Original article
УДК 341.63 (5-01)
DOI 10.18101/2658-4409-2024-4-57-64

CHALLENGES OF THE INTERNATIONAL INVESTMENT ARBITRATION IN ASIAN COUNTRIES

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Abstract. With the increased number of IIAs respectively the number of ISDS have risen. Consequently, with the higher number of cases in investment arbitration, the criticism against ISDS mechanism became a fiercely debated topic. In relation to this, countries began taking various measures to change their policy towards foreign investment. The article analyzes the reactions of Asian countries to newly increased number of ISDS cases and the criticism that followed it. The article aims to determine the challenges of the ISDS, and the beginning of the criticism supported by the numeric data of cases worldwide and in Asia, examine the actions of the states regarding the modification of the current ISDS system, and review current movements towards the new ISDS system.
Keywords: investor-state dispute settlement mechanism, Asia Pacific, international integration, arbitration procedure.

For citation
Ninjin B. Challenges of the International Investment Arbitration in Asian Countries. *Bulletin of Buryat State University. Law.* 2024; 4: 57–64.

Introductory Notes: Grounds for Challenges

Foreign investment is crucial for economic and social development in most countries, benefiting both the home and host states through increased employment, technology transfer, enhanced competitiveness, expanded product variety, market demand, and access to natural resources [1]. International investment regime has two main instruments that regulate the investment regime: International Investment Agreements (IIA) and Investor-State Dispute Settlement mechanism (ISDS). Most IIAs include provisions relating to the investment dispute settlement mechanism, precisely Investor-State Dispute Settlement. With over 2600 active International Investment Agreements now in place, the inclusion of ISDS clauses exceeds 90% in Bilateral Investment Treaties (BITs) and other international treaties like Free Trade Agreements (FTAs) and Multilateral Investment Treaties[1].

As of 31 December 2023, the total number of known Investor-State Dispute settlement cases pursuant of international investment agreements reached 1332. The number of concluded cases have reached 958[2]. Most common ground for initiating investment

[1] Data taken from International Investment Agreements Navigator by UNCTAD. Available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 12.09.2024).

[2] UNCTAD, Investor-State Dispute Settlement navigator. Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 12.09.2024).

arbitration is the violation of rights that are contained in investment agreements. For instance, discrimination, direct and indirect expropriation, violation of fair and equitable treatment, and restriction on movement of capital.

According to UNCTAD data, the most common sources of initiating ISDS were indirect expropriation, violation of fair and equitable treatment principle, discrimination and contractual breaches that triggered the umbrella clause. Violation of fair and equitable treatment principle and violation of minimum standard treatment were the highest in number[1]. As a general rule, these two principles impose 'due diligence' from the host state and requires their action to be consistent with investor's legitimate expectation [3]. The high number of claims based on FET principle can be reasoned by the fact that FET principle included in the most international investment agreements are not defined precisely and arbitral awards give broad, inconsistent and differing interpretations of the principle. Thus, with constantly increasing number of ISDS procedures with variety of grounds and sectors that the disputes are arising from, the need for reform and modification of the international investment law has become more relevant and crucial.

Based on the points, this article seeks to analyze alternative policy approaches for addressing recent challenges in ISDS, with a particular emphasis on the Asia-Pacific region.

Recent Challenges in Investor-State Dispute Settlement

The concerns regarding the ISDS *as an entire system* are rooted from the view that arbitral tribunals favor investors over host countries. Concerns about the Investor-State Dispute Settlement (ISDS) system stem from perceptions that arbitral tribunals often favor investors over host countries [12]. Critics argue that these tribunals prioritize investor protections without adequately considering host countries' needs, which encompass public health, environmental standards, labor rights, and economic stability. This imbalance raises fears of a «chilling effect» on host states' regulatory powers, allowing foreign investors to bypass domestic laws and courts [2]. *Procedural issues* further compound criticisms of ISDS, including excessive costs, lengthy proceedings, unpredictable and opaque decision-making, inconsistency in rulings, and concerns about arbitrator independence and impartiality. The practice of arbitrators serving interchangeably as adjudicators and advocates for disputing parties also raises ethical concerns about conflicts of interest, undermining confidence in the neutrality of the arbitration process.

In Asia, these concerns resonate deeply as governments grapple with the implications of ISDS within their evolving investment treaty frameworks. Countries like Sri Lanka, India, Indonesia, and Australia have taken steps to reform or even terminate their investment treaties amid perceptions that the ISDS system disproportionately favors investors. As Asia becomes a focal point for global investment flows, these countries are increasingly asserting themselves in international investment law discussions, advocating for reforms that enhance state sovereignty over foreign investment policies.

