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Article

International Investment Law in the Shadow of Populism: Between Redomestication and Liberalism Re-Embedded

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Abstract
The international investment regime is in crisis, nowhere more so than in regard to the investor–state dispute settlement system. While several developing countries have been critical of the system for some time, rich countries like the US and EU states—once the principal promoters of this regime—are now acknowledging problems and advancing reforms. This change of position has been fueled by the mobilization of civil society and the emergence of domestic populist movements on both the right and the left, reflecting widespread discontent with the past three decades of neoliberal globalization and its effects on job losses, lower wages, and increasing inequality. This article argues that this shift has opened up a unique opportunity for developing countries that want reform, as there is less pressure (real or imagined) from rich countries to continue with an old model that no longer serves. Two paths present a possible way forward: (a) Participating countries can disengage from investor–state dispute settlement and opt for the redomestication of international investment law, rekindling the Calvo doctrine, or (b) they can follow John G. Ruggie's "embedded liberalism" to re-embed the international investment regime with values and social objectives that are now deemed politically indispensable. This article explores each of these paths, with a particular focus on Latin America. It argues that although populism creates pressures to change or abandon the regime, in developing countries it also generates constraints that may prolong the status quo.

Keywords
Calvo doctrine; embedded liberalism; foreign direct investment; ISDS reform; international investment law; Latin America; neoliberalism; populism; redomestication

Issue
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1. Introduction

The international investment law regime is in crisis. Once held out as a promising innovation for attracting foreign direct investment (FDI) and a bastion for the rule of law, today it faces criticism from scholars, practitioners, governments, and civil society groups alike. Concerns focus not only on the regime itself, but also on the investor–state dispute settlement (ISDS) mechanisms found in hundreds of international investment agreements (IIAs). Critics note inter alia that as investors' interests are afforded prominence, states' regulatory powers have declined, staggering awards can damage a country's fiscal budget, and inconsistent awards negatively impact trust and predictability.

Countries that once enthusiastically embraced the system of ISDS are now leaving or reducing their engagement. Rich countries are increasingly wary of infringements on their regulatory autonomy, given the unanticipated use of IIAs to challenge domestic regulation and the effects of prioritizing investor rights on their democratic processes (Pelc, 2017). As countries in the Global North become significant recipients of capital, and not just capital exporters, they face mounting arbitration and the potential constraints and budgetary risks of ISDS. As a result, these countries—once principal promoters of this regime—have started acknowledging problems and advancing reforms at an ever-increasing pace.

This change of position has been fueled by the emergence of domestic populist movements in rich,

democratic countries on both the right and the left, reflecting widespread discontent with the past three decades of liberal globalization and its effects on job losses, lower wages, and increasing inequality (see, e.g., Milanovic, 2013; Roberts & Lamp, 2021; Rodrik, 2018b). This article argues that this shift has opened a unique opportunity for developing countries that want reform, as there is less pressure (real or imagined) from rich countries to continue with an old model that no longer serves. Two paths present a possible way forward: Participating countries can (a) opt for redomestication by disengaging with ISDS and bringing investment disputes under home-state jurisdiction, in line with the historical tenets of the Calvo doctrine, or (b) they can try to re-embed the investment regime with updated values, establishing a new "embedded liberalism" compromise like the one John G. Ruggie analyzed and substantially transforming it with a social purpose that is now deemed necessary. This article explores each of these paths, with a particular focus on Latin America. It argues that although populism creates pressures to change or abandon the regime, in developing countries it also generates constraints that may prolong the status quo.

2. The Populist Challenge to Neoliberal Globalization and Reform of Investor–State Dispute Settlement

The backlash against globalization in rich countries has led to important policy changes, which have sought to disengage from, substantially alter, or challenge the legal and institutional setup wrought by neoliberal globalization. The US siege of the World Trade Organization's Appellate Body, the North American Free Trade Agreement renegotiation (the United States–Mexico–Canada Agreement [USMCA]), the withdrawal from the Trans-Pacific Partnership (TPP), and the tariff war with China are all examples of the US challenging the agreements and principles for which it once proudly stood. In Europe, Brexit, opposition to the Transatlantic Trade and Investment Partnership, and growing nationalistic movements that oppose the EU illustrate creeping doubt about the liberal economic principles of free trade, underscored by concern about its distributional consequences.

