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Between Backlash and the Re-Emerging “Calvo Doctrine”: Investor-State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism

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Between Backlash and the Re-Emerging “Calvo Doctrine”: Investor-State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism

*Ylli Dautaj**

Abstract:

The Investor-State Dispute Settlement (ISDS) regime stands on shaky ground. Its legitimacy is heavily questioned by critics and a “backlash debate” has ensued. As a result, a contested and infected debate has been on-going for some years now and multiple reform proposals have been offered, ranging from (a) moderate (and sensible) reform proposals—e.g., increased transparency; the inclusion of state counterclaims; the inclusion of higher ethical standards; reformulating deference standards; applying human rights and environmental law when interpreting international investment treaties; etc.—to more (b) radical reform proposals—e.g., the elaboration of either an Appellate System or an Investment Court System (ICS). Such latter proposals are radical because they seek the total re-designing of the entire ISDS regime. It is argued that these radical proposals ultimately seek to undercut the fundamental elements of international arbitration in favor of a supposedly “fairer” and more “just” system. The proponents of these “equitable” reforms seek to dismantle ISDS as we know it.

It is submitted that all reform proposals are best analyzed through the lens of the mental representation of the stakeholders to the ISDS regime, namely, the essential actors; service providers; value providers; and the global community at large. But what interests should be preserved and further enhanced?

This paper makes several points, inter alia, (1) that the contemporary criticism is not a new phenomenon and that we must emphatically reject the spill-overs of extreme left-leaning ideology, nationalism, protectionism, idiosyncrasy, parochialism, and populism in transnational litigation; (2) that moderate reform-proposals merit attention if—and only if—those further the fundamental elements of international arbitration, and conversely, rejected if not; (3) that the way, shape, and form of ISDS must be analyzed through the lens of its historical and

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philosophical underpinning; and (4) that every stakeholder's claim must be heard, but that in the sociology of ISDS there should be a hierarchal structure deciding the validity (or normative value) of each claim depending on the stakeholders overall positioning in the regime.

Finally, the ISDS-reform discussions should be conducted in a manner that underscores broader historical, economic, political, philosophical, and sociological lessons of the project called "transnationalism," which happens to be a brainchild of liberal capitalism.

TABLE OF CONTENTS

I. Introduction	276
II. Post-War Virtues: Transcending Protectionism and Nationalism through Liberal Democratic Values and the Free and Open Market	281
III. War, Peace, and Diplomacy: Investment Law and ISDS in the Making or Breaking?	284
A. Rejecting Gunboat Diplomacy and Diplomatic Protection: ISDS's Role in Legal Civilization.....	288
B. Calvo Doctrine 2.0.....	293
C. Turkey and Libya: Full Protection and Security or (Gunboat) Diplomacy?	295
IV. Does ISDS Have a Future?	296
A. Backlash Against ISDS and the Quest for Legitimacy...	299
B. Reform Proposals	305
1. Radical Reform Proposals: Investment Court System or an Appellate System?.....	305
2. Reasonable Reform Proposals: Furthering the Fundamental Elements of International Arbitration..	308
C. Unsubstantiated Criticism and the Virtue of Truth.....	309
V. The Philosophy and Sociology of International Arbitration: The What, Why, and for Whom.....	313
VI. Conclusion	319

I. INTRODUCTION

It has often been said that tentative predictions about the future can be approximated by analyzing the past with due care and attention.¹ The recent investor-state dispute settlement (ISDS) reform debate is not an anomaly in this respect.² The current regime was not easily established, nor has it operated without repeated challenges to its overall legitimacy. The roots of the contemporary criticism are not new, albeit sometimes taking new shapes and forms. Since its inception, ideologues have attacked the regime for either lacking legal validity, for being too investor-oriented, or for resting on a “sovereignty deficit” and thus undercutting “public interest” concerns.³ Be assured, the frequent, streamlined, and often analytically sound attacks will continue to come. In fact, and even worse, post-WWII virtues will always be under attack.⁴ ISDS is but another product aligned with policy objectives and

¹ Kluwer Arbitration London Event, *The Gary Born lecture: International Arbitration: Recent Developments*, YOUTUBE (Oct. 14, 2015), <https://www.youtube.com/watch?v=MLa9KZEF92o&list=PLTkVrnnV6E6qDlzpM97q7n76xHlzwS7Kc&index=3&t=2s> [hereinafter Born] (Most scholarly work on ISDS reform worth its name—much of what is referred to in this paper—starts with a historical account of a legal theory on international law and transnational adjudication in the making. Gary Born rightly started a panel session on this topic by stating that, “I would like to look backwards instead of forwards; backwards to historical developments because I think they teach us something about possible future trends.”).

² See primarily the EU Commissions’ proposal of an Investment Court System (or often called a Multilateral Investment Court) and The UNCITRAL Working Group III. Several interest groups, so-called stakeholders in the sociology of arbitration are engaged in this debate—many of whom will be cited in this paper.

³ See Gloria Maria Alvarez et al., *A Response to the Criticism Against ISDS by EFILA*, 33 J. INT’L ARB. 1, 9, 12 (2015) (“Critics have raised concerns about the pro-investor interpretation of investment treaty provisions and their perceived unpredictability, the alleged lack of transparency of arbitral proceedings, the alleged lack of independence and impartiality of arbitrators. Others have suggested that ISDS bypasses the operation of domestic law and national courts and stymies the right of states to regulate. Criticisms have also been raised against the investor-state arbitration process itself, claiming that it allows partisan, self-interested arbitrators to secretly overrule governments with no right of appeal.”); See JAMES H CARTER, *The Culture of Arbitration and the Defense of Arbitral Legitimacy*, in PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION 97–105 (David D. Caron et al. eds., 2015); Stephan W. Schill, *Conceptions of Legitimacy of International Arbitration*, in PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION 106–24 ((David D. Caron et al. eds., 2015) [hereinafter Schill, *Conceptions*]. See Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, E15 INITIATIVE, ICTSD & WORLD ECON. FORUM I 1 (2015) [hereinafter Schill, *Reforming*] (“Recurring concerns involve inconsistencies in decision making, insufficient regard by some arbitral tribunals to the host state’s right to regulate in interpreting IIAs, charges of bias of the system in favor of foreign investors, concerns about the lack of independence and impartiality of arbitrators, limited mechanisms to control arbitral tribunals and ensure correctness of their decisions, and increasing costs for the resolution of investment disputes.”). See CHESTER BROWN & KATE MILES, *Introduction: Evolution in Investment Treaty Law and Arbitration*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 3, 3-4 (2011).

⁴ These critics actually try to undercut the praising of success and individualism. In fact, some states have been more successful than others in political theory; in fact, some ideas have

political concerns of a free and open market system. Thus, the roots of the criticism are rather to be found in political theory, i.e., in the critics' misinformed mental representation that considers the role of the individual as inferior to the superior objectives of the state. Left-leaning ideology, nationalism, protectionism, and populism will continue to feature as go-to doctrines wherever and whenever there are widespread fear and demagoguery in conjunction with distressed and dissatisfied people. Engaging in blame-games and moral grandstanding is big business. Some participants end up in well-paid and comfortable political positions, others in NGOs, and some, I guess, as tenured professors.⁵

The opponents to ISDS initially attacked the regime *ab initio*, but nowadays they level more measured criticism; the attack is intelligently presented in nuance, scope, and degree.⁶ The critics streamline their concerns

proved more successful than others; in fact, some ideologies have proved more successful than others; and so on and so forth. When one shies away from this, the underlying premises for any political, economic, or legal reform debate become based on flawed analysis and half-cooked logic. This symptom—i.e., postmodernism, a form of neo-Marxism—is seen all over the world in contemporary politics and has naturally spilled over into the domain of international arbitration. The critics that adhere to this worldview (intentionally or unintentionally and mostly well intended) will first grasp for low-hanging fruit; that is, level an attack first on ISDS, and then move on to international commercial arbitration, too. In this paper, I focus on arbitration but meanwhile, I am aware that the symptom has a root cause that goes much deeper than to arbitration critics. Moreover, I also seek to articulate the crucial need for young practitioners and scholars to study the philosophy and sociology of arbitration in conjunction with the technical “legal” solutions to complex “legal” problems. For any arbitration scholar, the work of Emmanuel Gaillard should serve as a guiding star. See EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2012) [hereinafter GAILLARD, *LEGAL THEORY*]; see also Emmanuel Gaillard, *Sociology of International Arbitration*, *PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION* 187-88 (David D. Caron et al. eds., 2015) [hereinafter Gaillard, *Sociology*]. Moreover, we urge the young (and now very young) arbitration practitioners to analyze human behavior also through the lens of the market, social norms, and architecture.

⁵ See Schill, *Conceptions*, *supra* note 3, at 107 (“Problems with, or even the lack of, legitimacy of investment treaty arbitration are frequently diagnosed by critical scholars, non-governmental organizations, politicians, and governments[.]”). See also Daniele Gallo & Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 *FORDHAM INT’L L.J.* 1081, 1087 (2016) (The investment court proposal in the European Union’s investment chapters “was a response to the criticism expressed by the European Parliament, civil society, some Member States and their national parliament alike distrusting the current international arbitration regimes for lack of democratic accountability, consistency, openness and independence[.]”); Charles N. Brower & Sadie Blanchard, *From ‘Dealing in Virtue’ to ‘Profiting from Injustice’: The Case Against ‘Re-Statification’ of Investment Dispute Settlement*, 55 *HARV. INT’L L. J. ONLINE* 45 (2014) (“Over the next decade and a half, opposition to arbitration developed, predominantly from leftist academics, anti-globalization groups, and States that found themselves as respondents in investment treaty arbitrations.”).

⁶ Many still believe that arbitration of public interests should not be arbitrable. See, e.g., Ruth Teitelbaum, *A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About It?*, 5 *BERKELEY J. INT’L L.* 54 (2010). Many NGOs that critique the contemporary set-up of ISDS do in fact not trust the regime at all and would dismantle its

to (1) whether the substantive protection in international investment agreements (IIAs) is too heavily favoring investors, and (2) whether arbitrators are in a position to render fairness and justice in matters implicating public policy or interest; in other words, critics ask whether ISDS is a legitimate legal institution. Anyone seeking to attack the ISDS regime *per se* must start at the back-end and move upwards; that is, first, question the procedural legitimacy of ISDS; second, question the substantive legitimacy in IIAs; and finally, question the very existence of ISDS altogether and the current design of IIAs.⁷ Thus, going forward, it will be important that the users of the regime make their voices heard before it is too late to stop the critics from, first, de-legitimizing the regime, and then, ultimately, orchestrating the dismantling of it.⁸ In this paper, I wish to put forth the wisdom in practical experience. This paper will inform the reader about the differences in a pre- and post-WWII era and their interrelation with international arbitration.

But we must start from the premise that there is nothing unique nor novel in the contemporary criticism, and therefore that there is not necessarily a need to address the core of the critique with novel solutions. Rather, we seek to once again elevate workability to the highest standing in transnational adjudication and to increase the currency of private adjudication, namely, the role of the state as a private party, subject to private law. At the end of the day, concepts such as *pacta sunt servanda*, *bona fide* negotiation, and party autonomy hold eternal wisdom as concepts that strengthen the rule of law and are, furthermore, to be treated as fundamental

existence in total. In their view it lacks legitimacy *ab initio*.

⁷ See, e.g., the remarks of two proponents of the ICS system and conversely opponents of the current ISDS regime: Gallo & Nicola, *supra* note 5, at 1151 (“The open question remains, however, whether beyond such procedural innovation also substantive aspirations lie behind the agenda of EU trade negotiators to promote a truly transformative trade and investment regime in their recently negotiated FTAs, rather than simply responding to external and internal political and legal pressures. While the transformative procedural architecture of the ICS is well established, we question whether its substantive clauses on the right to regulate and fair and equitable treatment are well-equipped to engage with emerging questions of corporate social responsibility, sustainable development and human rights arising in international investment disputes.”).

⁸ See, e.g., CARTER, *supra* note 3, at 103 (“[c]hallenges raise a number of issues, including whether investors should be allowed to use an arbitration mechanism at all, rather than the courts of the host state [...]”). See Gallo & Nicola, *supra* note 5, at 1082 (“we propose greater engagement with State-to-State arbitration and further substantive reforms for a truly transformative adjudication system addressing global inequalities created by the current investment regime.”). It should be mentioned that the authors are in favor of including an investment protection regime as opposed to subjecting the investor to state-to-state arbitration and national courts’ jurisdiction. They make the point that the ICS strikes this balance. However, I argue that an MIC and a de-politicized investment protection regime are mutually exclusive. The MIC proposal is inherently political. Moreover, to complement that regime with state-to-state arbitration and substantive reforms would dismantle the little that is left of the international arbitration element of the regime.

values in a liberal democratic and rules-based society.⁹ That said, some reform proposals deserve merit and attention because “[t]he ISDS system needs to continue to evolve to reflect lessons learned by states, investors, and other stakeholders from the last 30 years of experience and cases resolved under this system.”¹⁰ We must assess and address issues such as increased transparency, ethical standards of arbitrators and counsel, arbitrator intelligence, *amicus* participation, human rights concerns, environmental concerns, investor obligations in IIAs, etc. But other reform proposals do not merit equal attention nor appreciation, such as the establishment of a multilateral investment court or an appellate body.¹¹

In an era of extreme sensitivity and academic curtailing, this paper is consciously written without cowering down a single inch to praising—to a great extent, idolizing—the achievements made by liberal democracies that have embraced a rules-based international legal order and a market-economy, i.e., the free and open market system. Virtues transcending socialism, nationalism, protectionism, populism, idiosyncrasy, and parochialism should be praised wherever the opportunity is given. ISDS is a perfect manifestation of this post-WWII and post-Cold War success.¹² And while the regime should be scrutinized for its betterment, it should not too readily be criticized without first entertaining a historical account of its coming about. The ISDS community should be careful in pouring too much new wine in old bottles, else the bottles break, the wine runs out, and the bottles perish.¹³

Hence, I am not really engaging exclusively in a technical discussion

⁹ EDWARD BRUNET ET AL., *The Core Values of Arbitration*, ARBITRATION LAW IN AMERICA 3, 4–5 (2006), quoted in Schill, *Conceptions*, supra note 3, at 117-18 (“In a democratic society, party autonomy should be the fundamental value that shapes arbitration. The personal autonomy inherent in arbitration constitutes a dominant policy in all areas of a democracy. The freedom to select arbitration procedure is a choice that one anticipates should exist in a state that values personal autonomy. Arbitration liberty is achieved by making party autonomy the highest priority in the pantheon of arbitration values. Viewed in this light, the important value of party autonomy is directly related to the freedom essential in a democratic state. A strong version of arbitration party autonomy exemplifies the significance of freedom of contract. In a state such as ours characterized by the respect for individual liberty, courts should enforce customized agreements to arbitrate and the legislature should regulate minimally. In a society governed by rules of the free market, contract norms that guide exchanges are necessarily based on autonomous action of individual economic actors.”).

¹⁰ CORP. COUNSEL INT’L ARBITRATION GRP. (CCIAG), *Investor-State Dispute Settlement (ISDS) Reform*, 15 (2019), https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform.pdf.

¹¹ For a good outline of how each is structured by two proponents of an ICS, see Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, EUR. Y.B. INT’L ECON. L. (2018).

¹² See Sundaresh Menon, *The Transnational Protection of Private Rights*, PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION 17, 17 (David D. Caron et al. eds., 2015) (“The post-Second World War economic expansion is widely recognized as a period of economic prosperity which occurred in the mid-twentieth century following the end of the Second World War in 1945.”).

¹³ Mathew 9:17.

and analysis on “perfecting” the procedural features of ISDS. I believe that the radical reform proposals and the systematic attacks on ISDS’s legitimacy is seeking to step-by-step—intentionally or unintentionally—undercut the core values, objectives, and virtues of international arbitration—e.g., access to a neutral independent dispute settlement; cost and speed efficiency; a level playing field between investors and host-states; party autonomy; a large pool of qualified expert arbitrators; finality and enforceability; etc.¹⁴ Thus, apart from the technicality of the reform-proposals, we must engage in a debate on ISDS’s role in legal civilization and the philosophical positioning and standing it actually has as a manifestation of the free and open market.¹⁵

I do not believe that the ISDS regime is under an “existential threat” *per se*. The roots of the contemporary criticism is a disease that is cyclical and swings like a pendulum back and forth. Put differently, much of the criticism can be considered a breeze of not-so-fresh-air. However, the years of damage that can be done by entertaining parts of the criticism will definitely hit the backbone of any free society, namely, its small and medium enterprises. Conversely, major players will always be positioned to negotiate for ISDS protection in their investor-state contracts.¹⁶ Thus, the damage that can be done, generally, and for small and medium enterprises, in particular, can never be justified, and hence the ISDS-reform discussions should be conducted in a manner that underscores broader historical, economic, political, philosophical, and sociological lessons of the project called “transnationalism,” which is a brainchild of liberal capitalism.¹⁷

¹⁴ For a good contribution to the UNCITRAL Working Group III of Investor-State Dispute Settlement (ISDS) Reform, see CCIAG, *supra* note 10.

