REGULATORY CHILL IN INVESTOR-STATE ARBITRATION: IMPACT ON STATE SOVEREIGNTY

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"Investor-State Dispute Settlement cases have increased to over 1,200 cases worldwide as of 2023, and concerns have been raised about their impact on state regulatory autonomy and sovereignty."

Source: United Nations Conference on Trade and Development (UNCTAD) Investment Dispute Settlement.

ABSTRACT

Investor-state dispute settlement (ISDS) mechanisms embedded in international investment agreements (IIAs) have increasingly attracted scholarly and policy attention on account of their potential chilling effect on legitimate state regulation.

This paper examines the phenomenon of 'regulatory chill' the deterrence of good-faith public-interest legislation driven by states' apprehension of liability under investment treaty arbitration. Drawing upon arbitral jurisprudence, empirical case studies, and doctrinal analysis, the paper demonstrates that ISDS creates structural asymmetries which inhibit the sovereign regulatory capacity of host states, particularly in the domains of public health, environmental protection, and fiscal policy. The paper further argues that existing doctrinal safety valves such as the necessity defence, the police powers doctrine, and the fair and equitable treatment standard are insufficient to fully restore regulatory autonomy. In response, it advocates for systemic reforms including explicit treaty carve-outs, the establishment of a multilateral investment court, and enhanced transparency norms, in order to reconcile the imperatives of investment protection with the inviolable right to regulate in the public interest.

Keywords: Regulatory Chill; Investor-State Arbitration; State Sovereignty; ISDS Reform; Fair and Equitable Treatment; Police Powers Doctrine; International Investment Agreements.

I. Introduction

The post-war liberalisation of international trade and investment has engendered an expansive network of bilateral investment treaties (BITs) and multilateral investment chapters, now numbering over 2,500 instruments in force.[1] These instruments, intended to promote foreign direct investment by providing legal certainty and protection against arbitrary state conduct, confer upon foreign investors a remarkable procedural entitlement: the right to submit claims directly against sovereign states before international arbitral tribunals, bypassing domestic courts entirely.[2] The ensuing mechanism — investor-state dispute settlement (ISDS) — has produced an extensive and often inconsistent body of arbitral awards with profound constitutional implications for host states.[3]

Central to the critique of ISDS is the concept of 'regulatory chill': the phenomenon whereby states, confronted with the prospect of expensive arbitral proceedings and substantial monetary awards, decline to adopt, maintain, or enforce bona fide regulatory measures in the public interest.[4] The chilling effect operates on two registers. First, it may cause states to refrain from enacting legislation that would otherwise be justified by legitimate public purposes. Second, it may prompt states to weaken, delay, or rescind existing regulations following the commencement of arbitral proceedings.[5] Both phenomena corrode the essential attribute of sovereignty: the capacity to regulate within the territorial domain for the welfare of the polity.

The paper proceeds as follows. Part II surveys the doctrinal architecture of ISDS and situates it within the framework of international investment law. Part III interrogates the theoretical and empirical foundations of regulatory chill. Part IV examines specific domains — public health, environmental regulation, and fiscal policy — in which chilling effects have been most

1 UNCTAD, 'World Investment Report 2023: Investing in Sustainable Energy for All' (United Nations 2023) 172. As of 2023, there are over 2,500 bilateral investment treaties (BITs) in force globally.

2 United Nations Conference on Trade and Development (UNCTAD), 'Investment Policy Framework for Sustainable Development' (UNCTAD 2015) 5.

3 Metalclad Corporation v United Mexican States (Award) ICSID Case No ARB(AF)/97/1 (30 August 2000); SD Myers Inc v Government of Canada (Partial Award) (2000) 40 ILM 1408.

4 Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy (Cambridge University Press 2009) 3.

