THE EVOLVING ROLE OF DOMESTIC COURTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): CHALLENGES, TRENDS, AND PROSPECTS

Iqra Yousaf[*]

ABSTRACT

Investor-State Dispute Settlement (ISDS) mechanisms have been providing foreign investors with a number of avenues to challenge host state measures that can be considered as detrimental to their investments since long time. Traditionally, if these disputes are resolved through international arbitration, they often bypass domestic courts of the host state. However, there is a paradigm shift in recent times, where domestic courts are starting to play a more prominent role in ISDS. This article explores the historical context of ISDS, the consequent marginalisation of domestic courts, recent developments in ISDS jurisprudence, legal reform initiatives, a comparative analysis, and the challenges and opportunities linked with the increasingly enhanced role of domestic courts in ISDS. By examining all the above facets, we will be able to understand the evolving dynamics between domestic legal systems and international investment dispute resolution.

INTRODUCTION

Investor-State Dispute Settlement (ISDS) mechanisms have remained a cornerstone of international investment law for decades (Kinnear, M. 2020). These legal mechanisms are designed to provide foreign investors with a neutral and legally capable forum to resolve their disputes with host states and safeguard their rights and investments (Roberts, A. 2014). All these mechanisms have traditionally relied on international arbitration. Arbitration tribunals, including those convened under the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC), are preferred because of their well-established neutrality, procedural flexibility, legal efficiency, and expertise in complex investment issues.

[*]INTERNATIONAL LAW, NORTHWEST UNIVERSITY XIAN CHINA.

These arbitration forums operate independently of the local and domestic courts of the host states and assure investors protection from potentially biased or inefficient national judicial systems. (Kaufmann-Kohler, G., Potestà, M., Kaufmann-Kohler, G., & Potestà, M. 2020)

However, recently, the role of domestic courts in investor-state disputes is significantly evolving and expanding. While domestic courts were mainly limited to ancillary functions, including enforcing arbitration agreements and arbitral awards in old times, they are now becoming more proactive in the ISDS legal landscape. A number of factors, including growing concerns about state sovereignty, increasing judicial activism within national courts, criticisms of the international arbitration system, and a rising emphasis on the rule of law and public policy considerations, have caused this paradigm shift (Sweet, A. S., & Grisel, F. 2017).

This article aims to explore the multifaceted and all-time evolving role of domestic courts in investor-state disputes, examine how local legal systems of host state interact with international arbitration and influence the outcomes of disputes. The discussion begins with a foundational understanding of traditional ISDS dispute resolution mechanisms and the limited but essential role that domestic courts have played. It then delves deep into the recent trends and factors that motivate domestic courts to opt for a more active role, examine the growing importance of national public policy, see through the assertion of sovereign immunity, and the courts' increasing willingness to scrutinise arbitration agreements and awards.

Moreover, this article contains a constructive analysis of key case studies where domestic courts significantly intervened in the matters of investor -state disputes and highlights both positive contributions and challenges caused by such judicial intervention. For example, the Argentine courts refused to enforce ICSID awards when the country was going through an economic crisis. The incident illustrates how domestic courts of a country can assert sovereignty, and such actions can further complicate international arbitration. Similarly, the Indian judiciary has also opted for a careful approach towards public interest concerns in arbitration cases, and there is a growing judicial trend to bring a balance between investor protection and states' regulatory autonomy. The friction created as a result of interaction between domestic courts and international arbitration tribunals is a complex and dynamic process (Gu, W., & Tam, J., 2021).

Courts are the key players in the dispute resolution process, from deciding matters regarding jurisdictional questions, granting interim relief to the parties before or during the proceedings,

to enforcing or annulling the arbitral awards after they are concluded by the arbitration tribunals. This article considers all these interactions in detail, deliberating on how domestic courts' actions support or undermine the international arbitral system. While judicial involvement of national courts can enhance the legitimacy and enforceability of arbitration awards, the inconsistent decisions by these courts potentially lack any kind of specialised knowledge and sometimes lead matters towards uncertainty and fragmentation.

This article further dives into the challenges posed to the domestic courts' capacity to effectively engage in investor-state disputes. The judges of national or domestic courts lack any technical expertise of international investment law that affects the quality and consistency of their decisions. Political pressures also have an influence upon judicial behaviour where cases involve matters of significant public interest or economic policy, thereby resulting in biased judicial decisions. Such conflicts between domestic legal standards and international arbitration treaty obligations create a sense of tussle and require a calculated judicial balance to maintain respect for both national sovereignty and international obligations.