These challenges underscore broader systemic issues within the international investment regime, prompting discussions on potential reforms such as the establishment of a world investment court. As the field continues to evolve, influenced by both its

[1] UNCTAD International Investment Agreements Issues Note, Special Update on Investor- State Dispute Settlement: Facts and Figures, 2017, p. 6. Available at: https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf (accessed 13.09.2024).

historical context and contemporary criticisms, the future of ISDS and international investment law remains a pivotal issue for global economic governance. The existence of issues in international investment regime can be observed through number of events such as the denunciation of ICSID Convention by Latin American countries; withdrawal of countries form IIA systems by terminating the BITs;[1] exclusion of ISDS mechanisms from new investment agreements [7; 8];[2] and renegotiating the substantive content and procedural provisions of new investment agreements in pursuit of increasing the state's control over foreign investment policy.

Asian Perspective

Since the 1990s, Asian countries have increasingly joined the global investment regime, leading to a rise in Bilateral Investment Treaties and regional agreements aimed at boosting foreign investment flow. For example, ten Member States of ASEAN have concluded comprehensive investment agreement[3] and commences several investment and trade promotion initiatives. On a bigger scale Asia-Pacific Economic Cooperation's (APEC) initiatives of Free Trade Area of the Asia-pacific.

Regardless of many new initiatives and being one of the most attractive destinations for FDI flow, until recently the Asian countries participation in international investment regime, including investor-state dispute settlement, was not major. Recently, Asian states began to reform their own international investment agreement regimes and actively engaging in the development of international investment law. The shift is reasoned by the fact that Asian countries and its investors became more targeted in investor-state dispute settlement procedures, both as a respondent and a claimant. For instance, according to the UNCTAD, Chinese investors brought at least six claims, Singapore investors brought five and Malaysia four. As a respondent, India, Vietnam, and Indonesia have the highest number of cases with twenty-five, eight and seven cases, respectively. Nonetheless, Asian perspective on foreign investment approach and dispute resolution experiences were different than the rest of the world. The differences are rooted in their population, economic development and overall legal culture when balancing national and international interests.

International Investment Agreement Reform in Asia

Concerns regarding international investment agreements were addressed to the investor-state dispute settlement mechanism. Options for reform steps range from leaving the current system behind by creating a permanent investment court and creating an appellate mechanism for arbitration, to establishing entirely new instruments that will ensure transparency, predictability, and consistency of decisions in investment arbitration. And countries in Asia Pacific started following the reforms in the following way.

Procedural developments

Inconsistencies in international investment arbitration arise from varying interpretations of treaty language by arbitral tribunals, compounded by the broad and

[1] These countries include Indonesia, Czech Republic, Ecuador, Venezuela and South Africa.

[2] Australia has been the pioneer of such actions for some time now.

[3] ASEAN Comprehensive Investment Agreement in force since 29 March 2012. Available at: http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf (accessed 13.09.2024)

loosely defined principles found in numerous investment treaties. This interpretational discretion has led to over 1 000 cases of investment arbitration where arbitrators applied different interpretations of key treaty provisions, influenced by their diverse legal backgrounds and the ad hoc nature of arbitration processes. What was once seen as a mechanism for developing international investment law is now criticized by some countries for creating uncertainty and unpredictability in outcomes. Moreover, the absence of a precedent system and the ad hoc nature of decision-making in investment arbitration make achieving consistency in treaty interpretation challenging.

To address these concerns, some states have begun establishing joint interpretative committees or other mechanisms aimed at clarifying the interpretation of international investment agreements (IIAs). Initiatives like those seen in ACIA, ASEAN-Australia New Zealand FTA, and EU-Canada Comprehensive Economic Trade Agreement aim to provide clarity and consistency in treaty interpretation, offering a potential alternative to the current ad hoc arbitration model [4]. Another option that is stated in China-Australia Free Trade Agreement (ChAFTA) is to suspend the arbitral procedure while treaty parties make consultations up to 90 days (about 3 months) on the concern whether violation falls under the provisions of the FTA[1].

Transparency is a major concern in investment arbitration, focusing on publishing awards and related documents, and involving amicus curiae. The lack of transparency undermines ISDS legitimacy, restricts public access to vital information in arbitral awards, and violates the public's right to information. Recent international law developments, such as UNCITRAL's 2014 Rules on Transparency, aim to address these issues by mandating disclosure of proceedings, specifying documents to be disclosed, requiring open hearings, and promoting award publication. These rules apply broadly to various arbitration forums, including those in Asia through agreements like ACIA and ASEAN FTAs.

Appeal mechanism

In the ISDS system, the lack of a hierarchical structure akin to national courts prevents the correction of tribunal errors and consistent interpretation, fostering distrust. Criticism centers on inconsistent decisions and the absence of appellate mechanisms to review tribunal rulings. Proposals include creating a multilateral investment court or adding appeals to existing tribunals, with concerns about judge tenure and structure. Recent agreements like India's new model BIT and US-Singapore FTA explore appeal mechanisms, while CETA and EU-Vietnam agreements have already implemented Investment Court System. Decisions of ICSID cannot be appealed, however, it can be annulled on limited and procedural grounds included in Article 52 of the Convention.