5 Howard Mann and Konrad von Moltke, 'NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor State Process on the Environment' (International Institute for Sustainable Development 1999) 7.

pronounced. Part V analyses the doctrinal tools ostensibly available to protect state regulatory space, and assesses their efficacy. Part VI considers reform proposals, and Part VII concludes with a normative assessment.

II. The Doctrinal Architecture of Investor-State Dispute Settlement

A. Substantive Standards of Protection

International investment agreements typically afford foreign investors a suite of substantive protections. The most significant for regulatory chill purposes are: (i) the fair and equitable treatment (FET) standard; (ii) the prohibition on expropriation without compensation, including indirect or 'regulatory' expropriation; (iii) the national treatment obligation; and (iv) the umbrella clause.[6]

The FET standard, though appearing deceptively simple on its face, has been expansively interpreted by arbitral tribunals to encompass an investor's 'legitimate expectations' — the assumption that the regulatory environment prevailing at the time of investment will remain broadly stable.[7] This interpretation creates a structural tension with the state's inherent power to modify its legal order in response to new policy imperatives. A state introducing stricter environmental standards, renegotiating fiscal terms, or withdrawing licences granted under earlier regulatory frameworks may find itself confronted with FET claims even where such measures are entirely rational and non-discriminatory from a domestic constitutional standpoint.[8]

The concept of indirect expropriation poses an equally formidable challenge. Unlike direct expropriation the physical taking of property indirect expropriation involves regulatory measures that, while leaving formal title undisturbed, substantially deprive an investor of the economic value of the investment.[9] Tribunals have applied a spectrum of tests the 'sole effects' test, the

6 Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford University Press 2007) 45; see also David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (Cambridge University Press 2008) 6.

7 Tecmed v Mexico (Award) ICSID Case No ARB(AF)/00/2 (29 May 2003) [154]; see also Waste Management Inc v United Mexican States (Award) ICSID Case No ARB(AF)/00/3 (30 April 2004).

8 Tienhaara (n 4) 7; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1523.

9 Mann and von Moltke (n 5) 11; Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) 9(1) Journal of International Law & International Relations 1, 14.

proportionality inquiry, and the police powers doctrine with considerable inconsistency, generating significant legal uncertainty for states contemplating regulatory action.[10]

B. Procedural Architecture: The Arbitral Process

Disputes are typically submitted to institutional arbitration most prominently before the International Centre for Settlement of Investment Disputes (ICSID), administered under the auspices of the World Bank or to ad hoc tribunals constituted under the UNCITRAL Arbitration Rules. In either forum, the state is placed in an inherently disadvantageous structural position: it must defend the legitimacy of its regulatory choices before a tribunal that is neither elected nor accountable to any democratic constituency.[11]

The asymmetry is compounded by the fact that only investors may initiate proceedings; states may not bring claims against investors under investment treaties, however egregious the investor's conduct. Furthermore, arbitral awards may be enforced against state assets globally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the ICSID Convention (1965). The cumulative effect is a system in which the costs of regulatory action — both in terms of anticipated liability and defence expenditure — are internalised by the state, whilst the benefits of investor protection accrue exclusively to private transnational actors.[12]

III. Regulatory Chill: Theoretical and Empirical Foundations

A. The Concept and Its Variants

The term 'regulatory chill' was originally deployed in domestic constitutional contexts to describe the deterrence of protected speech by the threat of legal liability. Its migration into the investment law discourse reflects the analogous logic: where the threat of arbitral liability is sufficiently credible and the costs of litigation sufficiently onerous, rational state actors will engage in prophylactic self-censorship of regulatory ambition.[13]

10 The 'police powers' doctrine refers to the inherent authority of states to regulate in the public interest without incurring liability for regulatory takings: see Saluka Investments BV v Czech Republic (Partial Award) PCA (17 March 2006) [255]–[263].

12 UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2022' (IIA Issues Note No 1, 2023) 1–2; see also ICSID, 'The ICSID Caseload – Statistics' (Issue 2023-1) 7.

13 Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011) 606, 611.