"Populism" describes political movements that claim to represent "the people" in some capacity, against "the establishment." Its roots go back to the 19th century in the US, but it has been present in many parts of the world (Rodrik, 2018b). Rodrik (2018b) argues that economic history and economic theory indicate that advanced phases of globalization would produce a populist backlash, given concerns about distribution, inequality, and fairness. Whether the movement takes a left-wing or a right-wing form in each state depends on how the globalization shock has manifested there (in demand) and what social cleavage the political leaders choose to emphasize (supply).

In the left-wing variant, the shock is related to job losses due to trade competition, economic and financial crises, International Monetary Fund programs, conflict with multinational corporations' investments in sensitive sectors, and economic mismanagement. Such populist leaders mobilize the majority against the economic elite and its foreign capital/institutional allies, identifying them as the source of the peoples' economic woes. Left-wing populist narratives center on an income and social class cleavage (Rodrik, 2018b). The left-wing populist narrative critiques neoliberal globalization because it rarely compensated losers, the rules of the game were rigged in favor of the elite, and because of the selective nature of economic integration, which hurt the working class (Roberts & Lamp, 2021).

In the right-wing variant, the shock is focused on immigration and refugees, who are seen as displacing the "native" workforce, draining fiscal budgets, and changing the cultural mores of society. The majority turns against minorities (national, ethnic, racial, religious) and other countries, identifying *them* as the source of the problem. Politicians in right-wing populist movements emphasize an ethno-national/cultural cleavage (Rodrik, 2018b). The right-wing narrative also has an anti-trade trade protectionist element, combined with anti-immigration and nationalism. Proponents of this variant may use these elements jointly or separately, but they share the belief in an external threat from which they need to protect the people (Roberts & Lamp, 2021). In Latin American countries, left-wing populism has been dominant and long active, whereas in Europe the right-wing variant is prevalent and has emerged more recently. In the US, both variants are currently present and strong (Rodrik, 2018b).

Furthermore, populism can be economic or political (Rodrik, 2018a). Economic populism rejects constraints on economic policy whether imposed by autonomous agencies, independent central banks, or international economic agreements. Political populism, often led by a charismatic autocrat, rejects checks on power and political competition. It undermines separation of powers, an independent judiciary, free media, and free and fair elections. A populist regime may, but need not, have both components.

Are we witnessing the dawn of a new era? Is the neoliberal economic regime giving way to something else? And if so, what are the underlying principles of this new regime? What are its aims? The dust may still be too thick in the air to see what will come; whether countries will opt to re-define the values underpinning the international investment law regime, or to withdraw from the system entirely. We grasp for historical examples of regime change or theories that can shed light on the present shift. In recent years, scholars have begun to chart potential changes to the international investment law regime and to devise frameworks for assessing alternatives (Duarte Gomez et al., 2021; Puig & Shaffer, 2018; Roberts, 2018a, 2018b). The potential changes range from modicum corrections to a paradigm shift. These frameworks are designed to help reformers think about possible institutional setups, given their country's

context. Crucially, what institutional configuration a country may choose–and what level of integration or decoupling with the international investment system it entails–would depend on that country's goals, economic outlook, geopolitical situation, and institutional capacity. In what follows, I describe redomestication and embedded liberalism as two general approaches that can help conceptualize countries' efforts to disengage or reform the international investment regime and the general direction they may pursue.

2.1. Redomestication

In the last decade, several countries (including many in Latin America) have been affected by the frequency of ISDS claims against them and the staggering monetary awards they have been ordered to pay (Center for the Advancement of the Rule of Law in the Americas, 2022). Some countries have become so upset with the constraints imposed by ISDS on their ability to pursue social and economic regulatory agendas that they have decided to exit the system altogether. They have thus sought to disengage from ISDS systems and bring back to their domestic arena any disputes concerning investment law. I refer to this approach as "redomestication," evoking the double meaning of "domestication." On one hand, domestication means bringing to the national, domestic level all matters of investment law, making national law the governing standard and national courts the relevant fora for dispute resolution. Domestication also alludes to the act of taming or disciplining something, usually a wild animal, to be beneficial as opposed to dangerous (Domestication, n.d.) Redomestication may increase in appeal as an alternative to ISDS reform if reform proposals do not respond to the most powerful critiques of the system or address the needs of countries most at risk from a currently undomesticated and perilous regime.

