International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 16-09-2019; Accepted: 18-10-2019
www.lawjournals.org
Volume 5; Issue 6; November 2019; Page No. 37-41

Investor-State Dispute Settlement (ISDS): Reform proposals and their associated hidden risks

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Abstract
The proliferation of ISDS in International Investment Agreements (IIAs) shows how appurtenant the ISDS mechanism has become. However, with the increasing number of ISDS cases, the debates about the cons of the mechanism is also gaining recognition especially in countries where ISDS is on the agenda of IIA negotiations. The issue of ISDS reform is so crucial that it should be done in a well-informed manner and take into account the interests of all stakeholders in a well-balanced approach.

Despite the ongoing consensus about the necessity to reform the current ISDS mechanism, the scope, procedures, and modalities for the reform remain contested because the reform proposals by some countries and international organizations comes with certain hidden risks which may end up further fragmenting the international investment system.

This article sets out some possible reform proposals and probes into the hidden risks that are associated with them. It further suggests that in order to strike a progressive balance between the interests of the disputing parties; the investors and the states, the ISDS reform proposals should be developed and implemented in a concerted effort by employing a multilateral framework which will integrate the ISDS mechanism and domestic court proceedings.

Keywords: investor-state dispute settlement, international investment agreements, reform, hidden risks

1. Introduction

Provisions for Investor-State Dispute Settlement (ISDS) became fundamental components of International Investment Agreements (IIAs) since the initial bilateral investment treaty between Germany and Pakistan in 1959 [1]. Most investment treaties have clauses that provide consent for arbitration in the event of dispute between host states and investors, and at times, may contain alternative mechanisms, for example, a proceeding brought before a domestic court of a host states or different procedures settled by each party to the dispute [2]. IIAs, recognizing a need for neutral, independent, as well as efficient dispute settlements, make recourse available to their foreign investors involved in international arbitration against host states over not complying with investment disciplines [3].

The main objective was firstly, to depoliticize investment disagreements and secondly, to contribute to the enhancement of the rule of law with regards to investor-state affairs. ISDS is now the dominant mode for resolving disputes between a foreign investor and a host state. This mechanism determines whether a violation of investment treaty terms has occurred and the quantum of damages that is owed. Today, states as well as investors, are familiar with the system since it has become a shared tool for investors to use for enforcing their rights against host states.

Before the ISDS regime emerged during the mid-twentieth century. An investor-state dispute that could not be resolved directly through investor-state discussion or proceedings within a domestic court were either not settled or handled by home State espousal of the claim through a number of diplomatic processes or, sometimes, by threats or using military force [4]. Therefore, from such perspective, ISDS may be seen as a progressive and innovative institution in as much as it aided in the reduction of sources of international tensions as well as recourse towards military force [5]. The ISDS is an important component of a State's effort to emphasize the credibility of their commitment to their international investment agreements. However, bilateral investment treaties that effectively give provisions for international arbitration, roughly 93% of the total in accordance to the vast sample survey of treaties, give way to private enforcements of such commitments. In the event a state is found to have been in breach of their treaty obligations, the affected investor is in a position to obtain monetary compensation or perhaps other types of compensation [6].

In principle, having these kinds of remedies available gives rise to influential incentives for states to honor their commitments under the investment treaty. Therefore, the ISDS acts as an enforcement mechanism for promoting

[1] Gaukrodger D, Gordon K. Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, 2012. http://dx.doi.org/10.1787/5k46b1r85j6f-en accessed 20 August 2019.

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compliance as well as a way to compensate victims of harm initiated by a breach of any provision under the investment treaty.

The ISDS mechanism established by the thousands of IIAs and other international documents has three features that make it distinct from majority of other institutions [7]:

1. The legal basis of ISDS varies and is considered as complex, as a number of other dispute settlement mechanisms are anchored in properly defined treaty frameworks. It spreads across disputes resolution provisions that are in at least 3000 investment treaties.
2. ISDS enables a private party to bring forth a claim against a State; subject to various prerequisites set out in different investment treaties and is able to generate huge monetary awards. Few, if any, of the other mechanisms which allows a private party to compel a State to engage in dispute resolution procedures that involve monetary compensation of this magnitude.
3. ISDS' institutional set-up is drawn immensely from commercial arbitration, e.g. ad hoc, party-appointed arbitration panels, stress on speed as well as finality of findings.

