and issues faced by the states regarding the ever-growing complexities of ISDS and IIAs, the need to address these issues were felt even at the global level.[173] Noticing the pressing social and environmental challenges and persistent crisis, UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) recognized the priority of mobilizing investment to ensure its contribution to the sustainable development.[174] Launched in 2012, this framework was designed to guide policymakers by setting out principles for investment policymaking of both national and international investment policies regimes and options for better usage and drafting of IIAs.[175] The framework has served as a reference for many policymakers for negotiating IIAs by the states and also for formulating national investment policies.[176]

Another major change during this era was the formation of Working Group III in 2017 to work on possible reforms of the ISDS after the UNCITRAL identified various issues in the ISDS' jurisprudence.[177] The government-led Working Group III considers the expertise of its stakeholders as it (1) identifies and considers concerns regarding ISDS, (2) considers if any reform is desirable in the light of any identified concern, and (3) concludes if the reform is

[171] UNCTAD, *supra* note 3.
[172] UNCTAD, *World 2015*, *supra* note 17, at 124.
[173] *Id.* at 124-25.
[174] *Id.* at 125.
[175] UNCTAD, IPFSD, *supra* note 18, at 86.
[176] *Id.*
[177] Rep. U.N. Comm'n on Int'l Trade L., *supra* note 15.

desirable and develops any relevant solution to be recommended.[178]

Following the UNCTAD's IPGSD, multiple states started reorganizing their approach towards IIAs to address the growing concern against IIAs and FDI along with the rise in the number and complexities of ISDS adversely affecting the relationship of states and foreign investors.[179] Mounting criticism from civil societies and realignment of the future objectives towards sustainable development led the states to reform their IIAs by revisiting their BIT models and introducing new generation IIAs.[180] Many states introduced new "model BITs" which helped them clarify their position regarding investor protections and obligations and which served as a template for future BIT negotiations, achieving uniformity and maintaining international standards.[181] States terminated the previous generation's BITs and renegotiated them with states based on the new model BITs.[182] Even though each treaty is finalized and signed after negotiations and is drafted with such provisions that are convenient to the states, model BITs help in the negotiations and to clarify the intentions of the parties.[183] Learning from the previous mistakes, these model BITs focused on clarifying the meaning and scope of investment obligations, including the foreign investors' most alleged minimum standard of treatment and indirect expropriation.[184] Additionally, these new model agreements prepared by the states included specific provisions which aimed at clarifying

[178] *Id.*
[179] UNCTAD, *World 2020*, *supra* note 16, at 2.
[180] UNCTAD, *World 2015*, *supra* note 17, at 124.
[181] UNCTAD, *World 2020*, *supra* note 16, at 113 ("Since 2012, over 75 countries and REIOs benefited from UNCTAD support for the development of new model BITs and IIA reviews (WIR19)"). *See also* UNCTAD, *World 2015*, *supra* note 17; International Investment Agreements Reform Accelerator, *supra* note 16, at 2.
[182] UNCTAD, *World 2015*, *supra* note 17, at 124.
[183] *Id.*
[184] UNCTAD, *World 2015*, *supra* note 17.

that the investment protection provided to the foreign investors and further clarified that the objectives of economic liberalization of the state must not override the protection of health, safety, the environment, and the promotion of internationally recognized labor rights.[185] Soon, states started introducing innovative clauses in IIAs to reduce the ISDS while maintaining the balance between the confidence in foreign investors and sovereignty of the states and focusing on sustainable development.[186] Through the new generation IIAs based on model BITs and other model IIAs, states have provided narrow interpretations and clarification of the provisions focusing on improving the ISDS procedures to make the same more predictable, elaborate, and transparent.[187]

a) Analysis of a Model BIT in the era of Revision—An example of India

Although multiple states have introduced model BITs, India, which terminated its previous BITs to renegotiate treaties based on its Model BIT, is a perfect example of the development and dynamism of this novel jurisprudence, which terminated its previous BITs to renegotiate new treaties based on its new Model BIT.[188] India's economy was destroyed and looted by the British Empire during the colonial era, and it developed a socialist economy in the eras of evolution and contradiction.[189] India introduced liberal economic reforms in the era of expansion after realizing the importance and contribution of FDI to develop its economy.[190] After introducing the liberal reforms in 1991, India followed the global trend and signed

[185] *Id.* at 124.
[186] *See* UNCTAD, *World 2020*, *supra* note 16, at 2.
[187] *Id.* UNCTAD, *World 2015*, *supra* note 17, at 124.
[188] UNCTAD, Navigator, *supra* note 12.
[189] SHASHI THAROOR, INGLORIOUS EMPIRE: WHAT THE BRITISH DID TO INDIA (2017).
[190] Kumar, *supra* note 125, at 1321.

ninety-six IIAs with multiple states until 2014,[191] which consequently led to its FDI inflow jump from $252 million in 1992 to $34,582 million in 2014, and the percentage ratio of FDI to the GDP from 0.09% in 1992 to 1.69% in 2014.[192]

One of India's main concerns was continuously finding itself as a respondent in multiple ISDS proceedings initiated by foreign investors.[193] It started with *White Industries Australia Limited v. Republic of India*,[194] which was the first publicly known ISDS case that was partly awarded in favor of the investor against India.[195] The Honorable Tribunal in its final award referred to article 4(2) of the BIT between Australia and India as a "Most Favored Nation (MFN) clause" and thereafter referred to article 4(5) of the India-Kuwait BIT, which created an obligation upon the contracting parties to provide "effective means of asserting claims and enforcing rights."[196] It further held that the "Indian judicial system's inability to deal with White Industries' jurisdictional claim in over nine years and the Supreme Court's inability to hear White Industries' jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White Industries with 'effective means" of asserting claims and enforcing rights. "[197]

An attempt to undermine the judiciary by an international tribunal highlighting the "undue delay" by the judiciary was an embarrassment for India.[198] In the years

[191] UNCTAD, *supra* note 3.
[192] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[193] Until September 2020, India had been engaged as respondent in at least 25 publicly known ISDS. UNCTAD, Navigator, *supra* note 12.
[194] White Indus. Australia Ltd. v. India, IIC 529 (UNCITRAL 2011).
[195] UNCTAD, Navigator, *supra* note 12.
[196] White Indus. Australia Ltd. v. India, IIC 529, at ¶ 11.4.19 (UNCITRAL 2011).
[197] *Id.*
[198] *See, e.g.*, Abraham C. Mathews, Opinion, *Cairn Energy Case/India needs to have a better strategy in place*, MONEY CONTROL (June 2, 2021) https://www.moneycontrol.com/news/opinion/cairn-energy-case-india-

that followed, India was subjected to more ISDS initiated by foreign investors.[199] These ISDS included challenges to various governmental regulatory measures.[200] *White Industries* urged the government to address issues of the IIA regime and to implement reforms.[201] Foreign investors started raising questions about balancing India's investment protections with their exercise of regulatory power.[202] Report No. 246 on Amendments to the Arbitration and Conciliation Act recognized the need to mitigate the government's risk from foreign investors' claims while also boosting their confidence.[203] In March 2015, the draft of the Model BIT was made public by the government of India and was examined by the Law Commission of India in its Report No. 260; the Law Commission of India's suggestions aligned with the government's objective to encourage "doing business" in India.[204] By that time, India had signed a total of eighty-three BITs and various other FTAs, seventy-four of the FTAs with dedicated chapters on investment were in force.[205]

As anticipated, on December 28, 2015, India introduced new model BITs replacing its previous model BIT of 2003.[206] Soon thereafter, between 2016 to 2019,

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needed-a-better-strategy-that-didnt-question-its-reputation-for-abiding-by-the-rule-of-law-6902341.html (noting that the *White Industries* award was perhaps the most embarrassing of India's "chequered history with international arbitration.").

[199] From 2012 to 2019, fifteen publicly known cases have been initiated against India. *See* UNCTAD, Navigator, *supra* note 12.

[200] Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty*, Report No. 260, 3 (Aug. 27, 2015) [hereinafter Rep. 260].

[201] Law Commission of India, *Amendments to Arbitration and Conciliation Act*, Report No. 246, 17–18 (Aug. 5, 2014) [hereinafter Rep. 246].

[202] Rep. 260, *supra* note 200, at 3.

[203] Rep. 246, *supra* note 201, at 17.

[204] Rep. 260, *supra* note 200, at ii.

[205] *Id.* at 1.

[206] Office Memorandum F No. 26/5/2013-IC, Dept. of Econ. Aff. Inv. Div., Gov. of India Ministry of Finance (Dec. 28, 2015).