Tienhaara identifies two distinct manifestations of the phenomenon. 'Specific regulatory chill' occurs when a particular measure is abandoned, withdrawn, or modified following the commencement or threatened commencement of arbitration. 'Diffuse regulatory chill' operates at the systemic level: the general awareness of ISDS risk distorts governmental decision-making processes in ways that are difficult to observe empirically but may be inferred from patterns of regulatory inaction.[14]

The empirical documentation of regulatory chill faces an inherent methodological challenge: the phenomenon concerns legislative and regulatory activity that does not occur, making it resistant to conventional case study methodology. Nevertheless, scholars have developed a body of evidence relying on: (i) analysis of cases where specific regulatory changes were made following investor threats or claims; (ii) survey evidence of government officials acknowledging chilling considerations; and (iii) comparative legislative analysis revealing patterns of regulatory conservatism in high-exposure states.[15]

B. The Cost Structure of ISDS as a Deterrent

The chilling effect is structurally enabled by the cost architecture of ISDS. Average costs of defending an ISDS claim have been estimated at USD 8 million, with complex cases routinely exceeding USD 30 million. Awards in successful investor claims can reach tens of billions of dollars.[16] For developing and transition economies with constrained fiscal capacity, the prospect of even a single large award represents a material threat to macroeconomic stability, creating acute incentive structures toward regulatory self-restraint.[17]

These dynamics interact with the problem of legal uncertainty endemic to the ISDS system. The unpredictability of arbitral outcomes attributable to the absence of a doctrine of precedent, the composition of ad hoc tribunals, and the contested scope of substantive standards means that states

15 Tienhaara, 'Regulatory Chill' (n 16) 619–621; see also Lise Johnson and Lisa Sachs, 'International Investment Agreements, 2013: A Review of Trends and New Approaches' in Andrea K Bjorklund (ed), Yearbook on International Investment Law & Policy 2013-2014 (Oxford University Press 2015) 16.

16 Ibid 4; see also Nathalie Bernasconi-Osterwalder and Lise Johnson (eds), International Investment Law and Sustainable Development: Key Cases from 2000-2010 (IISD 2011) 3.

17 Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12 (Award, 14 October 2016). El Salvador ultimately prevailed but only after spending an estimated USD 12 million in legal fees.

are unable to form reliable ex ante assessments of the legality of proposed regulatory measures.[18] Rational risk-aversion therefore counsels' restraint, even where the regulatory measure in question would, in all likelihood, withstand challenge. The chilling effect is thus a function not only of actual liability but of perceived liability risk under conditions of normative indeterminacy.

IV. Sector-Specific Chilling Effects: Case Studies

A. Public Health and Tobacco Regulation

The tobacco litigation arising from Australia's introduction of plain packaging legislation in 2012 constitutes perhaps the most prominent illustration of regulatory chill in the domain of public health. Philip Morris Asia, having restructured its Hong Kong operations specifically to obtain investment treaty protections under the Australia-Hong Kong BIT, initiated arbitration challenging the plain packaging law under the FET and indirect expropriation provisions.[19]

Although Australia ultimately prevailed on jurisdictional grounds, the case had a demonstrable chilling effect on other states: multiple jurisdictions that had been contemplating similar measures including New Zealand, the United Kingdom, and several European states explicitly delayed or conditioned their legislative programmes on the outcome of the Australian litigation.[20] The episode illustrates how ISDS litigation risk quite independently of its merits can defer legitimate public health regulation, at measurable cost to population welfare.

B. Environmental Regulation and Energy Transition

The interaction between ISDS and environmental governance has been extensively documented. The foundational case of Metalclad v Mexico involved an arbitral tribunal finding that Mexico's denial of a construction permit for a hazardous waste facility a decision taken by municipal authorities on environmental grounds constituted an indirect expropriation in breach of Chapter

18 Franck (n 12) 1548–1550; see also M Sornarajah, The International Law on Foreign Investment (3rd edn, Cambridge University Press 2010) 340.