While the ISDS is viewed as unusual and at times a unique system for adjudicating when compared to other bodies formed within other parts of international law, the significance of its unusual status ought not to be overstated. The field of international dispute settlement bodies is wide and consequently so dissimilar that many of the other institutions are strange as well in their own way. In fact, international dispute resolutions are not controlled by a single or a number of institutional models that embody an agreed standard of good practice, in its place, a number of institutional designs have emerged, reflecting the specificities of the related subject matters, political considerations as well as historic circumstances.

2. Criticisms of current ISDS mechanism

For numerous years, ISDS mechanisms have been in place with little attention publicly. However, with recent increase in cases and the publication of certain prominent cases about legislation for the protection of public interests, for example, Philip Morris v. Australia and Vattenfall v. Germany have had an impact in drawing public interest to the mechanism [8]. In combination with prominent rejections of ISDS by some States such as Australia, India, and South Africa, the suspicions have increased between activists and NGOs.

In recent time, numerous apprehensions with today's ISDS system have been brought to the forefront. The system has been strongly criticized by civil society and representatives of governments all over the world. The main criticisms include contradictions in decision making, lack of sufficient regard by certain arbitral tribunals towards the host state's authority to regulate when interpreting an IIA, concerns over not having enough independence and the impartial nature of arbitrators, a limit on mechanisms that regulate arbitral tribunals and make sure the decisions are correct, as well as rising costs for resolving investment disputes. For these reasons, ISDS is facing significant backlash, together with the withdrawal by a number of countries from the prevailing regime, the recalibration of practical investment disciplines, and deliberations on ways of reforming it at the national, regional, and international levels.

It is important to highlight that the ISDS's reform is now part of the agenda of a number of international organizations, such as the United Nations Conference on Trade and Development (UNCTAD) as well as the Organization for Economic Cooperation and Development (OECD). In conjunction with the positions that certain influential parties to IIA contracts, such as the United States, the European Union, the Association of Southeast Asian Nations (ASEAN), and China.

3. The need for reform in the current ISDS mechanism

The Provision for Investor-State Dispute Settlement (ISDS) has been one of the main components of an international investment agreement (IIAs) for some years now. Having the ability to recognize a need for neutrality, independence, and efficient dispute settlements, IIAs provide reactions to the inadequacies at the domestic level and give a foreign investor remedies to international arbitration against host states for not complying with an investment discipline. Remedies provided under international arbitration have been hailed as those that depoliticize investment disputes and contributes towards the enhancement of the rule of law with regards to investor-state relationships. Nonetheless, due to the sudden escalation within investment treaty arbitrations throughout the past ten years, numerous concerns with today's ISDS regime have come towards the forefront, giving rise to extensive calls for reform.

The existing discussions show a budding consensus over needs of reforming the ISDS' system. Making sure there is a proper area for policies and constant confirmation of a state's control over the system are essential policy objectives of present labor reforms. It has been progressively clear that systemic reform alone will permit addressing apprehensions with the ISDS in a comprehensive manner. Piecemeal contrasting approach will only have a restricted effect as "older" IIAs are still in existence and investors are in a position to structure their investments to profit those treaties. However, even though the mounting consensus on the needs for ISDS reform, its scope, modalities, and strategies for reform are still disputed. Some options for the future include leaving the system overall as well as having it additionally institutionalized further by creating an appellate mechanism or a permanent investment court, and putting in place additional instruments for ensuring predictable and protection of public interests. In fact, the numerous reform suggestions presently being entertained are in danger of further dividing the international investment system and be the source of bewilderment when taking on systematic reform. All this may be counterproductive when trying to arrive at a balanced, predictable and legitimate system for every international stakeholder, in developed as well as developing countries alike, whether within the government, private sectors, or civil societies.