Redomestication is an approach that embraces the Calvo doctrine, a nationalist legal doctrine developed by Argentinean jurist Carlos Calvo in the 19th century, which stands for the proposition that foreign investors should be treated as nationals of the host state (Shan, 2007a; Shea, 1955). Under the Calvo doctrine, foreign investors renounce the protection of their home governments and accept to resolve their disputes in the national courts of the host state, according to domestic law. This doctrine was adopted by most Latin American countries and spread to other parts of the world (Shan, 2007b, p. 632). It was influential in the proposed New International Economic Order and the Charter of Economic Rights and Duties of States, advanced by countries of the non-aligned movement in the 1970s (Shan, 2007b).

Redomestication means movement on two fronts: a shift of the applicable substantive standard to national law and the attribution of jurisdiction for investment disputes to national courts (See Table 1). In the current context, redomestication can be better understood as a continuum, and a country may move in that direction even if it does not fully disengage from the international investment regime. For instance, a country may exit ISDS but still preserve state-to-state dispute settlement and applicable international law stemming from its investment agreements.

3. Re-Embedding Investment Law in an International Regime

3.1. Embedded Liberalism

In these uncertain times, Ruggie's (1982) work in international relations and his analysis of the "embedded liberalism" compromise in the regime of international economic law has gained new relevance. Writing in the early 1980s, Ruggie argued that the international trade regime established after the Second World War was not one of laissez-faire or unfettered market liberalization, as many claimed. Rather, he suggested that it was an international regime whose founders set out to interact with states' own social and economic institutions, making room for national compromises regarding economic competition and social protection. It was a liberal regime, but it was "embedded" with states' own values.

Table 1. From the Calvo doctrine to ISDS in a spectrum.

	Domestic		International	
Standard of treatment	National treatment		More favorable treatment to foreign investors	
Applicable law	Governed by domestic law exclusively	Governed by domestic law primarily, complemented by international law	Governed by investment treaty	Governed by international costumary law
Dispute settlement venue	Exclusive jurisdiction of national courts	Exhaustion of local remedies	Diplomatic protection: State to state	Investor–state arbitration

Ruggie's work helped to cast doubt on the characterization of the international trade regime as inherently neoliberal. The trade measures undertaken by the US in the 1980s to protect its industry against the rise of Japan were decried by trade scholars and policymakers as protectionist and anti-trade. By calling attention to the "embedded liberal" compromise of the international trade regime, Ruggie's work sought to dispel the notion that those actions were a departure from the values enshrined in the General Agreement on Tariffs and Trade, which allowed states plenty of space to modulate trade liberalization according to their own domestic choices and needs.

From this standpoint, the liberalization agenda that took hold more decisively in the 1990s with the formation of the World Trade Organization—not always in its agreements but in their interpretation and in the predominant normative discourse—was a departure from the embedded liberalism of the post-Second World War era (see Grewal, 2018). At its peak, and then during the long, gradual decline of neoliberalism, scholars have returned to Ruggie's work for inspiration on the possibility, desirability, or impossibility of re-embedding the liberal regime with new, socially relevant values (Dunoff, 1998; Howse, 2002; Lang, 2006; Rolland & Trubek, 2019). At present, in the face of the populist challenge to liberalism and nationalist attacks on the international liberal regime, "embedded liberalism" seems a promising port in which to dock the drifting ship.

Ruggie's work can be useful in several ways. First, it makes clear that social purpose is a central element of a regime's existence and of its continuation or eventual decline. Second, beyond the institutional and legal frameworks, it can help describe how the regime is constituted by a "generative grammar," which is to say a shared understanding of the assumptions on which the regime rests and which the relevant actors deploy and develop.

3.2. The Investment Regime's Social Purpose and Its Fading Legitimacy

A line of inquiry in Ruggie's work, less explored by international economic law scholars, analyzes the conditions that make a regime coalesce or lead it to unravel. Ruggie argued that, just as important as hegemonic power supporting a regime is the legitimacy of that regime's social purpose (Ruggie, 1982). So, even if the power configuration between regime participants changed (or a hegemon declined), the regime could endure so long as the social purpose held. Conversely, one could argue that even when a regime maintained the support of powerful countries, that regime could unravel despite hegemonic support if social legitimacy began to wane. What we are seeing today seems both a significant challenge to the social purpose of the international investment law regime and a withdrawal of support by its most powerful actors—hitherto its biggest proponents.

