

關於  
「從SDGs之視角論投資人地主國投資爭端解決之改革  
-UNCITRAL程序以及跨領域議題草案初探」之  
與談意見

國立政治大學第24屆國際經貿法學發展學術研討會

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# Outline



- **1 關於透過草案來落實ISDS改革的一些觀察**
- **2 關於規範投資人義務的一些想法**
- **3 關於本文的一些Q&A**

# 透過草案落實ISDS改革

- ▶ 草案可能採取**模範法 (UNCITRAL Model Law on ISDS Reform(?))** 模式 → **soft law per se**
  - ▶ depending on how individual member state **incorporate** the provisions into existing/future IIAs
  - ▶ Alternatively, **integrated by reference** into **UNCITRAL Arbitration Rules**
  - ▶ 參照UNCITRAL Arbitration Rules (2021), art.1.1.4 → when parties agree to refer to UNCITRAL Arbitration Rules → the Rules include the provisions of the Model Law on ISDS Reform



# 透過草案落實ISDS改革

- ▶ Hard facts: **ICSID arbitration** remains primary option for ISDS

Chart 7: ICSID and Non-ICSID Cases Administered over the Past Ten Fiscal Years

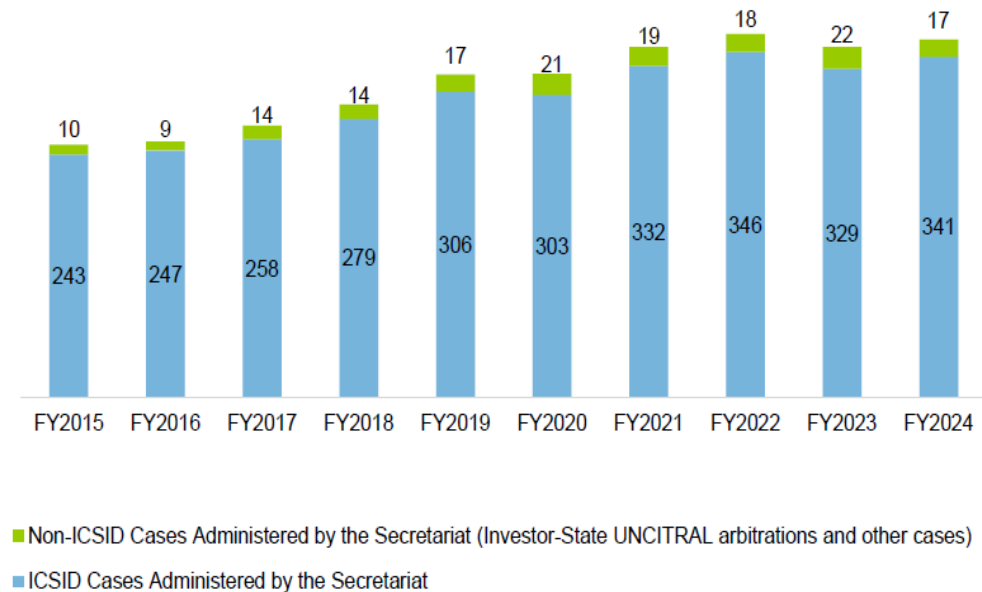
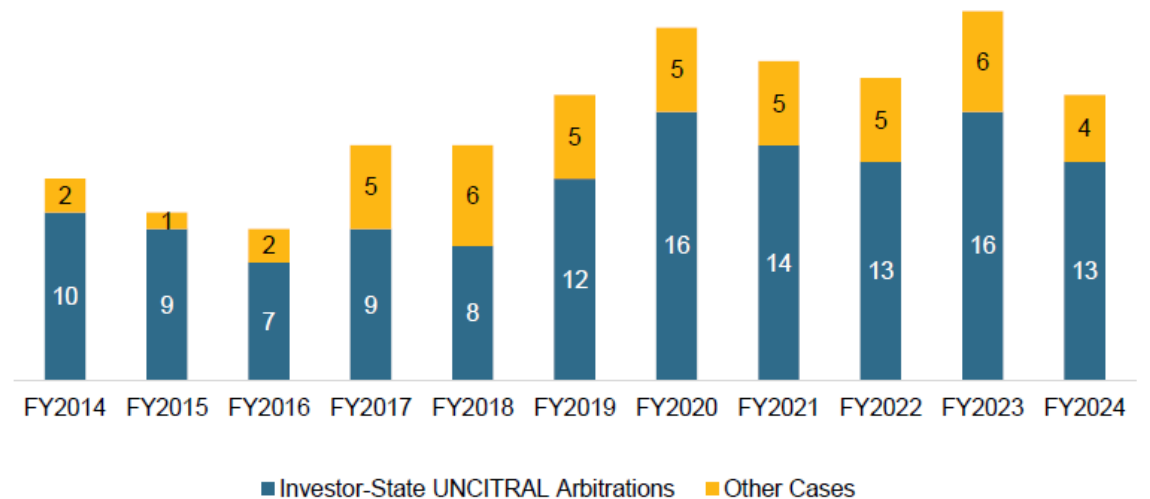