India terminated a total of sixty-six BITs with other states.[207] Although the new Model BIT included multiple progressive provisions, it curtailed and limited the protections and obligations afforded to foreign investors.[208] Compared to the 2003 model, the 2015 model was explicitly and precisely drafted.[209] It balanced the goal of promoting and protecting foreign investors' interests and exercise of the regulatory power of the government while also aligning the IIA regime with sustainable development and the Government's objectives.[210]

A few relevant provisions of the Model BIT include Article 1.4, which defined "investment" in a more specific, enterprise-based definition,[211] which became a concern for the government of India imposing excessive strain on its regulatory space.[212] This meant that an investment had to be "an enterprise*"* in the form of a legal entity as defined under article 1.3 of the Model BIT, and is *"*constituted, organized and operated in good faith by the investor in accordance with the law of the party in whose territory it is made."[213] Interestingly, learning from the global developments in the novel jurisprudence of ISDS, the definition follows the elements/criteria to asses investments as discussed in *Salini Costruttori S.P.A. and Italstrade S.P.A v. Kingdom of Morocco* and focuses on the "assets of the enterprise" along

[207] UNCTAD, *supra* note 3.
[208] *See* MODEL TEXT FOR INDIAN BILATERAL INVESTMENT TREATY (2015) [hereinafter MODEL BIT].
[209] *Cf.* INDIAN MODEL TEXT OF BILATERAL INVESTMENT PROMOTION & PROTECTION AGREEMENTS (2003) [hereinafter MODEL BIPA].
[210] *See* MODEL BIT, *supra* note 208. *See also id.* at pmbl. for a discussion on promoting and protecting investors.
[211] *See* MODEL BIPA, *supra* note 209, at art. 1(b) (noting that the definition for "investment" is asset-based, inclusive, and open-ended.).
[212] Rep. 260, *supra* note 200, at 8–9.
[213] *See* MODEL BIT, *supra* note 208, at art. 1.3 ("1.3 'enterprise' means: (i) any legal entity constituted, organised and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and (ii) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there.").

with the "commitment of capital or other resources," "certain duration," "expectation of gain or profit," "the assumption of risk," and "significance for the development" of the host state.[214] Focusing to limit the ISDS, the model BIT provides an exhaustive and specific definition of investment, which explicitly demarcates and limits the scope of protections afforded by the treaty to specific, bona fide, and committed investors who are more likely to contribute to economic growth.[215]

Furthermore, provisions like articles 2.2 and 2.4 of the Model BIT further narrow down and limit its scope of this model BIT.[216] Article 2.2 provides for non-applicability of the provisions of the treaty to pre-investment activities.[217] Article 2.4 provides for non-applicability of the treaty to numerous activities of the state like that of measures of the local government, law or measures regarding taxation, government procurement by a party to the treaty, subsidies and grants provided by a party to the treaty, and non-commercial based services supplied in exercise of government authority by relevant authority or body.[218]

Under Article 3 of the Model BIT, India has taken a restrictive approach regarding parties' obligations towards the treatment of investors.[219] Taking a traditional approach over the popular "fair and equitable treatment" (FET), Article 3.1 of the Model BIT protects the investments from violation of CIL, i.e., general and consistent practices of the states followed from a sense of legal obligation.[220] The reason may be in response to the wide, ever expanding and inconsistent interpretations that various tribunals have

[214] Salini Costruttori S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (2003). *See* MODEL BIT, *supra* note 208, at art 1.4.
[215] *See* MODEL BIT, *supra* note 208.
[216] *Id.* at arts. 2.2 and 2.4.
[217] *Id.* at art. 2.2.
[218] *Id.* at arts. 2.2 and 2.4.
[219] *See id.* at art. 3.
[220] *Id.* at art. 3.1 and n.1.

attributed to the FET, thereby expanding the ambit of its protections like inclusion of "legitimate expectations" as an integral part of FET while rendering inconsistent views regarding its subjectivity and constitution without any doctrinal basis.[221] Such interpretations have led the FET to become a problematic "catch all provision" for many host states and capable of sanctioning many legislative, regulatory and administrative actions.[222] Thus, this can be considered a rational new approach by India taken after analyzing global trends while prioritizing protecting its regulatory power and limiting the possibilities of disputes with the foreign investors.

Furthermore, learning from *White Industries* and limiting the unintentional invocation of provisions for investment protection from other treaties by foreign investors, the Model BIT does not include a "Most Favoured Nation" (MFN) clause but provides for foreign investor investment protection at par with its own domestic investors by ensuring that they do not get less favourable treatment.[223]

Other specific favourable protections for foreign investors' investments in the model BIT includes: (1) protection from direct and indirect expropriation or nationalization of investments, with an exception to public purpose, along with payment of compensation at a fair market value in a freely convertible currency; [224] (2) permission of free and non-discriminatory transfer of funds and capital; [225] (3) provision for non-discriminatory measures adopted for compensation of losses suffered by investments made by foreign investors owing to war or other armed conflict, civil strife, state or national emergency or a natural disaster; [226] (4) recognition of the validity of

[221] Rep. 260, *supra* note 200, at 15.
[222] *Id.*
[223] *See* MODEL BIT, *supra* note 208, at art. 4.
[224] *Id.* at art. 5.
[225] *Id*. at art. 6.
[226] *Id*. at art. 7.

subrogation in favour of the party state or its designated agency to any right held by a foreign investor;[227] and (5) permission for entry of natural persons of the other party employed by the investors for engaging in activities of the investment.[228]

India's attempt to specifically carve out protections and clarify the same through the Model BIT will reduce unnecessary claims and provide certainty and clarity for potential foreign investors of their rights, obligations and protections which may boost the confidence of bona fide investors.[229]

The Model BIT also includes certain innovative and progressive provisions. For example, a provision for "transparency," which creates an obligation on the parties, to "the extent possible," to make available or publish its laws, regulations, procedures and administrative rulings to the matters covered by the treaty.[230] This section also provides for reasonable opportunity to the interested persons and other parties to comment on a proposed measure that the host party wishes to adopt.[231] Similarly, investor obligations provided under Chapter III, which are divided into Article 11, on which BITs usually remain silent or merely provide a general obligation on investors[232] and Article 12, which creates an obligation to voluntarily incorporate international standards of Corporate Social Responsibility (CSR), may address issues such as labor, the environment, human rights, community relations and anti-corruption.[233] A bare perusal of these provisions points to the creation of specific obligations of the investors that addresses the problems

[227] *Id*. at art. 8.
[228] *Id*. at art. 9.
[229] *See id.*
[230] *Id*. at art. 10.
[231] *Id*.
[232] Rep. 260, *supra* note 200, at 25–26 (calling for compliance with laws of the parties).
[233] *See* MODEL BIT, *supra* note 208, at art. 11–12.

faced by most of the developing economies today.[234] The provisions for CSR, which are found in multiple IIAs today especially in developing economies, are a step that will help the government address social issues and achieve its political aims.[235] Other provisions, like the provisions for anti-corruption addressed in Article 11.2, Article 12 and Article 13.4, followed by specific provisions for an investor's compliance with the host state's laws and regulations keep them at par with domestic investors and transparent concerning the investment as the party state may require.[236]

Chapter IV of the Model BIT deals with the settlement of a dispute between an investor and a party with specific application only to the breaches of the provisions of Chapter II (obligation of parties), with exceptions of Articles 9 and 10 of the treaty, while clarifying its non-applicability to breaches of contract between a party and an investor.[237] Article 13.4 provides for disqualification of an investor to submit claim to arbitration "if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanism."[238] Another attempt has been made to address the issues that have been subject of discussions in various ISDS against the investors and has largely been faced by developing economies.[239] Codifying of such provisions will address the issue from a

[234] *See id.*
[235] *See* UNCTAD, *supra* note 3. A total of forty IIAs have provisions for CSR which includes twenty-seven BITs and thirteen TIPs with most of them having at least one party being a developing economy. *Id.*
[236] *See* MODEL BIT, *supra* note 208, at art. 10–13.
[237] *Id.* at art. 13.3.
[238] *Id.* at art. 13.4.
[239] *See* World Duty Free Company, Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 (Oct. 4, 2006); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24 (June 18, 2010); Metal-Tech, Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3 (Oct. 4, 2013); Phoenix Action, Ltd v. Czech Republic, ICSID Case No. ARB/06/5 (Apr. 15, 2009).

social standpoint and attract FDI from bona fide foreign investors.[240]

Another issue addressed by the Model BIT that has been the subject of constant discussions is the invocation of ISDS provisions of a treaty without exhausting the domestic legal remedies available of the host state.[241] On one hand, some believe this undermines the host state's legal system and discriminates against the domestic investors, whereas on the other hand, some believe it is an efficient and significant protection for foreign investors to place their confidence in, which is an important consideration.[242] Addressing this issue, the Model BIT sets out the "conditions precedent to submission of a claim to the arbitrator" by a foreign investor and prescribes to first "submit its claim before a relevant domestic court or administrating body" of the host state within one year from the date the investor first acquired knowledge of the measure in question.[243] It further states that after exhausting available domestic legal remedies, "for at least a period of five years from the date on which the investor first acquired the knowledge of the measure" and "where no resolution has been reached," the foreign investor may thereafter commence proceedings and transmit a "notice of dispute" to the defending party to initiate ITA.[244]

India, a developing economy attempting to address various internal issues, learning from global developments, and maintaining and expanding its FDI flow, serves as a perfect example of dynamism and development of this novel

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[240] Prabhash Ranjan, Harsha Vardhana Singh, Kevin James & Ramandeep Singh, *India's Model Bilateral Investment Treaty: Are We Too Risk Averse?*, BROOKINGS INST. (Aug. 1, 2018), https://www.brookings.edu/research/indias-model-bilateral-investment-treaty-are-we-too-risk-averse/.
[241] *See* MODEL BIT, *supra* note 208, at art. 15.1.
[242] *Compare* Ranjan, Singh, James & Singh, *supra* note 240, at 21 *with* Corp. Couns. Int'l Arb. Group, *Investor-State Dispute Settlement (ISDS) Reform*, 6–7, (Dec. 18, 2019).
[243] MODEL BIT, *supra* note 208, at art. 15.1.
[244] *Id.*

jurisprudence.[245] The Model BIT clearly aims to maintain the sovereignty of the state and its regulatory power over foreign investors while limiting the scope of initiation of ISDS.[246] Evidently, the Model BIT also points toward a shift in the intention of the states regarding FDI and IIAs (especially found with the developing states) from prioritizing to attract maximum FDI to focusing on regulating and channelizing the same for domestic economic development.[247] Compared to the previous generation IIAs and the 2003 Model BIT of India, this new Model BIT prescribes specific provisions that limit the protection afforded to foreign investors, which may dissuade certain foreign investors but will help India build a stable, regulated economy with potential for growth, which may attract bona fide foreign investors.[248] Since introducing the Model BIT on December 28, 2015, India has only signed three BITs up to December 2020, with none of them in force. [249] Therefore, it is yet to be seen whether the BITs executed by India under the 2015 Model BIT has brought desired results. Interestingly, in 2020, India's foreign investment regime experienced another setback because it lost two major ITAs against its foreign investors Vodafone International Holdings, BV, Cairn Energy, PLC, and Cairn UK Holdings, Ltd.[250]

b) The End of the Era of Revision

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[245] Ranjan, Singh, James & Singh, *supra* note 240, at 14–15.
[246] *Id.* at 5–7 (describing how conventional BITs interfere with state sovereignty and regulatory schemes).
[247] *E.g.* UNCTAD, *World 2020*, *supra* note 16, at 28–35 (discussing the downward trend of FDI investment in five African countries in 2019).
[248] *Indian Model Bilateral Investment Treaty*, ALLEN & OVERY (Aug. 5, 2016), https://www.allenovery.com/en-gb/global/news-and-insights/publications/indian-model-bilateral-investment-treaty.
[249] UNCTAD, *supra* note 3.
[250] *After Vodafone, Now Cairn Energy Wins Arbitration against India over Tax Dispute*, THE WEEK (Dec. 23, 2020, 11:20 A.M.) https://www.theweek.in/news/biz-tech/2020/12/23/after-vodafone-cairn-energy-wins-arbitration-against-india-over-tax-dispute.html; UNCTAD, Navigator, *supra* note 12.