¹⁵ Gaillard, *Sociology*, *supra* note 4, at 188 (“It is somewhat difficult for lawyers to distance themselves from legal rules and procedures—and all the controversies we enjoy discussing in arbitration circles—to take a step back and look at arbitration as a social phenomenon, with its actors, their social behaviour, and their interactions.”). Thus, this paper will emphasize why international arbitration—including ISDS—was established, what did it contribute with, and whether there have been any serious alternatives. For example, ICSID is a product of a multilateral initiative through the World Bank. This initiative had at its core post-war recovery. This is a legacy of Post-WWII virtues that transcends nationalism and seeks to contribute to peace through economic development, interconnectivity, and interdependence. See Part III for more.

¹⁶ See, e.g., Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 *LOY. U. CHI. L.J.* 271, 295 (2017) (“Large multinational investors may not like the EU’s vision, but seem unlikely to oppose it, in part because investment treaties do not rank high on their list of institutional concerns, and in part because multinational enterprises have other options in managing disputes with host states. Small- and medium-size investors might oppose the EU’s proposal for an investment court, but lack the political capital to influence treaty negotiations.”) (footnotes omitted).

¹⁷ A valid counterargument would be that an Investment Advisory Centre (IAC) would be established as an independent organ to support small and medium enterprises and developing countries in connection with an ICS procedure. See BUNGENBERG, *supra* note 11, at 3.

II. POST-WAR VIRTUES: TRANSCENDING PROTECTIONISM AND NATIONALISM THROUGH LIBERAL DEMOCRATIC VALUES AND THE FREE AND OPEN MARKET

I argue that apart from the conceptualization of a “social contract,” the creation of liberal democracies embracing the free and open market has represented the greatest achievement and success in political theory.¹⁸ In a relatively short time span following the world wars and the Cold War, liberal capitalist policies and initiatives stemming from such have lifted millions of people out of poverty by *inter alia* leading to unexpected heights of technological innovation and an increased frequency (and value) of cross-border goods and services. The core philosophical features of the western capitalist world-view have been a broad conceptual understanding of individual freedom, ease of doing business, and the protection of human rights. This mental representation of the world resonates with merchants seeking to improve their positioning. In this competitive environment, traditional barriers of culture, religion, race, etc. were obstacles to one’s own improvement. Highlighting the early transborder movement of merchants, Professor Carbonneau wrote that:

Desisting from political wrangles was the first characteristic of the nascent merchant class. Additionally, it was transborder in character. The centers of European commerce reached out to one another and to the existing global marketplace. Capitalism, almost intrinsically, had an international reach. The betterment of self and station had universal appeal. Political boundaries were not a significant or limiting factor to the enterprise. Although the commercial centers competed for international business, they also reinforced each other in self-interested cooperation. Everyone who contributed to the transaction could share in the profits it yielded. Commercial values were defined and prevailed. The private agreement was the primary source of regulation.¹⁹

As a result, the world became a more united, liberal, and progressive place. Trust, confidence, and harmony had received a heightened standing and interdependence and interconnectivity and increased currency. This is all

¹⁸ Commonly called “liberal capitalism.” RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 10 (2012) (“[E]conomic literature has emphasized that openness of an economic system to foreign competition is among the factors that contribute to economic growth and to good governance in general. Thus, investment law embodies and represents the nature and the effects of economic globalization, with the potential advantage of economic efficiency and of a higher standard coupled with a reduced legal power of the national authorities to regulate such areas that have an impact upon foreign investment.”).

¹⁹ Extract from Thomas E. Carbonneau, *Commercial Peace and Political Competition in the Crosshairs of International Arbitration*, 18 *DUKE J. COMP. & INT’L L.* 311 (2008), but reprinted in THOMAS E. CARBONNEAU, *CARBONNEAU ON INTERNATIONAL ARBITRATION: COLLECTED ESSAYS* (2011).

manifested in—and became further entrenched by—globalization.²⁰ Chief Justice Menon analyzed this post-war development and the need for a harmonized legal framework to facilitate the new world order.²¹ He wrote that:

At the same time, the rebuilding and reconstruction of the post-war world created both the impetus and the opportunity to focus on development and economic growth. So even as the number of discrete states and polities increased, the world witnessed a rapid increase in the connectedness of its economies and cultures. Thomas Friedman observed in his international bestseller, *The World is Flat*, what might now be accepted as conventional wisdom: that increased connectivity has resulted in the accelerated flattening of the world, facilitating the phenomenon of globalization. But globalization occasions the need for a more homogenous and harmonized legal framework that can accommodate the vast increase in economic relationships which crosses borders that might not previously have existed or been quite so firm.²²

In this respect, international arbitration has been playing an intrinsic part in providing for a more homogenous and harmonized legal framework to accommodate cross-border bargains. International arbitration helped provide for an artificial element of trust and thus *ipso facto* facilitated the transcending of barriers of all sorts, e.g., cultural, religious, economic, political, legal, and philosophical.²³ But even more and like in other aspects of life, international arbitration displays something more fundamental about human nature, namely, the desire for autonomy, freedom, and liberty.²⁴

But not all perceive international arbitration as a unifying legal framework and, because of its transnational nature, the “pluralistic structure

²⁰ STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 1 (2009) (Globalization has been described as “one of the formative processes which affects today’s cultural, political, and economic life virtually anywhere in the world, is gradually transforming international law from a simple tool to coordinate inter-State relations to an instrument that provides a legal structure for truly global social orders.”).

²¹ See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 83 (1905) (“And the more important international economic interests grow, the more International Law will grow.”).

²² Menon, *supra* note 12, at 17; See also THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2006).

²³ See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT’L L.* 471, 477 (2009) (“Dispute settlement has a central function in stabilizing the expectations of foreign investors and enables them to counter opportunistic behavior by the host state, such as unreasonable interferences with the investor’s economic rights or even expropriations without compensation. Recourse to a dispute settlement and enforcement mechanism empowers the investor to effectively hold states liable for breaches of their promises in investment treaties to not expropriate foreign investors without compensation, to treat them fairly and equitably, to provide full protection and security, and so on.”).

²⁴ See Born, *supra* note 1.

of international arbitration complicates the search for a unifying legal framework in which legality can be equated with legitimacy, as is traditionally done by lawyers.”²⁵ Thus, critics often misconceive this unique and challenging feature as being a “con” or obstacle of international arbitration. Often, they compare the legitimacy of the regime with a false notion of a municipal legal order that supposedly protects due process and the public interest while rendering fair, just, correct, and consistent outcomes.²⁶

International arbitration is a perfect manifestation of globalization gone *right*. It represents a successful experiment in both investment treaties and commercial dispute resolutions. Relative trust when entering international dealings is facilitated by a transnational dispute resolution system that is underpinned *inter alia* by party autonomy, available arbitrator expertise, procedural flexibility, finality, and enforceability. But mostly, the success of international arbitration is a direct result of removing justice from the realm of biased or cumbersome court procedures. It allows parties to operate globally without the fear of being dragged into a foreign court. ISDS promotes economic cooperation by allowing parties to trust each other with their private capital; in other words, the regime has elaborated an atmosphere of confidence.²⁷

Because arbitration is a specie of party autonomy, private citizens are free to order their affairs as they see fit. Allowing private individuals to enter into agreements in good faith and then obey the terms (*pacta sunt servanda*) is the backbone that facilitates a private ordering in the context of a market economy system. When a state assumes private capacity and enters dealings in matters of trade, commerce, and investment, it too should be held accountable to the terms of the bargain. This idea has been predominant in a post-WWII global landscape. Apart from international commercial arbitration (ICA), investor-state dispute settlement (ISDS) has facilitated a huge flow of capital and has, furthermore, helped de-politicize investment

²⁵ Schill, *Conceptions*, *supra* note 3, at 108.

²⁶ See, e.g., Gallo & Nicola, *supra* note 5, at 1151 (“EU trade negotiators have changed the international architecture for the protection of foreign investors through by moving away from a traditional ISDS model and adopting instead a permanent court system with procedural due process guarantees: the ICS.”).

²⁷ See ICSID REPORT OF THE EXECUTIVE DIRECTORS ON THE ICSID CONVENTION, para. 9 (1965), <http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section03.htm> (“The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”). This report was also discussed by Judge Brower in Brower & Blanchard, *supra* note 5, at 48-49 (“Thus, States sought to create an independent, neutral forum with clear rules to enhance trust and encourage foreign investment. To further induce international capital flows for economic development, States proceeded to conclude thousands of bilateral and multilateral investment protection and promotion treaties, which guarantee certain standards of treatment to alien investors.”).

disputes. It removed dispute resolution from the realm of diplomatic protection and state-to-state arbitration. Investors trust IIAs to offer sufficient substantive protection as well as ISDS to guarantee a procedural venue for redress. In this context, the state is a private party; no more and no less.

Signatories to IIAs have not elaborated a robust international investment law out of nicety, but rather out of necessity. The driving force behind IIAs is to promote a friendly investment climate and eventually attract foreign direct investment (FDI). Investors may be discouraged from making an investment—or if already established, further investments—if treaty provisions are not honored.²⁸ The ISDS regime reinstates trust in the system by allowing investors to redress their grievances in a neutral forum. In short, a host state promises to protect the investor and her investment and if things go wrong, the party can at least trust the reliable dispute settlement mechanism to uphold the rule of law. This is crucial because FDI helps to facilitate and promote sustainable development and economic growth. “[T]he principle of sustainable development requires understanding investment law not as an obstacle to development but as a tool for host states to achieve their economic development objectives[.]”²⁹

The bottom line is this: by providing for a neutral dispute resolution forum, international arbitration promotes and facilitates both interdependence and interconnectivity by enhanced cross-border trade, commerce, and investment.³⁰ For these combined reasons, the arbitral doctrine promulgated in the West should be strenuously praised. International arbitration is not perfect, but because the idea works, the dispute resolution regime represents quite a triumph in legal civilization.³¹ ISDS is but one manifestation of international arbitration and is in that light no exception in representing a triumph in legal civilization.

III. WAR, PEACE, AND DIPLOMACY: INVESTMENT LAW AND ISDS IN THE MAKING OR BREAKING?

The starting point of multilateral efforts to achieve peace and cross-border cooperation was the coming together at the Peace of Westphalia,

²⁸ ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 607 (2018).

²⁹ Schill, *Reforming*, *supra* note 3, at 5.

³⁰ See Clint Peinhardt & Todd Allee, *Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs*, in Y.B. ON INT’L INV. L. & POL’Y 2010-2011, at 833 (Karl P. Sauvant ed., 2012). There are plenty of studies suggesting otherwise, namely, that ISDS clauses have not been a major factor in promoting and attracting FDI.

³¹ See Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002); Charles N. Brower & Lee A. Steven, *Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT’L L. 193 (2001); THOMAS E. CARBONNEAU, *The Remaking of Arbitration: Design and Destiny*, CARBONNEAU ON INTERNATIONAL ARBITRATION: COLLECTED ESSAYS 66-67 (2011) (“Arbitration, in fact, has been so triumphant that it has spawned a professional culture of its own.”); see also Gaillard, *Sociology*, *supra* note 4, at 187-203.

where two treaties were produced.³² The diplomatic congresses ended with the Congress of Vienna in which the Napoleonic wars ended and a sophisticated multilateral system of political and economic cooperation started in Europe and has since been spread to almost all parts of the world.³³ Since then, much has happened. First, in 1920, there was the attempt to establish a League of Nations, which was established but stranded due to world wars. Later missions of regional and multilateral cooperation through the United Nations, the European Union, the North American Free Trade Association, BRICS, etc. were successfully established. These are all testaments to States' efforts and willingness to bring about peace, economic development, and monetary stability.

Thus, it was not until the early 1900s that the efforts of an internationalized political order was taken seriously, and was nearly established but for WWI and WWII.³⁴ Post-WWII, the world community once again started a slow but steady recovery period and kept true to the desire and mission of preventing further chaos through interdependence and economic prosperity by multilateralism.³⁵ Thus, following WWII and decolonialization, "numerous multilateral approaches were taken to develop the substance of international economic law systematically and in a more universally agreeable manner[.]"³⁶ These efforts were accelerated post-Cold War. These approaches are best manifested by two events: (1) the establishing of UN (and the ICJ), and (2) the Washington Consensus.³⁷ In light of the previous backlash against FDI regulation (let alone ISDS) from the 1970s, the Washington Consensus represented an abrupt change in policy objectives of a multilateral platform.³⁸ Professors Dolzer and Schreuer eloquently explained the impact of the Washington Consensus in the

³² THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW: IN A NUTSHELL 17 (2019). An interesting note is that the proclaimed doctrine of *pacta sunt servanda* was adopted and embraced in the deliberations.

³³ *Id.*

³⁴ DOLZER & SCHREUER, *supra* note 18, at 1.

³⁵ E.g., the purpose of the World Bank was to assist in post-war reconstruction and facilitate economic development in third-world and developing jurisdictions. The convention that came to be called the ICSID Convention came into force on October 14, 1966 and did not include any international investment law, but focused rather on the elaboration of an adjudicatory framework.

³⁶ Menon, *supra* note 12, at 28.

³⁷ Prateek Agarwal, *Washington Consensus*, INTELLIGENT ECONOMIST (2020), <https://www.intelligenteconomist.com/washington-consensus/> (last visited Mar. 22, 2020) ("The Washington Consensus refers to a set of free-market economic policies supported prominent financial institutions such as the International Monetary Fund, the World Bank, and the U.S. Treasury. A British economist named John Williamson coined the term Washington Consensus in 1989. The ideas were intended to help developing countries that faced economic crises. In summary, The Washington Consensus recommended structural reforms that increased the role of market forces in exchange for immediate financial help. Some examples include free-floating exchange rates and free trade.")

³⁸ See more in III.A. below.

following manner:

At the same time, international financial institutions revised their position on the role of private instrument, and the so-called Washington Consensus, with its new emphasis on the private sector in the process of development, summarized the foundation for the now dominant approach to development and its concomitant positive view of private foreign investment. In 1992, the new approach crystallized in the Preamble of the World Bank's Guidelines on the Treatment of Foreign Direct Investment. It recognizes "that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long-term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade." *Within this new climate of international economic relations, the fight of previous decades against customary rules protecting foreign investment had abruptly become anachronistic and obsolete.*³⁹

This new climate of international economic relations moved the debate from *whether* FDI should be protected to *how* it should be protected.⁴⁰ The proliferation of IIAs and transborder investment flows was a natural result of an increased globalization following the end of the Cold War.⁴¹

In fact, ISDS as a regime had been elaborated already in the 1960s but came to receive a serious push in the 1990s whereby the caseload of the ICSID increased significantly.⁴² States started concluding IIAs with ISDS

³⁹ DOLZER & SCHREUER, *supra* note 18, at 15-16; *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REVIEW 297-306 (1992).

⁴⁰ The Organisation for Economic Co-Operation and Development (OECD) had started work on a multilateral treaty protecting foreign investment. This was followed by the Abs-Shawcross Convention but again did not get enough traction. The World Bank was finally more successful when they initiated the groundwork that came to be the ICSID Convention.

⁴¹ Brower & Schill, *supra* note 23, at 472.