However, in order for a systematic ISDS reform to become fruitful, it is important to come up with reform proposals

[7] Gaukrodger D, Gordon, K. Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community." OECD Working Papers on International Investment No. 2012/3, 2012. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[8] Schubert. M, Carranza. S. Investor-State Dispute Settlement & the Transatlantic Trade and Investment Partnership (TTIP)'. 2006. https://www.esade.edu/itemsweb/wi/esadegeo/positionpapers/15_16/20160 5PositionPaper_ISDSintheTTIP_Schubert_Saz_Carranza_EN.pdf retrieved 4 November 2019.

based on normative and theoretical framework that is internationally agreed upon. Therefore, the conceptual framework developed could be utilized in formulating some actual proposals for legal investment reforms, particularly, amplified institutionalization of ISDS as well as implementing mechanisms that allow a state to certify that ISDS progresses democratically, respectfully and conforming with the essential demands of the rule of law. It is therefore important that discussions concerning ISDS reform continue in properly informed fashion and take into account interests of every stakeholder in a sensible manner.

4. Reform Proposals and Their Associated Hidden Risks

Considering the above criticisms of the current ISDS, it is evident that the substantive and procedural laws of the current ISDS mechanism needs to be reformed in a properly-knowledgeable way and consider the interest of every stakeholder in well-balanced approaches. These reform proposals should be developed and implemented in a concerted effort by employing a multilateral framework which will integrate the ISDS mechanism and domestic court proceedings. However, these reform proposals by countries and some international organizations are associated with certain hidden risks which may end up further fragmenting the international investment system. Below are some of these reform proposals and their associated hidden risks:

4.1. The Protection of the Right to Regulate

Certain apprehensions have been expressed over the possible limits to the right that governments have to regulate public interests. Particularly, the argument is that the ISDS offers to investors the right of suing a government any time new legislation does not positively affect their profits. In addition, the arguments given in public debates are that arbitral tribunals, while providing interpretation for investment agreements, have only given consideration to objectives of protection of economic interests of investors and have not balanced it against the sovereign right for states to legislate in public interests. The apprehension is founded on the fact that unequivocal references over the right of regulation have solely remained part of investment agreements. The EU and a country that it has negotiated with (Canada and Singapore) has considered that the authority of regulation is part and parcel of their contract, and have recalled this in preambles to such an agreement. Nonetheless, more clarity specifically relating to investment protections as well as arbitration could be of help. From this point, reforms ought to reiterate the rights to control in regards to legal provisions in the body of applicable chapters.

The proposal aims to boost a governments capability of regulating the public interests by; An operational provision that will make reference towards the governments right of taking measures for achieving genuine public policy objectives, founded on the protection level they consider suitable. A provision like this recognizes the rights that domestic authorities have towards regulating issues within their own borders that are still in existence in international law. It gives way to the positioning of proper contexts where investment protection standards are applicable.

A provision to clarify that agreements ought not to be understood as a prevention of a party from suspending grants of state aid or requesting the compensation of a state's aid already remunerated, whenever this type of state aid is declared as prohibited by the skilled authorities.

4.1.1. Hidden Risk

This approach will not be so effective because the old treaties will not be affected, it seems this approach will be applied to only new concluded IIAs. This alternative approach is no more lined up with a multicultural understanding of democracy since foreign investors who are not part of host states' constituency, are not inclined to benefit from similar civil and political rights as citizens, and are not able to be part of electing a government. This is a complete manifestation of an inadequate notion of democracy. This reform proposal does not address the issues that relate to it, but rather diminishes their severity. It slows down the proliferation of ISDS proceedings. It may also be helpful in strengthening a domestic judicial system as well as encouraging sturdier involvements of a host State's legal community. Nonetheless, the tactic would mean returning to the previous system where investors were able to bring in their claims solely in a domestic court of the host state, negotiating an arbitration clause within exact investor-state contractual agreements or applying diplomatic protection by their home state.

4.2. The Establishment and Functioning of Arbitral Tribunals

Currently, arbitrators on ISDS tribunals are selected by disputing parties depending on each individual case. Today's regime does not prevent similar persons from acting as lawyers in different ISDS matters. These circumstances can increase conflicts of interest and therefore distresses that the individuals are not acting with complete neutrality when acting as an arbitrator. The ad hoc nature of their selection is observed by the public as being an interference in their capability of acting independently and to appropriately create stability in investment protections against the authority to regulate. Additionally, it consequently led to the perception that it gives monetary enticements to arbitrators for the increase of ISDS cases.