The article will explore the emerging trends and reforms that enhance the cooperation and coordination between domestic and international arbitration courts after recognising the above-mentioned challenges. Effective treaty provisions that encourage exhaustion of local remedies, judicial training programs, and the adoption of international model laws like the UNCITRAL Model Law on International Commercial Arbitration are a few modes that can play a role in harmonising and improving the dispute resolution process. Such developments indicate that effective investor-state dispute settlement needs constructive engagement and coexistence between domestic legal mechanisms and the international legal framework.

Lastly the article ponders over how evolving role of domestic courts in investor-state disputes poses both opportunities and challenges for international investment regime. While the active and effective role of national courts can bolster the legitimacy, accountability, and transparency of ISDS processes in protecting state sovereignty, public interest, and national interest, divergent judicial interventions, undue political influences, and biased national policies, on the other hand, can certainly undermine the legal certainty for international investment, thereby reducing investor confidence. The futuristic approach towards providing a safe, fair, efficient, and sovereign-respecting investment environment requires a balanced integration of domestic oversight and international arbitration strengthening.

LITERATURE REVIEW

Emergence of ISDS Mechanisms: The Investor-State Dispute Settlement (ISDS) emerged to put broader efforts into protecting foreign investments and promoting economic cooperation at the international level. (Osmanski, E. (2017). Before ISDS, foreign investors could avail very limited legal remedies in case of a breach of an international investment treaty, thereby resulting in harm to their interests at the hands of the host state. Most of the time, reliance was upon the inconsistent and Unpredictable diplomatic protection or state- to-state arbitration to resolve the disputes.

The initiation of ISDS can be traced back to the post-World War II era of decolonisation and expansion of international trade, economic cooperation, and investment. (Mazrui, R. 2025). European countries established legal mechanisms to ensure fair and equitable treatment towards their investors in other countries, especially in the recently independent or newly established states where the practices of nationalisation and expropriation were common. This consequently led towards the signing of Bilateral Investment Treaties (BITs), which included a number of ISDS protection clauses allowing foreign investors to bring their case directly to foreign forums against host states. The establishment of the International Centre for Settlement of Investment Disputes (ICSID) was a landmark event that took place under the aegis of the World Bank in 1965(Kryvoi, Y. (2023). It provides a formally effective and neutral platform for the resolution of international investment disputes. Over time, ISDS proved to be a standard feature in thousands of BITs and free trade agreements and evolved into a cornerstone of international investment law. While ISDS is commended for depoliticised and unbiased dispute resolution, it also faces criticism over lack of transparency, consistency, and unduly undermining state sovereignty. (Nair, A. 2024).

International Arbitration Courts were given preference over domestic courts because of multiple concerns arising from domestic adjudication of international investment disputes. Investors were apprehensive and feared that domestic courts could favour their own state's narratives and doubted the judiciary's biased expertise in complex and multifaceted investment disputes. Moreover, arbitration was deemed to be a faster and more neutral forum for dispute resolution. The following are a few factors that led to ISDS mechanisms becoming primary forums and marginalised the judicial scope of domestic courts:

Perceived Bias: The foremost reason why international investors resorted to international arbitration was the perception of potential judicial bias of domestic courts. (Waibel, M. 2010).

Investors had fears that national courts might favour their own state's interests over foreign companies and international investments because of political influence, nationalism, and lack of judicial independence. Particularly in developing states, rampant corruption, weak rule of law, and limited transparency are major concerns that further ignite investors' distrust. Such risk of unfair and biased treatment has made international arbitration forums a more attractive and effective option for the investors and clauses of ISDS are included in investment contracts to avoid potential bias and easy access to international adjudication.

Lack of Expertise: Most of the time, the national courts of a country lack the technical and legal expertise required for the adjudication of complex international disputes related to international investments and finance. These cases require specialised knowledge of international investment agreements, treaties, cross-border financial instruments, and investor protection provisions under the framework of BITs (Bilateral Investment Treaties). In countries where legal systems are less developed, the judges are not well trained in international economic law, or they are unfamiliar with the international arbitration norms (Kidane, W. 2017). This absence of relevant legal skill has caused investors to become inclined towards international arbitration tribunals, where the adjudicators have specialised knowledge, subject-matter expertise, global experience, and competence to resolve high-stakes investment disputes.

Efficiency Concerns: Another concern about national courts' adjudication is the lethargic and delayed procedure. Case backlogs and appeals can stretch matters over many years. International arbitration is considered a more efficient forum that provides timely decisions with fairness, confidentiality and enforceability of awards under international conventions like the New York Convention. Investors opt for arbitration for its flexible nature, time efficiency, and predictability, as tribunals work according to strict timelines and focus only on resolving the dispute justly. (Dirani, M., & Hassoun, R., 2024). This efficiency makes the forums highly attractive in high-value investment cases, where delays and prolonged procedures and uncertain decisions can cause irreparable financial and operational losses to investors as well as host states. Consequently, ISDS mechanisms became the preferred avenue for resolving investor-state disputes, effectively sidelining domestic courts.