⁴² In 1972 the first case was registered. As a matter of fact, it was the only case registered that year. Between 1972-1996 there was an average yearly caseload between 0-4 cases. The increase in caseload increased gradually in 1997 with 10 registered cases and kept going upwards. The highest number recorded was in 2018 with 56 registered cases. In 2019 there was a substantial decrease from previous four years with 39 registered cases. "International Centre for Settlement of Investment Disputes, *The ICSID Caseload Statistics*, Issue 2020-1, 7 (the registered cases for 2015-2018 was 52, 48, 53, and 56, respectively)." International Centre for Settlement of Investment Disputes, *The ICSID Caseload Statistics*, Issue 2020-1. *See also* DOLZER & SCHREUER, *supra* note 18, at 19 ("In 1961 already, two years after the era of bilateral treaties had begun, the World Bank took the lead among the international economic organizations to address the emerging international legal framework of foreign investment, pointing to its mandate and to the link between economic development, international cooperation, and the role of private international investment."); For a good take on the groundwork of the ICSID Convention, *see* Aron Broches, *Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, 1965*, in SELECTED

clauses on a routine basis. The ensuing debates instead centered around the interpretation of these treaties. In this light, ISDS of treaty disputes became a field of its own (investment treaty arbitration, or “ITA”). These turnouts helped establish a favorable jurisdiction for FDI, on the one hand, and emphatically depoliticized the investment dispute framework, on the other.⁴³ In a word, it was understood that “[a]ccess to strong investment protections combined with effective ISDS helps avert . . . suboptimal outcomes [for investors].”⁴⁴

The initial politicization of dispute resolution through, for example, diplomatic protection was not to anyone’s satisfaction. Particularly small- and medium-sized enterprises were left with little recourse—“save what their government care[d] to give them after weighing the diplomatic pros and cons of bringing a particular claim.”⁴⁵ This was obviously an unsustainable situation. In this light ISDS was born and should be praised as a great invent and achievement in legal civilization.⁴⁶

ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 188, 195-96 (1995).

⁴³ See I. F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1 (1986); P. Lalive, *Some Threats to International Investment Arbitration*, 1 ICSID REV. 26–40 (1986). See also Schill, *Reforming*, *supra* note 3, at 1 (“Recourse to international arbitration has been celebrated as depoliticizing investment disputes and contributing to enhancing the rule of law in investor-state relations.”). See Brower & Blanchard, *supra* note 5, at 46-47 (“States created the [ICSID] and committed to other neutral arbitration fora for resolving foreign investment disputes precisely to remove such disputes from earlier politicized means of settlement, such as international diplomacy and potentially volatile domestic processes, because politicization inhibited capital flows essential to economic development.”). See Brower & Schill, *supra* note 23, at 477 (“Indeed, without the investor having the option of recourse to arbitration, investment treaties would be mere political declarations (albeit with some implications on the diplomatic level) instead of a set of rules enforceable against states.”). Finally, see Anna T. Katselas, *Exit, Voice and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 317 (2014). ISDS was in fact absent in the early IIAs, which referred instead to state-to-state dispute settlement or the ICJ—i.e., a more institutionalized and entirely state-centric venue for dispute settlement.

⁴⁴ CCIAG, *supra* note 10, at 2.

⁴⁵ REDFERN, *supra* note 28, at 443, citing congressional testimony of Dan Price. For a discussion on the effect on small and medium investors as opposed to multinational corporations *vis-à-vis* EU’s proposed ICS, see Brower, *supra* note 16, at 300 (“For multinational corporations involved in large investment projects, that remains a live option, meaning that they can vote with their feet. That, in turn, would transform the proposed investment court into a small claims court reserved only for small- and medium-sized investors, while the real action involving the big players and points of principle takes place elsewhere.”). See also Brower & Schill, *supra* note 23, at 481-82.

⁴⁶ REDFERN, *supra* note 28, at 443, citing congressional testimony of Dan Price. See also Schill, *Reforming*, *supra* note 3, at 1 (“From the perspective of foreign investors, investment treaty arbitration, which is offered in addition to,

or as an alternative for, the host state’s domestic courts, has been successful in making host states comply with their IIA obligations in an effective, neutral, and independent forum for the settlement of investment disputes. In particular, in countries with weak government and judicial institutions, ISDS is considered to be a crucial safeguard to allow foreign investors to

The critics of strong investment protection and ISDS need to follow a specific order if they wish to succeed in dismantling the regime; that is, first initiate a heated debate on solutions to allegedly fundamental issues (defined by the critics), which is then followed by a new or “better” structure or interpretation (e.g. aligning IIAs or the ISDS procedure with specific public interest considerations). When they are successful in amplifying procedural and substantive features that “make sense” by supposedly addressing the “legitimacy concerns,” the regime will be so far from its equilibrium state that it will be shaky, unstable, and perform so poorly that a justification for a total transformation or even rejection is a message easily conveyed. This is, indeed, the real mission of the philosophically sound and ideologically adverse critics. That said, one cannot refrain from applauding how well they are orchestrating this hit-job on one of the greatest achievements in legal civilization.

However, even if critics are noisy, loud, and organized at the moment, the free and open market system speaks volumes. As always, the international political order needs to adapt to the desires of successful entrepreneurs and profit-seeking individualism. The synergy effects of economic prosperity and peace through reciprocal individualism have been unmatched—no alternative is a serious contender. The contemporary international, political, and economic order will ultimately prevail because it actually works. But for the international economic order to function effectively, entrepreneurs need to trust each other. To facilitate trust in international cooperation and transnational commercial dealings, the surging commercial class demands both substantive protection and a neutral venue in which to redress their grievances. Accordingly, it is an absolute necessity to make informed decisions based on facts rather than myths.⁴⁷

A. Rejecting Gunboat Diplomacy and Diplomatic Protection: ISDS’s Role in Legal Civilization

Inflow of private capital in the form of foreign direct investment (FDI) is fundamental for the survival of most economies and is more generally an integral part of an increasingly interdependent world.⁴⁸ In other words, “[t]he

sanction illegitimate government conduct, such as arbitrary conduct or expropriations without compensation, without needing to be subject to the vagaries of litigating against the host government in its own courts. In addition, direct recourse to ISDS replaces the otherwise available mechanism for the investor’s home state to exercise diplomatic protection, thus preventing an investor-state dispute from becoming a diplomatic incident that can strain inter-governmental relations.”) [referring to O. Thomas Johnson and Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, Y.B. ON INT’L INV. L. & POL’Y 649 (2010–2011)].

⁴⁷ Alvarez et al., *supra* note 3, at 41.

⁴⁸ FDI was slow before and after the world wars until the 1990s where an outburst of FDI was seen. Following that, IIAs came about. Naturally, these came to include ISDS clauses. See DOLZER & SCHREUER, *supra* note 18, at 1. FDI constitutes 38% of global GDP. See CCIAG, *supra* note 10, at 1 [referring to Regional Fact Sheet: Developed Economies,

inflow of capital is essential for the growth of the economy, the provision of infrastructure, and continued economic development in the receiving country.”⁴⁹ Self-interest in profit has the potential to put bias, suspicion, hate, and fear to a secondary role by instead elevating profits to a primary positioning. This positioning gets firmly entrenched only where there is a legal framework competent to handle disputes in an orderly fashion. IIA allows the surging commercial class to take risks in seeking profits without being overly cautious of, *inter alia*, political and legal barriers. For example, IIAs with ISDS clauses help redress grievances of investors for possible breaches of their investments because of, for example, unforeseen, unreasonable, or unjustified regulatory changes rendering the investment worthless.⁵⁰ In this context, international arbitration has “made global business possible between Western parties and emerging States and countries that embrace different ideological and legal traditions.”⁵¹ In order to maintain the benefits of FDI—e.g., global economic growth and public welfare—“governments need to take proactive steps to cultivate an environment conducive to foreign investment, including ensuring access to neutral, independent dispute settlement procedures.”⁵²

For those reasons, investors enjoy substantive protection for their investments. Thus, international investment law offered through a system of and a push for IIAs—with the procedural venue for redress through ISDS—is a perfect manifestation of accommodating political concerns and doing justice to reasonable policy objectives in a globalized world.⁵³ It is a move away from a state-centric approach and a push for international intercourse through private ordering. Interdependence among culturally, politically, legally, and economically different nations was once a distant dream. With the invent of reliable cross-border protection, the dream became reality. This movement towards multilateralism—i.e., a new international economic order based on liberal capitalism—has elaborated a form of artificial trust in cross-

UNCTAD *World Investment Report* (2019). https://unctad.org/Sections/dite_dir/docs/WIR2019/wir19_fs_dvd_en.pdf.

⁴⁹ CCIAG, *supra* note 10, at 1.

⁵⁰ This does not mean any unforeseen change, the criteria to satisfy indirect expropriation or fair and equitable treatment is rather rigorous. However, as a reasonable addition to the contemporary practice of ISDS adjudication, arbitrators could strengthen the role of balancing or proportionality tests in ISDS practice. For brief remarks on this point, see Brower & Schill, *supra* note 23, at 484. For lengthy analysis of its current and future use in ISDS adjudication, see Gebhard Bücheler, *Investor-State Arbitration and the Argentine Cases*, PROPORTIONALITY INVESTOR-STATE ARB. 6 (2015) and Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*, ELGAR INT’L INV. L. SERIES (2018).

⁵¹ Carbonneau, *supra* note 19, at 108.

⁵² CCIAG, *supra* note 10, at 1.

⁵³ International investment law “consists of layers of general law, of general standards of international economic law, and of distinct rules peculiar to its domain.” DOLZER & SCHREUER, *supra* note 18, at 1.

border bargains. Confidence in the future conduct of the contracting parties lies at the heart of every investment decision, and reliable dispute settlement facilitates the exchange of mutual trust.⁵⁴ Cross-border cooperation, in turn, leads to integration of markets and the limited role and need for states to appear as “peace brokers.” Because global merchants can remedy investment disputes in a neutral forum, a transnational rule of law has developed and is protected by independent and impartial arbiters.⁵⁵

Thus, IIAs with ISDS, like international commercial arbitration, has helped transcend nationalism, populism, idiosyncrasy, and parochialism in international business. It allows parties to opt for a neutral dispute resolution forum of which the product is final, binding, and directly enforceable. Chief Justice Menon described this well, namely:

The rise in transnational contractual arrangements inevitably spawned a corresponding increase in disputes between parties from different jurisdictions and this gave rise to calls for a dispute resolution system that had at least two primary characteristics. First, there had to be a neutral forum for the resolution of disputes, so as to minimise the concern that disputes would be resolved in the unfamiliar judicial and legal terrain of a foreign land. Second, decisions had to be clothed with cross-border enforceability.⁵⁶

International arbitration provides market participants with a workable international adjudicatory system that provides for reasonable fairness, relative uniformity, some clarity, and sufficient foreseeability. As a result, international arbitration facilitates a reliable and robust global legal order. Incidentally, this FDI-friendly framework is also stimulating economic cooperation and economic growth. Private justice has by all standards represented a success in the spirit of and tailored to the free and open market system.

Much of the remedial success *vis-à-vis* ICA was eventually sought after when dealing with sovereign states. Due to the nature of ISDS, this was not an easy or straightforward task. Professor Hobér eloquently noted that:

It goes without saying that many problems and issues in State

⁵⁴ See DOLZER & SCHREUER, *supra* note 18, at 6.

⁵⁵ Because the standing of arbitrators has been challenged (primarily by the EU in the ICS proposal), it is important to point out that there is no evidence to prove that the current international arbitration framework is not able to manage arbitrator ethics and professional responsibility (e.g., through rigorous disclosure mechanisms). Moreover, the arbitral community keeps checks and balances on each other by internal and external scrutiny and possible reputational damage. See Brower, *supra* note 16, at 317 (“Assuming that party-appointed arbitrators act strategically and think long-term about their own professional welfare, one would expect them to avoid behavior that might imperil the continuation of investor-state arbitration as an institution. For this reason, party-appointed arbitrators have a vested, strategic, and long-term interest in *not* acting like politicians.”).

⁵⁶ Menon, *supra* note 12, at 23-24.

arbitrations are similar to those that arise in private commercial arbitration. On the other hand, it is equally clear that arbitrations involving States do present certain distinctive features, primarily as a result of the *simple fact* that one of the parties is a State, or a State entity, rather than a commercial enterprise.⁵⁷

However, ISDS or ITA did subsequently reconcile sovereign dignity with private commercial realities by providing investors and states with a neutral venue in which to achieve transactional fairness and accountability.⁵⁸ In exchange for a workable dispute settlement regime, states are requested to reassess and redraw the function of their courts with respect to enforcing arbitral agreements and arbitral awards. States are also requested to reconsider the notion of sovereignty during the procedure and at the front- and back-ends. Professor Carbonneau noted that:

Sovereignty can no longer be a cloak under which the selfish misdeeds of the state are sheltered. In the transborder trade context, states are fully accountable for their conduct, even their regulatory conduct, when sovereignty falsifies the unimpeded exchange of goods and services. The accountability of state governments for the impact of their conduct upon international trade is nothing less than an enabling revolution for the advocates of international unity, harmony, and progress.⁵⁹

It is expected that municipal courts abjure some fundamental values that govern their legal systems in order to opt into this great remedial success and strengthen the national legitimacy of ISDS. International arbitration has been reasonable in its means and magical in its ends. The success is undeniable.

Furthermore, the fact that the system is very attractive to foreign investors as compared to other forms of international adjudication is unquestionable. The adjudicatory systems of ICA and ISDS/ITA have contributed to legal civilization in an unparalleled manner. ISDS provided the rising global merchants with access to justice through a transnational and reliable dispute resolution mechanism. It has been said that:

One of the most novel and exciting elements of the recent advent of international investment arbitration is that international law has become accessible in a manner never before available to investors. As international law has traditionally been a state-to-state activity, espousal of the claims of nationals by states was previously the only means by which an individual or legal person could receive some form of international justice. The foundation principle of international law has been that states, and not private parties, or individuals, are the

⁵⁷ KAJ HOBÉR, *SELECTED WRITINGS ON INVESTMENT TREATY ARBITRATION* 17 (2013).

⁵⁸ THOMAS E. CARBONNEAU, *ARBITRATION LAW IN A NUTSHELL* 339-40 (2017) [hereinafter CARBONNEAU, *ARBITRATION LAW*].

⁵⁹ Carbonneau, *supra* note 19, at 66.

subject of international law. International investment instruments, such as Bilateral Investment Treaties (BITs) and the ICSID Convention, have effectively turned this fundamental element of international law on its head.⁶⁰

However, “sovereignty nonetheless remains an obdurate obstacle to adjudicatory civilization.”⁶¹ The backlash against ISDS seems to start and end here.⁶² What is forgotten in the debate is that states have renounced elements of their sovereignty for economic gain and following careful political considerations; in other words, there is a *quid pro quo* where sovereignty gives in for the need to attract FDI.⁶³

Moreover, as explained by Chief Justice Menon, the evolution of ISDS was “[i]n keeping with the postwar abhorrence of war and the use of force, states moved away from ‘gunboat diplomacy’ in economic relations, seeking instead multilateral international agreements for the protection of the private rights of their nationals.”⁶⁴ This was true then and is true now. Investors no longer have to rely on diplomatic protection or state-to-state arbitration and gunboat diplomacy is put to rest as an ancient bad practice.⁶⁵ In fact, because ISDS limits political discretion and avoids internal political dispute methods, it works to promote the rule of law.⁶⁶

⁶⁰ Alan S. Alexandroff & Ian A. Laird, *Compliance and Enforcement*, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1172 (2008). See also Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 188, 198 (1995) (“From the legal point of view the most striking feature of the [ICSID] Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a state in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.”).

⁶¹ Thomas E. Carbonneau, *The U.S. Law of Arbitration: From 1925 to 2019*, KLUWER ARB. BLOG (Nov. 17, 2019) <http://arbitrationblog.kluwerarbitration.com/2019/11/17/the-u-s-law-of-arbitration-from-1925-to-2019/?print=print>; See also Alvarez et al., *supra* note 3, at 4 (“[R]adical critics see it as a ‘Trojan horse’ enhancing the power of US companies at the expense of national sovereignty and interests.”).

⁶² See more on the backlash against ISDS in Part IV.

⁶³ DOLZER & SCHREUER, *supra* note 18, at 20 (“In an investment treaty, the host state deliberately renounces an element of its sovereignty in return for a certain new opportunity: the chance to better attract new foreign investments which it would not have acquired in the absence of a treaty. It is true that this *quid pro quo* underlying the policy choice on the part of the host state is based on a policy judgment the nature of which escapes precise evaluation. It is based upon assumptions about the effect of the treaty which are objectively uncertain.”).

⁶⁴ Menon, *supra* note 12, at 28.

⁶⁵ Recently we have seen a disturbing folding of events in Libya that calls this assumption into question. See Part III.B.