The end of this era was marked by a decline in the global FDI and IIA regime along with stronger criticism and growing concern regarding the prevailing ISDS regime.[251] In 2018, the global FDI inflows decreased by 13% to $1,495,223, which was the third consecutive annual decline despite an increase to $1,539,880 recorded in 2019.[252] Whereas the FDI inflow to developed economies rose by 5% in 2019, which had been declining steadily since 2016, the FDI inflow to developing economies declined marginally by 2% in 2019, which had been relatively stable since 2010.[253] In 2019, despite the FDI inflow to developing Asian states declining by 5% (primarily due to the plunge in FDI of about 34% in Hong Kong) China, it still remained the largest FDI recipient region globally, attracting more than 30% of the global FDI inflow.[254] On the other hand, the transition economies saw a significant surge in FDI inflows with a 59% increase (primarily due to recovery of FDI by Russia) and an increase in the flow to newly liberalized Uzbekistan.[255] On the other hand, the global FDI outflows in 2019 were still dominated by developed states with around 69.8%, while the developing states accounted for around 28%, which had sharply declined from 42% in 2018.[256]

By the end of 2019, 3,734 IIAs had been signed, out of which 2,664 IIAs were in force.[257] Interestingly, thirty-four IIAs terminated in 2019 but only twenty-two IIAs concluded (including sixteen BITs and six TIPs), a trend which was also witnessed in 2017 when forty IIAs were signed whereas fifty-five were terminated.[258] In terms of

[251] *See* U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4; UNCTAD, Foreign Direct Investment, *supra* note 5.
[252] UNCTAD, Foreign Direct Investment, *supra* note 5.
[253] *Id.* UNCTAD, *World 2020*, *supra* note 16, at 11.
[254] UNCTAD, *World 2020*, *supra* note 16, at 11.
[255] *Id.* at 12.
[256] UNCTAD, Foreign Direct Investment, *supra* note 5.
[257] UNCTAD, *supra* note 3.
[258] UNCTAD, *World 2020*, *supra* note 16, at 106; UNCTAD, *supra* note 3.

progress of IIAs, in 2019 almost all the new IIAs followed the UNCTAD's Reform Package for the International Investment Regime, focusing mainly on preserving states' regulatory space followed by reforms in ISDS provisions and sustainable development.[259] Furthermore, in 2019, domestic policies were introduced focusing on the additional rigorous screening of investments, especially in strategic industries, by majorly all the developed economies for the reason of concern over national security, which led to multiple cross borders deals being blocked or withdrawn.[260]

At the regional level, significant developments unfolded, like the agreement establishing the African Continental Free Trade Area (AfCFTA) taking effect, the United Kingdom's withdrawal from European Union (Brexit), the European Union's termination of Intra-EU BITs following *Slovak Republic v. Achmea B.V.*, the EU Mercosur Trade Agreement, the modernization of the Energy Charter Treaty, and ratification of United States-Mexico-Canada Agreement.[261] Overall, in 2019, at least 107 reforms affecting FDI were introduced by as many as 54 states, mostly by developing and emerging economies in Asia, amongst which three-fourths of the reforms were directed towards liberalization, promotion, and facilitation of foreign investment.[262]

By 2019, total ISDS cases had reached over 1,000, with 55 additional known ISDS being initiated by foreign investors in 2019 against 36 states and the European Union.[263] All the ISDS initiated in 2019 were under treaties signed before 2012, and over 70% of them were brought under IIAs

[259] UNCTAD, *World 2020*, *supra* note 16, at 112.
[260] *Id.*
[261] *Id.* at 106–109.
[262] *Id.* at xii.
[263] UNCTAD, Int'l Inv. Agreements Issues: Note on Investor State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019 (July 2020) [hereinafter UNCTAD, 1,000 Mark].

signed before the 1990s.[264] The number of these disputes are likely to be higher as many arbitrations initiated in 2019 and previous years are believed to be confidential.[265] Interestingly, 2019 was the year with the lowest number of cases being initiated since 2013.[266] Among the cases initiated in 2019, over 70% were initiated by investors from developed states against respondent states, in which about half of them were from developing and transitional economies.[267] Furthermore, in the majority of cases in 2019, the investors challenged the actions of the host state, alleging expropriation and violation of the principle of fair and equitable treatment/minimum standard of treatment.[268]

6. The Covid and the Post-Covid Era (2020–beyond)

The COVID-19 crisis, which emerged in October 2019 and by February 2020 was designated as a pandemic by the World Health Organization, has drastically and adversely affected the international trade regime.[269] The severity of the crisis that resulted from the pandemic is estimated to be relatively worse than two years following the economic crisis of 2007, which started in the Era of Revision.[270]

Global FDI is estimated to fall drastically by around 40% and experience the effects in 2021 when it is further expected to decline by 5-10%.[271] Consequently, for the first time since 2005, the FDI would fall below $1 trillion and may lead to stagnation or a negative growth trend for several years.[272] Considering the best forecast, the FDI is expected

[264] *Id.* at 4; UNCTAD, *supra* note 3.
[265] UNCTAD, *World 2020*, *supra* note 16, at 110.
[266] UNCTAD, *supra* note 3 (fifty-five arbitrations were initiated in 2012).
[267] UNCTAD, 1,000 Mark, *supra* note 263.
[268] UNCTAD, Navigator, *supra* note 12.
[269] WORLD HEALTH ORG., SITUATION REP. 51, CORONAVIRUS DISEASE 2019 (COVID-19) (2020); *see* UNCTAD, *World 2020*, *supra* note 16.
[270] UNCTAD, *World 2020*, *supra* note 16, at 2.
[271] *Id.* at x.
[272] *Id.*

to level with the pre-pandemic statistics in 2022.[273] Although such projections are quite uncertain and would depend upon the lasting effect of the pandemic and government policies to curb its effect on the healthcare system, the gigantic scale of projected damage is expected to bring multiple reforms to stabilize the investment trade regime.[274]

To curb the spread of the pandemic, many states have imposed lockdown measures that severely affect foreign and domestic investors.[275] Such measures resulted in the physical closing of various establishments, such as manufacturing plants, construction sites, and other places of business.[276] Furthermore, several states introduced temporary restrictive foreign investment policies, such as directly restricting foreign investments in certain industries and new additional screening requirements for FDI.[277] Although the objective of such policies may vary from state to state, the two-fold objective seems to be the prevention of an already fragile domestic industry from any hostile takeover from a foreign investor and the protection of strategic industries and industries related to healthcare to prioritize and fulfill domestic demands.[278] Certain examples of such policies include measures taken by the European Union introducing guidance for its members concerning screening of FDI from non-members for protection of Europe's strategic assets,[279] and Australia's investment reviews to protect national interest and local assets from

[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at 3.
[277] *Id.* at 4.
[278] *Id.*
[279] *See Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, COM (2020) 1981 final (Mar. 25, 2020).

acquisition.[280] Other trade restrictions included mandatory production and export bans on necessary medical products and equipment.[281] To curtail the spread of the pandemic, approximately fifty states introduced measures to restrict or regulate the exports and imports of products necessary to attend to the growing needs of public health.[282] Subject to necessity, many states, such as the United States of America and certain states from the European Union, have reduced their import duties to address immediate shortages of necessary medical products.[283]

These restrictive measures have not only delayed multiple projects and contractual obligations, but have also increased the cost burden caused by the running fixed cost on the investors.[284] Soon, FDI was found stuck in government lockdown policies as investment projects got stalled and delayed.[285] The imbalance created by delays in completion of projects, leading to increased costs, along with delays in the earning of projected profits from such an investment by an investor have adversely affected the businesses globally.[286] Furthermore, the uncertainty created from an unexpected plunging global economy, sudden changes in investment policies, and restriction on the movement of capital and goods have deepened the crisis.[287] These developments will hinder future investment plans of investors due to liquidity issues caused by diverting funds to cover additional costs and losses suffered during the pandemic combined with uncertain economic prospects.[288] Additionally, as many states are bearing massive additional

[280] UNCTAD, *World 2020*, *supra* note 16.
[281] *Id.* at xi.
[282] *Id.* at 90–93.
[283] *Id.* at 4.
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.* at 5.
[288] *Id.* at 4.

financial burdens to mitigate the economic loss caused due to crisis and diverting massive funds to healthcare programs, there is a possibility that states may scrap or postpone future projects that might have attracted large FDI.

