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Investor-State Dispute Settlement (ISDS): Balancing Economic Sovereignty and International Legal Commitments

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ABSTRACT

Investor–State Dispute Settlement (ISDS) has become one of the most controversial processes of international economic law, and has straddled the nexus of foreign investment, sovereignty and development policy. Though ISDS was initially created to give its investors a sense of security and depoliticize their claims, lately it has gained critics over excess damage payments, regulatory stifling and political responsibility. The example of Pakistan, most notable in the Tethyan Copper arbitration exemplifies the disadvantages developing states suffer when signing one-sided investment treaties. The paper is a critical review of the historical developments, economic justification as well as the criticisms of ISDS using EU, U.S and Chinese experiences as a case example. It also gets involved in current reformist discussions such as the Multilateral Investment Court and the evaluations of their possible impact in terms of balancing investment protection and regulatory independence of states. The analysis outlines that it is in Pakistan interest to adopt a dual approach to the treaty modernization and institutional strengthening and also get actively involved in multilateral reform efforts in order to make ISDS consistent with the state policy of economic development and its sovereignty.

Keywords: *Investor State Dispute Settlement (ISDS); Bilateral Investment Treaties (BITs); Sovereignty; Foreign Direct Investment (FDI); International Arbitration; Multilateral Investment Court (MIC); Pakistan; Economic Sovereignty; International Economic Law.*

INTRODUCTION

Investor-State Dispute Settlement (ISDS) has been proved to be one of the most controversial instruments in international economic law. ISDS is meant to offer to foreign investors neutral and executable rights against host states and is usually enshrined in Bilateral Investment Treaties (BITs) and in broader trade and investment agreements. The essence of its fundamental reasoning is in the reduction of risks of investments by providing the investors with recourse in a foreign court thus stimulating cross-border investment and economic development (Salacuse, 2021a). ISDS however has met controversy despite this being economically logical. Critics claim that the system undermines state sovereignty, augers the rights of corporate interests excessively and lays mounting financial debts on the developing economies(Wellhausen, 2021)

The intensity of the need to safeguard foreign investment and the requirement to uphold the regulatory autonomy of the host states has resulted in what scholars term as the sovereignty-commitments dilemma (Qumba, 2021). Investment treaties are often entered by states in anticipation of encouraging FDI, but the existence of investment treaties later threatens to include claims that call into question legitimate exercise of public authority with respect to environmental regulations, measures in response to threats to public health, or resource management policies. This produces the spectra of regulatory chill, whereby governments will pass on implementing regulations deemed as socially necessary due to the fear of investor claims (Tams et al., 2023). At the same time, dismantling ISDS entirely raises concerns over investor confidence, capital flight, and reduced economic growth, issues particularly relevant for states in the Global South, including Pakistan.

The agnostic question that lies at the core of this paper is whether there is a compromise that can be achieved between economic sovereignty and international lawful pledges through the use of ISDS? Can it be said that enforcement of a system that was originally made to protect investors could also develop to suit the host state in exercising its right to regulation in its best interest? To respond to this question, the paper reviews ISDS, using a legal-economics framework, that is, a combination of doctrinal analysis along with economic theory and evidence. It will critically assess the historical development, economic justifications, case law, and reform proposals to evaluate whether ISDS, in its current or reformed form, is capable of achieving equilibrium between state sovereignty and investor protection.

This inquiry holds particular relevance for developing economies. Pakistan, for example, has faced multi-billion-dollar arbitral awards such as the *Tethyan Copper Company v. Pakistan* case, where state regulatory actions in the mining sector resulted in one of the largest ISDS awards in history(Giroud, 2024). Such cases illustrate how ISDS can impose severe fiscal burdens while limiting the ability of states to pursue domestic policy goals. By situating Pakistan's experience within the broader global debate, this paper seeks to contribute to the literature on international investment law by exploring reforms that may render ISDS more equitable, economically efficient, and politically legitimate.