⁶⁶ Menon, *supra* note 12, at 29 (referring to Charles Brower & Sadie Blanchard, *What’s in a Meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, 52 COLUMB. J. TRANSNAT’L L. 689, 757 (2014). See also Schill, *Reforming*, *supra* note 3, at 1 (“Recourse to international arbitration has been celebrated as depoliticizing investment disputes and contributing to enhancing the rule of law in investor-state relations.”).

I would add that ISDS furthers public accountability and therefore contributes to a heightened democratic standing. Finally, IIAs protect the intrinsic human right of owning property without arbitrary interference of such. We should embrace post-WWII and Cold War virtues of liberal capitalism and move on from utopian ideals to once again increase the currency of practical experience.

B. Calvo Doctrine 2.0

Prior to the emergence of the Calvo doctrine, the international community had achieved consensus on domestic protection schemes; these were meant to sufficiently guarantee protection to foreign investors.⁶⁷ However, the idea of preferential treatment in exchange for an inflow of FDI was not praised by all. The now infamous “Calvo Doctrine” was first published in 1868 by the Argentine jurist Carlos Calvo in which he “for the first time presented a new perspective of this paradigm and asserted that the international rule should in effect be understood as allowing the host state to reduce the protection of alien property whilst also reducing the guarantees for property held by nationals.”⁶⁸ Additionally, the Calvo doctrine was based on the view that foreign investors should remedy any grievances in national courts and that there should be no access to international tribunals nor diplomatic protection.⁶⁹ The central ethos of the Calvo doctrine is (a) the removal of IIAs, and (b) no ISDS procedures available for foreign investors.

Not so surprisingly, the ethos of the doctrine was revived “in a dramatic fashion after the Russian revolution in 1917.”⁷⁰ It then faded again together with the reception of liberal democratic values and the endorsing of a free and open market system. For some time, ideas that transcended socialism, nationalism, protectionism, parochialism, and idiosyncrasy were strenuously praised, and any alternative was emphatically debunked and rejected. Then, again, there was a call for “New International Economic Order” that was to *inter alia* get rid of rules protecting property by international law.⁷¹ This phase lasted from the mid 1970s until around 1990 when it “became clear that, together with the end of the Soviet Union, the Socialist view of property had collapsed and that the call for economic independence had brought a major financial crisis, rather than more welfare upon the people of [at that time] Latin America.”⁷² As a result, these states “started to conclude [BITs] the spirit of which was at odds Calvo doctrine, and the annual calls for ‘Permanent Sovereignty’ in the UN General Assembly came to an end.”⁷³

⁶⁷ DOLZER & SCHREUER, *supra* note 18, at 1.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *Id.*

⁷¹ Brower & Schill, *supra* note 23, at 496.

⁷² DOLZER & SCHREUER, *supra* note 18, at 5.

⁷³ *Id.*

The now debunked and rejected Calvo doctrine was actually developed “against the background of gunboat diplomacy” and “other practices through which [Western] countries imposed their view of international law on foreign governments.”⁷⁴ Similar criticism is today leveled against capital-exporting states and labeled a new form of hegemony. Critics make the point that IIAs and ISDS are tilted too much in favor of foreign investors and undercut public interest and sovereign prerogatives. Some criticism deserves attention and should be assessed and addressed properly in light of a post-decolonization landscape.⁷⁵ This doctrine—and hence the justification for it—faded away by intensified multilateral cooperation and economic interdependence through cross-border cooperation.⁷⁶

Today, in the 21st century, the pendulum is swinging back, and we are witnessing the toxic and cyclical ethos of the Calvo doctrine reemerge. Again, the doctrine makes its proponents believe in misinformed sovereign-centered “virtues” that have—as described above—never stood the test of time. For example, in Latin America, we now see a reemerging turmoil, including redefining IIAs, total withdrawal of IIAs, as well as abandonment of the ISDS regime altogether.⁷⁷ Critics strenuously argue that there is a fallacy that ISDS positively impact investment flows and focus instead on their perceived fact that host states “see these clauses as an obstacle to environmental and social policies that will be challenged in front of arbitrators rather than courts.”⁷⁸

It is argued that the ethos of the Calvo doctrine is underpinned by a “Marxist analysis of international law and [that this mental representation] views international investment law as an attempt by developed countries to impose their power on weaker, developing countries.”⁷⁹ This backlash from a minority of countries should better be understood as a result of their internal

⁷⁴ *Id. at 2.*

⁷⁵ In addition to serious reform proposals, such as increased transparency or ethical standards, look at the work by TWAIL scholars and voices from the Global South. *See, e.g.*, “International Law and the Global South – Perspectives from the Rest of the World”; *e.g.*, Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration*, INTERNATIONAL LAW AND THE GLOBAL SOUTH (2018); Leila Choukroune, *Judging the State in International Trade and Investment Law Sovereignty Modern, the Law and the Economics*, INTERNATIONAL LAW AND THE GLOBAL SOUTH 1–8 (2016). However, much of this criticism is also cyclical and there was already in the 1970s a call for a “New International Economic Order” that would *inter alia* get rid of rules protecting against expropriation.

⁷⁶ *See, e.g.* DOLZER & SCHREUER, *supra* note 18, at 2 (“In 1907, the Drago-Porter Convention was adopted to prevent the use of force for the collection of debt, and Calvo’s radical attack on the protection of foreign citizens lost some of its justification.”).

⁷⁷ For example, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention. Some states have withdrawn from many IIAs or all of them, *e.g.*, South Africa, India, Venezuela, Indonesia, etc. *See* Brower & Blanchard, *supra* note 5, at 46.

⁷⁸ Gallo & Nicola, *supra* note 5, at 1086.

⁷⁹ Brower & Schill, *supra* note 23, at 474.

political situation rather than a lack of legitimacy of IIAs and ISDS.⁸⁰ The unsubstantiated sentiments of the architects behind the “New International Economic Order” may once again be emerging, but this time the Marxist analysis is accompanied by the power of state capitalism (most predominantly China but also the capital-exporting Gulf States and other BRICS countries). It is not an easy task to attack the critics’ analysis on economic grounds alone. Thus, we must now add and emphatically underscore philosophical preferences and the gravamen of liberal capitalism.

Additionally, one recent turn of events should cause a great deal of concern in the international law community, namely, Turkey’s military engagement in Libya (*see below*). The critics—i.e., social engineers with neo-Marxism policy objectives—are now paving the way for a “legitimacy war” on ISDS. They coin the battle of ideas as “a time of backlash.” Once again, critics and ideologues are making the case that there is a deficit in equality because domestic investors are not treated in the same manner as foreign investors.⁸¹ The Calvo doctrine seems to have reemerged as a serious lens through which to analyze IIAs and ISDS.

C. *Turkey and Libya: Full Protection and Security or (Gunboat) Diplomacy?*

Several ISDS procedures have been brought against Libya following its *two* civil wars. Hundreds of infrastructure projects were initiated in Libya, a large portion of which came from the Turkish construction industry.⁸² More specifically, in February 2011, “there were an estimated 100 construction firms from Turkey operating in Libya, with over 270 unfinished projects worth an estimated 28 billion US dollars (USD).”⁸³ In the first civil war, many Turkish investments were suspended. However, some projects were reinitiated subsequent to the first civil war when the newly formed government gave signals of economic and political recovery (between 2012 and 2014); this temporary improvement took yet another turn with the second civil war (triggered on May 16, 2014).⁸⁴ As a result, in the aftermath of Libya’s failure to offer *inter alia* full protection and security, many investors

⁸⁰ *Id.* at 496.

⁸¹ Schill, *Reforming*, *supra* note 3, at 3 (“ISDS also poses a problem for the principle of equality, which is part of the democratic principle, because it only grants standing to foreign investors, while denying access to domestic investors who are limited to accessing domestic courts.”).

⁸² *See* Ana Maria Daza-Clark & Daniel Behn, *Between War and Peace: Intermittent Armed Conflict and Investment Arbitration*, INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 43, 47 (2019). *See also* footnote 11 listing some major Turkish construction firms with large infrastructure projects in Libya, e.g., “some of the major Turkish construction firms with large projects in Libya include: Güriş İnşaat, Rönesans İnşaat, Summa İnşaat, Cengiz İnşaat, Enka İnşaat, Tekfen İnşaat, Ustay İnşaat, TAV İnşaat, Ertak İnşaat, and Nurol İnşaat.”

⁸³ *Id.*

⁸⁴ *Id.* at 48.

turned to ISDS in order to remedy their grievances.⁸⁵

Very recently, things have taken an unexpected turn; that is, Turkey decided to support the internationally-backed Libyan government through military support—and has even promised engagement if necessary.⁸⁶ Apart from any possible political stand-off or geopolitical positioning, it has been described by Turkish officials as an aim “to salvage billions of dollars of business contracts thrown into limbo by the conflict and secure more leverage in the scramble for oil and gas in the Mediterranean.”⁸⁷ Turkish officials suggest the main goal is to ensure that the construction projects will eventually be resumed—the projects are worth approximately \$18 billion.⁸⁸ Turkish companies have, for example, abandoned equipment such as bulldozers and cranes. There are plenty of costly construction projects to be resumed—including hospitals, shopping malls, and five-star hotels.⁸⁹

If Turkey did indeed deploy troops in Libya to secure a favorable investment climate for its many investors or to recoup lost profits through diplomatic pressure, Turkey may have turned the tides on the evolution of international investment law and ISDS by re-inviting a new era of gunboat diplomacy or informal diplomatic protection. This could be one of many manifestations of the unintended consequences of the contemporary, misinformed backlash debate.⁹⁰ These turn-outs must be monitored carefully, and IIA protection through ISDS procedures should be strenuously praised as a great invention in legal civilization. IIAs with ISDS clauses depoliticize investment disputes and establish a favorable jurisdiction for FDI.

IV. DOES ISDS HAVE A FUTURE?

States have been inconsistent on matters of international trade and

⁸⁵ *Id.* at 49 (“Thus, there are currently at least 11 pending treaty-based arbitrations under four different IIAs that all relate to disputes that arose following the first Libyan Civil War.”). See also footnote 23 listing the cases (Nurul İnşaat II v. Libya, ICC (2017), pending; Nurul İnşaat I v. Libya, ICC (2017), discontinued; Ustay İnşaat v. Libya, ICC (2017), pending; Tekfen İnşaat I v. Libya, ICC (2016), pending; Güriş İnşaat v. Libya, ICC (2016), pending; Cengiz İnşaat v. Libya, ICC (2016), pending; Turkish Investor v. Libya, ICC (2016), pending; Etrak v. Libya, ICC (2015), pending; South Korean Investor v. Libya, UNCITRAL (2016), pending; German Investor v. Libya, ICC (2016), pending; DS Construction v. Libya, ICC (2016), pending.). Additionally, there is a debate on whether there were two civil wars or one continuing. It is a matter of controversy that I do not entertain here because it is outside the scope of this paper.

⁸⁶ Carlotta Gall, *Erdogan Announces First Turkish Troops Are Heading to Libya*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/world/europe/erdogan-turkish-troops-libya.html>.

⁸⁷ Selcan Hacaoglu, *In Battle for Tripoli, Turkey Has Billions in Projects at Stake*, BLOOMBERG.COM (July 8, 2019, 12:00 AM), <https://www.bloomberg.com/news/articles/2019-07-08/in-battle-for-tripoli-turkey-has-billions-in-projects-at-stake>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Another is Latin American countries seeking to (a) redefine IIAs or withdrawal from such, or (b) abandoning the ISDS regime altogether.

investment—shifting between protectionism to extremely favorable conditions. “These shifts in position often depend on how the internal political climate of that country meshes with the world-wide economic climate.”⁹¹ And at the moment “we are seeing more turmoil and dissonance on trade than anytime since World War Two.”⁹² For example, recently, some Latin American countries have again rebelled against IIAs and ISDS.⁹³ Some Latin American states have either refused to comply with the framework of ISDS in general, or withdrawn from ICSID in particular, believing it to be a source of Western oppression and economic imperialism.⁹⁴ These states often oppose IIAs or the interpretation of such.

For ISDS to fulfill its destiny and deliver on its promise, an exchange between states must take place. States must refrain from invoking ancient notions of “sovereignty” when acting in the international economic sphere. States should unequivocally respect and honor consensual agreements to arbitrate. Voluntary compliance is the norm for a rule of law and not an ad hoc gesture of comity. Rogue actors should not be allowed to upset, disrupt, or, worse, dismantle a transnational rule of law. However, the problems looming in the horizon are far worse than isolated rogue states seeking to circumvent compliance. European Union overreach and the surge in populist and nationalist regimes combined with socialist-friendly movements have led to a backlash to ISDS. In other words, the ITA “universe is not shielded from the trend towards nationalism and protectionism currently sweeping many parts of the world.”⁹⁵ “It is in this politically, economically[,] and legally very complex environment in which the current investment policy debate is taking place in Europe.”⁹⁶

We must underscore the workability and reasonable fairness and justice

⁹¹ WILLIAM F. FOX, *INTERNATIONAL COMMERCIAL AGREEMENTS AND ELECTRONIC COMMERCE* § 1.1 (6th ed. 2018).

⁹² *Id.*

⁹³ *See supra* Part III.A.

⁹⁴ *See* CARBONNEAU, *ARBITRATION LAW*, *supra* note 58, at 340. For example, “Venezuela, Bolivia, and Ecuador have withdrawn from ICSID or have reduced the scope of their consent to ICSID arbitration.” Some states have withdrawn from many IIAs or all of them, e.g., South Africa, India, Venezuela, Indonesia. Brower & Blanchard, *supra* note 5, at 46.

⁹⁵ KAJ HOBÉR & JOEL DAHLQUIST CULLBORG, *INVESTMENT TREATY ARBITRATION: PROBLEMS AND EXERCISES* 14 (2018). *See also* CCIAG, *supra* note 10, at 2 (“However, given increasing geopolitical volatility and the general perception of increased risks of cross-border investment, global FDI flows have seen little growth over the last decade. [...] In this environment, it is more important than ever that states take steps to promote and facilitate foreign investment. Among the most important of these is the development of stable and transparent reinvestment regimes protected by access to effective ISDS mechanisms. Numerous multilateral institutions have recognized that access to impartial third-party dispute settlement is one of the key characteristics of a positive investment climate, along with such factors as open competition, predictability, rule of law, lack of corruption, and stability. It is one of the major factors considered by ratings and assessment mechanisms, including the World Bank Group’s Ease of Doing Business Index.”).

⁹⁶ Alvarez et al., *supra* note 3, at 41.

delivered by the transnational regime of ISDS. Trust and confidence in reasonableness must once again receive a heightened standing and increased currency. ISDS has been a huge success, period. However, despite the unparalleled success in adjudicating investor-state disputes, critical voices have been loud in repeatedly demanding several reforms and, eventually, a total transformation of the regime. These voices have primarily anchored ISDS criticism in the fact that the respondents in ISDS procedures are always states, and, therefore, there are external stakeholders to the procedure whose interests should be taken into account. In the words of Professor Schill, the ISDS community should perhaps move from considering legitimacy as a “monodimensional concept” towards a “multidimensional concept of legitimacy[.]”⁹⁷ In this multidimensional representation of ISDS, the regime takes into consideration “‘community legitimacy,’ ‘national legitimacy.’ and ‘global legitimacy’”; that is, not only—or primarily—focusing on “party legitimacy.”⁹⁸

With all due respect, before entertaining that debate, which is meritorious *per se*, we should ask: why seek legitimacy through the lens of a “mono-dimensional” conceptualization?⁹⁹ And, if we do, how should we understand each sub-area of legitimacy from a hierarchical point of view? When we answer these questions, we then need to ask ourselves: why should private parties be held accountable to one standard and states to another? Should private enterprises arbitrating against each other also take into account the effects and consequences on third parties (e.g., workers)? In other words, should ICA also move towards a (re)conceptualization of its internal and external legitimacy to account for stakeholders beyond the dyadic structure of the private adjudicatory mechanism? With the logic of ISDS critics, I can see no other answer than yes, unless the difference is justified by the fact that one party is a sovereign state. And if that is the underlying rationale, we have turned our back on years of legal evolution to make states legally accountable when acting in a private capacity. At the end of the day, if we start from the only serious premise that international arbitration is one of the greatest achievements in legal civilization, then we should, as a corollary, refuse to entertain any reform proposal that “would alter any of the fundamental elements of international arbitration.”¹⁰⁰

No matter the exact form ISDS is to have in the future; whether reforms will be significant or modest; whether a total transformation is under way; there is no denying that there has been a demand for the legal framework among active cross-border investors. This is evidenced by the virtual

⁹⁷ Schill, *Conceptions*, *supra* note 3, at 117-22.