The developing states are expected to be the most affected in terms of the fall in FDI given their reliance on investments in Global Value Chain (GVC) and intensive and extractive industries, which have been severely hit.[289] Additionally, developing states' lack of financial support and economic limitations may prevent them from introducing significant economic support packages or measures.[290] Certainly, the developing states will be worst affected—a fall in FDI and lockdown measures directly affecting its labor-intensive industries may consequently lead to a staggering unemployment rate.[291] For such situations, the governments need to gradually redirect the excess funds from public healthcare programs to boost the economy.[292] However, this can only happen when the pandemic is under control.[293] For immediate relief, the states might have to depend on stabilizing FDI back as soon as possible.[294] Such an alternative may not be that easy to conquer as multiple states, especially the developing states, may depend on such alternatives facing similar crisis, thereby intensifying the competition to attract FDI experienced in the Era of Expansion.[295] On the other hand, the foreign investors also may not be willing to invest further, considering the limitation of liquidity caused by this crisis and economic uncertainty.[296] Furthermore, with the fall and

[289] *Id.* at x.
[290] *Id.* at 8.
[291] *Id.*
[292] ORG. FOR ECON. COOP. & DEV., THE TERRITORIAL IMPACT OF COVID-19: MANAGING THE CRISIS ACROSS LEVELS OF GOVERNMENT 3 (2020).
[293] *Id.* at 3.
[294] UNCTAD, *World 2020*, *supra* note 16, at 40.
[295] *See* Kumar, *supra* note 125.
[296] UNCTAD, *World 2020*, *supra* note 16, at 4.

delay in the profits of the major multinational enterprises, the reinvested earnings, which account for 50% of the FDI, may also lead to a sharp fall in future FDI.[297]

The increased restrictions on international trade and change in the priority of the states to control the spread of the pandemic consequently slowed down the development and negotiation of new IIAs.[298] Many new IIA negotiations have either been postponed or cancelled, such as the postponement of Brazil-Nigeria BIT, the new investment protocol of AFCFTA, and the European Union-United Kingdom Free Trade Agreement.[299] The main reason for postponement/cancellation of new IIAs may be the global economy's uncertainty along with a looming global recession, which may have led the states to reserve such negotiations after contemplating the economy's future requirements.[300] With only seven publicly known IIAs signed this year, 2020 may likely have one of the lowest numbers of IIAs following the Era of Contradiction.[301]

Even though the development of IIAs has faced stagnation, the situation may soon change as the lockdown policies are relaxed and states again focus on bringing their respective economies back on track. Although many relief policies, such as monetary and fiscal measures, have been announced by the respective governments,[302] it is clear that FDI inflow can address the issues, especially for the developing economies.[303] To achieve this, states may soon introduce liberal investment policies to promote and facilitate FDI.[304] International groups such as the G-7, G20, and Asia Pacific Economic Cooperation, have already issued

[297] *Id.* at x.
[298] *Id.* at 94.
[299] *Id.* at 117.
[300] *Id.* at 94.
[301] UNCTAD, *supra* note 3.
[302] UNCTAD, *World 2020*, *supra* note 16, at 90.
[303] *Id.* at iv.
[304] *Id.* at 127.

declarations in support of international investment.[305] In an attempt to maintain the FDI flow, stabilize the economy, and address the growing unemployment in such unforeseen circumstances, states have introduced multiple measures, including online services and e-regulations and lifted bureaucratic obstacles for stabilizing and boosting the economy, such as the speeding up of approvals for labour intensive and infrastructure projects, reduction of fees, etc.[306]

Considering that the states may promote liberal investment reforms to attract more FDI, states may prefer to continue the 2019 trend from the height of the pandemic to regulate FDI through stringent screening for investments to protect essential and strategic industries from hostile takeovers by foreign investors.[307] Although it has been largely followed by developed economies, such balancing between liberal policies and stringent measures may also be necessary for developing states considering the fragile condition of the domestic economy in the post COVID-19 era and a still persistent perception of the public towards neo-colonialism.[308] Such a situation will also affect the development of future IIAs as the same may lead to incorporation of stringent and restrictive provisions of investments regarding strategic assets and sectors considered significant for national security.[309]

The post pandemic global investment regime may also experience a surge in ISDS claims.[310] Measures taken by the states during this pandemic for public interest and the benefit of their domestic economies, subject to their manner of implementation, may have adverse implications on the

[305] *Id.* at 94.
[306] *Id.* at 87–88.
[307] *Id.* at 92.
[308] *Id.* at 81.
[309] *Id.* at 148.
[310] *Id.* at 95.

operations of foreign investors.[311] Although the stringent lockdown and restrictive trade measures imposed by the states in response to the pandemic may be termed as a classic "force majeure" situation for contractual obligations, this might not stop desperate foreign investors facing huge losses and increased costs resulting from such policies from invoking ISDS provisions highlighting the host state's obligation under respective IIAs.[312] Through ISDS, investors may question the host state's measures, such as restrictions imposed on imports/exports, investments of strategic assets, movement of capital, scrapping/suspension of projects, and challenge such measures for violating FET principles and legitimate expectancy while terming such measures taken for welfare of the state as discriminatory.[313] The possibility of facing such a situation may be higher with states that have liberally drafted IIAs with broader scope and provisions.[314]

Appreciating the situation, on May 6, 2020, the Columbia Centre on Sustainable Investment called for a complete moratorium on all ITA claims raised by any foreign investors against respective host states until the end of the pandemic.[315] Furthermore, fearing a post pandemic scenario of multiple ISDS raised against host states, they have also called for a permanent bar on claims raised by foreign investors against government measures implemented for the benefit of the economy.[316]

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[311] *Id.* at 89.
[312] *Id.* at 94. *See also* Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR ASSOC. (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/.
[313] UNCTAD, *World 2020*, *supra* note 16, at 111–16.
[314] *Id.* at 113.
[315] *Id.* at 95.
[316] *Id.*

II. Working Group III

The criticism against the prevailing ISDS regime grew stronger and intensified in the Era of Revision, which by 2017 was widely recognized and discussed at the global stage.[317] Apart from the growing number of ISDS, the main concerns were regarding method of the appointment of arbitrator, impartiality and independence of the arbitrators, lack of coherence of ad-hoc tribunals, lack of review mechanism, the cost and time constraint, and the lack of transparency.[318] In essence, the criticism of the ISDS regime reflected the concern regarding democratic accountability and legitimacy.[319]

To comprehensively identify and address the issues in the ISDS regime, UNCITRAL assigned Working Group III (WG-III) in 2017 with a broad mandate to: (1) identify and consider concerns regarding ISDS; (2) consider if any reform was desirable in the light of any identified concern; and (3) develop any relevant solution if reform was desirable.[320]

Like the UNCITRAL process, the WG-III was a consensus-based government-led group, benefitting from the widest possible experts and stakeholders, which was given broad discretion to discharge its mandate.[321] The WG-III agreed that it would initially focus on treaty-based investment arbitration and would later consider its extension over the contract and investment law based ISDS.[322]

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[317] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[318] *Id.*
[319] *Id.*
[320] U.N. Doc. A/72/17, *supra* note 15, at 46.
[321] *Id*.
[322] UNCITRAL, Rep. of WG-III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session-Part I, U.N. Doc. A/CN.9/930/Rev.1, at 6 (2017) [hereinafter U.N. Doc. A/CN.9/930/Add.1/Rev.1].

A. Identification of concerns in the ISDS regime

Following the mandate, the WG-III, between its thirty-fourth and thirty-ninth sessions, identified and discussed multiple concerns in the ISDS regime and concluded that reforms were desirable in the light of the identified concerns, thereby completing the first two phases of its mandate.[323] For convenience, the concerns identified by the WG-III have been categorized broadly into the five categories below:

1. Concerns Regarding Consistency, Coherence, Predictability and Correctness of the Award

Concerns regarding consistency, coherence, predictability and correctness of the award rendered by the tribunal which include the concerns regarding different interpretations of substantive standards, jurisdiction, admissibility, and procedural inconsistencies.[324] The present ISDS mechanism has been criticized for unjustified inconsistencies with instances of similar investment treaty provisions being interpreted differently by tribunals and even an instance of concurrent proceedings in which facts, parties, treaty provisions, and arbitration rules were identical.[325] The WG-III clarified that the concern was not regarding interpretation of similar provisions identically in all circumstances but focused on unjustified inconsistences in such cases.[326] It was identified that one of the primary reasons for lack of consistency was divergent decisions rendered by different tribunals in multiple and concurrent

[323] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.166 (July 30, 2019) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.166].
[324] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[325] U.N. Doc. A/CN.9/930/Add.1/Rev.1, *supra* note 322.
[326] *Id.*

ISDS proceeding.[327] Furthermore, the insufficient mechanisms in the present ISDS regime to address such inconsistencies, incoherence, lack of predictability, and lack of correctness have also been recognized as a significant concerns by the WG-III.[328]

It was observed that the ad-hoc tribunals have lacked consistency while interpreting rules of customary international law or the international rules of treaty interpretations.[329] Some examples of inconsistent decisions include conflicting interpretations of the definition of investments, whether investments made by a foreign investor are supposed to be made for the benefit of the host state, the proper application of the Most Favored Nations (MFN) clause, the scope of indirect expropriation, the scope of umbrella clauses, procedural decisions on security, and annulment proceedings and enforcement of awards.[330] The WG-III has also observed inconsistencies by tribunals in the interpretation of substantive protection standards like the determination of FET standards, scope and applicability of the doctrine of necessity, and commitments made by the states under various IIAs to create "favorable investment conditions."[331] In cases of jurisdiction and admissibility, inconsistent views have been taken by tribunals in ICSID matters regarding the interpretations of the outer limit of the jurisdictions under article 25(1) of the ICSID convention, interpretation of jurisdiction of the tribunal post ICSID denunciation, interpretation of the effective control of an entity, interpretation of whether awards qualify as

[327] UNCITRAL, Rep. of WG-III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session, U.N. Doc. A/CN.9/964 (2018) [hereinafter U.N. Doc. A/CN.9/964].
[328] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, U.N. Doc. A/CN.9/WG.III/WP.150 (Nov. 2018) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.150].
[329] U.N. Doc. A/CN.9/930/Add.1/Rev.1, *supra* note 322.
[330] U.N. Doc. A/CN.9/WG.III/WP.150, *supra* note 328.
[331] *Id.* at 7.

