

Contemporary Dilemmas of International Investment Law: From the Perspective of Settlement of International Investment Disputes

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Abstract. The current state of international investment law consists of thousands of International Investment Agreements (IIAs) and Investor-State Dispute Settlement (ISDS) mechanisms that create safeguards in international investment law and provide foreign investors with the means to mitigate the political risks they face in host countries. However, the number of effective international investment treaties is generally decreasing, and new investment treaties also exclude investor-state dispute settlement mechanisms. Based on past litigation, it is easy to see that the majority of investors who have successfully initiated litigation against host States have come from developed countries. Litigation against the host State by investors from the global South has been relatively few and far between, and has mostly been dismissed, and even when it has been successfully filed, it has not been successful. As a result, the dispute settlement mechanism is not inherently fair. It can be said that this mechanism is a symbol of protectionism in the post-colonial era, which is no longer suitable for the current time. This paper addresses these issues by providing a comprehensive analysis of the current state of development of international investment treaties and the current state of investor-state dispute settlement mechanisms.

Keywords: International investment agreements; international investment law; investor-state dispute settlement; ISDS.

1. Introduction

International investment treaties formed during the neo-liberal period, represented by developed countries in Europe and the United States, provided foreign investors with one approach to reducing political risk in order to safeguard their investments --the non-market risk pertains to the inadvertent violation of the intellectual property rights possessed by a foreign investor due to the political conduct exhibited by the host country. Nevertheless, due to the ongoing progress in global investment and the emergence of developing nations, the economic relations among the world's countries have taken on a new pattern. Emerging powers have the dual status of capital export and import, and the reciprocity of investment between developed and emerging powers has become more obvious, which makes the traditional international investment law face serious challenges. In order to attain equilibrium between investors and host countries, between investors and host countries, many countries have begun to look at existing investment treaties and make a series of modifications and adjustments to them, or re-conclude them. An increasing number of countries from the global South are even rejecting their IIA commitments, and even traditional capital-exporting countries from the global North are joining the ranks of various multilateral reforms. At the same time, as countries continue to expand their areas of openness to the outside world, the export and import of capital between countries continues to increase, and with it the number of cases of investment disputes. While investment arbitration is usually the preferred mechanism for settling disputes between investors and host countries, in recent years investment arbitration has been caught in a "legitimacy crisis" [1]. On the surface, Investor-State Dispute Settlement (ISDS) is a procedural mechanism to ensure the substantive rights and treatment of foreign investors under investment agreements. In essence, the rules of ISDS are not relatively neutral technical rules; they are not only rules with substantive impact on the interests of countries, but also a reflection of the competition between traditional capital-exporting countries and emerging capital-exporting countries represented by China for the dominance of international

investment rules [2]. As a result, arbitration for international investment has numerous problems in terms of the scope of jurisdiction, litigation mechanisms, and enforcement of awards. This makes it even more difficult for international investment law, which is not adapted to contemporary political and economic relations, to gain recognition, and this paper will explore various aspects of it.

2. The Development of International Investment Rules

The multipolarization of the world is accelerating, and the international system is evolving at an accelerated pace, with various strategic forces diverging and combining. At the economic level, this is mainly reflected in the rapid development of emerging markets and developing countries, and the world economic landscape is still changing, in which protectionism and unilateralism continue to emerge. Therefore, from the perspective of the overall order, the international multilateral system has entered a process of disintegration and reconstruction, and the locus of international economic cooperation has transitioned from multilateral collaboration to regional and bilateral collaboration, with the centre of gravity being repositioned accordingly, and the international investment rules are also increasingly showing the characteristics of "regionalization". From the perspective of conceptual norms, the rise of anti-globalization reflects the imbalance of the neoliberal economy, and neoliberalism is no longer the dominant theoretical basis for international investment rulemaking. Available evidence suggests that the recognized objectives of the international investment regime are about to undergo a major shift from primarily safeguarding foreign investors against political risks to a greater emphasis on State sovereignty in deciding the extent of legal responsibilities within the framework of international investment law. The existing system of international investment rules, which is mainly organized in international investment agreements (IIAs), is also undergoing significant changes.

2.1. Current Situation of Bilateral and Multilateral Agreements

As of August 2023, the total number of IIAs globally was more than 3,200, with at least 2,584 still in force, this figure encompasses 2,218 bilateral investment treaties (BITs) and 366 treaties including investment provisions (TIPs). Those that are terminated are usually renegotiated, but it is also possible that the treaty expires as planned or, in some cases, is unilaterally withdrawn. According to research findings, there has been a downward trend in the annual entry into force of new International Investment Agreements (IIAs) since the prosperous period of the 1990s. Conversely, there has been a rise in the annual termination of IIAs. In 2017 alone, 56 IIAs were terminated. This trend suggests that the current state of the IIA regime is fragile and that the pace of reform is accelerating.