Chart 6: Non-ICSID Cases Administered over the Past Ten Fiscal Years



- ▶ Source: The ICSID Caseload—Statistics, Issue 2024 - 2

# 透過草案落實ISDS改革

## ► The gaps between **Model Law on ISDS Reform** and **ICSID Arbitration Rules**

Issues	Model Law on ISDS Reform	ICSID Arbitration Rules
增加前置程序	諮商/調解先行；等待期間條款	無規範
	用盡當地救濟程序	無規範
調整(限縮)仲裁庭管轄權	對人管轄； DOB條款；排除treaty shopping / 違反TPF規範者	<ul style="list-style-type: none"> <li>• 僅規範自然人雙重國籍問題與受外國控制之法人 (ICSID公約, art.25(2))</li> <li>• 僅規範TPF之揭露義務，未規範違反之效果 (2022 ICSID仲裁規則, Rules 14)</li> </ul>
	對事管轄： 排除違法投資 / 違反誠信原則 / 涉及詐欺貪腐 / 限制企業股東索賠範圍，排除反射性損失 / 排除涉及地主國規制權之爭議	無規範
	對時管轄： 逾時提交之爭訟的排除	無規範

# 透過草案落實ISDS改革

► The gaps between **Model Law on ISDS Reform** and **ICSID Arbitration Rules**

Issues	Model Law on ISDS Reform	ICSID Arbitration Rules
濫訴防止 機制	棄權條款 / 岔路條款	無規範
	明顯欠缺法律依據案件之盡早駁回，原則上由仲裁庭依職權主動駁回+命敗訴方負擔程序費用	有盡早駁回，但係由當事人提出異議，且無敗訴方負擔之規範 (2022 ICSID仲裁規則, Rules 41)
	原則許可，例外禁止第三方出資；需揭露相關資訊	僅規範TPF之揭露義務，未設限制 (2022 ICSID仲裁規則, Rules 14)
強化國家 地位	地主國反請求 (與本案請求有密切關聯，或投資人違反義務)：投資人提交仲裁=同意反請求	ICSID公約, art.46
	投資母國代理投資人進行SSDR	無規範

# 透過草案落實ISDS改革

## ► The gaps between **Model Law on ISDS Reform** and **ICSID Arbitration Rules**

Issues	Model Law on ISDS Reform	ICSID Arbitration Rules
限制費用 導向之仲 裁庭裁量 權	證人以書面方式進行陳述	證人原則須親自出庭接受訊問，除非仲裁庭認定以其他方式為宜 (2022 ICSID仲裁規則, Rules 38(5))
	仲裁庭有權裁量是否採文件提示	• 由當事人提出，仲裁庭裁決 (2022 ICSID仲裁規則, Rules 37)
	當事人無故延遲提交證據，仲裁庭可依現有證據逕行判斷	無規範
	仲裁庭得依職權主動進行分階段審理	• 由當事人提出 (2022 ICSID仲裁規則, Rules 42-44)
	仲裁判斷限於「損害賠償」或「返還財產」+單利計算	無此限制
	計算損害賠償之數額，考量投資人與有過失，地主國有無採取改善措施，投資人是否遵守國際RBC規範	無類似規範