Investment Court

The Investment Court System already implemented in the EU-Canada Comprehensive Economic and Trade Agreement and other European Union's new generation FTAs with Singapore, Vietnam. In the EU-Singapore Investment Protection Agreement (EUSIPA), the ICS mechanism promotes a less adversarial approach. After arbitration proceedings commence, parties are encouraged to settle disputes amicably. If they fail to do so within 30 months of the alleged violation, the claimant can initiate a consultation process

[1] Article 9.11.5-9.11.6, China-Australia Free Trade Agreement. Available at: https://www.dfat.gov.au/sites/default/files/chafta-agreement-text.pdf (accessed 15.09.2024).

with the respondent. If this consultation also fails to resolve the dispute, the claimant may then formally notify the respondent of their intention to bring the claim before the tribunal. After a three-month notice period, the claimant can proceed to submit the claim to the Tribunal. The Tribunal comprises six members: two appointed by the EU, two by Singapore, and two jointly selected by both parties[1].

UNCITRAL's initiative on Multilateral Investment Court has proposed an appellate mechanism to ensure procedural and substantive correctness of arbitral decisions and rectification of errors. At this instance, the WGIII is working on the scope of appeal and the appellate body's competence which could include not only procedural matter but substantial matters too[2].

Other developments on procedural criticisms overall and in Asia could include counterclaims and state-state dispute settlement. Recent developments suggest that counterclaims have become more common than before. In the last six years thirteen counterclaims were filed out of a total of 28 [9]. As for Asian states, only Indonesia has been successful in initiating a counterclaim in Hesham Talaat M. Al-Warraq v The Republic of Indonesia [6]. Altogether there have been four counterclaims in Asia[3].

The criticism points are addressed more to the systemic and institutional framework of investment arbitration rather than the substantial standards of it. Furthermore, from the host country's perspective on ISDS criticism concerns the impact on the future of investment arbitration, rather than the outcome of individual proceedings [11, p. 654].

Asian engagement with regional and international policies

Asian engagement with regional and international policies, particularly through APEC, focuses on promoting and liberalizing foreign investment since 1994. APEC member states voluntarily adopt principles like due process and non-discrimination into their national legislation and investment agreements. Recently, APEC has emphasized negotiating international investment agreements and enhancing dispute resolution mechanisms, including the Investment Facilitation Plan to boost regional investment flows[4].

On a multilateral level, some APEC members participated in WTO initiatives like the Joint Ministerial Statement on Investment Facilitation for Development, aiming to establish a global framework for foreign investment. Additionally, countries such as Indonesia, China, South Korea, and Thailand have engaged with UNCTAD on reforming Investor-State Dispute Settlement[5].

The Asian Development Bank continues to promote regional integration through trade and investment, while contemporary efforts like the RCEP and CPTPP have emerged as pivotal regional trade agreements. RCEP, signed in 2020, aims to eliminate tariffs

[1] Article 3, Chapter Three Dispute Settlement, EU-Singapore Investment Protection Agreement.

[2] UNCTAD Working Group III, Possible reform of ISDS, Appellate and multilateral court mechanisms. Available at: https://undocs.org/en/A/CN.9/WG.III/WP.185.

[3] For counterclaims in Asia, see Trisha Mitra and Rahul Donde Claims and Counterclaims under Asian Multilateral Investment Treaties in: [6].

[4] International Investment Agreements Negotiators, Handbook: APEC/UNCTAD Modules, 2012. Available at: https://investmentpolicy.unctad.org/publications/119/international-investment-agreements-negotiators-handbook-apec-unctad-modules (accessed 15.09.2024).

[5] UNCTAD's Working Group III is focused on possible ISDS reforms. Full list of government's submissions can be found at: https://uncitral.un.org/en/working_groups/3/investor-state (accessed 17.09.2024).

and enhance investment environments among its diverse member countries[1], while the CPTPP, effective since 2018, sets modern standards for international investment agreements, including comprehensive Investor-State Dispute Settlement provisions and mechanisms for dispute resolution and interpretation[2].

Reaction overview from individual countries

The approach to foreign investment varies across Asia, with countries like China and South Korea fostering FDI flows while Indonesia and India have taken more restrictive measures. Indonesia's decision to terminate its 67 existing BITs, starting in 2014, stemmed from dissatisfaction with how these treaties were applied in investment arbitration cases, such as the Church ill Mining dispute [10]. This move aimed to reform ISDS mechanisms and align treaties with current national regulations, particularly in sensitive sectors like mining and public health.