Corresponding to the above, recent years have seen a proliferation of large regional trade and investment agreements. Examples include the EU-UK Trade and Cooperation Agreement (TCA), the Regional Comprehensive Economic Partnership Agreement (RCEP), the U.S.-Mexico-Canada Agreement (USMCA), the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), and the China- EU Comprehensive Investment Agreement (China-EU CIA). The reconfiguration of international investment laws is significantly influenced by these expansive regional accords. The EU-U.K. Trade Cooperation Agreement, concluded on December 30, 2020, has an investment chapter that calls for pre- and post-access national treatment and most-favored-nation (MFN) treatment for investors, but does not contain provisions on investment protection such as expropriation, investor-state dispute settlement (ISDS), and fair and equitable treatment. The RCEP contains a complete investment chapter that focuses on the promotion and facilitation of investments, including simplified investment approval procedures and the establishment of one-stop investment centers, etc. USMCA investment rules place greater emphasis on the state's regulatory powers in domains encompassing health, safety, and the environment, as well as the importance of corporate social responsibility guidelines. The Central European CIA has a dedicated chapter on investment liberalization, which similarly grants investors pre- and post-access national treatment, most favoured nation treatment, and additionally incorporates a section dedicated to the promotion of sustainable development.

2.2. Sustainable Development Orientation of the New Treaties

Traditional IIAs have focused on the protection of foreign investors' interests, sometimes neglecting the promotion of sustainable development in the host country. Without emphasizing the sustainable development of the host country, creating an imbalance between investment and development, and between the rights and obligations of investors, a contradiction that has been particularly pronounced in the aftermath of the Covid-19 pandemic [3]. The large regional agreements mentioned above have all made some reforms and adjustments to their investment provisions, and one of the key themes of these reforms is the requirement of sustainable development.

As global FDI recovers, investment in SDGs in 2021 is up a whopping 70 percent compared to 2020. Following a significant downturn in 2020 and a robust recovery in 2021, the global inflow of foreign direct investment (FDI) experiences a decrease of 12% in 2022, with sustainable financing still growing [4]. International investment rules are now shifting towards sustainable development, with greater emphasis on corporate social responsibility (CSR), an increased emphasis on safeguarding the right of host nations to exercise regulatory control in the public welfare, and a greater focus on the contribution of investment to development. Provisions to promote responsible development have been systematically included in all newly concluded IIAs, emphasizing on safeguarding health and safety, worker rights, environmental preservation, and sustainable progress. Additionally, it is mandated that parties must refrain from diluting health, safety, or environmental regulations with the intention of attracting investments. Even most of the newly signed IIAs spell out in the preamble that the main objective of the agreement is sustainable development. Although the preamble cannot create binding obligations, it is in a general position and has a guiding role.

2.3. Status of Application of ISDS

Dispute settlement mechanisms in international investment and trade treaties are among their most controversial components. "Investor-State Dispute Settlement" (ISDS) grants foreign investors the legal capacity to initiate legal proceedings against host nations and local governments through international investment arbitration. This allows them to pursue financial compensation for purported infringements on their property rights. The ISDS process is a powerful tool for transnational corporations (TNCs) in obtaining awards of damages, for the purpose of mitigating commercial losses resulting from policy decisions pertaining to matters like privatisation and environmental standards. Plus, it serves as a deterrent against the implementation of such laws. This factor acts as a deterrent to the implementation of such regulations. But IIAs impose few legal obligations on foreign investors to observe or comply with the development policy objectives of host countries. Nor do host countries possess the corresponding rights to initiate legal proceedings against foreign investors in accordance with the International Settlement of Investment Disputes Agreement (ISDA).

Legal experts have identified a total of 2,575 IIAs that are deemed to be of significant importance, 95 percent allow for the use of investor-state dispute settlement (ISDS) mechanisms. In contrast, more recent agreements either limit the use of ISDS or exclude it. The USMCA and CPTPP retain ISDS, but limit its application in terms of who it applies to, the disputes it applies to, and the procedures it applies to, whereas the CEE CAI and the EU-U.K. trade agreement have not yet addressed ISDS. At the same time, there has been increased political efforts to counter the increase

of ISDS claims since 2000 [5]. Several countries in the Global South, such as Bolivia, Brazil, Ecuador, India, Indonesia, and South Africa, have initiated the termination, renegotiation, or complete rejection of BITs. The EU has also developed a strong argument for protecting national regulatory powers, as expressed by former EU Trade Commissioner Cecilia Malmstrom: "My assessment of the traditional ISDS system has been clear--it is not fit for purpose in the 21st century... I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate" [6].