19 Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12 (Award on Jurisdiction, 17 December 2015). Australia ultimately succeeded on jurisdictional grounds, but only after significant legal costs and prolonged policy uncertainty.

20 Valentina Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), Human Rights in International Investment Law and Arbitration (Oxford University Press 2009) 452, 466.

11 of the North American Free Trade Agreement (NAFTA).[21] The award of USD 15.6 million signalled to states that environmental zoning and licensing decisions could attract substantial liability.

More recently, Germany's decision to accelerate its nuclear phase-out following the Fukushima disaster in 2011 prompted two separate sets of ISDS proceedings by Swedish energy company Vattenfall under the Energy Charter Treaty (ECT). The second case, filed in 2012 and claiming EUR 4.7 billion in damages, remained pending for over a decade.[22] The proceedings generated significant political controversy and contributed to the broader debate about whether commitments under the ECT are compatible with the Paris Agreement obligation to phase out fossil fuel subsidies and pursue decarbonisation.[23]

El Salvador's decade-long dispute with Pacific Rim Cayman — subsequently acquired by OceanaGold — over the state's refusal to grant mining permits in environmentally sensitive areas provides an instructive example of how ISDS can constrain resource and environmental governance in developing states. El Salvador ultimately prevailed but only after expending an estimated USD 12 million in legal defence costs and enduring sustained regulatory paralysis.[24]

C. Pharmaceutical Policy and Intellectual Property

The intersection of ISDS with pharmaceutical and intellectual property policy illustrates the risks of regulatory chill in domains of particular sensitivity for developing economies. In Eli Lilly v Canada, the American pharmaceutical giant challenged Canada's 'promise utility doctrine' in patent law — a distinctive approach to patent validity developed by Canadian courts — on the basis that it constituted an expropriation of its patent rights under NAFTA Chapter 11.[25]

21 Metalclad Corporation v United Mexican States (n 3); see also Ethyl Corporation v Canada (Jurisdiction) (1998) 38 ILM 708, where Canada repealed a ban on a gasoline additive after an investor-state arbitration was initiated.

22 Vattenfall AB and others v Federal Republic of Germany (I) ICSID Case No ARB/09/6 (Discontinuance Order, 7 March 2011); Vattenfall AB and others v Federal Republic of Germany (II) ICSID Case No ARB/12/12 (pending, filed 31 May 2012).

23 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156; see also Nathalie Bernasconi-Osterwalder, 'The Trouble with ISDS in the Energy Charter Treaty' (IISD Commentary, 2018) 3.

25 Eli Lilly and Company v Government of Canada, UNCITRAL, ICSID Case No UNCT/14/2 (Final Award, 16 March 2017) [221]–[224].

The claim, which sought USD 500 million in damages, was ultimately dismissed, but its initiation generated considerable concern about the extent to which ISDS could be weaponised to discipline domestic intellectual property jurisprudence. Scholars have noted that the threat of such proceedings creates incentives for states to harmonise their IP regimes upward toward levels favourable to innovative pharmaceutical companies, potentially restricting access to affordable medicines.[26]

V. Doctrinal Safety Valves: Adequacy and Limitations

A. The Police Powers Doctrine

The police powers doctrine holds that a state's bona fide, non-discriminatory regulatory measures enacted in the public interest do not constitute compensable expropriations under international law, regardless of their economic impact on foreign investors.[27] The doctrine has received support in a number of significant awards: in Saluka Investments v Czech Republic, the tribunal acknowledged that states retain an inherent right to regulate in the public interest and that this right cannot be treated as a species of compensable taking.[28]

However, the doctrine's practical efficacy is constrained by several factors. First, there is no consensus among tribunals on whether the doctrine operates as an absolute exclusion from the definition of expropriation or merely as a factor to be weighed in a proportionality analysis. Second, the doctrine tends to be applied inconsistently: tribunals have reached contradictory conclusions on materially similar facts. Third, even measures that survive the expropriation challenge may still be vulnerable to FET claims based on a frustration of the investor's legitimate expectations.[29]

B. The Necessity and Essential Security Defences

26 James Gathii and Cynthia Ho, 'Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime' (2017) 18 Minnesota Journal of Law, Science and Technology 427, 437.