investments, and admissibility of multiple claims pursued by related parties.[332] Other major procedural issues and inconsistencies that have been observed in ISDS are regarding scope and interpretation of the cooling off period, interpretation of unilateral offer to arbitrate, initiation of arbitration based on repealed foreign investment laws, retrospective application of denial of benefit clause, the requirement to exhaust local remedies, impact of pursing claims before domestic courts prior to initiating ISDS, interpretation of continuing breach as an exception to limitation of filling claims, the allocation of costs, and legal reasoning and methodology of evaluating claims.[333]

2. Concerns Regarding Arbitrators And Decision Makers

Concerns regarding arbitrators and decision makers were considered at the thirty-fifth session of the WG-III from two main perspectives, viz. concerns regarding the present ISDS regime guaranteeing the impartiality and independence of the tribunal, and, concerns regarding the appointment of the arbitrators having appropriate qualifications and characteristics to decide a dispute.[334] At this session, the WG-III expressed concerns about the impartiality and independence of the arbitrators prevailing in the ISDS regime, focusing on the party-based appointments and the incentives thereby created which has resulted in a perception of biasness.[335] The remuneration of the arbitrators by the parties and the lack of transparency in it, along with an inclination of arbitrators for reappointment have also fueled such perceptions.[336] Furthermore, considering the ad-hoc appointments of the arbitrators, the

[332] *Id.* at 7–9.
[333] *Id.* at 9–10.
[334] UNCITRAL, Rep. of WG-III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session, U.N. Doc. A/CN.9/935 (April 23–27, 2018).
[335] *Id.*
[336] *Id.*

WG-III also observed the overwhelming dissenting opinions raised by the arbitrators appointed by the losing party which raised the possibility of the arbitrators feeling duty bound towards the appointing parties resulting in a perceived lack of impartiality and independence.[337]

The prevailing mechanism to check independence, impartiality, and bias is primarily based on voluntary disclosure by the arbitrators regarding any potential conflict of interest.[338] This mechanism is prescribed under both the UNCITRAL and ICSID rules.[339] Other legal frameworks include the International Bar Association (IBA) guidelines which prescribes a detailed disclosure requirement.[340] However, it still does not address all relevant concerns like the relationship between the arbitrator and the party or the counsel.[341] Furthermore, practices such as double hatting, which involves switching of roles between individuals acting as arbitrator, counsel, and expert in different ISDS with a possibility of conflict of interest, have also been the subject of significant controversy.[342] Even though the majority of the arbitration laws and rules prescribe procedures for challenging the appointment of arbitrators, critics have identified limitations to these, including a lack of transparency, limitations in the mechanism to sufficiently address certain challenges like conflict of interest, addressing frivolous challenges, and uniformity in its application—especially with the ad-hoc arbitrations.[343] Pursuant to discussions of WG-III, it was considered

[337] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, U.N. Doc. A/CN.9/WG.III/WP.151 (Nov. 2, 2018) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.151].
[338] *Id.*
[339] *Id.*
[340] INT'L BAR ASS'N, GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, Rule 7, (2014).
[341] U.N. Doc. A/CN.9/WG.III/WP.151, *supra* note 337.
[342] *Id.*
[343] *Id.*

desirable to address the concerns regarding the adequacy, effectiveness, and transparency of disclosure in the present challenge mechanism.[344] Secondly, concerns have also been raised regarding the prevailing mechanisms for constitution of the tribunals in existing treaties and rules of arbitration. The WG-III observed limitations by various stakeholders in ensuring competence and qualifications of the arbitrators in party-based appointment mechanisms, considering that the required arbitrators should have a sound knowledge of the impact of public interest and public policy, which has a significant role in ISDS cases, along with sound knowledge of domestic laws.[345]

Furthermore, the WG-III also observed the concerns regarding the impact of party remuneration, limited number of repeated appointments as arbitrators, and dissenting opinions given by arbitrators, creating a perception of bias and raising concerns over the prevailing mechanism of constitution of the tribunal.[346]

Lastly, the WG-III has also identified the lack of diversity in proportional representation of arbitrators in terms of gender, age, ethnicity and geographical distribution, which adversely impacts and undermines the policy considerations of countries with developing economies because the majority of appointed arbitrators are from Western Europe and North America.[347] Such a disparity raises concerns of lack of impartiality and arbitrator's ability to act independently and also affects the confidence of developing states.

3. Costs and Duration of the ISDS Proceedings

[344] U.N. Doc. A/CN.9/964, *supra* note 327.
[345] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and decision makers: Appointment mechanisms and related issues, U.N. Doc. A/CN.9/WG.III/WP.152 (Nov. 2, 2018) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.152].
[346] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4.
[347] U.N. Doc. A/CN.9/WG.III/WP.152, *supra* note 345, at 5.

Costs and duration of the ISDS proceedings have also been identified as significant concerns by various stakeholders, including states and other government organizations, and were discussed by the WG-III in its 34th Session.[348] Both the claimant investors and respondent states have raised concerns over the heavy cost burden of the proceedings.[349] This issue has a significant impact over the developing states who are not able to justify the use of their limited financial and human resources in defending themselves and their actions in such proceedings that are subjected to heavy criticism.[350] On the other hand, the burden of the cost is also heavy on small and medium scale investors who may, after analyzing its financial feasibility, ultimately decide not to pursue the remedy under ISDS.[351] The WG-III has also identified state concerns in recovering costs against investors and has pointed out the necessity of rules to secure costs.[352]

4. Third Party Funding and External Financing

Third-party funding and external financing that are available to investors, but not to the states, have created a structural imbalance and have a direct impact over other issues such as the impartiality of arbitrators, conflict of interests, and enforcing the cost awarded by the tribunals.[353] While identifying it as a significant concern, the WG-III has also highlighted the concerns related to its definition of third-party funding, lack of transparency, and lack of regulation.[354]

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[348] U.N. Doc. A/CN.9/WG.III/WP.149, *supra* note 4, at 4.
[349] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Cost and Duration, A/CN.9/WG.III/WP.153, at 1, 3 (Aug. 30, 2018).
[350] *Id.*
[351] *Id.*
[352] *Id.* at 8.
[353] *Id.* at 4.
[354] UNCITRAL, Rep. of WG-III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session, U.N. Doc. A/CN.9/970, at 1, 5–6 (April 9, 2019) [hereinafter U.N. Doc. A/CN.9/970].

5. Other Issues

Other issues that the WG-III have identified and discussed range from other means of dispute prevention methods, exhaustion of local remedies, third party participation, counterclaims, regulatory chills, and calculation of damages.[355]

B. Proposed Reforms Submitted by WG-III

While moving towards accomplishing its broad mandate and evaluating possible reform options, the WG-III has taken into account the suggestions and proposals submitted by several states, intergovernmental organizations, the 2030 agenda for Sustainable Development Goal (SDG), and the policy objectives of the ISDS regime.[356] The proposed suggestions received from states and intergovernmental organizations include promoting and attracting investments and focusing on reducing poverty, hunger, and environmental degradation while focusing on the development of indigenous people, improving access to affordable energy, and promoting decent work.[357] Other proposals submitted by the states include focusing on investment policies to ensure legal certainty, efficient and equal protection to investors and investments, access to efficient, effective and affordable mechanisms for settlements; effective mechanisms for enforcement procedures; focus on ISDS proceedings to be fair, transparent with appropriate safeguards for preventing abuse of process, and addressing diversity among tribunals.[358]

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[355] U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323, at 3.
[356] *See Working Group III: Investor-State Dispute Settlement Reform*, U.N., https://uncitral.un.org/en/working_groups/3/investor-state (the submissions of all the stakeholders are available); G.A. Res. 70/1 (Sept. 25, 2015); U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323.
[357] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa, U.N. Doc. A/CN.9/WG.III/WP.176, at 1, 5, 15 (July 17, 2019). *See* U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323.
[358] U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323, at 5.

After identifying and discussing the concerns of the present ISDS regime, the WG-III has broadly categorized and presented possible reforms into the following eight sub-categories:

1. Tribunals, Ad Hoc and Standing Multilateral Mechanism

a) Multilateral Advisory Center

To focus on providing support and other facilities to the developing and least developed states, the WG-III has proposed for the establishment of an independent multilateral advisory center following the model of the advisory center on WTO Law (ACWL).[359] It is suggested that the Advisory Center be established as an intergovernmental organization or through an appropriate existing institution.[360]

At the 38th session of the WG-III held in Vienna, general support was observed for establishing the advisory center so it could address multiple concerns identified by the WG-III like the cost of the proceedings, the lack of financial and human resources available to developing and under-developed states, and maintaining decision accuracy and consistency.[361] The primary beneficiaries would be states, preferably developing and under-developed states and states with limited experience.[362] To prevent any conflict of interest, claimant investors have been excluded from receiving the services of the advisory center, but services to small and medium sized enterprises are being considered.[363] After a detailed discussion, the WG-III provided points for

[359] UNCITRAL, Rep. of WG-III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eighth Session, U.N. Doc. A/CN.9/1004, at 1, 8 (Oct. 23, 2019).
[360] *Id.* at 9.
[361] *Id.* at 10.
[362] *Id.* at 8.
[363] *Id.*

consideration and guidance for preparation work for the establishment of the advisory center.[364]

b) Standalone Review or Appellate Mechanisms

Standalone review or appellate mechanisms would be similar to the procedures of the International Court of Arbitration of the International Chamber of Commerce, which focuses on a procedure for prior scrutiny of an award before it becomes final.[365] Other suggestions include procedures for parties to submit written comments on the award before it is finalized or scrutinizing the award through an independent body without reviewing the merits of the matter.[366]

On the other hand, a stand-alone appellate mechanism, which would be a higher judicial authority ensuring procedural and substantive consistency of BITs and correcting errors in awards, has also been proposed.[367] An appellate mechanism may be a significant step towards bringing consistency, predictability, and correctness in arbitral awards through uniform treaty interpretations and interpretations of legal principles of international law. Such a reform may also have significant positive impact over the legitimacy concerns of the present ISDS regime.