⁹⁸ *Id.* at 119-22.

⁹⁹ *Id.*

¹⁰⁰ See Charles N. Brower, Michael Pulos & Charles B. Rosenberg, *So Is There Anything Really Wrong with International Arbitration As We Know It?*, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2012 1, 7 (2013).

explosion of ISDS in the last 15-20 years.¹⁰¹ The explosion is a direct result of the investor's desire for and trust in a neutral and workable dispute settlement mechanism, on the one hand, and a host state's desire to promote and attract FDI, on the other.

Finally, and most importantly, it is argued that the critics of ISDS have failed to appreciate the essential elements of arbitration.¹⁰² The premises of the "backlash debate" are often flawed, half-cooked, and misinformed. As an unfortunate result, there has been an unjustified move to reform the ISDS to address these poorly-premised criticisms, which allegedly identify a deficit of democracy,¹⁰³ of the rule of law, and of human rights. As will be demonstrated below, this criticism misses the purpose and objectives of ISDS in favor of supposed adjudicatory virtues found in national court systems and international judicial bodies—what critics indirectly consider to be legitimate legal institutions. The truth is that ISDS furthers democracy, generally, and the rule of law, in particular. ISDS is undemocratic only if democracy is understood to mean political influence of host states in the regime.

Despite the criticism and "signs of a backlash, [ISDS] remains the best available method for the protection of private investments from the acts of a foreign host state."¹⁰⁴ Anyone that attacks ISDS must make a much more compelling case than thus far presented. Most of the criticism has been broadly sweeping and unsubstantiated. The fact is that "[a]rbitrators not only achieve efficient and effective dispute settlement, but they also, through their independent and impartial application of the governing law, foster the international rule of law and an investment-friendly environment."¹⁰⁵

A. Backlash Against ISDS and the Quest for Legitimacy

The nature of transnational justice, in general, and of international investment law and ISDS, in particular, is such that the distinction between international and domestic law, on the one hand, and between public law and private law, on the other, at times becomes blurred and hard to accommodate

¹⁰¹ HOBÉR & CULLBORG, *supra* note 95, at 9.

¹⁰² A caveat could be added here, namely, that the contemporary ISDS regime already constitutes part of a quasi-institutional international arbitration order. These actors (essential actors, service providers, and value providers) already engage in several rituals to make the system perform and where necessary, reform. See Gaillard, *Sociology*, *supra* note 4, at 189 ("There is no doubt that the international arbitration world possesses all the key features of a 'recognized area of institutional life' with a constellation of actors performing various roles and functions such as key suppliers, consumers, regulatory agents, and organizations, all of which share a 'common meaning system' and interact more frequently with one another than with other social agents.").

¹⁰³ Brower, *supra* note 16, at 286-87 (Critics are "[c]oncerned by the threat that it poses to their political preferences, stakeholders have articulated narratives that portray investment treaty arbitration as a menace to the public interest, to democracy, to sovereignty, and even to the constitutional order in host states.").

¹⁰⁴ Menon, *supra* note 12, at 35.

¹⁰⁵ Brower & Schill, *supra* note 23, at 497.

in neat categories.¹⁰⁶ That said, it is unequivocally the case that IIAs and ISDS “do not cast the interest and benefits of the host state and of the investor in an antithetic mode”; rather, the “motivation underlying such treaties [and the nature of the ISDS procedure] assume that the parties share a joint purpose.”¹⁰⁷ Much of the backlash debate has been justified in half-cooked criticism that cannot be verified, and, as a result, many of the reform proposals lack fiscal rationale and sound commercial sense. Despite the faulty reasoning behind the backlash, the consequences are real: countries are leaving the ICSID system or the ISDS regime altogether.¹⁰⁸

But before entertaining a backlash debate, one needs to conceptualize “legitimacy” in the context of ISDS. At the outset, it should be said that legitimacy is a concern for the defenders of ISDS as much as for the critics, but their conceptualizations differ.¹⁰⁹ A major concern with the contemporary debate is that critics have been allowed to form their own conception of legitimacy and then employ that conception as the “standard against which to measure the acceptability of international arbitration.”¹¹⁰ As Professor Schill rightly noted, “the concept of legitimacy is used pervasively in international arbitration,” and he further added that “it animates the abstract debates about the theory, philosophy, and idea of arbitration, and informs practical, present-day controversies.”¹¹¹ In this analysis, he rightly underscores that the debate is anchored in the mental representation of international arbitration. I use the definition adopted by Judge Brower and Professor Schill in a paper published 2009 as a working definition; that is, legitimacy is used to mean the “acceptance of ‘a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.’”¹¹²

Now to the debate. The vocal critics are not seeking to perfect the interpretation of a clause in a particular IIA or to improve the procedural integrity and efficiency of ISDS. Rather, their goal is to question the very core features of international investment law and of international arbitration. I argue that the “legitimacy crisis” is a subjectively-defined marketing strategy that is aimed at capturing the narrative of the ISDS regime, in

¹⁰⁶ See DOLZER & SCHREUER, *supra* note 18, at 3.

¹⁰⁷ *Id.* at 23.

¹⁰⁸ Schill, *Reforming*, *supra* note 3, at 1 (“In reaction to [the legitimacy] concerns, ISDS is facing a considerable backlash, including the retreat of some countries from the existing system, the recalibration of substantive investment disciplines, and debates about ways to reform it at the national, regional, and international levels.”).

¹⁰⁹ *Id.* at 108.

¹¹⁰ *Id.* at 106.

¹¹¹ *Id.* at 106.

¹¹² Brower & Schill, *supra* note 23, at 471 (citing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)).

general, and at deciding on the premises of what makes it legitimate, in particular.¹¹³ It calls to mind much about the infamous strategy of coining a negative attribute to a serious contender, such as “lying Ted,” “crooked Hilary,” “little Marco,” etc. It is inherently unfair, based on myths, and has no basis in reality whatsoever. Though there may be room for improvement or scope to discuss personal preferences or best practices, ISDS has no real legitimacy crisis.

The inherently-subjective and perpetually-unresolved nature of the legitimacy debate derives from a focus on how to respond to the legitimacy criticism from selectively-chosen standards of justice, fairness, and adherence to constitutional values. The primary focus should be trained on ISDS as a mechanism to settle individual, private disputes. Professor Schill is of the opinion that “[i]n order to remedy this shortcoming, a multidimensional concept of legitimacy that encompasses not only ‘party legitimacy’ but also ‘community legitimacy’,¹¹⁴ ‘national legitimacy’, and ‘global legitimacy’¹¹⁵ should be adopted.”¹¹⁶ Professor Schill wrote that:

All of these concerns ultimately involve the issue of whether international arbitration as an institution exercises its transnational authority in a way that can deliver fairness and justice for all stakeholders involved, and hence is in line with the fundamental values not only of disputing parties or the communities of users of arbitration, but of society as a whole.¹¹⁷

¹¹³ I do not mean that there could be no measures from which to assess legitimacy. My point is merely that there is no agreement on any such measures. See Schill, *Conceptions*, *supra* note 3, at 108 (“Beyond the idea that legitimacy requires some sort of social acceptance of the institution of international arbitration, of the procedures it follows, and the results it produces, there is little agreement on what legitimacy actually means and whose views on legitimacy count.”).

¹¹⁴ “Community legitimacy” was described by Professor Schill as “also includ[ing] questions of arbitrator independence and party equality, questions of fairness in arbitral procedure, and reasoning of arbitral awards that is adequate in order for the users of arbitration to build up normative expectations about the functioning of international arbitration.” Schill, *Conceptions*, *supra* note 3, at 119. It would be hard to deny that the current ISDS regime satisfies any reasonable demand for community legitimacy.

¹¹⁵ “Global legitimacy” was described by Professor Schill as “the conditions under which arbitration is seen as legitimate from the perspective of global society and its interests. This conception is broader than ‘community legitimacy’ because it refers to all actors worldwide, whether users of arbitration or not, that are affected by international arbitration.” Schill, *Conceptions*, *supra* note 3, at 121. For a very good account of the civil society participation in ISDS, see FAROUK EL-HOSSENY, *CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS* (2018).

¹¹⁶ Schill, *Conceptions*, *supra* note 3, at 109 (“Beyond the idea that legitimacy requires some sort of social acceptance of the institution of international arbitration, of the procedures it follows, and the results it produces, there is little agreement on what legitimacy actually means and whose views on legitimacy count.”).

¹¹⁷ *Id.* at 112.

The ISDS-reform debate should indeed include a thorough discussion on constitutional values such as democracy, the rule of law, and fundamental human rights.¹¹⁸ In fact, it already does, and ISDS has been reformed to reflect such values in conjunction with—but without disturbing—the underlying features of international arbitration. The current regime does indeed take into account more aspects than party autonomy and any other hallmark of international arbitration. Most jurisdictions validate international arbitration through both multilateral treaties (e.g., the New York Convention and the ICSID Convention) and domestic pro-arbitration legislation (often modelled after the UNCITRAL Model Law). In pro-arbitration jurisdictions, national courts refrain from interfering in the procedure and generally do enforce the arbitration agreement (at the front-end), refrain from intervening unnecessarily (during the arbitration), and enforce the arbitral award (at the back-end). The ISDS regime carefully considers party legitimacy, community legitimacy, and national legitimacy. Thus, the critics of ISDS will put an extra emphasis on global legitimacy. Another reason for critics' focus on global legitimacy is that party, community, and national legitimacy are more specific, and, as a result, an honest analysis and discussion can take place. It is much easier to make sweeping allegations on the basis of “the principle of legality and accountability governing the conduct of public bodies,” on the one hand, and the global dimension (i.e., considering the perspective of the global society and its interests) of ISDS, on the other.¹¹⁹ There must be a balancing exercise of workability and the illusion of adjudicatory perfection. The idea of ISDS as a forum of global governance would require a different constitution of its empires and a total transformation in its architectural structure. ISDS is not an institution of global governance, even though its outcomes may have a great impact on governance.¹²⁰

More fundamentally, why should one accept the underlying premise that ISDS should “deliver fairness and justice to all stakeholders involved”? And if one does, which may be—and is according to the author—reasonable,

¹¹⁸ See *id.* at 1 (“Responses to this criticism, in turn, should be framed within the same value system, that is, by reference to constitutional principles that are globally shared, including principles of UN constitutional law and the concept of sustainable development.”). It is true that the proponents of contemporary ISDS should explain why ISDS actually furthers democracy, the rule of law, and public interests (e.g., human rights, labour standards, etc. through economic development and the spread of ideas of open-market economics and liberal democratic values). In fact, Professor Schill proposed that any reform proposal should consult the principles of UN and be done through a comparative constitutional law methodology. This would lead to a situation whereby the deficit of democratic input, rule of law, and the protection for fundamental rights would be enhanced; *Id.* at 4.

¹¹⁹ *Id.* at 121.

¹²⁰ E.g., challenges may involve public regulatory acts, relate to actions taken in times of political turmoil, affect the actions taken *vis-à-vis* natural resources, impact policy *vis-à-vis* the environment, touch upon taxation, fiscal regulation, procurement, etc. ISDS is not a forum of global governance merely because the disputes “often occur in highly politicized contexts, and can be seen as challenges to the normal operation of political processes of host states.” Brower, *supra* note 16, at 277-78.

why should the stakeholder be defined as broadly as by the critics? Why should a supposed lack of consistency trump the value of party autonomy? Why should the supposed lack of diversity trump the value of choosing your own expert? Why are permanent judges that are appointed by politicians and subject to re-election considered more impartial and independent than private arbitrators who are subjected to a robust disclosure regime, as well as pressure and scrutiny from their peers and the public?¹²¹

As illustrated, much can be said about the backlash in nuance, scope, and degree. However, the crux of the debate is both the ideological notion of “sovereignty” and spill-over sentiments from colonialism (i.e., hegemonical skepticism, that IIAs and ISDS are new forms of colonialism through maintaining market superiority).¹²² The backlash debate starts from false premises of what ISDS should be and whom it should serve. The debate fails to consider three fundamental features of the adjudicatory framework: (1) the “balance between the disputing parties”; (2) the “balance between consistency, correctness, and finality”; and (3) the “current system [of] enforceable awards.”¹²³

First, states are in a global competition for FDI and a “favorable”

¹²¹ Law is not the only means of regulating human behavior. Human behavior can also be regulated by social norms, the market, and architectural design. Arbitrators are constrained by rules of professional responsibility, but more so by public scrutiny, peer pressure, reputational stake, market demands, the architectural design of the ISDS (e.g., by arbitral institutions in the appointment procedure), etc. See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 501 HARV. L. REV. 501, 507 (1999).

¹²² See DOLZER & SCHREUER, *supra* note 18, at 14 (“The period between 1945 and 1990 saw major confrontations between the growing number of newly independent developing countries, on the one hand, and capital-exporting states, on the other, about the status of customary law governing foreign investment. These were often prompted by ideological positions, by an insistence on strict notions of sovereignty (“Permanent Sovereignty over Natural Resources”), and by the call for economic decolonization, supported by an economic doctrine calling for independence from centres of colonialism.”). See also Rudolph Dolzer, *Permanent Sovereignty over Natural Resources and Economic Decolonization*, 7 HUM. RTS. L. J. 217 (1986). See also Schill, *Conceptions*, *supra* note 3, at 113 (“The second challenge relates to the issue of whether arbitration is able to deliver fairness to all participants and is representative of the interests of all participants, or is a dispute settlement system dominated by Northern and Western actors and ideology, which disregards interests and values of developing and transitioning countries.”). Generally speaking, the critique that ISDS is dominated by Western ideology is not wrong. It is a manifestation of both globalization and the free and open market system. The crux of the matter is whether it is good or bad? One should not too readily reject the success as hegemonical or one-sided. It does not disregard the interest and values of developing and transitioning countries, but it may not yet resonate as well with these countries. There may be a reason apart from hegemony and bullying as to why some countries are considered developed and others are not. In fact, this debate is a bit problematic in today’s environment as state-capitalism (e.g., China and Saudi Arabia) has been a fiscal success, just as liberal-capitalism has been for quite some time. Finally, see also Schill, *Reforming*, *supra* note 3, at 1 (“[D]ifferent reform proposals often reflect different (political, ideological, or institutional) preferences that may not be globally shared.”).

¹²³ CCIAG, *supra* note 10, at 2-3.

investment regime serves the purpose of attracting investors.¹²⁴ Second, “the system was not designed to produce *absolute* consistency.”¹²⁵ This is very important because the debate often culminates in a false quest for adjudicatory perfection through aligning the ISDS regime with a loose and undefined notion of the “rule of law” and misses the need for functionality and workability. This is not to say that ISDS should not develop in accord with a strong notion of the rule of law—it always has. It just means that the performance of ISDS should first be defined and tested against the core features of international arbitration. In addition, the half-hearted mission for absolute consistency (which is impossible even with an appellate body) would significantly increase time and costs of the proceedings. In fact, ISDS furthers a global rule of law and manifests a new global legal order. Finally, international arbitration has been the preferred means of settling investment disputes partly because the enforcement of ISDS awards is a success story compared to other means of dispute settlement—e.g., mediation or enforcing foreign judgments.¹²⁶

I close this section by quoting Gary Born from a now rather famous panel speech he gave in 2016 where he addressed several clouds that are lurking on the horizon and the critics’ actual world-view and justifications for their critique:

The reality is that the critics of [ISDS] see it as a threat to their vision of the rule of law. In fact, they do not want a rule of law, what they want is state domination, just like the Napoleonic code, of all aspects of private life. They do not really want a TTIP investment chapter at all, they do not really want protections against expropriation, or denials of justice, or denials of fair and equitable treatment. They want states to be entirely free to do as they wish and take as they want. That

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 4.