Changes in the US and European position, as well as that of many emerging countries who have been vocal critics of the regime, manifest a challenge to the regime's assumed social purpose and consequently a weakening of its legitimacy. This fracture could lead to the eventual demise and transformation of the international investment law regime. It is not clear what China's position will be regarding the international investment law regime and ISDS in the future. For now, China maintains a somewhat flexible, uncommitted position, participating in discussions about the regime's reform but not advocating for any big change (Du, 2022). Other emerging countries like India have been strong critics of the regime and have clearly departed from it. Brazil was an early critic and has developed its own model of investment agreement, which excludes ISDS.

So, what is the purported social purpose of the international investment law regime? How did those who designed and promoted it justify it? What expectations gave the regime such allure? Of the various objectives that scholars have identified, two seem central. First, that IIAs with ISDS would help attract much-needed FDI to developing countries that needed capital but could not source it nationally (Howse, 2017). In addition, it was often assumed that FDI would naturally lead to growth and development, improving society's overall welfare.

Second, it was argued that IIAs would help improve the rule of law in the host state or act as a substitute when it was weak (Howse, 2017, p. 34). Rule of law is a notoriously vague concept. I am referring here to a formal and instrumental conception of the rule of law, which assumes that there must be clear, general rules and that those rules must be capable of being followed so that individuals can plan accordingly (Santos, 2006). ISDS would help discipline the government to avoid defaulting on its promises or acting arbitrarily, hence providing certainty and predictability to foreign investors. The state would be disciplined given the real threat of an unfavorable arbitral award rendered by an independent tribunal. This newfound restraint of the host state would have spillover effects for all economic actors in society, hence improving the rule of law in the country. If the host state's rule of law remained weak and unreliable, ISDS would fill that gap, providing a necessary enclave to guarantee certainty to investors (Howse, 2017).

After three decades of the regime's boom and the beginning of a potential bust, both objectives have clearly fallen short. On the attraction of FDI, results of empirical research show that there is no clear causal connection between the existence of an IIA and FDI (Brada et al., 2021). States that did not sign on to ISDS, like Brazil, continue to attract significant FDI. States that have withdrawn from the ISDS system, like South Africa, have seen no decline in FDI. Investors consider many factors when deciding where to invest and the existence of an IIA does not seem to be high on the list. Moreover, investors have effective alternatives to ISDS in the case of conflict, such as political risk insurance. Investors can also seek

to include arbitration clauses in their contracts with governments. But even if ISDS somehow helped attract FDI, the connection between FDI and growth is not automatic, much less the connection to economic development that was the ultimate aspiration of developing countries in adopting ISDS.

On the rule of law question, it also seems clear by now that there is no direct connection between ISDS and rule of law improvement in a host state (Bonnitcha et al., 2021). First, many state policies that have led to ISDS action and hefty awards have little to do with (a lack of) rule of law, for example, having to respond to economic crises, regulating in the public interest in areas of health or the environment, or complying with other international obligations like climate change mitigation or human rights that conflict with investment obligations. In addition, several of these cases involve the US, Canada, and EU countries, with traditionally robust legal systems, underscoring that the regime is disciplining the regulatory autonomy of countries, not strengthening their rule of law.

Second, ISDS does not seem to have changed the institutional incentives to prevent the state from acting arbitrarily or unpredictably in other instances (Sattorova, 2018). The potential risk of an adverse arbitral award from an administrative or regulatory action does not seem to have been internalized or socialized domestically to the requisite extent to produce this change. Finally, the many extant critiques of the investment law regime and ISDS should put to rest any lingering notion that the system could be a good substitute for rule of law when one is lacking in the host state. These critiques include, inter alia, the inconsistency of arbitral awards, the practice of double hatting by arbitrators and the potential conflicts of interest this may entail, the delay of proceedings, the flaws of evidentiary rules, the methodological problems with how damages are calculated, and the resulting exorbitant amounts of the awards (Kahale, 2018). In short, there are serious problems with the predictability, transparency, and certainty of the investment law norms and their application, the very problems that a rule of law system was supposed to resolve.

It is in this context that the ongoing discussions about the potential reform of the system are taking place. As Alvarez (2021) has recently noted, however, if the central critiques of the legitimacy of the system are ignored, this will likely become an opportunity wasted. This calls for an honest engagement with how the social purpose of the regime has failed, and for a new purpose to be explicitly rearticulated. Otherwise, it would be unclear what the reforms of the regime are for or what ultimate purpose they ultimately seek to achieve.