A functioning arbitral tribunal would be an institutional public good that serve investors interests, states as well as additional stakeholders. The tribunal is able to address many of the issues mentioned above, and it would go a long way in ensuring that there is a legitimate and transparent system, facilitate consistent and accurate decisions and make sure there is independence and impartiality of adjudicators [9].

The proposal includes a condition that states that every arbitrator is selected from a register pre-established by a party to an agreement. This choice will not present technical issues and will permit breaking the connection amongst a party to the disagreement and an arbitrator. This means that every arbitrator would have been scrutinized by each party.

Such an obligation can be accompanied by a requirement of particular credentials of arbitrators, particularly, that they possess skills to obtain a judicial position in their home country or alike qualifications. This would consequently be supplemented by the fact that they additionally require skilled information of how international law is applicable as enclosed in agreements that would vary exactly from usage

[9] A system where judges are assigned to the case, as opposed to being appointed by the disputing parties, would also save significant resources currently spent on researching arbitrator profiles.

of their purposes and make a drastic reduction of the risks of unanticipated understanding of the guidelines concerning investment protection. Therefore, even choices of a disputing party could be restricted to people who to the agreement have been opted for in advance and are capable, independent, impartial and able to be trusted to make the decision according to well-known and foreseeable legal principles.

Additionally, the proposal highlighted on the possibility for the tribunal to assent amicus curiae briefs, it ought to confer the authority to intervene towards third parties with a straight-forward and prevailing interest during the conclusion of the disputes.

4.2.2. Hidden Risk

This approach would be hard to implement since it requires total overhaul of the existing ISDS regime through a well-organized activity. It could also be argued whether a functioning arbitral tribunal would be fit for a disjointed system that consists of a hefty number of mainly bilateral IIAs. It would also raise legitimacy concerns such as who would sit as the decision-maker, as well as the person that assigns or elects them.

4.3. The Review of ISDS decisions through an appellate mechanism

The possibility of the inclusion of an appellate mechanism was one of the matters that gathered majority of support during public consultations from investors as well as NGOs. The prevailing thought was that the right to appeal ought to be part of any operational judicial or quasi-judicial regime. Its importance is to develop proper institutional setups that comprises permanent judges for ensuring more validity.

The Transatlantic Trade and Investment Partnership (TTIP) negotiating directives clearly indicates an appellate mechanism. It states that consideration ought to be provided towards possibilities of creation of appellate mechanisms apply to investor-to-state dispute settlements as per their agreement.

This reform proposal ought to be inclusive in bilateral appellate mechanisms for ISDS. States are to clearly outline their role, set up, as well as practical procedure. This appellate mechanism would then evaluate awards as they regard to errors of law and a manifested error during valuation of facts to ensure consistent interpretation of TTIP and the rise of validity on substance and by the institutional design through strengthening independence, impartiality as well as predictability.

An appellate mechanism and a permanent investment court would permit the control of law-making events within the ISDS, therefore making the international investment regime more democratic. Issues associated to conflicts of interests might be overlooked in the event a member of a standing appellate mechanism or investment court are not permitted to act as counsels during an ISDS proceeding. This is able to guarantee additional independence as well as impartiality compared to the current arbitral regime. Introducing an appellate phase would additionally contribute to the period and fees of proceedings, even though it might be controlled through placing constricted timelines, as has happened with the WTO Appellate Body [10]

4.3.1. Hidden Risk

This approach is likely to face practical challenge or legitimate concern such as the means and procedures of electing members onto the tribunal, how these members are going to be paid. Would the tribunal be looking at only the issue of law or issue of fact would also be considered? One other question to ask with this approach is whether it going to cover all ISDS institutions like ICSID, UNCTAD or it will be limited to some selected few. If a constricting timeline, as has been done for the WTO Appellate Body is not put in place, proceedings in appellate mechanism might take a long period which will go a long way to increase the cost involve in the process.