An appellate mechanism can co-exist with other systems already in place and would also be helpful in effectively implementing other reform options like reviewing decisions of standing investment courts, international commercial courts, regional investment courts, and domestic courts.[368] The mechanism may also have a significant impact over ICSID arbitrations which exclude

[364] *Id.* at 10.
[365] U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323, at 6.
[366] *Id.*
[367] *Id.*
[368] *Id.* at 7.

any appeals or remedies except for the ones provided under the ICSID convention itself.[369]

c) Standing First Instance And Appeal Investment Court With Full Time Judges

These reform options involve establishment of a first instance court and an appellate court for investment that is based on submissions made by the European Union and its member states.[370] Those options may be helpful in addressing all the concerns identified by WG-III. These options would include the establishment of a standing court with full time adjudicators and two tiers of adjudications, i.e., the court of first instance and a court of appeals.[371]

Per the submissions received by the WG-III, the court of first instance with its own procedure will fill in the shoes of arbitral tribunals and hear disputes on facts and apply relevant law,[372] whereas the appellate court will hear appeals arising out of the court of first instance on the limited grounds of error of law and a manifest error in the apprehension of facts.[373]

Again, such reform may have a significant positive impact on the legitimacy concerns, may further address significant concerns of transparency and consistency in the ISDS regime, and there is a greater chance the majority of states including developing states will better receive the reforms.

2. Arbitrators and Adjudicators Appointment Methods and Ethics

[369] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanisms, U.N. Doc. A/CN.9/WG.III/WP.185, at 1, 8 (Nov. 29, 2019) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.185].
[370] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1, at 1, 4–5 (Jan. 24, 2019).
[371] U.N. Doc. A/CN.9/WG.III/WP.185, *supra* note 369, at 10–11.
[372] *Id.*
[373] *Id.*

a) ISDS Tribunal Members' Selection, Appointment, and Challenge

This involves a variety of reform options like strengthening and regulating the present mechanism of the prevailing party-based appointment, establishing a roster to promote transparency, additional institutional and appointed authority involvement, and involving standing courts with full time adjudicators who can exercise an appellate mechanism which may directly address this issue.[374]

b) Code of Conduct

The general support received proved apparent the necessity for the development of a code of conduct for adjudicators, which prompted ICSID and UNICITRAL to release a draft of the code during the thirty-eighth session of WG-III.[375] The purpose of such a reform is to address an issue with the tribunals' impartiality and independence and promote integrity, efficiency and fairness.[376] Possible implementation options involve the applicability of the code of conduct on other relevant stakeholders including counsel and experts—even the draft created by UNCITRAL and ICSID limits the application to only adjudicators.[377] This reform may prove to be efficient if it is backed by a strong legal framework and enforcement mechanism.

3. Treaty Parties' Involvement and Control Mechanisms on Treaty Interpretation

a) Enhancing Treaty Parties' Control Over Their Instruments

[374] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members, U.N. Doc. A/CN.9/WG.III/WP.169 (Oct. 19, 2020) [hereinafter U.N. Doc. A/CN.9/WG.III/WP.169].
[375] *See* The Draft Code of Conduct (Sept. 15, 2021), https://uncitral.un.org/en/codeofconduct.
[376] *Id.*
[377] *Id.* at arts. 1 and 2.

This proposed reform option focuses on addressing unjustified and inconsistent treaty interpretations discussed during the thirty-sixth session of WG-III and encourages the implementation of a more systematic treaty interpretation mechanism.[378] Such a reform is based on encouraging the development and systematic use of treaty provisions by unilateral and joint or multilateral interpretative declarations; providing guidance to the tribunal regarding interpretation of provisions, terms, and standards; ensuring binding treaty interpretations; abidance of provisions by tribunals and decisions makers; and establishing commissions or joint committees on treaty interpretation.[379] Such a proposed reform may bring consistency in treaty interpretation by ISDS tribunals and serves to provide clarity to investors and parties, both of which may eventually help to mitigate disputes. This reform also promotes the usage of precise language in treaties and the development of general rules of treaty interpretation.[380] Possible options focus on the reforms at the drafting stage of the treaty, after the treaty conclusion and interpretative practices and involves mechanisms like precision and clarity in investment treaty drafting; ad-hoc authoritative interpretation; institutionalized authoritative interpretation; appellate review; non-disputing party submission regarding treaty interpretations during ISDS proceedings; and the release of documents for treaty interpretation like *travaux préparatoires* which may assist the tribunal to understand the parties original intent and *renvoi* of certain interpretative questions.[381]

b) Strengthening the Involvement of State Authorities

[378] U.N. Doc. A/CN.9/WG.III/WP.169, *supra* note 374, at 5.
[379] *Id.*
[380] *Id.*
[381] *Id.*

To address unjustified inconsistent treaty interpretations along with other concerns of frivolous investor claims, abuse of process, and increasing cost and duration of ISDS, a possible reform option is to strengthen the involvement and control of state authorities.[382] Such a mechanism may include establishing and strengthening the framework for consideration of preliminary issues amongst states which may include technical consultations; decisions of respective state authorities; constituting state committee joint review; state-state or appellate review; and the establishment of a state-state body which can be approached if settlement failure occurs at any given time at the technical level.[383] Implementation is possible as a stand-alone reform option through various means such as prescribing certain legal standards for qualification for inclusion in investment treaties, or establishing a multilateral framework, or joint state-state based multilateral appellate mechanism.[384]

4. Dispute Prevention and Mitigation

a) Strengthening of Dispute Settlement Mechanisms Other Than Arbitration (Ombudsman, Mediation)

To mitigate disputes between investors and host states, maintain a harmonious relationship with investors, and reduce the heavy cost and duration of ISDS, the WG-III is focusing on possible alternative dispute resolution reform options other than arbitration.[385] Possible reform options may include implementing mediation, ombudsman facilities, and promoting existing mechanisms similar to those established during the United Nations Convention on International Settlement Agreement (the Singapore Convention).[386]

b) Exhaustion of Local Remedies

[382] U.N. Doc. A/CN.9/WG.III/WP.169, *supra* note 374, at 1.
[383] *Id.*
[384] *Id.*
[385] *Id.*
[386] *Id.*

A significant reform option for developing economies that is also mentioned in the Model BIT- India (2015) is the pre-requirement of foreign investors to first approach and exhaust local host state remedies before invoking any ISDS mechanism provided under the respective IIA.[387] Such a reform may also address the growing concern of unequal treatment for host state domestic investors where a foreign investor may bypass the domestic legal remedy and invoke a treaty ISDS mechanism. This reform can come to fruition through either binding multilateral guidelines or incorporation under individual IIAs.

c) Procedure to Address Frivolous Claims, Including Early Dismissal

To check the filing of frivolous or unmeritorious claims by investors, the WG-III is considering developing guidelines containing checks and balances for claims, establishing a preliminary review mechanism to pick out frivolous claims, imposing costs for tribunals in ISDS, and expediting processes.[388]

d) Multiple Proceedings, Reflective Loss, and Counterclaims by Respondent States

To address investor concerns of filing same claims before multiple fora against the same host state or one corporate structure with different proceedings and different entities, the WG-III is considering introducing soft law instruments to consolidate the proceedings, initiate the exchange of information between tribunals, and stay the proceedings. Additionally, the WG-III is also considering applying the principles of *res judicata, lis pendens*, and abuse of process.[389] Furthermore, in a situation where unrelated multiple investors initiate proceedings against the same state measure, the WG-III is considering consolidating

[387] *Id.*
[388] *Id.*
[389] *Id.*

such proceedings and establishing a commission to hear such disputes.[390] Suggestions have also been submitted before the WG-III to enable host states to file counterclaims before the ISDS tribunal if an investor fails to perform its respective IIA obligations.[391]

5. Cost Management and Related Procedures

a) Expedited Procedures

One of the most significant concerns that affects both states and investors are the lengthy time-consuming proceedings of ISDS. To address the same, the WG-III is considering proposals for reform for expedited procedures to reduce time and cost of the proceedings which includes strengthening and streamlining of the application of relevant rules and procedure.[392]

b) Principles/Guidelines on Allocation of Cost and Security for Cost

Another optional reform to address the cost and duration of the ISDS is development of principles, regulations or guidelines on allocation and sharing of cost, security of cost, application of the loser-pays rule, and providing guidance to tribunals.[393]

c) Other Streamlined Procedures and Tools to Manage Costs

Other possible reforms include establishing a fixed or acceptable budget of the proceedings, capping of fees of tribunal members, and even the possibility of regulation of counsel's fee.[394]

d) Third Party Funding

The WG-III in its 37th session at New York heard preliminary suggestions on possible reform options

[390] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.166/Add.1 (July 30, 2019).
[391] *Id.*
[392] *Id.*
[393] *Id.*
[394] *Id.*

concerning third party funding.[395] Possible reform options include reviewing the contract between the claimant and the funder by counsels and arbitrators to better understand the relationship, establishing legal aid cells to minimize the use of third party funding, limiting or capping the return of the funder, disclosing the details of third party funders, applying security for cost for third party funders, and even banning the same.[396]

To cover its broad mandate, the WG-III may evaluate other possible reform options at a later stage other than the aforesaid reform options. Due to the Covid-19 pandemic, the 39th session of the WG-III to be held in New York was postponed and was held on the 5th through 9th of October 2020 at Vienna.[397]