¹²⁶ See, e.g., White & Case and Queen Mary School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration*, (2018), www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration. There is no comparable multilateral instrument for the enforcement of foreign judgments. However, for purposes of competition with arbitration, see the recent product of the Hague Conference (Twenty-Second Session), Final Act (July 2, 2019), on elaborating a treaty for the recognition and enforcement of judgments in civil or commercial matters. See also the recent Singapore Mediation Convention, i.e., United Nations Commission on International Trade Law, *United Nations Convention on International Settlement Agreements Resulting from Mediation* (2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf. For a good remark of one of the more prominent practitioners and scholars of international arbitration, see GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 73 (2d ed. 2009) (“While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts and as offering more workable opportunities for remedying or avoiding those ills which do exist.”). Enforcing ISDS awards happens primarily pursuant to the enforcement regime established by *New York Convention* or the *ICSID Convention*.

is not the rule of law, it is the opposite. In 1933, the height of Nazi-Germany's ascent to power, there was issued something called the Reich guidelines on arbitral tribunals—those guidelines provided that the institution of arbitration was a threat to the national socialist vision of state order. Those guidelines counseled that the state and state owned entities not conclude arbitration agreements because they undermined the state's ability to affect the rule of law in Nazi Germany. That is the vision unintentionally that the critics of TTIP embrace. That is not the vision that Germany accepted in the next 60 years, the Federal Supreme Court instead looked to the liberal constitution that followed WWII in affirming the right of citizens to arbitrate.¹²⁷

Gary Born is right in his observation. The actual vision of the critics was displayed in a report titled "Profiting From Injustice." In that report, the authors rhetorically ask whether anyone would "go to court with the devil if the court was in hell?"¹²⁸ With this mindset, it is hard to see how they would genuinely seek to improve ISDS rather than to eliminate it altogether.

B. Reform Proposals

1. Radical Reform Proposals: Investment Court System or an Appellate System?

In light of the supposed legitimacy deficit, two radical proposals have been suggested, namely, the proposed Investment Court System (ICS) and the call for an appellate mechanism.¹²⁹ These proposals have gained much traction since 2015, following the European Commission's proposal to substitute ISDS for an ICS in the European Union's investment chapters in future Free Trade Agreements (FTAs). The ICS-proposal seeks to set up a permanent tribunal with an appellate body and permanent judges. Both proposals represent a systematic reform and have been held out as options that:

[W]ould bring ISDS more in line with constitutional principles. Both an appellate mechanism and a permanent investment court would serve the rule of law by introducing an additional instance that could ensure the correctness of decisions rendered in ISDS. Both an appellate mechanism and a permanent investment court would also increase coherence in ISDS and contribute to the emergence of a jurisprudence constante (a consistent and stable jurisprudence). This

¹²⁷ Born, *supra* note 1.

¹²⁸ PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 11 (2012). *See also* Brower & Blanchard, *supra* note 5, at 46.

¹²⁹ For a very good outline of the idea of an ICS or an Appellate Body, *see* Bungenberg & Reinisch, *supra* note 11.

would reduce uncertainty in decisionmaking and increase predictability and legal certainty for both investors and host governments.¹³⁰

On the other hand, it has been opined that these proposals “are fundamentally contrary to the interests of both states and investors” and that such reforms “would significantly undermine investor confidence and reduce global investment flows.”¹³¹ The CCIAG listed five “flaws that cannot be remedied with technical solutions,” namely:

The [ICS] is flawed because it: (1) tilts the balance of the dispute settlement system against investors, who will change their investment decisions accordingly; (2) eliminates party autonomy for both investors and respondent states in the selection of arbitrators; (3) reduces the pool of qualified arbitrators; (4) introduces uncertainty regarding the enforceability of arbitral awards; and (5) introduces uncertainty regarding how dispute settlement proceedings will be funded and maintained over time.¹³²

An ICS regime had for long been met with contempt. It was not until recently, when the European Union proposed it as a serious alternative to ISDS, that it picked up steam.¹³³ This proposal, except for being radical *ipso facto*, underscores yet another concern among freedom loving European citizens, namely, EU overreach. The European Union has institutionalized almost every aspect of social life in Europe, and this ICS-proposal can be traced back to the European Union yet again, cloaking itself as the centre for solutions to all political concerns and policy objectives among its member states. This proposal came shortly after the Lisbon Treaty, whereby the European Commission began to develop a common investment policy.¹³⁴ In

¹³⁰ Schill, *Reforming*, *supra* note 3, at 8. In addition to strengthening the rule of law, it has been argued that these proposals would enhance democracy. *See id.* In addition, it has been said that an ICS would lead to greater consistency of decisions; greater legitimacy; independence and neutrality of judges; be more cost-efficient; enhance access for small and medium enterprises; increase transparency; and be more time efficient. *See* Bungenberg & Reinisch, *supra* note 11, at 16-20.

¹³¹ CCIAG, *supra* note 10, at 1.

¹³² *Id.* at 5.

¹³³ Following EU having developed a common investment and trade policy initiative, the commission has proposed the ICS in investment chapters in new Free Trade Agreements (FTA). *See* Transatlantic Trade and Investment Partnership (“TTIP”), the EU-Singapore and EU-Vietnam bilateral agreements, and the newly released Comprehensive Economic and Trade Agreement with Canada (“CETA 2016”).

¹³⁴ *See* EUROPEAN COMMISSION, INVESTMENT (2019), <https://ec.europa.eu/trade/policy/accessing-markets/investment/>. For good discussions on its consequences, *see inter alia* Gallo & Nicola, *supra* note 5; Sophie Meunier & Kalypso Nicolaidis, *The Geopoliticization of European Trade and Investment Policy*, 57 J. COMMON MKT. STUD. 103 (2019); Ondrej Svoboda, *The Common Commercial Policy after Opinion 2/15: No Simple Way to Make Life Easier for Free Trade Agreements in the EU*, 15 CROATIAN Y.B. EUR. L. & POL’Y 189 (2019).;

this new role of negotiating and concluding new IIAs, the European Union has levelled serious critique against ISDS and proposed instead the ICS. Thus, the ICS may be a symptom rather than a disease.

What the European Union fundamentally fails to see and willfully ignores is that “[m]ost EU Member States and the [United States] are in favour of including this type of dispute resolution mechanism as they consider that ISDS will encourage investment flows.”¹³⁵ Serious concerns have also been raised *vis-à-vis* an appellate mechanism. CCIAG argued that:

The appellate mechanism is flawed because it: (1) tilts the balance of the dispute settlement system against investors in the same manner as the MIC [multilateral investment court]; (2) makes erroneous decisions permanent; and (3) increases the cost and duration of proceedings.¹³⁶

One does not have to agree with all three points. The appellate proposal is significantly different and to be distinguished from the more radical ICS proposal. For example, one can argue in response, as Chief Justice Menon has done, that “an increasing number of major and complex commercial cases are heard by arbitral tribunals rather than by municipal appellate courts” and that “this threatens to hinder the development of a coherent freestanding body of substantive international commercial law, and over time, this must add to the cost of transnational trade.”¹³⁷ However, it is demonstrative of valid counter-arguments. It is argued that the establishment of an appellate mechanism should be refused due to *inter alia* the tilting of balance between the parties and the interference with the fundamental element of finality. This culminates essentially in a policy preference for the traditional one-bite at the apple arbitration over a permanent or two-tier system—unless the parties exercise party autonomy on an ad hoc basis to opt for an alternative appellate tribunal. It should be mentioned that some scholars are of the opinion that an appellate body does not sufficiently solve the legitimacy deficit in the same manner as the proposed ICS.¹³⁸

Finally, before venturing onto more reasonable reforms and debunking some of the myths surrounding the contemporary criticism, we need to ask ourselves: “[s]o is there anything really wrong with international arbitration as we know it?”¹³⁹ I argue that there is nothing wrong with contemporary ISDS—quite to the contrary.

and Ondrej Svoboda & Jan Kunstýr, *What Can We Expect from Post-Brexit United Kingdom's Investment Policy?*, 9 CROATIAN Y.B. PUB. & PRIV. INT'L L. 352 (2018).

¹³⁵ Alvarez et al., *supra* note 3, at 3.

¹³⁶ CCIAG, *supra* note 10, at 11.

¹³⁷ Menon, *supra* note 12, at 27.

¹³⁸ See Bungenberg & Reinisch, *supra* note 11, at 21.

¹³⁹ See Brower, Pulos & Rosenberg, *supra* note 100.

2. Reasonable Reform Proposals: Furthering the Fundamental Elements of International Arbitration

Apart from radical proposals rooted in ideology and manifested as a supposed lack of legitimacy, there is good substance in the fact that ISDS is no longer a dyadic dispute settlement mechanism only; ISDS has transformed into a “stable institution of transnational governance.”¹⁴⁰ That said, because reform-proposals may affect not only global investments but the civil society at large for many years to come, the ISDS-reform debates must “proceed in a well-informed manner and take into account the interests of all stakeholders in a balanced way.”¹⁴¹

Because ISDS was based on the same model as ICA, there are elements that could be reformed to accommodate for the fact that the respondent is always a host state. As mentioned already, some reform-proposals deserve merit and attention; such as increased transparency, higher ethical standards of arbitrators and counsels, increased arbitrator intelligence, *amicus briefs*, appropriate consideration of human rights concerns, investor obligations in IIAs,¹⁴² and joint committees to issue binding interpretations of IIA standards.¹⁴³ In addition, the establishment of an advisory center could be of immense benefit for developing states as well as small- and medium-sized investors.

But, if we bear in mind that ISDS is actually a form of arbitration and that reform proposals are best considered with that in mind, this reform debate should not focus too much on suggestions to institutionalize the regime in order to supposedly elevate its standing to a so-called legitimate body of global governance. Judge Charles N. Brower, Michael Pulos, and Charles B. Rosenberg made a perfect point in that:

[A]ny proposal that would alter any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution of international arbitration. Conversely, any proposal that does not attack those fundamental elements, but instead is

¹⁴⁰ Schill, *Conceptions*, *supra* note 3, at 110.

¹⁴¹ Schill, *Reforming*, *supra* note 3, at 1.

¹⁴² This critique has been frequently ventilated, and some countries have started amending their BITs to take into account investor obligations (e.g., India). See Gallo & Nicola, *supra* note 5, at 1149 (“While foreign investors have access to international investment courts against the host State when it is in violation of environmental, human rights, labor, or corporate social responsibility norms affecting local communities, indigenous people and workers have limited remedies against these tortious actions by foreign investors.”).

¹⁴³ Such committees already exist in BITs, and most BITs have some form of a clause to remedy a difference of understanding in interpretation between the states. However, states should not be allowed to interpret the text of the treaty *ex post facto* or *post hoc*. Such an approach would undercut the essence of the VCLT, in general, and Articles 31 and 32, in particular. *Post hoc* interpretative statements would disrupt the arbitrator’s independence and impartiality to rule on the matter before them in accordance with the rule of law textually perceived on the day or at the sequence of time that the alleged breach occurred.

designed to enhance them, should be considered carefully and may be found to be an improvement of it.¹⁴⁴

As a corollary, we should strengthen the fundamental elements of international arbitration. We could, for example, discuss expedited procedures for small- and medium-sized companies, additional case management tools, a possible advisory center, a code of conduct, etc.¹⁴⁵ International arbitration has always been amended to reflect business needs and the concerns of civil society. To illustrate the willingness to reform, the international arbitration community has welcomed *inter alia* the International Bar Association rules on the taking of evidence in international arbitration, the UNCITRAL rules on transparency, and the Hague rules on human rights and arbitration.

C. *Unsubstantiated Criticism and the Virtue of Truth*

It should be mentioned and strenuously emphasized that much of the contemporary criticism is misinformed and often outright false. Illustratively, the European Federation for Investment Law and Arbitration (EFILA) outlined why eleven of the main criticisms are one-sided and lacking in nuance.¹⁴⁶ I will briefly outline *only* three for demonstrative purposes;¹⁴⁷ those are, (1) the “claim of a lack of transparency;” (2) the “claim that a small elite group handles most arbitrations;”¹⁴⁸ and (3) the “argument that ISDS

¹⁴⁴ Brower, Pulos & Rosenberg, *supra* note 100, at 7.

¹⁴⁵ See, e.g. CCIAG, *supra* note 10, at 16-20.

¹⁴⁶ Alvarez et al., *supra* note 3, at 4-42.

¹⁴⁷ This list could have been much lengthier. For further illustrative purposes, see Brower & Blanchard, *supra* note 5, at 50-58 (discussing several critiques and debunking each; for example, that BITs favor rich Northern states by emphasizing the large number of intra-South BITs; that there is no anti-State bias and that statistics firmly debunks that argument; that ISDS does not unjustifiably interfere with democratically elected governments or “sovereignty” but that there is an exchange for benefits whereby a sovereign binds itself to treat foreign investors in accordance with the rule of law; and that the assumption of a “regulatory chill” is blown out of proportion and is mostly hypothetical and that in fact investment law has grown to provide host states with broad deference to their public concerns.) and Brower & Schill, *supra* note 23, at 474. (debunking *inter alia* the pro-investor bias argument, i.e., that investors do not at all come out as huge winners in the vast majority of ISDS dispute).

¹⁴⁸ Furthermore, it is argued that state appointed permanent judges would make the investment regime more democratic. See Schill, *Reforming*, *supra* note 3, at 8 (“Finally, an appellate mechanism, as well as a permanent investment court, would allow controlling law-making activities in ISDS and thereby make the international investment regime more democratic. This is particularly the case if members of the respective mechanisms are appointed by participating states in democratic processes, which are modeled, for instance, on how judges of other international courts are selected.”). I fundamentally reject this position. It is actually the opposite. It undercuts the bedrock principle that makes the institution of international arbitration internally democratic, namely, party autonomy. Moreover, at its core, this argument stems from the critique on the impartiality and independence of arbitrators. The current ad-hoc appointment is considered to lead to a pro-investor bias. This critique, too, is unsubstantiated, and there is no evidence to show that the current disclosure regime and the

leads to so-called ‘regulatory chill.’”¹⁴⁹

First, “the truth is that the majority of arbitral proceedings take place under ICSID rules and ICISD awards have been published on the ICSID website for several years (and the new UNCITRAL Transparency Rules introduce the same level of transparency for UNCITRAL proceedings).”¹⁵⁰ Transparency in ISDS procedures has already occupied a central part of the reform debate and has to a large extent, been remedied with success. This reform is manifested in the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, the 2006 ICISD Amendments, and the increased currency and standing of *amicus curiae* in ISDS procedures with an alleged public policy concern.¹⁵¹ EFILA summarized this position well as follows:

Over the past decade, the investment arbitration community and States have continuously sought to implement a wide range of effective tools that supports its legitimacy as a system of investment global governance, where transparency has been a key tool for the accountability of investment arbitration.

[...]

The reality is that the system has never been so transparent and the criticism that there is a lack of transparency in ISDS is not supported by the developments and improvements of the past decade.¹⁵²

This reform proves that the ISDS regime continuously reforms to take into account the global dimension of the overall quest for legitimacy. Allowing public interest groups to participate in ISDS proceedings strengthens the constitutional value of democracy. In this light, one could highlight that a similar evolution is possible to remedy the concern of shielding human rights violations. Much in the same manner as the UNCITRAL Transparency Rules have been developed and adopted, the Hague Rules on Business and Human Rights Arbitration has been adopted to reflect this concern.¹⁵³ Yet again, the ISDS community is showing great

reputation stake (among other things) has not protected the regime against impartial or independent arbitrators.

¹⁴⁹ Alvarez et al., *supra* note 3, at 4-5.

¹⁵⁰ *Id.* at 4.

¹⁵¹ The 2006 ICSID Amendments “make non-dispute parties able to intervene in arbitration proceedings and attend hearings. The new rules also promote disclosure of ICSID awards. The participation of third non-disputing parties has incorporated into ISDS a different way of promoting transparency by means of public interest participation [...]”. *Id.* at 15. *See also* CAFTA and NAFTA provisions on *amici* participation.

¹⁵² Alvarez et al., *supra* note 3, at 17.

¹⁵³ The Hague Rules on Business and Human Rights Arbitration Team, Dec. 12, 2019, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf. *See also* Ylli Dautaj, *Roll Out the Red*

willingness to consider legitimate proposals to enhance the national and global legitimacy of the regime.

Second, “the truth is that arbitrators are appointed by States and investors and thus states are entirely free to appoint other individuals thereby widening the pool of arbitrators.”¹⁵⁴ Arbitration is underpinned by party autonomy. Party appointed arbitrators are one of its many expressions. Party autonomy combined with flexibility allows parties to tailor their procedure and to appoint an arbitrator of their choice. The fact that a small group of individuals is “over-represented” is actually common sense in a field that requires unique experience and expertise. A permanent institution would narrow the potential field, and furthermore, “undermine the very foundations of arbitration (and justice): the equality of arms between parties.”¹⁵⁵ The fact that parties appoint their arbitrator does, in fact, strengthen the legitimacy of ISDS by ensuring “that the decision-making process is not perceived as something wholly extraneous to the parties, but instead as a legitimate mode of resolving disputes.”¹⁵⁶ Moreover, states are completely free to choose outside the pool of the “elite”. Party autonomy is the only concept that can truly address inequality and combine it with the liberal democratic bedrock concept of freedom. EFILA wrote as follows: “[i]f States indeed feel so uncomfortable with the current pool of arbitrators, they are totally free to expand that pool by selecting “new” individuals. In this way States can also actively widen and improve the composition of the pool by selecting more women and more non- Western individuals.”¹⁵⁷

Another critique often launched in this respect is that “arbitrations create friction with domestic constitutional law as arbitrators, who have little democratic legitimacy, often operate in non-transparent proceedings and produce increasing amounts of incoherent decisions.”¹⁵⁸ Thus, it is said that this pool of elite arbitrators undercuts constitutional values (*see* discussion above, Part IV.A).