# 透過草案落實ISDS改革

- ▶ The gaps between **Model Law on ISDS Reform** and **ICSID Arbitration Rules**
  - ▶ 在行為準則方面，UNCITRAL與ICSID合作推動
    - ▶ UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (final draft, 2024)
    - ▶ UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (final draft, 2024)
      - ▶ 獨立公正
      - ▶ 保密義務
      - ▶ 利益衝突揭露
      - ▶ 禁止單方接觸
      - ▶ 盡職義務
      - ▶ 兼職與多重角色限制



# 透過草案落實ISDS改革

- The gaps between **Model Law on ISDS Reform** and **ICSID Arbitration Rules**

Issues	Model Law on ISDS Reform	ICSID Arbitration Rules
程序透明	適用範圍跨大至SSDR	無規範
	各種文書均應公開，除非屬機密資訊，或妨礙地主國重要安全利益	原則上需當事人合意才能公開 (2022 ICSID仲裁規則. Rule 64)
	公開聽審	除非當事人任一方反對，否則仲裁庭必須允許第三方旁聽聽審程序 (2022 ICSID仲裁規則. Rule 65)
	第三方提交意見	第三方得提交書面意見，由仲裁庭依職權准駁 (2022 ICSID仲裁規則. Rule 67)

# 關於投資人義務的規範

- ▶ 由於草案提及，對於違反地主國法律之投資，可排除於仲裁庭對事管轄範圍；又規定，地主國對於違反義務 (包括法定或契約義務) 的投資人有反訴權 → 可考慮引進類似**負責任的商業行為 (Responsible business conduct; RBC)** 概念 → 避免投資活動可能對永續發展指標產生不利影響 (adverse impacts)
- ▶ **參考一：WTO IFDA (finalized as of Feb 2024), art.37:**
  - ▶ Each Party shall **encourage** investors to **voluntarily** adopt internationally recognized principles/standards/guidelines of RBC **endorsed/supported by that Party** (art.37.1).
    - ▶ Ex: UN Guiding Principles on Business and Human Rights, ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, OECD Guidelines for Multinational Enterprises (footnote 42 to art.37.1).
  - ▶ Each Party **recognizes** the importance of investors ...implementing due diligence for RBC in order to identify and address adverse impacts in their operations, their supply chains and other business relationships (art.37.3).

# 關於投資人義務的規範

## ➤ 參考一：WTO IFDA, art.37 (continued)

- Soft norms without binding effect → depending on individual Party's voluntary endorsement/support (of which RBC norm and in what way?).
- Merely “**encouraging**” investor to **voluntarily** adopt RBC → implying no legal obligation on investors → no treaty obligation for a Party to enact domestic legislation with mandatory or binding effect.
- Merely “**recognizing**” importance of implementing due diligence for RBC in order to identify and address adverse impacts in business operations/ supply chains → no further action demanded (sanctions/incentives concerning implementation?).
- Effectiveness remains doubtful.



# 關於投資人義務的規範

- ▶ 參考二：Directive (EU) 2024/1760 on corporate sustainability due diligence (Corporate Sustainability Due Diligence Directive; CSDDD) (effective on 25 July 2024)
  - ▶ Aims to foster **sustainable and responsible corporate behavior** in companies' operations and across their global value chains.
  - ▶ Creates a "**corporate due diligence duty**"
    - ▶ Core elements → identifying/addressing potential and actual adverse human rights and environmental impacts in the operations of the company, of their subsidiaries, of their business partners.