6. Submissions by Corporate Counsel International Arbitration Group (CCIAG) Before Working Group III

Apart from the submissions received from the states, the WG-III has also received submissions on possible reform options from other stakeholders like various observer groups and relevant organizations closely related to ISDS like the Corporate Counsel International Arbitration Group (CCIAG).[398]

The CCIAG, an association of corporate counsels representing international companies focusing on international arbitration and dispute resolution and an observer in the working group, offered its submissions to the WG-III on 18th December 2019.[399] Focusing on the interests of the investors, the submissions highlighted the importance of FDI for global economic development and

[395] U.N. Doc. A/CN.9/970, *supra* note 354.
[396] U.N. Doc. A/CN.9/WG.III/WP.166, *supra* note 323.
[397] *See Working Group III: Investor-State Dispute Settlement Reform*, *supra* note 356.
[398] Corp. Couns. Int'l Arb. Group, *supra* note 242.
[399] *Id.*

growth like creation of mass-employment, development of infrastructure, development of human capital, development of standards of living, transfer of technology etc., and further pointed out to the need for the states to promote and facilitate the environment conducive for foreign investment.[400] The CCIAG submissions highlighted the importance and global recognition of an impartial third-party dispute settlement mechanism as an effective ISDS mechanism essential for a stable and transparent reinvestment regime and a key factor for creating a positive investment climate for investors, whereas, its absence was labeled as a contributory factor for the creation of uncertainty which may dissuade investors, especially the small and conservative investors and will thus adversely affect the development plans of a state.[401]

Further in the submissions, the CCIAG also evaluated and surveyed the current ISDS regime and its essential features. Comparing the outcomes of the ISDS by relying on the data provided by the UNCTAD, the CCIAG pointed out that amongst the cases having outcomes, other than the cases settled or discontinued, 36% of the cases have been decided in favor of states and 29% has been decided in favor of the Investor.[402]

Furthermore, CCIAG also pointed out to the importance of party autonomy, particularly the equal participation of the parties in the constitution of the tribunal as a key element which is essential in creating balance in the treatment amongst the state and investor in ISDS.[403] The CCIAG, via its submission, further favored the current generally acceptable mechanism of constitution of a tribunal consisting of three arbitrators with one each appointed by respective parties, and the chairperson of the tribunal being appointed by the two party appointed arbitrators. [404]

[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.*

Furthermore, the CCIAG has submitted that the availability of choice before the parties for selecting the appropriate procedures and institutions creates confidence in both the parties regarding the proceedings to be conducted in a fair and impartial manner.[405]

CCIAG has further emphasized the present ISDS mechanism to have suitable consistency, correctness, and finality.[406] The submissions state that the present mechanism of arbitration which doesn't formally recognize precedent, although tribunals often rely on the decisions rendered previously by other tribunals, is suitable considering that each tribunal is constituted to hear a particular case and that the system itself was not designed to have absolute consistency.[407] The CCIAG has further pointed out that the focus has been on the correctness of the award, which more likely results from appointing the best suited arbitrators instead of confining itself to binding precedents.[408]

Regarding the finality of the award, the CCIAG, while accepting a possibility of errors and mistakes being committed by tribunals, submitted that the present mechanism of limited grounds of challenge and annulment has been supported by the states and investors as alternative mechanisms of appeal and a further reform broadening the scope of review, although may result in some correct decisions, would come at unacceptable costs and time.[409]

Thirdly, pointing out to the ICSID convention providing essentially no ground for review and the New York Convention providing limited grounds for review, the CCIAG highlighted the significance of enforcement of awards as a critical aspect of states' and investors'

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[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.*

confidence in the system.[410] The CCIAG submitted that although investors support the need for reforms in the ISDS regime concerning the slow and expensive procedures and independence of arbitrators, they will not support reforms that may adversely affect the equal rights of the parties, balance between consistency, finality, and correctness or the enforceability of the awards.[411]

Therefore, rejecting the reforms of establishment of a Multilateral Investment Court and Appellate Mechanism, the CCIAG has supported reforms such as establishment of a Multilateral Advisory Centre while sharing concern regarding the center acting as counsel in ISDS, a Code of Conduct for arbitrators, while opposing a broad double hatting prohibition and regulation of third-party funding rather than prohibiting the same altogether.[412]

The CCIAG has further provided comments of preliminary nature regarding proposed reform options which are at an initial stage in WG-III.[413] Such comments included comments regarding reforms for improving arbitrator selection by either maintaining a list or a database while also focusing on the diversity of selection which the CCIAG has welcomed.[414] There were also comments regarding "prior scrutiny of awards" by an independent body to which the CCIAG has conveyed its concern regarding its feasibility and instead has proposed to provide the disputing parties an opportunity to review the award before it is finalized.[415] And there were reforms focusing on alternative dispute resolution which although the CCIAG has welcomed but has also emphasized on it being optional and reforms focusing

[410] *Id.*
[411] *Id.*
[412] *Id.*
[413] *Id.*
[414] *Id.*
[415] *Id.*

on expedited procedures and additional case management tools to which the CCIAG has welcomed discussion.[416]

III. Conclusion

An analysis of the expansion of IIAs and FDI in the past century and the resultant inevitable rise of ISDS establishes that their development has been dynamic and inconsistent. Barring a few exceptions, the approach of the global community towards the development of the international investment regime has generally been to address the short-term issues or issues-at-hand instead of working on a long-term, coherent, permanent mechanism that can withstand a significantly longer period of time. A notable example is the failure to execute the ambitious Havana Charter and the proposed establishment of ITO in the Era of Institutional Conceptualization which had the potential to provide a long-term, stable, coherent, permanent, and institutionalized framework right in the initial years of the present international investment regime. Even though, the establishment of institutions in the later eras, like the establishment of the WTO in 1994, which is considered intellectually similar to the idea of ITO,[417] have made significant impact on the global trade. Its development in the later period itself clearly establishes the lack of a pre-emptive approach to act and address issues on part of the global community. The reason for such myopic approach is mainly that on a global stage, states have largely been divided on their respective agendas and political motives. Till the end of the Era of Contradiction, it was the debate between Economic Marxism and Economic Liberalism, which although today has faded away, but the difference of opinion and mistrust originating from the neo-colonialist perspective of many states and their respective stakeholders

[416] *Id.*
[417] *See About WTO- The GATT Years: from Havana to Marrakesh,* WORLD TRADE ORG. (Dec. 28, 2020), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

remain as a main barrier for a unified approach towards global trade. Thus, the future development and revaluation of the international investment regime must necessarily focus on the long-term goals of the global economy and establish a permanent coherent mechanism to fulfill the aspirations of all stakeholders in the long run.

Presently, in the midst of a pandemic fueling the uncertainty, there is hardly any state that undermines the significance of FDI for the economic development. Clearly, for past few years, more states have preferred to regulate FDI while maintaining its uninterrupted flow.[418] To achieve this, states have constantly been evolving their IIA regimes, whereas the investors have been relying and constantly exploring the novel jurisprudence of ISDS to evade such regulatory measures that they do not find feasible or beneficial for their investment.

To mitigate the drastic effect of the pandemic over the economies, states have introduced many fiscal and other economic measures to immediately stabilize the economies like increased control and regulations over the supply chain, introduction of flexible credit facilities by nationalized banks, equity investment by states in crisis hit industries, or even partial or full nationalization.[419] However such measures come at a cost of increased state intervention in the free market which may increase a socialistic pattern in the longer run.

This may not be an easy option, as such measures, which promote a socialistic pattern, although still acceptable in developing and transactional economies, may not find acceptability in developed economies, which are usually characterized by minimum state control and may prefer to resume back to the old ways as early as possible. Furthermore, developing economies may lack the financial

[418] UNCTAD, IPFSD, *supra* note 18, at 14. *See* UNCTAD, *World 2020*, *supra* note 16.
[419] UNCTAD, *World 2020*, *supra* note 16, at 88.

means to efficiently and immediately implement such fiscal packages and reforms at a scale that is necessary. Under these circumstances, both the developing economies as well as the developed ones will mainly have to rely on FDI to boost up and re-stabilize their economies which may consequently lead to another intensified competition to attract FDI amongst states similar to that of the Era of Expansion.

At the same time, states may also continue the trend of formulation of restrictive investment policies experienced in the latter part of Era of Revision caused by the insecurities of states towards foreign investments on the grounds of national security and protection from hostile takeovers of strategic industries by foreign investors. Furthermore, states may also prefer to regulate and restrict Foreign Investment to focus toward self-sufficiency in terms of production, especially for the critical supplies that has been highlighted during this pandemic. Due to disruption in the GVC as a result of the pandemic, major MNEs, which have faced significant disruption may consider developing flexible and multiple regional supply chains which may be beneficial for the investors as well as align with the goals of the states. Such a development may lead to major reevaluation of policies which is likely to have a significant impact on the present basic structure of international trade and may drastically affect the FDI flow to Asian developing countries which in recent years had emerged as global production hubs.[420]

However, to compensate the possible loss of FDI due to adoption of restrictive policies for protection of strategic and critical industries or by possible reevaluation of GVC, states may focus and channelize the FDI flow towards other sectors and industries by adopting favorable polices accordingly. Furthermore, in an attempt to move away from the increasing socialistic pattern, certain states, majorly the

[420] *Id.* at 38.

developed states characterized by free market liberal economies, may strategize their policies to assist them to initiate disinvestments from the industries in which state investments were made during the pandemic and at the same time, channelize investments, including FDI, to re-stabilize such industries.

This complex blend of restricting foreign investments in certain critical and strategic industries while increasingly depending on FDI flow to re-stabilize economies, thereby intensifying the competition to attract maximum FDI, may lead to complete reevaluation of the global trade and investments policies that may have a significant impact on its present basic structure even though the chances of implementation of such changes cannot be guaranteed. Therefore, considering the possible reevaluation of the basics of the international investment regime combined with an intense competition amongst states to attract maximum FDI to re-stabilize their respective economies, the post pandemic era may have similarities to both the era of infancy and the era of proliferation.