Thirdly, the truth is that “there is no evidence which would support such a claim.”¹⁵⁹ This theory is based on the false (or at least unverified) premise that ISDS leads the legislative branch to a halt in legislating for the betterment of the state in accordance with public concerns (e.g. environmental, human rights, employment, etc.). In other words, the theory goes that “[i]f you were to face significant liabilities if you took a particular

Carpet: The Hague Rules on Business and Human Rights are Finally Here!, KLUWER ARB. BLOG (Dec. 26, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/>.

¹⁵⁴ Alvarez et al., *supra* note 3, at 5.

¹⁵⁵ *Id.* at 23.

¹⁵⁶ Brower & Schill, *supra* note 23, at 494.

¹⁵⁷ Alvarez et al., *supra* note 3, at 23.

¹⁵⁸ Schill, *Conceptions*, *supra* note 3, at 114.

¹⁵⁹ Alvarez et al., *supra* note 3, at 5.

action, you are less likely to take that action.”¹⁶⁰ Furthermore, it has been held that structuring IIAs and ISDS procedures in ways that leave sufficient policy space for host states to regulate in the public interest would improve the democratic deficit and in turn increase the legitimacy of ISDS by aligning the regime with constitutional values.¹⁶¹ However, as reliable studies have shown, “all concluded ICSID cases up to 2014, 47% relate to executive or administrative acts, such as permits and licenses, whereas only 9%, or 14 cases, relate to legislative acts”.¹⁶² EFILA noted that:

[D]escribing ISDS as a force that unduly restricts countries’ legislative branch in exercising its sovereign powers to regulate or that unduly chills existing or proposed legislation has no basis in political science or analysis of international (investment) law and ISDS statistics. The fact that regulatory chill cannot be measured may help those who support the theory when influencing public opinion. However, in the scholarly or policy debate, this impossibility should nullify the regulatory chill theory, as does the fact that the vast majority of ISDS-cases are not brought on the basis of legislative acts, but rather due to executive acts.¹⁶³

One should not too readily accept these many one-sided, flawed, and baseless premises, and thereby engage in the ISDS-reform debate by legitimizing a half or non-contextualized truth. It is important that any reform proposal is underpinned by facts and not based in unsubstantiated and sweeping allegations. “The bottom line of this analysis is that most of the criticisms are neither supported by the facts nor by the treaty practice and case law.”¹⁶⁴ There is a virtue in truth and “an examination of the actual evidence on investment treaties and [ISDS] fails to reveal the threats and harms that have been posited.”¹⁶⁵ Quite the opposite, “the system has been functioning satisfactorily and that it generally provides for adequate resolution of investment disputes.”¹⁶⁶

¹⁶⁰ *Id.* at 28.

¹⁶¹ Schill, *Reforming*, *supra* note 3, at 4.

¹⁶² Alvarez, *supra* note 3, at 27 (referring to Prof. Dr. Tietje and Associate Prof. Dr. Baetens and Ecorys Rotterdam, “The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership” [2014] Study prepared for the Minister of Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands).

¹⁶³ *Id.* at 30; *see also* Brower & Schill, *supra* note 23, at 483-89.

¹⁶⁴ Alvarez et al., *supra* note 3, at 42.

¹⁶⁵ Brower & Blanchard, *supra* note 5, at 58.

¹⁶⁶ Alvarez et al., *supra* note 3, at 42.

V. THE PHILOSOPHY AND SOCIOLOGY OF INTERNATIONAL ARBITRATION: THE WHAT, WHY, AND FOR WHOM

Having discussed the virtues of international arbitration¹⁶⁷ and its role in legal civilization,¹⁶⁸ we moved on to the contemporary criticism and reform proposals.¹⁶⁹ The reader should understand that within the sociology of international arbitration there are constant debates as to the mental representation of the regime and its effect on various stakeholders. The dominant theories on international arbitration have been to conceive the system as either (a) rooted in domestic laws (and practices)¹⁷⁰; (b) deriving from an entirely private normative order; or (c) as a transnational legal system.¹⁷¹ No matter which underlying theory one embraces, some fundamental elements of ICA are shared by all, such as expertise; flexibility; neutrality; finality; confidentiality; and procedural informality.¹⁷²

The first conception of arbitration is the least appealing but is also the one resonating best with critics of private adjudication. The inherent feature of arbitration as a system of party autonomy, whereby arbitrators exercise *kompetenz-kompetenz* and the judicial branch in turn exercises minimal interference at the front-end, let alone at the back-end due to the transnational enforcement mechanism in place (e.g., the NY Convention), makes this mental representation of arbitration completely unsuitable to contemporary practices, doctrinal development, and sensible arbitration theory. Moreover, the arbitral procedure itself has changed as a result of both the complexity of the subject-matter, but also as a result of trial lawyers partaking in the procedure. Thus, many of the features of court litigation are currently integral parts of many ICA procedures.¹⁷³ Judicialization has the potential to make the well-functioning system as slow, expensive, and inflexible as court litigation. But this is a debate for another day.

Now we come to the debate for today; that is, whether ISDS should assimilate the theory of ICA, and if so, which one? As a corollary, should ISDS embrace the fundamental elements of international arbitration and if it

¹⁶⁷ See Part II.

¹⁶⁸ See Part III.

¹⁶⁹ See Part IV.

¹⁷⁰ See Schill, *Conceptions*, *supra* note 3, at 116 (“Under this conception, the legitimacy of international arbitration flows from the conformity of the functioning of international arbitration with the governing national law or laws.”).

¹⁷¹ See JAN PAULSSON, *THE IDEA OF ARBITRATION* (2014); GAILLARD, *LEGAL THEORY*, *supra* note 4; Schill, *Conceptions*, *supra* note 3, at 115-17; and WON KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* 63-89 (2017).

¹⁷² See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 235 (1999).

¹⁷³ See, e.g., Eric Bergsten, *Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289 (2006). We speak about judicialization as either (or both) (a) the procedural intricacies and formalities of “ordinary” litigation in the U.S., or/and (b) judicial intervention and interference prior to, during, or post the arbitral procedure.

curtains some, how many could it reject without undercutting what made it one of the greatest achievements in legal civilization?¹⁷⁴

We can start with the corollary, which results in an emphatic “yes”; the fundamental elements of international arbitration should be embraced wholeheartedly. Apart from confidentiality, which could be eroded somewhat due to the global community at large, the elements of finality, neutrality, and expertise should be strenuously praised.

ISDS procedures that are not “ICSID arbitrations” may be quite different and more akin to large-scale ICA disputes. However, ICSID arbitration represents a perfect balance in having evolved to take into account for the global community at large, while maintaining a clear arbitration-like mandate. In fact, the underlying theory of ISDS can allow for some “judicialization” in order to satisfy the “sovereignty” element and the “global community at large” (e.g., increased transparency), but it can only do so by an informed exchange; that is, offer increased procedural intricacies in exchange for a lessened judicial intervention/interference by national courts. This is exactly what the ICISD regime provides for. Thus, the underlying theory of ICSID ISDS is a mixture of deriving from a private normative order and working as a manifestation of a transnational legal order (especially since the substantive matters—and procedural features—evolve through arbitral case law). The ICSID has its conceptualisation based on three prongs, all of which are part of its mandate and founding document: (1) the first is providing private parties and corporations direct access to states for dispute settlement in an international tribunal; (2) giving recognition to the agreements between a state and private parties or corporations as legitimate international undertakings; and (3) the availability of an international forum with its own arbitrators and rules giving it *a separate existence than all the existing machinery*.¹⁷⁵

Thus, ISDS should be (and thanks to ICSID is) grounded and regulated in an international legal order (an arbitral legal order) that “remain[s] detached from the municipal legal system.”¹⁷⁶ The “ICSID Convention is a self-contained regime detached from any municipal legal systems and with a robust framework for its operation.”¹⁷⁷ Conclusively, the contemporary ISDS-ICSID regime is a national legal order that is detached from municipal laws (apart from fact-finding) and municipal court intervention/interference.

¹⁷⁴ See Thomas E. Carbonneau, *THE LAW AND PRACTICE OF UNITED STATES ARBITRATION* (6th ed. 2018). (“In order to survive, legal civilization must transfer its mandate to a process that abjures, to some degree, the fundamental values that define the legal system.”).

¹⁷⁵ Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 235, 242 (2014).

¹⁷⁶ ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 107 (2009).

¹⁷⁷ Ylli Dautaj, *Enforcing Arbitral Awards Against States and Defence of Sovereign Immunity from Execution*, *MANCHESTER J. INT’L ECON. L.* 402 (2019).

In the context of this paper on the legitimacy and future of ISDS, this brief awareness of the theory underpinning international arbitration—ICA and ISDS/ITA—and its fundamental elements (which are equally shared by all mental representations) is important for mainly two reasons because (1) the social actors of international arbitration always seek ways to improve the system without disturbing its equilibrium state (whatever mental representation they subscribe to), and (2) in determining which social actors of international arbitration should be given “superiority” (or a higher claim) in either pursuing the necessary legitimacy of the regime or in assessing a particular reform proposal—is it the essential actors;¹⁷⁸ the service providers;¹⁷⁹ the value providers;¹⁸⁰ or the global community at large? The latter reason may seem controversial to some, but the fact of the matter is that not everyone should be given the same voice in these reform-discussions. Nowhere in the sociology of human beings do we treat everyone as having the same stake all the time. Put simply, not everyone has skin in the game nor a dog in the fight.

Adopting the ICS would disturb the underlying theory of international arbitration—both ICA and ITA. Thus, the ultimate question for ISDS is just how much it could move away from its equilibrium state in order to take into account concerns beyond its dyadic dispute settlement function. Put slightly differently, should ISDS seek legitimacy in factors extraneous to its traditional features of neutrality, party autonomy, reasonable fairness, finality, enforceability, etc.? If yes, how much and when has the practice amplified so much that it is a mere shadow of its equilibrium state? As we engage in a debate on the evolution of ISDS, criticism, and reform-proposals, we should bear in mind the role of ISDS in legal civilization and its philosophical underpinnings.¹⁸¹ There must always be a balance and the features should never move too far from a workable mental representation of international arbitration as grounded in its fundamental elements.

Moreover, having discussed monodimensional approaches to analyzing legitimacy,¹⁸² we should assess whether all providers should be given an equal stake in reforming the regime. The backlash debate is misinformed because its premises and assumptions are flawed; the debate is unjustifiably one-sided. First, much of the debate is based on the fundamentally flawed or even false assumption that “party legitimacy,” “community legitimacy,”

¹⁷⁸ The essential actors are the parties and the arbitrators. See Gaillard, *Sociology*, *supra* note 4, at 189.

¹⁷⁹ The service providers are primarily the arbitral institutions, but can also include expert witnesses, arbitration reporters, publishers, third-party funders, etc. See *id.* at 190-92.

¹⁸⁰ The value providers are those actors that seek to “provide guidance as to the way in which international arbitration should develop and arbitral social actors should behave” (e.g., the UNCTAD, UNCITRAL, OECD, other NGOs, IBA, academic institutions offering arbitration-tailored teaching, etc.). *Id.* at 192-95.

¹⁸¹ See Part III and IV.

¹⁸² See Part IV.A.

“national legitimacy,” or “global legitimacy” all should be treated on an equal footing and that the former two cannot constitute the overall yardstick for the legitimacy of international arbitration. I argue that this is not wrong *per se* but definitely misconceived. It is argued that party and community legitimacy should indeed be the overall yardstick for the legitimacy of international arbitration, but that aspects of national and global legitimacy should be carefully considered. In the sociology of arbitration, all stakeholders have important roles to play, but there is indeed a hierarchy between the actors. Put differently, the stakeholders should have different voting rights in the ISDS articles of incorporation. For example, where a proposal is presented and includes valid public interest considerations that can improve the national or global dimension without interfering too much with the private interests and the fundamental features of international arbitration, such a reform proposal merits serious consideration. This is nothing new; the contemporary ISDS regime has developed to take into account the public interest without undercutting the fundamental elements of international arbitration.

Second, the backlash debate is oftentimes based on yet another misunderstood or misused assumption that “the international arbitration system [is required] to open up towards outside perceptions and develop a more sophisticated framework for thinking about its own legitimacy.”¹⁸³ Not being open to all forms of outside perceptions does not exclude taking into consideration features that may improve and enhance the bedrock principles of international arbitration. Input from non-actors or stakeholders lower in the hierarchy is welcomed. However, “one cannot forget that arbitration is intended for the parties and not for all the other actors that gravitate around it[.]”¹⁸⁴ If the regime is to take into account the global dimension as much as the party and community dimensions, the regime must turn into a permanent body that exercises global governance. This would indeed be in line with an egalitarian approach to arbitration.

Third, the debate is often presented as a binary choice of two evils,¹⁸⁵ that is, as an option between (a) “termination of [IIAs] and disengagement from the ISDS system” or (b) “proposals involving a further institutionalization of ISDS[.]”¹⁸⁶ The first alternative defies the evolution of international investment law and ISDS. It would place the ethos of the Calvo doctrine and many other barriers at the forefront once again. But, the second alternative is not at all in sync with the fundamental elements of international arbitration, and therefore also constitutes an unacceptable assault on the

¹⁸³ Schill, *Conceptions*, *supra* note 3, at 123.

¹⁸⁴ Gaillard, *Sociology*, *supra* note 4, at 189.

¹⁸⁵ To borrow language from an infamous critical report, why should investors choose one of two options when both are held in hell? See EBERHARDT & OLIVET, *supra* note 128 (“Would you go to court with the devil if the court was held in hell? Of course not. But governments have done it hundreds of times. And continue to do so.”).

¹⁸⁶ Schill, *Reforming*, *supra* note 3, at 6.

institution of international arbitration.¹⁸⁷ I strongly reject this false dichotomy.¹⁸⁸ Judge Brower’s approach has more nuance to it, namely, to keep improving ISDS by enhancing the fundamental elements of international arbitration.¹⁸⁹ This approach has proven to take into account all dimensions of legitimacy—party, community, national, as well as global.

In practice, the binary fallacy leads the reform debaters to conclude that “a” system that protects investors is better than “no” such framework at all. Having reached this reasonable conclusion, the reform debaters have entertained another binary fallacy and are presented with yet another false dichotomy; that is, that the legitimacy deficit can only be remedied by an ICS or an appellate mechanism. Both are said to “have similar benefits in terms of creating coherence and a better balance in ISDS jurisprudence[.]”¹⁹⁰ Thus, having gone through a series of false assumptions and misinformed premises, the proponents of ISDS are presented with two alternatives whereby the lesser of the two evils supposedly emerge as a “compromise[.]”¹⁹¹

Finally, all these assumptions and premises for ISDS-reform seem to have accepted at the very outset that any reform should be “systematic” in order to address the concerns of “ensuring policy space and reaffirming state control over the system[.]”¹⁹² I argue instead that reform does not have to be systematic, and it does definitely not have to assure state control over the system. Quite the contrary, ISDS should level the playing field and should guarantee equality of arms and party autonomy above all else.¹⁹³ ISDS has

¹⁸⁷ Brower, Pulos & Rosenberg, *supra* note 100, at 7.

¹⁸⁸ See Schill, *Reforming*, *supra* note 3, at 8, for a presentation of a binary choice in this dichotomy (“While terminating IIAs and disengaging entirely from ISDS will not further access to justice and efficient dispute settlement in investor-state relations, the existing arbitral system needs fundamental reform to make it more democratic and bring it in line with the demands stemming from the concept of the rule of law. Thus, to remedy the problem of inconsistencies, a more centralized ISDS system is needed. This is only achievable through increased institutionalization and the establishment of some centralized dispute settlement body.”).