# 關於投資人義務的規範

## ▶ 參考二：EU CSDDD

### ▶ Issues covered by **corporate sustainable due diligence**

- ▶ **Integrating** due diligence into corporate **policies and risk management systems** (art.7)
- ▶ **Identifying/assessing** actual or potential adverse impacts (art.8)  
prioritizing actual and potential adverse impacts (art.9)
- ▶ **Preventing/mitigating** potential adverse impacts, and bringing actual adverse impacts to an end and minimizing their extent (arts.10, 11)
- ▶ **Providing remediation** for actual adverse impacts (art.12)
- ▶ Carrying out **meaningful engagement** with stakeholders (art.13)
  - ▶ Consultation and provision of information

# 關於投資人義務的規範

## ➤ 參考二：EU CSDDD

### ➤ Issues covered by **corporate sustainable due diligence** (continued)

- Establishing/maintaining a **notification mechanism** and a **complaints procedure** (art.14)
- **Monitoring effectiveness** of due diligence policy and measures (art.15)
  - Periodic assessments
- **Publicly communicating** on due diligence (art.16)
  - Online publication of annual statement
- **Combating climate change** (art.22)
  - **Transition plan** for climate change mitigation.

# 關於投資人義務的規範

## ▶ 參考二：EU CSDDD

### ▶ Enforcement:

- ▶ **Administrative supervision: supervisory authority** to be designated (art.24) to enforce the rules through **injunctive orders** and **penalties** (art.25.5). At EU level, a **European Network of Supervisory Authorities** will bring together representatives of the national bodies to ensure coordination (art.28).
- ▶ **Civil liability** (art.29): victims entitles to **full compensation** for damages resulting from **intentional** or **negligent failure** by covered companies regarding due diligence obligations.

# Q&A

- ▶ 關於草案限縮仲裁庭的對物管轄範圍之類型，其中「違反誠信原則的投資」，以及「提出ISDS會對IIA本身與其目標形成濫訴」者，能否說明可能的具體事例？
- ▶ 關於限縮仲裁庭的對物管轄範圍，或從防止濫訴的觀點，是否可考慮明文禁止「保護傘條款」，關閉「投資人與地主國間的契約或其他法律爭議」透過保護傘條款「轉化為投保條約爭議」之管道
  - ▶ 如：台日BIT第5條：「任一方領域內之機關應遵守其就他方投資人之投資及投資活動所承諾之**任何義務**」
- ▶ 第20頁，註156：「關於UNCITRAL程序透明規則與特定投資協定之衝突，以投資協定優先」→ 引用透明規則art.3.7 → 似為art.1.7？



# 工商時間 (請勿列入發言紀錄)

## ➤ 關於**仲裁前置程序**

- 投資人對地主國仲裁的前置程序之探討 – 以等待期間條款為中心，中原財經法學第35期，頁47-108 (2015)

## ➤ 關於**程序透明化**

- 投資人對地主國仲裁程序的透明化問題 - 兼論跨太平洋夥伴協定下投資保障專章的相關規範，輔仁法學第53期，頁43-116 (2017)

## ➤ 關於**歐盟投資法院系統 (Investment Court System; ICS)**

- 'The Inclusion of Investment Court System into the EU-China CAI: Innovations, Prospects and Problems,' China-European Union Investment Relationships - Towards a New Leadership in Global Investment Governance (Edward Elgar), pp.247-266 (2018)

## ➤ 關於**地主國反請求**

- 投資人與地主國仲裁程序中的地主國反訴與投資人義務，第十八屆國際經貿法學發展學術研討會論文集，頁85-128 (2018)

# 工商時間 (請勿列入發言紀錄)

## ► 關於地主國規制權

論環保條款於投資協定之新定位，第十七屆國際經貿法學發展學術研討會論文集，頁385~ (2017)



國際投資爭端中菸品包裝規範與商標使用爭議之探討—以Philip Morris v Uruguay案為中心，第十七屆國際經貿法學發展學術研討會論文集，頁309~ (2017)



## ► 關於濫訴之防制

國際投資仲裁程序中投資人浮濫提出控訴主張之問題與對應，月旦法學雜誌，第277期，頁156-175 (2018)





謝謝聆聽

敬請指教

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