EVOLUTION OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Investor protection may be viewed as having roots in diplomatic protection, in which a home state took up the cause of its nationals against a host state. The exercise is not apolitical and sometimes inconsistent, resulting (at the same time) in the possibility of diplomatic tensions instead of neutral dispute settlement (Dolzer et al., 2022). After World War II, there was the formation of Bilateral Investment treaties (BITs), which entrenched the rights of investors, giving them substantive rights, e.g. fair and equitable treatment, and procedural rights, e.g. access to arbitration(Salacuse, 2021b).

The most important institutional change as shown in this respect was the institution under the Washington convention of the International Centre of Settlement of Investment Disputes (ICSID) in 1965 (Kryvoi, 2023). CSID established an impartial treaty-based system to address disputes between investors and the host state without involving the local courts. The provision of direct investor access to international arbitration was groundbreaking: it aimed at depoliticizing investment disputes, and at giving investors certain to have their claims adjudicated in an impartial, third party. By the 1990s the addition of ISDS provisions had become the norm in BITs and as of 2023 there are nearly 2,500 such provisions in BITs (Kryvoi, 2023).

The economic argument behind ISDS was simple: with the risks of investing driven down, the states would increase the capital inflows. This theoretically would encourage economic growth especially in the developing nations that have poor judiciary systems (Pahis, 2025a). Nevertheless, these positive effects came at the cost of inconsistency in the arbitral decisions made, the lack of transparency, and the legitimacy of international tribunals, which was left in question. These problems have led to a rash of reformation discussion in both scholarly and squeak arenas which still influence the development of ISDS to date.

Economic Rationale and Critiques of ISDS

Economic theories of transaction costs and of risk reduction form the rationale justifying Investor-State Dispute Settlement (ISDS). Within a law-and-economics framework, the primary argument is that ISDS mitigates the risk that investors encounter in a foreign country, especially with weak or unstable state judicial systems (Kułaga, 2024). ISDS has the advantage of providing access to a global arbitral institution that minimizes the negotiating costs that countries incur when negotiating investment protections one by one and thereby also addresses the risk of opportunistic government behavior relative to foreign investors, such as expropriation or the imposition of discriminatory treatment (Pahis, 2025b). In theory, In principle, such protections boost the investor confidence, raise foreign direct investment (FDI) flows, and boost the economic growth in the host state (Nobavehvatan, n.d.).

evidence on the association between ISDS and FDI inflows is inconclusive. Though some reports indicate that strong investment protections might influence the flow of capital, others have revealed very low to no connection between the investment treaties and actual FDI (Bonnitcha et al., 2017). This opposes the economic basis of ISDS, bringing into question the degree to which the costs of ISDS are worth the developmental gains.

A second critique that is quite substantial is that of regulatory chill. Researchers maintain that ISDS can dissuade governments against implementing valid laws of the public interest, including protection of natural life, public health laws and improvement in workplaces, out of fear of expensive investor actions (Nedeva, 2024). In this way, the system can distort policy-making by prioritizing investor interests over democratic decision-making and social welfare.

Additionally, ISDS proceedings in many cases are costly, lengthy and biased against the State. Arbitration is calculated at an average of USD 8-10 million per case, and some cases have surpassed USD 30 million as far as legal and tribunal charges are concerned (Eken, 2024). his cost incurs a serious fiscal obligation on the developing economies, without any damages awarded in the cases. Moreover, critics point to the lack of consistency in arbitral decisions, limited mechanisms for appeal, and concerns over arbitrator bias, all of which undermine the predictability and legitimacy of the system (Deshpande, n.d.).

Thus, while ISDS was designed to promote economic efficiency and stability in cross-border investment, its operation has generated substantial criticism. The tension lies in reconciling the system's economic rationale with the political and legal realities of host states, particularly in the Global South. The next section will examine how these critiques manifest in specific case studies, illustrating the sovereignty–commitments dilemma in practice.

CASE STUDIES AND EMPIRICAL EVIDENCE

ISDS is a practical implication of a method which could be best described by using the cases. A number of high-profile disputes exemplify the sovereignty to commitments problem, where assuring scientific and treaties to validate state action in the overall interest and regulatory activities clash with investor protections in international agreements.