These alterations align with the scholarly observations regarding the emergence of a novel form of protectionism. The EU has increasingly seen trade and investment protection as a significant policy domain of interest. Furthermore, the preceding Trump administration (2017 to 2021), had a trade

strategy that leaned towards protectionism. Consequently, the United States has shown scepticism towards multilateral cooperation and has raised concerns regarding the the World Trade Organization.

3. The Prevailing Position of the Prevailing Party in International Investment Arbitration

In recent years, concerns about the fairness of the ISDS process have grown. The structure of this legal system is intentionally constructed to exhibit a notable absence of openness. Due to the lack of comprehensive transparency at a systemic level, information about the investor-state arbitration system is extremely limited. From the late 1950s (when the system was first established) to 2000, there were only 50 cases. From the turn of the millennium, the number of cases increased dramatically, with 500 cases recorded between 2000 and 2014 [7]. As of August 2023, the aggregate quantity of publicly disclosed ISDS claims has reached a total of 1,257 cases. However, there can be no assurance that arbitration in these cases is fair and reasonable. Although the ISDS process is designed to be formally symmetrical, providing an equal dispute settlement option for private parties regardless of their nationality, the practical implementation reveals substantial imbalance. This will be discussed next.

3.1. Prevailing Party as State

The number of litigation cases initiated by investors from developed home nations against developing host countries has exhibited a notable upward trend over the years, constituting a significant proportion of 56% of the overall count of cases. Investors in the European Union (EU15), the United States and Canada initiated more than 600 cases, but they were only subject to 109 claims. The four main European empire states -- France, Germany, the Netherlands and the UK -- initiated almost 300 cases, but only five were the subject of claims. The number of cases initiated by investors from developed home nations against developing host Nearly half of the legal disputes involving nations belonging to the "Global North" were instigated by investors from the United States and Canada within the framework of the North American Free Trade Agreement (NAFTA). Similarly, a significant majority of the litigations against Spain and Italy under the ECT were initiated by investors hailing from the EU-15 member states. A mere 11 cases have been filed by foreign investors against the EU-15, the United States, and Canada together, with none of them resulting in a favourable outcome.

The number of cases initiated by investors from developed home nations against developing host. Undoubtedly, it is the developing nations who have historically shouldered and will persist in shouldering the majority of the litigation responsibility. There is a growing trend among foreign investors from the Global South to utilise ISDS arbitration as a means to initiate legal proceedings against other developing nations, constituting 16.2% of the overall number of cases. However, ISDS arbitration against developed host countries is also on the rise. Litigation by investors from developed home states against other developed host states has gained traction, now accounting for 24.5% of cases [8]. Finally, only a very small number of cases have been brought by investors from developing home countries in the Global South against developed host countries. At the same time, developing countries lose or settle a higher proportion of cases than developed countries, also against foreign investors.

3.2. Prevailing Party as Investor

Prosecutors from developed countries accounted for about 80 per cent of all admitted cases. A specific analysis of investor status reveals that a large proportion, specifically 70.5%, of the cases were initiated by the main offices or overseas branches of investors in firms that do not belong to the Global 500. Ninety-one ISDS arbitrations (8.2%) were brought by the world's "super multinationals" in the Fortune Global 500; examples include Chevrolet, Samsung, and Telefónica. The fact that the largest, most productive multinational corporations (MNCs) are a small proportion of observed

claimants suggests that the realized costs of ISDS proceedings may not meaningfully correlate with a host state's ability to attract and retain growth-enhancing FDI made possible by those MNCs [9]. However, Fortune Global 500 businesses have expressed their appreciation for the implementation of ISDS. As an illustration, a representative from ExxonMobil expressed approval of the Trump administration's choice to tweak, rather than completely eliminate, the ISDS provisions of NAFTA in the renegotiated U.S.-Mexico-Canada Agreement. Furthermore, in 14.5% of documented instances, the party making the claim as an investor was an individual of foreign nationality, as opposed to a corporate entity.

It can be argued that whether an investor wins or not does not have much to do with its economic size, but it cannot be ruled out that the investor has taken measures other than ISDS to deal with the dispute.

4. The Realities of International Investment Arbitration

The contemporary international investment law regime proposes two objectives. First and foremost, it is worth noting that one explanation is that the signing of IIAs by States and their commitment to implement investor-State dispute settlement mechanisms is a credible means of commitment that reduces political risk and thus promotes FDI. Furthermore, the legalisation of investor-State disputes serves as a viable strategy for depoliticization, thus avoiding the necessity for diplomatic intervention. Litigation clauses as a means of protecting investors' interests must then have a notable role to play, and the outcome of their application should determine investors' willingness to invest. Both the operation of ISDS itself and its overall impact on investors will be considered next.