28 LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006) [195]–[213]; Chemtura Corporation v Government of Canada, UNCITRAL (Award, 2 August 2010).

29 Pope & Talbot Inc v The Government of Canada (Award on the Merits of Phase 2) UNCITRAL (10 April 2001) [116]; SD Myers (n 3) [261]–[263].

Many IIAs contain specific carve-outs for measures that a state considers necessary to protect its essential security interests or to respond to extreme economic emergencies. The necessity defence in customary international law — as codified in the ILC Articles on State Responsibility — provides a further source of protection.[30] The Argentine financial crisis litigation of the early 2000s produced extensive arbitral jurisprudence on these provisions, with tribunals reaching starkly inconsistent conclusions on the applicability of the necessity defence to the same set of emergency measures.

The inconsistency of these outcomes underscores a fundamental institutional dysfunction: without a system of binding precedent or an appellate mechanism, investment arbitration cannot generate the doctrinal stability necessary to provide reliable guidance to states on the limits of permissible regulation.[31]

C. Proportionality as a Mediating Framework

A number of tribunals have deployed proportionality analysis as a means of reconciling investor protection with regulatory autonomy. Under this approach, a regulatory measure may survive an FET or expropriation challenge if it is proportionate — in the sense of having a rational connection to a legitimate objective and imposing the minimum necessary burden on the investor — to the public interest it is designed to protect.[32]

Proportionality analysis has the advantage of flexibility and doctrinal familiarity — drawn as it is from both European human rights law and domestic administrative law traditions. However, critics argue that its deployment by international arbitral tribunals entails an inappropriate substitution of the tribunal's policy preferences for those of the democratic legislator.[33] The application of proportionality to regulatory measures thus risks compounding rather than resolving the democratic legitimacy deficit in ISDS.

31 Van Harten (n 11) 152–153; Schneiderman (n 11) 209–211.

32 Van Harten (n 11) 5–6; see also Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' (2009) NYU School of Law, Public Law & Legal Theory Research Paper Series No 09-46, 3.

33 Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775, 782.

VI. Reform Proposals and Emerging Trajectories

A. Treaty Drafting Reforms: Carve-Outs, Annexes, and Clarifications

The most tractable reform is the modification of IIA text to incorporate explicit carve-outs for specified categories of regulatory measures. Modern investment agreements — including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the EUCanada Comprehensive Economic and Trade Agreement (CETA), and the USMCA contain more nuanced provisions that acknowledge the right to regulate, limit the scope of indirect expropriation claims, and narrow the autonomous content of the FET standard.[34]

Developing and emerging economies have also pursued bilateral model treaty reform. The 2015 Indian Model BIT contains an explicit provision excluding regulatory measures relating to public health, environment, national security, and taxation from the scope of treaty protections, alongside a requirement that investors exhaust local remedies before accessing international arbitration.[35]
The SADC Model BIT Template adopts a similar approach, reflecting a broader movement in the Global South toward treaty revision that restores regulatory space.