The Churchill Mining and Planet Mining v. Republic of Indonesia[3]

Churchill UK owned mining company and its wholly owned Australian Subsidiary Planet mining have entered the project East Kutai Coal Project with Indonesian local company Ridlatama. EKCP had mining licenses in a territory where another local company (Nusantra) had license too and claimed the license is still valid. Local government have decided in favour of Nusantra group and revoked licenses of EKCP. After exhausting local remedies including the Supreme Court of Indonesia, Churchill began its investment arbitration in May 2012, which was followed by Planet's claim in December 2012. The tribunal have issued two awards in jurisdiction which enabled the claimants to proceed with the damages claim. Nonetheless in the procedure of arbitral proceedings the tribunal found that the licenses presented by the claimants were forged and subsequently found the claims inadmissible.4 The claimants have filed for annulment in March 2017 and the decision has not been rendered yet. The problem with the BITs was the fact that it did not provide any clause for the consequences of unlawful conducts by the claimant.

Reactions to Indonesia's strategy have been mixed, with some supporting the reforms while others fear it may deter investment. Despite terminating BITs, Indonesia remains bound by multinational agreements like ACIA and ASEAN-Australia-New Zealand FTA, as well as its commitments to WTO and ICSID. The sunset clauses in many BITs ensure ongoing protections for foreign investors during renegotiations or the establishment of new IIAs. India followed a similar path by terminating and renegotiating BITs, introducing stricter conditions for initiating investment arbitration under its new BIT. Globally, countries are reassessing ISDS provisions in their IIAs in response to concerns about investor-state disputes and regulatory sovereignty, reflecting a broader trend towards reforming international investment law.

[1] RCEP, Article 19.5.

[2] Article 9.18, Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Available at: https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf (accessed 17.09.2024).

[3] Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB.12.14 and 12.40. Award from 6 December 2016. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw7893.pdf (accessed 17.09.2024).

[4] *Ibid*, para 528.

Conclusion

Alongside with the positive integration and increase of foreign direct investment flows, some Asian states started taking bold measures to terminate, renegotiate, reforms their international investment agreement and entirely exclude investor state dispute settlement mechanism from their treaty protection of investors. Such actions were praised by some, and others were saying that these countries will effectively lose their flow of foreign investments. Counties such as Indonesia and India, that have terminated their bilateral investment agreement, started negotiating and signing new investment agreement to replace the old ones. This action does not necessarily leave the foreign investors without protection. International treaties, including Comprehensive and Progressive Agreement for Trans-Pacific Partnership, are still in force for investors to seek protection from them. Furthermore, these countries have not denounced the ICSID Convention as well.

However, the different proposals to reform international investment regime might confuse the parties of an investment treaty even more. The active parties have different ideological, political and institutional preferences that often do not harmonize with each other. As Stephan Schill stated, such actions might be counterproductive in arriving at a balanced, predictable and legitimate ISDS system that is accepted worldwide in developing and developed countries.

Regarding the efficacy of these reform proposals, both within the Asian region and globally, a period of observation is warranted. Countries that have amended their Bilateral Investment Treaties are likely to be the first to gauge whether such modifications enhance or diminish their investment inflows. Furthermore, the transformative proposal of a Multilateral Court System will only realize its potential once all member states have ratified the relevant international treaties.

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The article was submitted 15.10.2024; approved after reviewing 10.11.2024; accepted for publication 20.12.2024.

ПРОБЛЕМЫ МЕЖДУНАРОДНОГО ИНВЕСТИЦИОННОГО АРБИТРАЖА В СТРАНАХ АЗИИ

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Аннотация. С ростом числа международных инвестиционных договоров возросла и необходимость урегулирования споров между инвесторами и государством. Следовательно, с ростом числа дел в инвестиционном арбитраже критика механизма урегулирования споров между инвесторами и государством стала предметом ожесточенных дискуссий. В связи с этим страны начали предпринимать различные меры для изменения своей политики в отношении иностранных инвестиций. В этой статье будет проанализирована реакция азиатских стран на вновь возросшее число международных арбитражных разбирательств и последовавшую за этим критику. Цель статьи — определить проблемы международного инвестиционного арбитража, подкрепить их количественными данными о подобных делах по всему миру и в Азии, изучить действия государств в условиях изменения системы международного инвестиционного арбитража и рассмотреть тенденции обновления системы урегулирования споров между инвесторами и государством.

Ключевые слова: механизм урегулирования споров между инвесторами и государством, Азиатско-Тихоокеанский регион, международная интеграция, арбитражная процедура.

Для цитирования
Нинджин Б. Проблемы международного инвестиционного арбитража в странах Азии // Вестник Бурятского государственного университета. Юриспруденция. 2024. Вып. 4. С. 57–64.

Статья поступила в редакцию 15.10.2024; одобрена после рецензирования 10.11.2024; принята к публикации 20.12.2024.