4.1. Arbitration in Practice

There have always been a number of inherent problems with International Center for Settlement of Investment Disputes (ICSID) reviews. Initially, the award has significant procedural drawbacks. The nature of the investor-state dispute settlement mechanism is ad hoc, and when ad hoc tribunals are formed, arbitrators are selected from a list of arbitrators maintained by the ICSID and every case is determined by a team of three judges. Both the investor and the host State have the authority to designate an arbitrator, and it is customary for these arbitrators to subsequently select a third arbitrator. The judges' impartiality has been subject to scrutiny because to the potential overlap in their positions, whereby the same judges may serve as counsel in other ISDS proceedings, thus creating a "two-faced" situation, which creates an imbalance of power and a conflict of interest in preparing the investor's claim. At the same time, the majority of ISDS arbitrators are made up of commercial arbitrators who are male and are from the higher echelons of wealth distribution, and individuals originating from the Global North. So there has been a contention that ISDS is fundamentally inconsistent with the rule of law; it is commercially biased, the arbitration process lacks transparency and accountability, and it is wholly unjust.

Additionally, in terms of the object of arbitration, SOEs have historically played a significant role in international commercial arbitration, actively engaging as both claimants and responses. Nevertheless, the increasing number of SOEs utilising ISDS arbitration as foreign investors has introduced domestic political dynamics into the arbitration system. This development has reignited worries among host states that international investment law might potentially be used as a means for perpetuating external influence and control.

Finally, the appeal mechanism of arbitration, as well as the issue of enforcement, remains in an ambiguous zone. Existing international investment treaties lack comprehensive and specific regulation of the jurisdiction, admissibility and cause of action elements of, for example, State counterclaims. At the same time, the existence of state immunity affects the ability of a successful investor to seek enforcement of host state property in a third (contracting) state [10]. This means that the arbitration mechanism is still facing different dilemmas at different stages.

4.2. The Causal Link with Inward Investment

As can be seen in specific arbitration cases, most of the plaintiffs are not large companies that can contribute significantly to the economic development of the host country. This group encompasses numerous little enterprises that possess limited public information and are improbable to serve as substantial contributors to FDI for development purposes. Moreover, the integration of numerous IIAs and the complexities associated with contemporary corporate ownership provide investors with supplementary prospects, so that even investors understood to be large firms may have little pro-development FDI in their host countries. There are also a small number of individual claimants who, at most, exert a marginal influence on the host economy. Thus, rather than triggering large amounts of desirable FDI, host countries' compliance with IIAs is more likely to expose themselves to hundreds of foreign investor claims. Moreover, the total number of ISDS investor claimants who manage to maintain their investment or choose to return to the host country, particularly in lower-risk disputes, stands only at 31%.

What's more, states encounter indirect expenses resulting from market participants, aside from the claimants, when facing lawsuits, adversely affects policies aimed at fostering a favourable investment climate and results in a substantial decline in FDI. In contrast, investment provisions in BITs and TIAs without ISDS clauses have a positive and significant impact on regional inward FDI. Overall, investment clauses such as investment protection, facilitation and promotion in IIAs (BITs and TIAs) are strategic policy tools for anchoring the region to increase inward FDI. To summarize, the acceptance of ISDS as a hand-tied instrument has not only failed to bring about a significant increase in FDI in host countries, but has also led to a significant loss of FDI "when the claim is made".

5. Conclusion

The IIA system is still dominated by an older generation of treaties. Some of the commitments of such treaties overlap, and ISDS has been gradually abandoned as an important part of them. Ultimately, this is due to the fact that the original world order has been disrupted and the subjects who now apply the rules are no longer the same as those who were intended to apply them when they were written. The forerunner of ISDS is the system of international law developed in the 19th century, originally to protect US and European investors in the newly independent Latin American countries, and then in the 1950s and 1970s as many of the newly independent countries nationalized their resource nationalisation and protectionist policies as integral components of their economic plans. BITs and the ISDS regime emerged to provide investors with continued protection in a decolonized geopolitical context. ISDS must therefore be understood as a post-colonial instrument that serves to establish and maintain the imbalanced global power dynamics that emerged during the colonial period. Thus, from around 2010 onwards, ISDS cases against countries in the Global North have caused political panic and there has been a shift away from the willingness of these developed countries to use ISDS in the face of globalization.

The promise of IIAs to protect the property rights of foreign investors, which was expected to provide capital-deficient developing nations with limited legal frameworks to mitigate political uncertainties in the absence of other reliable investor safeguards, has in actuality operated to add to their burdens. This product of the old order is bound to become obsolete, and a top-down effort at the international level is therefore necessary in today's quest for the ideal path for structuring the rules of international trade and investment.

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