3.3. The "Generative Grammar" of International Investment Law

One of the most interesting aspects of Ruggie's (1982, pp. 380–382) analysis of a regime is his idea of generative grammar (see also Lang, 2006, pp. 102–105). Regimes cannot be understood simply by looking at their institutions and norms, or at the "descriptive inventory of their concrete elements, but by their generative grammar, the underlying principles of order and meaning that shape the manner of their formation and transformation" (Ruggie, 1982, p. 380).

What a regime is and what it does is construed by what the actors in the system think it is and does. The most important policy questions will not be determined by the rules or institutions but by a "common sense," a normal baseline construed and shared by the actors through which those rules will be interpreted to assess specific actions. In international trade law, this normal baseline delimits, for instance, what constitutes a legitimate regulation and what is a "protectionist" measure or trade barrier. It delimits what a subsidy is and what is a market-based transaction (Tarullo, 1987, p. 546). There is no objective or "natural" normative baseline upon which to make these decisions. They are policy choices informed by the common assumptions shared by the regime's actors which ultimately mark the limits of what is appropriate state action or inaction.

These underlying assumptions can change over time as a result of new phenomena and of contestation. In the trade regime, the debate about trade's linkage to other domains, such as the environment and public health, seems to have challenged some of the regime's established assumptions. The World Trade Organization's Appellate Body seemed to have worked to broaden and rearticulate those assumptions. For some actors and observers, it did not go far enough. For others, it went too far and overstepped its limits. What is clear is that the "generative grammar" that prevailed for much of the last three decades in the trade regime has changed dramatically in recent years, and we speak differently now.

In international investment law, this generative grammar is undergoing changes too. That states have had to advance an agenda to reclaim their "right to regulate," an essential state function, says much about what came to be the regime's underlying assumptions regarding the role of the state in the economy and society. There are proposals to introduce obligations of investors to comply with national laws or international standards regarding labor, the environment, and human rights, conditioning investors' standing in arbitration, or their ability to collect damages to compliance with these obligations. There are proposals to grant rights to third parties—local communities or workers—to bring claims against investors in an ongoing arbitral process or in the investor's home state (Perrone, 2021).

When then-US Trade Representative Robert Lighthhizer criticized ISDS as a system promoting outsourcing and unduly rewarding US companies with insurance to create jobs abroad, it was clear that the long-held assumptions of the regime had begun to crack. The significant reduction of investor rights in the USMCA, including the elimination of indirect expropriation and fair and

equitable treatment for all but five sectors, the requirement of exhaustion of local remedies, and the elimination of ISDS altogether between the US and Canada show a significant shift in the US actors' assumptions about the desirability of the regime.

3.4. The Limits of Embedded Liberalism

Ruggie's analysis of the way the embedded liberalism compromise of the post-Second World War era enabled a type of globalization that left considerable space for states' social and economic choices, and for the pace of their liberalization, holds much attraction today. In the face of frontal attacks on globalization, it is useful to challenge the inevitability of "hyperglobalization" (Rodrik, 2011) and remember that a different institutional architecture, with a different social purpose, was and is possible. It is useful to remember that assumptions that held sway for decades—such as the limited role of the state in the economy, the need to discipline its actions, and the privileges that foreign capital required to be attracted—have lost their grip.

However, there is also a risk of idealizing the embedded liberalism compromise or holding it as the main compass of reform efforts. That compromise, particularly in the trade regime, represented a particular vision of globalization forged by North Atlantic countries in the post-Second World War settlement. It left out proposals from the South that advocated a different international economic law regime, more attuned to their needs and developmental aspirations. Those who forged the compromise looked at the developing countries' proposals with skepticism and disdain (Lang, 2006, p. 100).

Moreover, it was a state-focused compromise, which allowed states to pursue their development goals with more flexibility. However, the developmental state could also sacrifice the livelihoods of indigenous and local communities as it carried out development projects in the name of national welfare. It often operated under authoritarian forms of governance, with serious gender and racial biases, and a blind spot for environmental impact and climate sustainability. Thus, returning to embedded liberalism seems unappealing from the perspective of those groups and perspectives it excluded. It can, nonetheless, help us be mindful of those critiques and think about alternatives to the neoliberal settlement in international investment law.