4.4. The relationship between domestic judicial systems and ISDS.

The claim often made is that ISDS provides investors with special and corresponding tracking in order to settle investment disputes by which they will be able to avoid ordinary jurisdiction of domestic courts. Arguments made are of the opinion that domestic courts solely are to resolve disputes concerning foreign investors, who ought not be in positions to appeal to a domestic courts' decision prior to special ISDS tribunals. Few IIAs require exhausting domestic remedies prior to the submission of a claim towards ISDS. Others even contain clear rejections of this idea, inter alia since it is considered to add to the price as well as the length of litigation. This approach ensures that similar claims are not allowed, for example, so that investors are not able to gain double reimbursement.

Under this approach, a simpler way is the need of investors to come up with conclusive choices amid the ISDS and domestic courts at the onset of a legal proceeding therefore, fork-in-the-road clause. Consequently, it would be a contribution to shorter durations and fee for litigation, through evading that disputes are initially litigated in a domestic court, and later before ISDS tribunals.

However, investors will be requested to waive their right to move towards domestic courts the moment a claim is submitted to ISDS. This possibility has the benefit of not disheartening an investor from trying to seek redress before a national court and therefore, reducing the amount of possible ISDS claims.

It was also concluded that the proposal ought to be clear on relevancy of domestic laws of every party for the purposes of the ISDS, through confirmation that;

1. Applying domestic law does not fall under the competence of ISDS tribunals.
2. Domestic law could be taken into account by ISDS tribunals only as a matter of fact; and
3. Any interpretations of domestic law done by ISDS tribunals are not binding upon domestic courts.

4.4.1. Hidden Risk

Restoring a requirement for exhausting domestic remedies might completely challenge the efficiency of the ISDS. This approach would require amendment and renegotiation of the past treaties. This alternative approach might also lead towards the piecemeal tactic that falls short of contributing to an all-inclusive and unified way towards the future.

5. Conclusion

Investor-State Dispute Settlement model is based on 1950s pre-globalization situation so its pillars are outdated and do

[10] At the WTO, the appeals procedure is limited to 90 days.

not correspond to the present scenario. Hence, it is time to move into the modern and adapt ISDS to the present circumstances, a multilateral and globalized scenario. Because of this, the future of ISDS has become somewhat uncertain; reforms have been proposed, but it is not yet clear whether or not they are sufficient or what is the most efficient way for the reforms. Even though some countries have already started to abolish Investor-State Arbitration or withdrawing from the International Centre for Settlement of Investment Disputes. However, it seems that states are rather continuing to provide for ISDS in their treaties, a recent example of this is the inclusion of ISDS clause in TPP.

Due to the many challenges that have risen from the present ISDS regime, I think the reform of ISDS is not enough to provide solutions to the issues that the international investment regime is faced with. There are numerous problems since the vague and ambiguous nature of substantive standards of treatment that would not be a possibility to correct in the event that thousands of IIAs remain in existence. Hence, it is about time for states to give proper assessment towards the existing system, ponder options for reform, and consequently agree on the most suitable route. Some possibilities for reform may suggest that specific government actions and others need combined action by an important amount of countries. Majority of possibilities could be aided from being complemented by all-inclusive training and capacity building for enhancing cognizance and understanding of ISDS related matters [11].

While collective action possibilities could go ahead when taking note of the issues modeled after the current ISDS system, they could be faced with additional difficulties during implementation and need an agreement between many more States. Collective efforts at the multilateral level are able to aid in developing a consensus on the favored path for reform and methods of putting it into action.

A significant fact to keep in mind is that the ISDS is a system of applying the law. Hence, improvements geared towards the ISDS regime ought not to go hand in hand with liberal developments of substantive international investment law itself. A number of arguments given by ISDS opponents that demand omission or at least key reforms seem to be parallel to reality. It is against this background that there should be an adequate scope for reform for increasing the general public's trust within the regime's legitimacy as well as impartiality. Nevertheless, it additionally appears as if a general exclusion would rightfully depreciate the sureness that an investor has over security of their overseas investments. Thus, a substantiated reform of the ISDS regime will most likely be the most suitable way moving forward.

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[11] Such capacity building activities are, being carried out by UNCTAD, among others, (together with different partner organizations)