RECENT JURISPRUDENTIAL DEVELOPMENTS

Reassertion of Domestic Courts: In recent years, domestic courts have begun to reassert their authority in investor-state dispute resolution. A landmark example is the U.S. Supreme Court's

2022 decision in ZF Automotive U.S., Inc. v. Luxshare, Ltd., which clarified the interpretation of 28 U.S.C. §1782. The Court held that this provision, which allows for discovery in aid of foreign proceedings, does not extend to private international commercial arbitrations. This ruling significantly narrows the scope of judicial assistance available to investors and arbitral tribunals, reinforcing the primacy of domestic courts in regulating access to evidence and jurisdiction within their own legal systems.

European Union's Legal Landscape: The European Union has also actively reshaped the ISDS framework to reinforce and reassert the authority of domestic courts in international investment disputes. A pivotal instance occurred when the Court of Justice of the European Union's (CJEU) 2018 Achmea decision declared the ISDS clauses, related to intra-EU bilateral investment treaties, incompatible with EU law. This rule emphasised the autonomy of the internal legal order of the European Union and the preference for domestic judicial resolution of disputes. In a landmark judgment, Micula v. Romania, the CJEU held that enforcement of ISDS arbitral awards is incompatible with EU state aid rules. This case law reinforces domestic legal mechanisms and exposes the friction between international arbitration and national and supranational laws such as European law.

Global Perspectives: A global reassessment of the ISDS regime is also taking place around the world. This reassessment is generally driven by growing concerns over state sovereignty and national public policies and national interests (Alvarez, J. E., 2021). In a case titled Odyssey Marine Exploration v. Mexico, Mexico's domestic court dismissed the investors' claims under NAFTA. This decision reaffirmed Mexico's regulatory autonomy in international environmental matters. Similarly, in another case, TransCanada v. United States, where the cancellation of the Keystone XL pipeline happened, challenges and tensions between investors' rights and environmental policies were highlighted. Such high-profile international case law has triggered intense debates about the scope of ISDS and its legitimacy and called for reforms to ensure a balance between investment protection and the state's right to sovereignty and to regulate its affairs regarding health, safety and environmental sustainability.

REFORM INITIATIVES AND POLICY SHIFTS

European Union's Investment Court System (ICS): After the traditional ISDS mechanisms faced stern criticism, the European Union introduced an Investment Court System (ICS) as a structural reform (Lenk, H. 2019). The ICS replaces ad hoc arbitration tribunals with a two-tiered court that is permanent and consists of publicly appointed judges. This court aims to

improve predictability and impartiality in investor-state dispute resolution. Such reforms in the European Union place stress on transparency and allow public access to hearings, proceedings, and documents. The ICS model has been integrated into various EU trade agreements, including CETA with Canada, Vietnam, and Singapore. The EU continues to make efforts towards making ICS a more legitimate and efficient framework to showcase its commitment to protect both public interests and foreign investors' rights while upholding the rule of law.

Multilateral Investment Court (MIC): To expand bilateral reforms, the European Union is also promoting the establishment of a Multilateral Investment Court (MIC) through negotiations under UNCITRAL Bungenberg, M., & Reinisch, A., 2020). The MIC is envisioned to be a permanent judicial body, an international institution established to resolve investor-state disputes with coherence, fairness and legitimacy. Unlike fragmented arbitration tribunals, the MIC is likely to offer a more consistent legal framework, public appointment of judges, and a coherent appellate framework to ensure accountability. A key feature of MIC is that it has the potential to integrate domestic legal norms and enhance collaboration between international investment law and national legal systems. This kind of initiative reflects a global emphasis on depoliticising dispute resolution at national levels and reinforces the rule of law while balancing investor protection with state sovereignty.

National-Level Reforms: More and more countries are undertaking national reforms to reclaim their sovereignty in investment dispute resolution. For instance, South Africa has terminated a number of bilateral investment treaties (BITs) and legislated the Protection of Investment Act, which gives the domestic courts jurisdiction over foreign investors rather than resorting only to arbitration tribunals. This paradigm shift indicates a broader effort to align international investment with national development and constitutional priorities. Likewise, the United States has also scaled back ISDS provisions in recent trade dealings; for example, the USMCA deal offers fewer arbitration rights as compared to NAFTA (Lai, J. L., 2021). These changes in the international investment system show a growing preference for domestic adjudication, regaining control over legal processes and involving public interest regulations and foreign investments.