One of the most referred cases is Philip Morris v. In Uruguay, the tobacco company contested the anti-smoking policy of Uruguay in a case brought against that country in a dispute arbitral tribunal under an investment treaty signed between Uruguay and Switzerland (Garde & Messenger, 2025). Philip Morris claimed that the rules set by Uruguay including the mandatory graphic health warnings on the packages and the restriction by the number of variations of the logo were amounting to indirect expropriation and breaching of fair and equitable treatment. Nevertheless, the arbitral tribunal sided with Uruguay due to the state regulating in the interest of the general health of the population (Kinnear & Esteban, 2024). This case is often quoted showing that ISDS is flexible enough to accommodate bona fide regulatory interests, but it also shows that state have to go to immense length to justify such a measure. The expenditure came at a high cost as Uruguay is a small developing nation, yet it spent more than USD 10 million on its legal fee (Kathiarayan & Affandi, 2024).

A contrasting example is *Vattenfall v. Germany*, arising from Germany's environmental regulations and energy policy. In the first Vattenfall case, the Swedish energy company sued Germany over restrictions on a coal-fired power plant under the Energy Charter Treaty, resulting in a settlement that relaxed environmental standards (Tambe, 2024). In the second case, Vattenfall challenged Germany's decision to phase out nuclear power after the Fukushima disaster, claiming billions in damages (Krayem & Thorin, 2024). These disputes highlight concerns about regulatory chill, where even advanced economies may hesitate to adopt strong public interest measures due to the risk of costly ISDS claims.

For Pakistan, the *Tethyan Copper Company v. Pakistan* case illustrates the severe economic consequences of ISDS. The dispute arose after Pakistan denied a mining lease to the company, citing environmental and regulatory concerns. The ICSID tribunal awarded USD 5.9 billion in damages against Pakistan, one of the largest ISDS awards in history (Butler, 2024). The case not only imposed a staggering financial burden but also underscored how ISDS can constrain resource sovereignty in developing economies. Pakistan eventually reached a negotiated settlement, but the episode highlighted the vulnerability of states facing powerful corporate claimants (*Tethyan Copper v. Pakistan | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub*, n.d.).

These cases collectively demonstrate that ISDS can produce widely divergent outcomes. While some rulings uphold the right to regulate, others impose significant financial costs that may deter future regulatory action. Empirical studies confirm this pattern: states facing large ISDS claims often adjust their policies to avoid further disputes, thereby validating concerns about regulatory chill (Wilske & Adams, 2024). The cumulative effect of such cases suggests that ISDS, in its current form, disproportionately impacts developing economies, where the balance between protecting investors and preserving sovereignty is most precarious.

Reform Debates

The widespread criticisms of Investor–State Dispute Settlement (ISDS) have fueled global reform debates, particularly concerning transparency, legitimacy, and the balance between investor protection and state sovereignty. Several reform pathways have emerged at multilateral, regional, and national levels, reflecting a growing consensus that the traditional ISDS system requires recalibration.

One of the most influential voices in the debate has been the United Nations Conference on Trade and Development (UNCTAD). Since the early 2010s, UNCTAD has highlighted the "new generation" of investment policies, calling for balance between investor rights and sustainable development objectives. Its Investment Policy Framework for Sustainable Development (IPFSD) emphasizes the need for states to preserve regulatory autonomy while offering fair treatment to investors. UNCTAD has urged countries to revise their bilateral investment treaties (BITs) by including exceptions and clarifications on fair and equitable treatment (FET), expropriation standards, and dispute settlement procedures (Artamonova, 2025).

The European Union (EU) has also pioneered institutional reform by moving towards the Investment Court System (ICS). Introduced in agreements like the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the ICS replaces ad hoc arbitral tribunals with a permanent tribunal composed of appointed judges, as well as an appellate mechanism. The EU argues that this system improves transparency, consistency, and judicial independence, while reducing perceived biases in favor of investors (Wong & Yackee, 2025).