3.5. Investor–State Dispute Settlement Reform in the North

Populist opposition to new trade and investment agreements in the US, and to some extent in Europe, further illustrates how wealthy countries have become more aware of ISDS-related threats. Opposition to the Trans-Pacific Partnership in the US from academia, civil society, and politicians focused prominently on ISDS. Opponents criticized the potential encroachment on government regulatory autonomy, the unwarranted protection of US investors abroad and the resulting stimulation of outsourcing, and a better standard of treatment for foreign investors than to nationals by US law. In Europe, significant opposition by civil society to new trade agreements with the US (Transatlantic Trade and Investment Partnership) and Canada (EU–Canada Comprehensive Economic and Trade Agreement [CETA]) focused on ISDS. Responding to the opposition, Canada and Europe transformed CETA's investment dispute settlement system, including by establishing a permanent investment tribunal with an Appellate Body, a code of conduct and qualification requirements for arbitrators, and deliberately expanding the state's regulatory space (see Tietje & Crow, 2017).

Against the backdrop of the ISDS backlash, many countries are actively participating in the multilateral reform discussions hosted by the United Nations Commission for International Trade Law Working Group III. In this context, the EU has proposed a multilateral investment court, with an Appellate Body, following the model it has established in its recent bilateral trade agreements (Roberts, 2018a).

The most significant change in the US position is reflected in the new USMCA. The agreement significantly reduces the rights of investors (except for investors with government contracts in five sectors) and limits their protection to direct expropriation and non-discrimination. It eliminates the rights of indirect expropriation, fair and equitable treatment, and full protection and security, which are the basis for most claims. Moreover, the USMCA requires the exhaustion of local remedies before investors can bring a claim against one of the parties. Furthermore, ISDS is only operative between the US and Mexico. Significantly and in an example of redomestication, the US and Canada decided to eliminate ISDS as to claims between them and foreign investors from the other state in the USMCA. Any claims their respective investors may have against the other government must instead be adjudicated in the host countries' courts. Canada and Mexico have no ISDS agreement between them in the USMCA, but both are parties to Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and its ISDS mechanism (Santos, 2019).

Other rich countries have recently changed their position too. Australia and New Zealand decided to opt out of ISDS in the CPTPP (New Zealand Government, 2018). In addition, New Zealand signed side letters with Brunei, Malaysia, Peru, and Vietnam to exclude compulsory jurisdiction in ISDS, with the result that each country must consent to ISDS arbitration on a case-by-case basis (New Zealand Government, 2018). New Zealand's Minister for Trade and Export Growth also expressed that ISDS had been one of their main concerns in negotiating CPTPP and that they "will oppose including ISDS in any future free trade agreements involving New Zealand" (New Zealand Government, 2018).

This comes on the heels of the last two decades during which rich countries have changed their model bilateral investment treaties (BITs) to address criticisms and clarify that investor protection should not undermine legitimate state objectives, like protecting public health, labor rights, or the environment (Shan, 2007b). Also, as rich countries increasingly became recipients of foreign investment, the worries of developing countries hit home—see, e.g., *Vattenfall AB and Others v. Federal Republic of Germany* (2012), wherein Swedish energy company Vattenfall filed a request for arbitration against Germany following a democratic decision to phase out nuclear energy.

In Europe, in addition to social mobilization, a significant driver of the ongoing changes in ISDS is the competence struggles between European institutions and member states since the 2009 Lisbon Treaty transferred competence over foreign investment policy from member states to the EU (Basedow, 2021). The decision by the Court of Justice of the European Union in the Achmea judgement (*Slovak Republic v. Achmea BV*, 2018), holding that the arbitration clause of the Netherlands–Slovakia BIT was incompatible with EU law, led to the Agreement on the Termination of all Intra-EU BITs, signed by most EU members, which is now in force. The process of BIT termination is advancing as members ratify the agreement, which also terminates the BITs' sunset clauses, leaving them without effect. The goal is to end all intra-EU investment arbitration. The Court of Justice of the European Union made a similar ruling in *Republic of Moldova v. Komstroy* (2021), holding that the ISDS mechanism in the Energy Charter Treaty was incompatible with EU law and thus not applicable to intra-EU disputes. While there are still open questions and ongoing litigation on the Energy Charter matter, this is a significant example of redomestication at the EU level.