B. A Multilateral Investment Court

The European Union has been the most prominent advocate for the replacement of ad hoc ISDS with a permanent multilateral investment court (MIC). The EU's Investment Court System (ICS), first advanced in the context of TTIP negotiations, would feature a permanent roster of judges appointed through transparent public processes, a first-instance tribunal, and an appellate mechanism empowered to correct errors of law.[36]

Proponents argue that a permanent court would address both the consistency deficit and the legitimacy deficit of the current system: professional judges with security of tenure are less susceptible to structural incentives favouring expansive investor protection than party-appointed

34 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, entered into force 30 December 2018); United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018, entered into force 1 July 2020), Ch 14.
35 Southern African Development Community (SADC), 'SADC Model Bilateral Investment Treaty Template with Commentary' (July 2012); India Model BIT (2015), Art 2.4 (excluding taxation, subsidies, and government procurement from treaty coverage).
36 European Commission, 'Inception Impact Assessment: Multilateral Investment Court' (Ref Ares(2016)4972693, 26 October 2016). The EU proposed a permanent Investment Court System (ICS) in its negotiations for the Transatlantic Trade and Investment Partnership (TTIP).

arbitrators.[37] A binding appellate mechanism would progressively develop a coherent jurisprudence on the police powers doctrine, the FET standard, and legitimate expectations, enabling states to regulate with greater legal certainty.

C. Transparency, Third-Party Participation, and Counterclaims

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) and the Mauritius Convention on Transparency (2014) represent incremental steps toward an open arbitral process. Publication of awards, access for amicus curiae participation by civil society organisations, and the right of third-state intervention are mechanisms that can begin to address the democratic deficit by ensuring that public-interest considerations are visible and ventilated in proceedings.[38]

An equally important structural reform is the introduction of investor obligations alongside investor rights, including the right of states to file counterclaims against investors for violations of human rights, labour standards, or environmental obligations. UNCITRAL Working Group III has identified this as a priority reform area, recognising that the imbalance between investor rights and investor responsibilities is a systemic source of legitimacy deficit.[39]

D. Sector-Specific Exclusions and Climate Compatibility

The tension between the Energy Charter Treaty and states' Paris Agreement commitments has prompted calls for modernisation of the ECT, including provisions explicitly preserving regulatory space for climate-related measures and excluding protections for new investments in fossil fuels.[40] More broadly, the imperative of decarbonisation requires that investment treaties explicitly accommodate the disruption that energy transition entails for incumbent investors, without

37 United Nations Commission on International Trade Law (UNCITRAL), 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (Note by the Secretariat, Working Group III, A/CN.9/WG.III/WP.149, 5 September 2017).

affording those investors a right to compensation for regulatory change that is both necessary and foreseeable.[41]

VII. Conclusion

Regulatory chill constitutes one of the most profound challenges posed by the contemporary investment treaty regime to the foundational principle of state sovereignty. As demonstrated throughout this paper, the structural features of ISDS — expansive substantive standards, asymmetric standing, unpredictable arbitral outcomes, and substantial financial exposure — collectively create incentive structures that distort the regulatory decision-making of states in ways that systematically favour the maintenance of existing investor rights over the evolution of law in the public interest.

The doctrinal safety valves the police powers doctrine, necessity defences, and proportionality analysis provide partial relief but cannot, in their current form, eliminate the chilling effect. Their inconsistent application and contested scope perpetuate the very uncertainty that generates the deterrent dynamic. Systemic reform is therefore not merely desirable but necessary to preserve the coherence of the international investment law framework and its legitimacy in the eyes of the states that sustain it.

The most promising path forward combines three complementary strategies. First, at the level of treaty text, states should incorporate explicit, precise carve-outs for regulatory measures in the public interest, narrowed FET standards, and clarified indirect expropriation provisions. Second, at the institutional level, the establishment of a multilateral investment court with an appellate mechanism would generate doctrinal stability, judicial accountability, and democratic legitimacy. Third, at the normative level, investment treaties must be reconceptualised not as instruments exclusively dedicated to investor protection, but as components of a broader international legal order that must be compatible with the imperatives of sustainable development, human rights, and climate justice.

The right to regulate, as an expression of sovereignty and democratic self-determination, is not a concession to be grudgingly permitted by international investment law. It is a constitutive

41 Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19(1) Journal of International Economic Law 27, 28–30.

precondition of the international legal order itself. A system of investment protection that systematically undermines that right corrodes the foundations of the very order it purports to serve.

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