Beyond regional efforts, discussions at the United Nations Commission on International Trade Law (UNCITRAL) have focused on establishing a Multilateral Investment Court (MIC). This proposal envisions a standing court with universal jurisdiction over investment disputes, composed of permanent judges and a multilateral appellate body. While the MIC could address fragmentation and legitimacy concerns, critics argue that it may replicate problems of cost, complexity, and sovereignty constraints, especially for developing states(Kam, 2025).

Parallel to these institutional reforms, alternatives to arbitration are gaining traction. Mediation is being promoted as a cost-effective and less adversarial mechanism, particularly for disputes where long-term investor–state relationships are at stake. Some scholars and policymakers also advocate for greater reliance on domestic courts, with ISDS serving as a secondary option after exhaustion of local remedies. This approach could strengthen domestic legal capacity while reducing reliance on international arbitration (강주연, 2024).

Despite these reform initiatives, opinions remain divided. Proponents of ISDS reforms argue that legitimacy and sustainability of the global investment regime require institutional change, while skeptics maintain that reforms like the MIC or ICS could entrench a system still skewed towards investors. The reform debate therefore reflects not just procedural concerns, but also deeper disagreements about the relationship between globalization, investment, and sovereignty (Salman, 2024).

Balancing Sovereignty and Commitments

The central challenge in the ISDS framework lies in striking a balance between protecting foreign investors and preserving the regulatory autonomy of host states. Investment treaties are designed to create a stable and predictable legal environment, thereby encouraging capital inflows. Yet, this stability should not come at the expense of states' capacity to regulate in the public interest, particularly in areas such as health, environment, and resource management.

One way to mitigate the tension is through the use of carve-outs or specific exceptions in treaty drafting. For example, public health and environmental measures may be explicitly safeguarded, ensuring that ISDS tribunals do not override legitimate regulatory actions. Recent agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), illustrate attempts to embed such protections within modern treaty frameworks (Garcia, 2024).

Balancing also requires consideration of economic efficiency versus fairness. While ISDS is justified on grounds of reducing transaction costs and mitigating investor risks, the disproportionate burden on developing economies raises questions of distributive justice (Eastwood, 2024). For instance, multimillion-dollar awards against states with limited fiscal capacity, such as Pakistan in the *Tethyan Copper Company* case, undermine long-term economic development goals (*(PDF) The Role of Developing Countries in Investor-State Arbitration: Reflections on Tethyan Copper v Islamic Republic of Pakistan*, n.d.). This has led to calls for a more equitable model that balances investor rights with sustainable development and policy autonomy.

Pakistan's experience illustrates the stakes of this debate. After facing multiple ISDS claims, Pakistan has embarked on a process of BIT renegotiation to include greater policy flexibility. The government has sought to introduce clauses that clarify the scope of fair and equitable treatment (FET), emphasize state regulatory powers, and promote mediation before arbitration (Simões & Mamede, 2024). Such reforms represent a pragmatic attempt to reconcile investor confidence with sovereign prerogatives.

Ultimately, balancing sovereignty and international commitments requires a multi-pronged approach: (i) reformulating treaties to explicitly protect public interest regulation, (ii) adopting flexible dispute resolution mechanisms such as mediation, and (iii) promoting capacity-building in developing states to handle complex arbitration cases. By ensuring that economic efficiency does not eclipse fairness and sustainability, states can reconfigure ISDS into a tool that serves both investors and sovereigns(Bonnitcha & Williams, 2024).

COMPARATIVE INTERNATIONAL CONTEXT

The international discourse on ISDS reform demonstrates several areas of differences in the way the leading economies practice that balance between state sovereignty and investor protection. Such experiences can be instructive in Pakistan and other Global South jurisdictions being faced with analogous challenges.