4. Investor–State Dispute Settlement Reform in the South: The Latin American Experience

The experience of Latin America effectively demonstrates the rise and fall of the appeal of international investment law, and particularly of ISDS, and its changing social purpose. One-third of all ISDS cases globally involve a country in the region (Center for the Advancement of the Rule of Law in the Americas, 2022). Latin American states have together faced claims for US$1.5 trillion and have been ordered to pay US$32.2 billion in awards and settlements (Center for the Advancement of the Rule of Law in the Americas, 2022). The frequency of claims and the steep increase in the value of the awards have led some countries to rethink their participation in the system. Latin America is of interest for another reason amidst the conversation on ISDS reform: The region was the birthplace of the Calvo doctrine, named after Argentinian jurist Carlos Calvo. Conceived in the late 19th century as a defense against rich states' interventions in developing countries, the Calvo doctrine was widely adopted by many Latin American countries. The doctrine became enshrined in a clause—often referred to as the "Calvo clause"—in many countries' constitutions and foreign investment laws. This was a significant feat in a region that had experienced military interventions and diplomatic pressure from foreign governments looking to defend the interests of their investors. Looking at how Latin American countries have responded to the concerns with ISDS can be instructive, particularly at a time when populism is gaining force.

It is important to underscore that there is no monolithic "Latin American position" on ISDS. Countries in the region have differed in their approach to resolving its problems, based on factors including their political and economic history, the respective states' economic performance at any point in time, and the popularity of their governments (Calvert, 2018; Droubi & Elizondo, 2022)

4.1. The Rise and Fall of Investor–State Dispute Settlements

Starting in the 1990s, most Latin American countries embraced the neoliberal economic model, pursuing domestic reforms of privatization and deregulation, and integrating their economies into the global market through international trade agreements. They also became avid participants in IIAs with ISDS, hoping to attract much-needed FDI that could lead to growth. Argentina, for instance, signed its first BIT (with Italy) in 1990. By 2001, it had signed 58 BITs (Pérez-Aznar, 2016). This new international investment regime soon started to produce investment disputes, in frequency and amounts that were hardly anticipated. Argentina experienced a wave of investment claims based on measures to address its 2001 economic crisis. In 2003 alone, it received 20 claims. By 2008, there were 45 cases against Argentina stemming from measures related to the crisis.

By 2010, the increasing number of investor claims and the fiscal risk they represented led some countries to change their mind about the desirability of ISDS. A number of commentators began discussing a "Calvo revival" in Latin America (e.g., García-Bolívar, 2009; Shan, 2007a, 2007b). Ecuador, Bolivia, Venezuela, and Argentina denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and withdrew their consent from a number of IIAs (Feng & Shen, 2020). The 2008 Ecuadorian constitution proscribed the celebration of international agreements in which non-state parties could sue the state before international arbitration tribunals. By 2018, Ecuador had denounced all its IIAs, though several are still in effect given the length of the sunset clauses. By 2019, it had received 29 claims, losing 13 disputes for a total of US$1.3 billion. Similarly, the 2009 Bolivian constitution introduced a Calvo clause for foreign companies operating in the hydrocarbon sector.

Between 2008 and 2018, Bolivia denounced all its IIAs. These were all efforts of redomestication, led by left-wing populist governments. After a change in government in Ecuador in 2021, the country re-signed and ratified the ICSID Convention (International Centre for Settlement of Investment Disputes, 2021).

An additional player beyond a country's executive government are its courts, which can rule on the constitutionality of IIAs. In 2019, the Constitutional Court of Colombia issued two judgments conditioning the ratification of IIAs with France and Israel on the treaties not providing more favorable treatment to foreign investors over national ones (Constitutional Court of Colombia, 2019a, 2019b). We may begin to see further action by courts asserting national control and imposing conditions on IIAs to make them conform to the country's constitutional principles.

Changing course or terminating IIAs has not been an exclusively Latin American phenomenon. Among developing countries, South Africa denounced 20 of its IIAs (2010; Davis, 2019), Indonesia announced it would end all of its 67 IIAs (2014), and India denounced its network of 58 IIAs (2016). These developments show that redomestication is an increasingly appealing option to dissatisfied developing countries across the Global South. Further, the case of India, governed by a right-wing populist government under Modi, also shows that this option appeals to both sides of the populist political spectrum (Agarwal, 2019, p. 11). These developments have caused concern among advocates of international investment arbitration, who argued openly against the "re-statification" of dispute settlement in investment law (Brower & Blanchard, 2014).

