

INVESTOR-STATE DISPUTE SETTLEMENT IN INTERNATIONAL PUBLIC LAW: A CRITICAL ASSESSMENT AND FUTURE DIRECTIONS

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XALQARO OMMAVIY HUQUQDA INVESTOR-DAVLAT NIZOLARINI HAL QILISH: TANQIDIY BAHOLASH VA KELAJAKDAGI YO'NALISHLAR

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УРЕГУЛИРОВАНИЕ СПОРОВ МЕЖДУ ИНВЕТОРАМИ И ГОСУДАРСТВОМ В МЕЖДУНАРОДНОМ ПУБЛИЧНОМ ПРАВЕ: КРИТИЧЕСКАЯ ОЦЕНКА И БУДУЩИЕ НАПРАВЛЕНИЯ

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Abstract: Investor-State Dispute Settlement (ISDS) is a mechanism that allows foreign investors to bring claims against states in which they have invested, typically through arbitration rather than national courts. Initially conceived as a means to protect investments in politically unstable environments, ISDS has become a central point of debate in international public law. This article offers a critical assessment of ISDS and explores future directions for reform to align the mechanism more closely with modern principles of public international law.

Key words: investor-State Dispute Settlement (ISDS), Bilateral Investment Treaties (BITs), Foreign direct investment (FDI), Sovereignty, Regulatory space.

Аннотация: Урегулирование споров между инвесторами и государством (ISDS) — это механизм, который позволяет иностранным инвесторам предъявлять иски против государств, в которых они инвестировали средства, обычно через арбитраж, а не через национальные суды. Первоначально задуманная как средство защиты инвестиций в политически нестабильных условиях, ISDS стала центральной темой дебатов в международном публичном праве. В данной статье предлагается критическая оценка ISDS и исследуются будущие направления реформы, направленные на более тесное приведение этого механизма в соответствие с современными принципами международного публичного права.

Ключевые слова: урегулирование споров между инвестором и государством (ISDS), двусторонние инвестиционные договоры (ДИД), прямые иностранные инвестиции (ПИИ), суверенитет, пространство регулирования.

Annotatsiya: Investor-davlat nizolarni hal etish (ISDS) - bu xorijiy investorlarga o'zlarini investitsiya qilgan davlatlarga nisbatan odatda milliy sudlar emas, balki arbitraj orqali da'vo qilish imkonini beruvchi mexanizm. Dastlab siyosiy jihatdan beqaror muhitda investitsiyalarni himoya qilish vositasi sifatida ishlab chiqilgan ISDS xalqaro ommaviy huquqda markaziy munozara nuqtasiga aylandi. Ushbu maqola ISDSni

tanqidiy baholashni taklif qiladi va mexanizmni xalqaro ommaviy huquqning zamonaviy tamoyillari bilan yanada yaqinroq muvofiqlashtirish uchun islohotning kelajakdagi yo'nalishlarini o'rganadi.

Kalit so'zlar: investor-davlat nizolarni hal qilish (ISDS), ikki tomonlama investitsiya shartnomalari (BITs), to'g'ridan-to'g'ri xorijiy investitsiyalar (FDI), suverenitet, tartibga solish maydoni.

Introduction

Investor-State Dispute Settlement (ISDS) mechanisms have been an essential tool in promoting foreign direct investment (FDI) since their inception in the mid-20th century. Their establishment under bilateral investment treaties (BITs) and free trade agreements (FTAs) has ensured that investors from one state can seek compensation through arbitration if the host state violates investment protections. Despite their initial success in fostering cross-border investment, ISDS mechanisms have increasingly attracted criticism for their procedural issues and broader implications for state sovereignty and public policy [1].

Main part

The introduction of BITs and the inclusion of ISDS provisions enabled investors to bypass national courts, perceived as biased or ineffective, and take disputes to neutral international arbitration tribunals. The ISDS mechanism primarily aimed to provide security for investors, improve investment flows, and create a legal recourse for investors facing discrimination or arbitrary state action [2].