European Union (EU). In particular, the EU has taken a very reformist approach in general, and the Investment Court System (ICS) in particular, as it was introduced in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)(Bonnitcha & Williams, 2024). Instead of ad hoc arbitral tribunals, this model introduces a permanent body that is quasi-judicial in nature: the judges are appointed and there is an appeals mechanism. The EU is also an advocate of development of a Multilateral Investment Court (MIC) convened by UNCITRAL (Karimi & Yavari, 2024). This reflects the European concern that traditional ISDS undermines regulatory autonomy, particularly in sensitive areas like climate change and digital policy.

United States. Compared to this, the U.S. has traditionally been pro-ISDS especially in bilateral agreements and early trading arrangements. Current doubts have since arisen though. ISDS has also been diminished under the USMCA where Canada renounced and where between the U.S. and Mexico, ISDS can be applied only in a few sectors, e.g., oil and gas (Gagné, 2025). These narrowing signals a recalibration toward safeguarding state regulatory space while still accommodating key industries.

China. Such a path of China is especially topical in the case of Pakistan. Stepping tentatively into investor protections, China has become increasingly open-minded in its adoption of ISDS as it moves toward a position of capital-exporter. More recent Chinese BITs and its involvement in the Belt and Road Initiative (BRI) are a more pragmatic attitude: Chinese offer ISDS in the protection of their investments in foreign countries, but renegotiate its older treaties where it faces extensive liability (Gagné, 2025). Pakistan, as a BRI hub through CPEC, faces direct implications from this evolving Chinese model, which increasingly balances sovereignty with strategic economic interests.

Lessons for Pakistan and the Global South. Countries like Pakistan imply a mixture of routes depending on the global experiences. First, institutional changes that are EU-inspired e.g. the introduction of appellate review may diminish inconsistency in awards. Second, and also based on the U.S. model, coverage of ISDS may be focused on strategic sectors instead of providing blanket protection. Third, following the example of China, Pakistan can seize the opportunity to renegotiate existing agreements to ensure it conserves its regulatory prerogatives in addition to defending the outbound investments of its own multinationals (Alvarez, 2024).

Taken collectively, these comparative models make it clear that ISDS reform has no single template. Rather, host states will need to tactically manage their treaty obligations, determined by where to strategically draw the balancing exercise between investor confidence and long-term development and policy independence.

CONCLUSION

Pakistan is an exemplary case where Investor-State Dispute Settlement (ISDS) trajectory signifies the tensions between foreign attraction and protection of regulatory sovereignty. The highly expensive lesson of the Tethyan Copper arbitration highlights how bilateral investment treaties that are poorly negotiated can subject states to exorbitant liability, jeopardizing the governments operational and financial integrity. Meanwhile, Pakistan cannot just abandon ISDS because this would not only deteriorate its reputation in the international arena but also lose investor confidence.

A comparative study of reform processes across the European Union, United States and China indicates that it is difficult to draw any general models of this dilemma solution. Instead, nations should work within their own individualized economic circumstances, developmental priorities and geopolitical interests by customizing their approaches. In the case of Pakistan this will entail a judicious balancing between welcoming foreign investment and a stringent protection of its domestic policy space especially on natural resource management, infrastructural and provision of services.

Moving ahead, there should be three interconnected pillars on which the reform strategy in Pakistan is based. It must modernize its investment treaties by affording explicit convertible limits providing investor rights, broadening transparency and ensuring the right to regulate within the greater societal good. Second, enhance national legal and regulatory systems in order to allow dispute resolution to be done at that level and not to rise to the international regime of arbitration. Third, constructive participation in multilateral efforts to reform the current system, especially in negotiating a new system of permanent investment court/appellate mechanism, such that the voices of the developing countries can be heard.

The issue is not whether ISDS is a good or bad idea, the question is how will it be reformed to keep up with modernity. In the case of Pakistan, the task is how it can prevent its old sins to emerge and the manner in which it can become a credible and equitable investment destination. By combining legal reform, institutional strengthening and strategic diplomacy in an integrated approach, there is a good chance that Pakistan can turn ISDS into an instrument that would help achieve sustainable development and long-term investor confidence.

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