¹⁸⁹ See Brower, Pulos & Rosenberg, *supra* note 100, at 7.

¹⁹⁰ Schill, *Reforming*, *supra* note 3, at 8.

¹⁹¹ Gallo, *supra* note 5, at 1086 (“The position of the Commission resulted in a compromise between these two polar positions in its Report on the consultation on ISDS in TTIP.”). The proposition here is that the ICS is a compromise between investors’ and some host states’ perception; that is, “[m]any host governments see these clauses as an obstacle to environmental and social policies that will be challenged in front of arbitrators rather than courts” but that “investors favor ISDS clauses for fear that host governments will adopt legislation in conflict with investment or trade treaty obligations[.]” Gallo, *supra* note 5, at 1086. This reasoning is flawed and misinformed. The ICS is not a compromise at all. It is a proposal that undercuts the regime of ISDS altogether. A big concern of mine is that when a radical idea is proposed (and especially when receiving traction in the civil society), the proponents of the system tries to reach some form of consensus and may end-up giving in so much too that risk the baby is thrown out with the bathwater.

¹⁹² See Schill, *Reforming*, *supra* note 3, at 1.

¹⁹³ The host state can utilize its sovereign prerogatives if the investor negates its undertakings and circumvents sticking to their original promise. As Judge Brower and

not been an asymmetric legal regime that is unfairly detrimental to host states in favor of investors. No statistical data can support such a claim.

In response to the supposed rigidity and unfairness of ISDS, reality tells another story, namely, that about ISDS's adaptability. Reforms have considered and adopted not only the views of a close-knit community. The type of institutional growth of ISDS has indeed been unique. It reflects the stakeholder's combination of "competitiveness, our inborn creativity, and the proliferation of external indicia making our individual worth[.]"¹⁹⁴ ISDS has reformed so much that we today talk about ICA and ITA as two separate regimes for transborder adjudication.¹⁹⁵ Therefore, it is evident that the critical social actors in the sociology of arbitration could neither integrate nor assimilate to the ideology of international arbitration and therefore seek to transform it. But a historical account of the regime supports the legitimacy of ISDS—"it has been tested and accepted by states over centuries[.]"¹⁹⁶

From the philosophical perspective, the main question we are left to deal with is whether the supposed legitimacy crisis—which is motivated primarily on a supposed systematic underperformance of ISDS as an institution that exercises public governance—should trump the regime's fundamental features. ISDS has elaborated a workable doctrine on transnational dispute settlement for the purposes of remedying grievances of an individual character. Any reform proposal that undercuts the fundamental features of international arbitration would move the regime farther from its equilibrium state and eventually make the regime a mere shell of its former self.¹⁹⁷

Professor Schill put it, the "host state does not depend on a dispute-settlement and compliance mechanism to make the investor comply with its promises." Brower & Schill, *supra* note 23, at 482. At the outset the investor carefully must assess any risk to its investment, e.g., political risk of future intervention, administrative consistency, tax protection, fluctuation in applicable law, etc. However, "[o]nce these negotiations are concluded and the investor's resources are sunk into the project, the dynamics of influence and power tend to shift in favor of the host state." DOLZER & SCHREUER, *supra* note 18, at 4. Thus, it can properly be said that IIAs and ISDS levels the level playing field between investors and host states.

¹⁹⁴ See Brower, Pulos & Rosenberg, *supra* note 100, at 2.

¹⁹⁵ So much that there are independent university modules on each and master's programmes too. See, e.g., *Master's Programme in Investment Treaty Arbitration*, UPPSALA UNIVERSITET, <https://www.uu.se/en/admissions/master/selma/program/?pKod=JIS2N> (last visited Mar. 14, 2021). *Master of Laws (LL.M) (60 credits) in International Commercial Arbitration*, STOCKHOLM UNIVERSITY, <https://www.su.se/english/search-courses-and-programmes/jiiclm-1.411462> (last visited Mar. 14, 2021).

¹⁹⁶ Brower & Schill, *supra* note 23, at 493.

¹⁹⁷ The question is whether the regime can maintain its fundamental features and still give enough attention to constitutional values to enhance its global legitimacy. See Schill, *Reforming*, *supra* note 3, at 3 ("In sum, the current ISDS system conceptually suffers from a tension between its public governance functions and its set-up as a private dispute settlement mechanism that is modeled on how private-private disputes are settled in commercial arbitration. Against this background, ISDS comes as a challenge to core constitutional law values, such as the principle of democracy, the concept of the rule of law, and the protection of fundamental or human rights.").

For the purposes of clarity, the proponents of ICS embrace a hierarchal structure of legitimacy in ISDS. They favor external legitimacy over internal legitimacy by emphasizing the global dimension. This may be because the critics see the regime as having to perform its base and audience. We need go no further than to quote the former European Commissioner for Trade, Cecilia Malmström: she said that “[b]y making the system work like an international court, these changes will ensure that citizens can trust it to deliver fair and objective judgments[.]”¹⁹⁸ This statement makes it abundantly clear that the proposal seeks to eliminate any feature of international arbitration and seeks to satisfy the legitimacy request primarily *vis-à-vis* the global dimension.

VI. CONCLUSION

Logical and analytical reasoning underpinned—intentionally or unintentionally—by a Marxist worldview has the potential to dismantle what represents, with the benefit of hindsight, the greatest achievement in humankind—that is, a workable economic, legal, and political order.¹⁹⁹ This is done in a streamlined, and often well-intentioned, aspiration to achieve perfect harmony, unity, equality, and progress. The fairytale of outcome equality guaranteed by the state and preserved in a “comrade hood” lives on.²⁰⁰ This world-view overlooks facts; for example, that liberal democracies

¹⁹⁸ EUROPEAN COMMISSION, *CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement* (Feb. 29, 2016), https://ec.europa.eu/commission/presscorner/detail/cs/IP_16_399.

¹⁹⁹ See Brower & Schill, *supra* note 23, at 474. Wars are mostly fought over competing ideas, virtues, and values. According to me, the greatest threat to economic prosperity is the so-called progressive, postmodernist movement that occupies much space in academia and in other “intellectual” circles.

²⁰⁰ The reader might be of the opinion that this is an exaggeration and that the author is making sweeping allegations in order to ventilate some of his overall political concerns and policy fetishes. This is far from true. The backlash on ISDS and IIAs is political, indeed ideological, and must be responded to in the same manner. The critique now, as in the era of the Argentinian jurist Calvo, comes from a mental representation different from that rooted in liberal capitalism. See, e.g., Gallo & Nicola, *supra* note 5, at 1148 (“In substance it remains to be seen whether this new adjudication system transforms the practice and the outcomes of international investment law in a more democratic and egalitarian direction.”). See also Lance Compa, *Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: A US Perspective*, 49 *ECONOMIA & LAVORO* 87, 88 (2015). This is exactly what the critics desire, namely, to take make transnational cooperation more egalitarian. Most critics do not put words on it, some do it unintentionally, and most do it from a morally sound standpoint. However, that is neither here nor there. This mental representation of international arbitration and transborder commerce, trade, and investment is outright dangerous to liberal capitalism. For a more sound take on the matter, debunking the states’ utilitarian role and focusing instead of de-politicization of investment disputes (i.e., measuring the success of ISDS on practical experience rather than ideals), see Brower, *supra* note 16, at 318-19 (“In fact, ‘depoliticization’ occurs only in the sense of removing controversies from the normal political processes of host states and subjecting them to an international legal process, where the decisionmakers lack direct political accountability, often have little direct experience with

with free and open markets have elaborated a doctrine of cross-border cooperation and municipal and global competition that transcends legal, historical, philosophical, religious, political, and other barriers. It overlooks the more reliable and functional idea of equal opportunity and individualism that has allowed merchants to charter new territory and incidentally paved the way for an interdependent, interconnected, and globalized world. In much the same manner, the critics of ISDS overlook what actually works in exchange for many naïve and utopian ideals.²⁰¹ In this paper, I have underscored that the ISDS universe is not shielded from the trend towards socialism, nationalism, and protectionism currently sweeping many parts of the world.²⁰² To illustrate the view of critics, two authors highlighted what they perceive to be ISDS's shortcoming in redressing global inequities and why they favor the investment court system. They write:

The ICS demonstrates that the Commission has challenged the status quo of the traditional ISDS regime to institutionalize a permanent tribunal. From a procedural perspective, we welcome this new investment regime embodying the main criteria of public law adjudication. Yet we question whether in substance the ICS is equipped with necessary tools to engage with global inequalities, sustainable devolvement, and human rights violations arising in the current international investment regime in a transformative way.²⁰³

I urge the arbitration community to not too readily embrace a supposedly good idea as a substitute for a workable one.²⁰⁴ The critics are

the social, political, and economic context for the underlying events, and have no mandate to determine whether the challenged measures have produced beneficial outcomes for the greatest number of people in host states"). See Brower & Blanchard, *supra* note 5, at 46-47 (discussing the quote above, the authors write that "[s]uch opponents of investor-State arbitration argue that investment arbitration is biased in favor of multinationals, either harms or fails to benefit poor States, and interferes with the ability of democratic governments to pursue policies in the public interest."). Finally, see Enrique Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS 195, 452 (2011), (describing that ISDS is meant to decide on whether the respondent state has "injured a single foreign investor" and not whether the measures taken—for whatever reason—was "beneficial to the greatest number").

²⁰¹ The critics emphasize a "transformative ideal" in the protection of the global community at large. See, e.g., Gallo & Nicola, *supra* note 5, at 1148 ("In light of this transformative ideal, the underlying political economy of the international investment treaty regime shows not only the benefits in protecting foreign investors but also how the costs of pollution and labor violations are easily shifted from the investors to the local communities of the host State.").

²⁰² HOBÉR & CULLBORG, *supra* note 95.

²⁰³ Gallo & Nicola, *supra* note 5, at 1090.

²⁰⁴ See Dautaj, *supra* note 151. This reasoning has in part been inspired by the work of Professor Thomas E. Carbonneau and Judge Charles N. Brower, see, e.g., Brower, Pulos & Rosenberg, *supra* note 100, at 13 ("Remember, however, that 'change' and 'improvement' are not synonyms.") and Thomas E. Carbonneau, *Darkness and Light in the Shadows of International Arbitral Adjudication*, FACT-FINDING BY INTERNATIONAL TRIBUNALS 95, 163 (R. Lillich ed., 1991), reprinted as Chapter 5 in Carbonneau, *supra* note 19, at 158 (2011)

close to orchestrating a hitjob on one of the greatest achievements in legal civilization, namely, ISDS. In case they are successful, a global legal order rooted in private ordering, freedom, and accountability will eventually—and inevitably—turn into a dead and long-forgotten aspiration of global intercourse.

The critics call for either (1) disengaging with IIAs, generally, and ISDS, in particular, or (2) moving moderately to transform ISDS and reform IIAs. Both lines of attack ultimately grow out of two re-emerging and dangerous policy objectives and political concerns; that is, (a) the re-emerging ethos of the Calvo doctrine, and (b) institutionalization of private affairs, e.g., the European Union’s newly embraced common investment policy that emphasizes primarily the political concerns and policy objectives of EU bureaucrats and the “civil society” while rejecting party legitimacy.²⁰⁵ As a result of giving in to unjustified and unsubstantiated criticism, platforms for multilateral cooperation “must take into account numerous interests and satisfy divergent or even conflicting demands from parliaments, NGOs, trade unions, business associations, etc.”²⁰⁶ Alarm bells are ringing and it is important that these institutions must not forget the reason for their coming about. Moreover, it is hoped that the European Union does not (ab)use the vacuum created by Donald Trump’s global resistance to “focus on negotiations with more pliable states, thereby establishing a critical mass of treaties embracing the European Union’s vision and obligating the other states’ parties to pursue the same vision in their own treaty practices, which could shift global expectations about the prospects for an investment court[.]”²⁰⁷ It is time for the immediate stakeholders to speak up.

The bottom line is this: we have already tried to centralize and institutionalize private affairs at the mercy of the sovereign. A world where the state was absolutely immune from private law consequences for private acts was tried and international commerce, trade, and investment were hindered as a consequence. We decided that states should not be able to do as they wish and take as they want. Political, economic, philosophical, and legal revolution—and evolution—took place. We should emphatically embrace and align with political concerns and policy objectives of liberal

(“Integrating different adjudicatory values into the established ideology of arbitration could impede or extinguish the viability of the process rather than adapt it to changing circumstances. Tinkering with the tried and true, a workable and working process, is a hazardous undertaking.”).

²⁰⁵ See, e.g., the argument of two proponents of the ICA proposal and EU’s new role: Gallo & Nicola, *supra* note 5, at 1089 (“However, we argue that the transformative EU proposal stems, above all, from internal constraints such as the need to safeguard the EU legal order and to avoid jurisdictional clashes, as well as the need to reconcile the opposing notions of the right to regulate for public interest, and the fair and equitable treatment of foreign investments.”). For a good discussion on the role of the civil society in ITA, see EL-HOSSENY, *supra* note 115.

²⁰⁶ Alvarez et al., *supra* note 3, at 41.

²⁰⁷ Brower, *supra* note 16, at 294.

democracies that strenuously have elaborated and observed the concept of individualism and the free and open market system. A rules-based international legal order merits a heightened standing and increased currency once more. A private ordering of business facilitates and promotes trust and cooperation. This is not the time to cower down to ideologues, demagogues, or moral grandstanders. As Gary Born eloquently noted, if Europe decides to not follow the rest of the world in guaranteeing citizens the right to arbitrate, we “would turn our back on the rest of the world and place ourselves behind a wall”.²⁰⁸ As demonstrated by experience, the setback will prove temporary, as the roots of the criticism are unsubstantiated and therefore remain at best cyclical. However, the years of turbulence and damage would be unnecessarily devastating. As with the Berlin wall, let’s hope that this European wall does not last either.²⁰⁹ If the ICS wins traction, the invisible college of the proletarian arbitration league has finally made its existence visible.²¹⁰ Thus, before the league gains further acceptance, the proponents of the regime and the immediate actors and stakeholders in the sociology of international arbitration better prepare to make their case loud and clear by underscoring the standing of ISDS in legal civilization and the intrinsic currency in its philosophical underpinnings.

At the end of the day, instead of writing this lengthy research paper on why ISDS is the best venue for redressing grievances stemming from investment disputes, one should simply have placed the burden on the critics by asking the accusers to make their case beyond a reasonable doubt before starting the assassination of a perfectly functional transnational adjudicatory framework. But because the critics deal in ideology and bliss beliefs rather than facts and virtue,²¹¹ we need to engage in this silly blame game in order to expose the European Union’s naked Emperor to a blind and deaf audience

²⁰⁸ Born, *supra* note 1. On the other side of the Atlantic Ocean, nationalism and populism is pushing for another, physical wall meant to divide rather than unite.

²⁰⁹ Born, *supra* note 1.

²¹⁰ Gaillard, *Sociology*, *supra* note 4, at 194 (“The only clubs missing in arbitration are those reflecting social class divides. The Proletarian Arbitration League has yet to be created.”). Intentionally and often unintentionally, this creeping movement of ideologues have been well-represented in academic settings, in politics, and in NGOs. In other words, they make up for a large part of the “civil society” that seeks to enhance the global legitimacy of ISDS. *See, e.g.*, EBERHARDT & OLIVET, *supra* note 128; *Jean-Claude Juncker plays with future of EU-US trade deal*, FIN. TIMES (Oct. 23, 2013), <https://www.ft.com/content/3571c8b2-5ac0-11e4-b449-00144feab7de>; B. Segol, *TTIP Will Not Be Approved Unless ISDS Is Dropped*, FIN. TIMES, (Oct. 27, 2014); Alison Ross, *Will Juncker junk ISDS?*, GLOBAL ARB. REV. - GAR (2014), <https://globalarbitrationreview.com/article/1033829/will-juncker-junk-isds>; Gallo & Nicola, *supra* note 5; Elizabeth Warren, ‘Interview with New York Times’, N.Y. TIMES (Jan. 14, 2020) <https://www.nytimes.com/interactive/2020/01/14/opinion/elizabeth-warren-nytimes-interview.html> (discussing ISDS negatively, comparing the regime with labour enforcement provisions).

²¹¹ Brower, Pulos & Rosenberg, *supra* note 100.

of ideologs.²¹² On the other hand, the European Union's proposal even smells bad.

²¹² See HANS CHRISTIAN ANDERSEN & VIRGINIA LEE BURTON, *THE EMPEROR'S NEW CLOTHES* (1949).