As a result, these developments may lead the states to modernize and renegotiate the present IIAs and sign new IIAs with a focus on regulating the FDI flow and adapt to the new changes and policies to restabilize their economies. An initial increase in socialistic pattern of state interference in markets may accordingly lead to the introduction of provisions for an increase in regulatory powers even though many stakeholders and mainly the investors may not like it. As seen in the model BIT of India, other states, especially the developing states, may also follow in its footsteps and soon introduce new regulatory or restrictive provisions in future IIAs to regulate investments on the grounds of public or national interest. Provisions such as exhaustion of domestic remedies before the initiation of ISDS provided under an IIA, limited grounds for initiating ISDS, limiting the foreign investor's protections like eliminating a provision for FET or adoption of a traditional approach of

CIL etc., may increasingly be adopted by states. Furthermore, modern IIAs may also try to bring some semblance of equality between its domestic and international investors. Therefore, states may modify their previous approach to attract maximum FDI adopted during the Era of Expansion i.e., by offering abundant protections and instead focus to attract FDI by other means such as a stable market and potential for growth while maintaining a regulatory control over it.

Due to uncertainty and possible reevaluation in the post pandemic era, states may initially prefer a cautious approach while negotiating or signing IIAs specifically BITs. Although, with the return of certainty and stabilization in the international investment regime and growth in the demand of FDI, a surge in signing and renegotiation of modern IIAs is certainly expected.

On a multilateral level, the development of IIA on the global stage may not gain significant momentum for a lack of unified approach amongst states due to the prevailing differences in the political and economic objectives and approach of each state. However, success is expected to be achieved at regional level with the states having similar economic objectives, development status, and approach. A recent significant development is the signing of the Regional Comprehensive Economic Partnership signed by Association of South East Asian Countries (ASEAN) on 15th November 2020, which is one of the world's largest FTA considering the significant role of the signatory states in FDI flow and international trade.[421] Similarly, other significant developments at regional level in IIAs may be expected in regional unions like AFCFTA, European Union, NAFTA, etc. having similar economic objectives, approach, and development status.

[421] *Investment Trade Monitor–RCEP Agreement a Potential Boost for Investment in Sustainable Post COVID Recovery*, UNCTAD, No. 37 (Nov. 16, 2020), https://unctad.org/webflyer/global-investment-trend-monitor-no-37.

Another projection having significant impact over the international investment and trade regime is the projection of a huge surge in ISDS.[422] As per the available data, as many as 31 new known ISDS' have been initiated in 2020 and considering that many ISDS proceedings are not disclosed in public and remain confidential, there is a high probability of this number being greater.[423] The main factors contributing to such projection are the implementation of restrictive policies by the states in view of the pandemic and resultant significant disruptions in the FDI flow, along with the consequential losses faced by the investors globally. Desperate foreign investors facing huge losses, disruptions, and increased costs resulting from the state's lockdown policies, investors may challenge them by citing the protections afforded to them and obligations of the host state under the respective IIAs. Such cases of ISDS may further surge in the future if the states decide to continue the trend of implementation of restrictive trade policies.

Considering these projected events and increasing dissatisfaction towards the present ISDS regime, the states may soon get impatient to bring stability, consistency, and transparency in the ISDS regime. Perhaps the present ISDS regime was not designed to accommodate such a huge number of cases involving such complex questions of interpretations of the law and involving massive monetary claims having a significant impact on the economies of the states. It is a big advantage that the requirement of reforms in the ISDS regime was recognized well before the pandemic and WG-III was formed.[424] Clearly, with the rising number of issues deepening the legitimacy crisis of the present ISDS regime, the reforms have become inevitable, and the pandemic has only focused on the urgency for crystallization

[422] UNCTAD, *World 2020*, *supra* note 16, at 38.
[423] UNCTAD, Navigator, *supra* note 12.
[424] *Working Group II Impacts, Adaptation and Vulnerability*, IPCC (2022), https://www.ipcc.ch/working-group/wg2/.

and implementations of the same. The WG-III, which is instrumental in evaluating the reforms, had been following its broad mandate in a time-bound manner until the disruptions caused by the pandemic.[425]

In the wake of the projected surge in ISDS in the post-pandemic era, the WG-III should, now more than ever, focus on the urgent implementation of reforms for stability and coherence of the ISDS regime which may also provide a long-standing permanent solution. The fall in FDI flow has already been raising eyebrows for the past few years and the pandemic has further fueled uncertainty. Such reform options should not only suit the states in fulfilling their objectives, but should also be acceptable to foreign investors who today are reluctant to invest due to fear of uncertainty caused by the pandemic. While states may introduce suitable investment policies in the future to attract FDI and re-stabilize the economy, foreign investors would also prefer the presence of an efficient dispute resolution mechanism and evaluate the same before investing.

It is now clear that starting from the Era of Expansion, a majority of the states globally are moving towards a democratic and transparent form of government, and undisputedly, democratic processes are more amenable to establishment of institutions than resting responsibilities to individuals. Therefore, states would prefer institutional reforms as per the options discussed in WG-III. Such an institution may include the establishment of a standing court on investment disputes or the establishment of an Appellate Authority. However, investors may not prefer the establishment of a standing court or appellate body citing concerns over the lack of autonomy of the parties and fear of

[425] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Ninth Session, U.N. Doc. A/CN.9/1044 (2020).

disputes being lagged in courts prolonging the resolution of disputes.[426]

A permanent institutionalization of ISDS will also address major concerns amongst the stakeholders regarding the correctness of awards, consistency, appointment, and qualification of judges, limiting the interference of domestic judiciary, limiting/capping the cost, procedural stability, transparency, etc. A permanent standing court for investment dispute settlement or an appellate body will bring fairness and coherence compared to ad-hoc arbitration, especially interpreting legal principles and applying provisions of the same investment treaty in multiple disputes. Such a reform option may readily be accepted by a majority of the states considering the large number of cases already initiated, especially in the Era of Expansion and Era of Revision, and a far greater number of cases projected to be initiated in post-pandemic era.

Although the WG-III is a state-led initiative, any reform to which the investors have a legitimate concern would not be implemented, especially after a strong projection for an increased dependency on FDI flow in the post-pandemic era. It must be ensured that the investors feel confident with the dispute resolution mechanism. Apparent from the submissions of CCIAG, it is highly unlikely that the investors would favor the establishment of a permanent standing court and would prefer to continue a dispute resolution mechanism through Arbitration. Therefore, considering the urgency of reform implementation, in light of legitimacy concerns, transparency, inequality, and coherence of the present ISDS mechanism along with the state and investor considerations, it would be apt to establish an appellate authority with fulltime judges having jurisdiction over the awards passed in ITA. Such an appellate mechanism may have limited power to review the award in a time-bound manner, and should have powers to

[426] Corp. Couns. Int'l Arb. Group, *supra* note 242.

review, annul or modify awards on the grounds of any procedural error, jurisdictional issue, any blatant error, an allegation of any immoral or corrupt practice, conflict of any basic notion of morality or justice, and most importantly to review awards in terms of international legal principles and questions of law and interpretation of provisions of the treaty. An appellate institution will also create another higher level of adjudicating authority over arbitral tribunals which can effectively address the issue of legitimacy of the arbitral proceedings.

Such a reform will also address the concern of the investors by maintaining party autonomy in the arbitral proceedings as well as address the issues of correctness, fairness, predictability, and coherence in final adjudication of disputes. Furthermore, it will also address the issue of providing an opportunity to appeal/review/proceed for annulment of the award that today is either not present in ICSID or is present to limited effect under the New York Convention, without causing any unnecessary or significant delay.

Although reforms anticipating a surge in ISDS in the post-pandemic era are urgent, implementing reform in appellate authority remains challenging. For efficient implementation, states will have to individually agree to implement the reforms and effectively ratify and recognize the same. Even if such reforms are ratified and incorporated legally in law, a retrospective application of them would not be possible to bring the arbitrations already initiated prior to implementation of the reforms under its purview. Therefore, other options that reforms within the present ISDS mechanism of ITA and which can be parallelly implemented with the establishment of an appellate authority should be focused: like the development of a code of conduct, mandatory disclosures for arbitrators, regulations regarding double hatting, providing a database for qualified arbitrators, transparent proceedings, etc.

Another reform option that should be focused upon and requires urgency is establishing an Advisory center as suggested by the WG-III and has also been accepted by CCIAG. This reform would help prevent the developing states and specifically the LDC from being burdened from a surge of ISDS soon from the foreign investors. Additionally, an inclusive approach may also be necessary, requiring not only a reform of the ISDS regime, but also of the substantive rules of investment protection.[427]

Such reforms will also assist in the formation of a permanent coherent mechanism for the longer run in the resolution of ISDS. The issue that arises is the urgent and planned implementation of reforms by carefully analyzing and prioritizing their implementation with complete cooperation by all the stakeholders. Furthermore, considering the prevalence of feelings of insecurity and mistrust based on a neocolonialist perspective amongst the majority of developing states, a reform based on institutionalization while maintaining an equal participation of the developing states will help gain trust and confidence. Overall, a new perspective must be developed in the post-pandemic era to reform and develop policy making in the IIA regime and the ISDS regime. Coming years may lead to uncertainty regarding FDI flows, but certainly, states will be aiming and depending on an increased FDI flow for economic stabilization and thereafter for future growth. Instead of a short-term need-based legal mechanism addressing only the immediate issues, the development and implementation of a permanent long-term standing mechanism should be focused, which can be addressed by an institutional-based reform. Lastly and most importantly, while considering any reform, it has to be borne in mind that the general trend of an increasing outflow of FDI towards developing states in recent years has made it clear that the interest of developing states has to be the foremost priority

[427] U.N. Doc. A/CN.9/917, *supra* note 9.

and any reform, no matter how ambitious it may be, cannot be implemented without their consent, support and agreement.