While the ISDS system has facilitated investor confidence and fostered economic development, it has also encountered widespread criticism on several fronts:

• **Lack of Transparency and Accountability:** Many ISDS arbitration proceedings are conducted behind closed doors, with limited public access to documents or proceedings. This lack of transparency has raised concerns about the accountability of arbitral tribunals, especially when disputes involve matters of public interest, such as environmental protection or public health [3].

• **Bias and Inconsistency in Awards:** ISDS has been criticized for its perceived bias in favor of investors, particularly large multinational corporations, at the expense of states' regulatory authority. Arbitrators, often drawn from the same pool of professionals, may prioritize investor interests over public welfare. Additionally, the lack of a formal appeals mechanism has resulted in

inconsistent and sometimes contradictory rulings across different cases [4].

• **Impact on Sovereignty and Regulatory Space:** ISDS has been seen as encroaching on the sovereign right of states to regulate in the public interest. Disputes over environmental regulations, labor standards, and public health measures have drawn attention to the potential of ISDS to constrain states' ability to implement policies that prioritize the well-being of their populations over investor profits [5].

• **Costs and Length of Proceedings:** Arbitration under ISDS can be extremely costly, with legal and arbitration fees running into millions of dollars. Developing countries, in particular, have found themselves disproportionately burdened by the financial and administrative demands of ISDS proceedings, even when claims are ultimately dismissed.

The ISDS system, while initially designed to safeguard private interests, increasingly interacts with public international law, particularly in areas such as environmental protection, human rights, and sustainable development. A growing number of cases have raised fundamental questions about the balance between protecting investors' rights and states' obligations under international law [6].

For instance, in cases involving environmental regulations, arbitrators must navigate a complex intersection of treaty obligations under BITs and broader commitments to international environmental law. Similarly, cases that affect public health (such as disputes over tobacco regulation) have brought ISDS into conflict with human rights obligations. This evolving dynamic highlights the need for ISDS reform to better align with the principles of international public law [7].

In response to growing criticism, various initiatives have been proposed to reform the ISDS system:

• **Multilateral Investment Court (MIC):** One of the most prominent reform proposals is the establishment of a permanent Multilateral

Investment Court. Spearheaded by the European Union, the MIC would replace ad hoc arbitration tribunals with a standing body of judges, ensuring greater consistency, transparency, and accountability in decisions [8].

• **Transparency and Public Participation:**

Efforts are being made to increase the transparency of ISDS proceedings. The United Nations Commission on International Trade Law (UNCITRAL) has introduced transparency rules that allow for greater public access to documents and hearings. The inclusion of amicus curiae (friend of the court) briefs in ISDS cases involving public interest issues is also gaining support.

• **Appellate Mechanisms:** To address the issue of inconsistent rulings, there are calls for the creation of an appellate mechanism within the ISDS framework. Such a mechanism would allow for the review of arbitral awards, promoting greater coherence and predictability in investment dispute resolution.

• **Balancing Investor Protection and Public Policy:** Recent BITs and FTAs have started to incorporate provisions that explicitly preserve the right of states to regulate in the public interest. These provisions aim to safeguard states' ability to pursue legitimate public policy objectives, such as environmental protection, public health, and labor rights, without fear of investor retaliation through ISDS [9].

Conclusion

The Investor-State Dispute Settlement mechanism, while essential in protecting foreign investments, faces significant challenges in maintaining legitimacy and aligning with evolving public international law principles. Reforms are necessary to address concerns about transparency, fairness, and the balance between investor protection and state sovereignty. The proposed solutions, particularly the establishment of a Multilateral Investment Court and the introduction of appellate mechanisms, represent promising steps toward a more balanced and just system [10].

However, the ultimate success of ISDS reform will depend on the willingness of states and international organizations to embrace these changes and ensure that investor protection does not come at the expense of broader public interests. By reimagining ISDS within the framework of public international law, the international community can create a more equitable and sustainable system that reflects the realities of a globalized world.

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