4.2. The Paradox of Populism and Reform in Developing Countries

Given the crisis of the international investment law system and the policy space opened by the shift in rich countries' positions, one would expect a greater move towards redomestication or reform by new populist governments in developing countries. Paradoxically, the advent of populist governments may make it harder for these countries to advance reforms. First, developing countries' governments will have to overcome their own fears of reputational risk from exiting or significantly reforming their engagement with ISDS. They may be reluctant to reform for fear that it will signal they are hostile to FDI (Salacuse, 2017). This fear emerges from their insecure geopolitical situation, where being part of international investment and trade agreements is often regarded as desirable (Poulsen, 2015). Left-wing governments often feel pressured to reassure international investors, financial markets, and rich country governments that they will stay the course, even promising not to alter their international obligations. At least initially, they often seek to downplay their divergence from the neoliberal economic model in rhetoric and practice.

Second, when these populist governments (whatever their political valence) are not only economic but political populists and advance domestic policies that undermine the country's democratic institutional framework, such as the independence of the judiciary, other parties and civil society groups in the country may be less supportive of changing international agreements, raising the political cost of reform. In a context of authoritarian rise, these international agreements are often perceived, even if mistakenly, as providing a basic backstop for rule of law and an important protection against the potential arbitrary abuse of the government.

While Ecuador, Bolivia, and Venezuela pursued the path of redomestication, other countries like Mexico and Chile have significantly reformed their agreements with the US and Europe. These changes drastically reduce investor rights and require the exhaustion of local remedies in the case of USMCA or create a two-tier arbitral tribunal with an Appellate Body in the case of the EU. But the initiative and pressure have come from the US and Europe. There has not yet been an endogenous effort in the region by countries to significantly transform their international agreements and re-embed them with the social values these countries now espouse.

5. Concluding Remarks

The rise of populism in rich and developing countries and its opposition to ISDS has made evident that the original social purpose of the international investment regime has lost its legitimacy. Populist governments of left- and right-wing varieties are disengaging or advancing changes. There are two broad options. The first option is redomestication, leaving the existing international investment regime and at the very least opting out of ISDS. A country willing to go this way would need to both fully withdraw from international commitments and adjust its domestic law appropriately. For developing countries concerned about signaling, it would be important to consider which guarantees it would still offer to foreign investors, particularly during the transition, and how it equalizes that treatment to national investors. The experience of South Africa stands out as a successful example of this strategy. The hero figure of this strategy is Calvo.

The second option is re-embedding international investment law, making it compatible with the social and economic values of states. This is an overhaul strategy that would need to reorient the regime's social goals and then redesign its norms and institutions accordingly. This path would forge a new international compromise, leaving sufficient room for states to pursue their own domestic economic and public welfare strategies. The hero figure for this strategy is Ruggie.

An important question is whether embedding international investment law can be done in a way that brings together the overarching interests of both developing and developed countries' agendas. As noted, several

developing countries have been critical of the regime for a long time, but it is opposition in rich countries' societies and the recent shift in their governments' position that has galvanized attention and created a credible space for change.

Rich countries are concerned about their regulatory autonomy in essential public welfare areas but also in light of a more active role of the state in the economy. They want to be free to advance other international commitments such as climate change mitigation or national security goals. They are concerned about the potential offshoring incentives of ISDS and are increasingly reluctant to provide what they see as free political risk insurance to their national companies. These countries are going in the opposite direction, advancing economic policies of homeshoring, or nearshoring that seek to bring production home.

Developing countries are extremely worried about the fiscal hole that ISDS claims can make to their budget and their capacity and costs to manage the increasing number of claims. They worry about their regulatory space too, as a great many claims involve challenges to regulatory policy. A top concern continues to be their ability to attract FDI and not scare it away with reforms that could send the wrong signal to current or potential investors, despite evidence that ISDS does not have a causal connection with FDI. An increasing awareness that FDI does not necessarily translate into growth, or development, has led some countries to pay more attention to the effects of investments, particularly when they have significant detrimental effects on the environment or the local communities in which they operate. The ability to screen investors, ensure that they comply with domestic law obligations during operations, and to maximize the chance that investments will have a positive effect in the economy is increasingly prized.

One of the main demands for an embedded regime would be to include rights for third parties, namely those stakeholders involved in or affected by the investment such as workers and local communities. There are already a variety of proposals to that effect, which include procedural requirements and substantive obligations for investors to comply with. This possibility is a clear advantage of embedding the investment law internationally in contrast to redomestication, as it adds a layer of protection to these stakeholders that they would not necessarily have in a purely domestic regime.

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Conflict of Interests

The author declares no conflict of interests.

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