In recent years, several countries have taken significant initiatives to bring national legal reforms to create a balance between investor protection and state sovereignty. These reforms include re-evaluating and sometimes replacing traditional Investor-State Dispute Settlement

(ISDS) mechanisms with national-level frameworks that emphasise a more dominant role of domestic courts.

South Africa's Legislative Shift: South Africa is a notable example of initiating this movement. In response to raising concerns about limits of ISDS and the undermining of domestic policies and national interests, South Africa has struck down many Bilateral Investment Treaties (BITs) and introduced its Protection of Investment Act in 2015(Langalanga, A. (2015). This Act lays stress upon resolving the investment disputes within the national legal framework and reinforces the role of South African courts in adjudicating investment disputes. Such legislation aims at adopting a balanced approach to protect investors' interests and preserve the government's right to regulate and safeguard the public interest.

India's Model BIT and Tailored Agreements: India has also been restructuring its legal approaches towards investment treaties. India has introduced new legal Model BIT in 2016, and investors protections scope was narrowed down under this model (Söderman, M. 2020). This model is considered a template for BIT negotiations in India and mandates the exhaustion of remedies available under the domestic legal system before resorting to international arbitration, and domestic legal avenues are prioritised in international investment disputes. India is also gradually moving towards negating the one-size-fits-all policy and has started negotiating BITs tailored to specific countries. For instance, the forthcoming investment treaty between the United Kingdom and India includes some provisions that reflect a nuanced strategy to balance investors' interests and domestic legal processes.

Brazil's Alternative Dispute Resolution Framework: Brazil is one spectacular example and a unique case of a country that never adopted traditional ISDS mechanisms. Instead, the country has developed the Cooperation and Facilitation Investment Agreements (CFIAs). (Vidigal, G., & Stevens, B., 2018). These agreements first prioritise the prevention of disputes through dialogue and institutional negotiations and settlements. Under these agreements, ombudsman offices and joint committees are established to address investors' concerns, and, in this way, formal arbitration can be avoided. This approach shows Brazil's commitment to first prevent disputes through domestic mechanisms and then resolve them within the national legal framework and foster a favourable investment climate.

COMPARATIVE ANALYSIS: DOMESTIC COURTS VS. INTERNATIONAL ARBITRATION

Efficiency and Accessibility: International arbitration is considered reliable for its speedy proceedings and flexible legal framework, especially in cross-border disputes. (Oliveira, N. B. (2023). International Arbitral Forums help parties bypass the sluggish and overburdened domestic legal systems that have no clear jurisdictional boundaries and have weak legal infrastructure. Moreover, arbitrators are usually selected on the basis of their expertise, and confidentiality during the proceedings is always maintained. However, domestic courts, on the other hand, have their own legal perks and advantages. Domestic courts offer greater accessibility and inclusiveness that is difficult in case of international arbitration. All local businesses, citizens, companies and governments can easily reach the local courts, while international arbitration can be inaccessible on grounds of unfamiliarity, lack of resources, and no financial capacity for hiring international counsel and engaging in expensive arbitral processes. Domestic adjudication also provides swift appeal mechanisms, while arbitration typically has finality in its awards and avoids appellate proceedings.

Expertise and Specialisation: Lack of specialised expertise of domestic courts for settlement of investor-state disputes is one of the primary criticisms they generally face. (Kaufmann-Kohler, G., & Potestà, M. 2020). Springer Nature. Usually, international disputes involve intricate matters that require technical and specialised legal knowledge and skills, such as interpretations of treaties according to international law norms and complex financial arrangements. In such matters, international arbitral tribunals are more suitable forums because subject-matter experts and legal persons are appointed there.

Transparency and Legitimacy: However, this perceived lack of skill, efficiency and expert knowledge is not entirely insurmountable. Domestic courts can acquire necessary capabilities with appropriate judicial training and by establishing specialised financial and investment benches to handle such disputes with technical competence. Many countries have already brought reforms to enhance the special knowledge of international economic law.

Another aspect is that domestic courts have the advantage of knowing and understanding the local socio-political and legal contexts of their own country. This knowledge can lead the system towards more nuanced and balanced decisions on international disputes. With the passage of time, as global investment law is gradually evolving, empowering and equipping the domestic judiciary with the required capabilities is also the need of the hour.

Both transparency and legitimacy play a critical role in enhancing the credibility of every dispute resolution mechanism. Domestic courts typically have a well-established legal system of transparent procedures and include open court hearings, publicly published judgments, and open forums for appeals. This public access allowance of courts proceedings leads towards media scrutiny and contributes to a sense of more fairness and accountability in judicial process.

Contrary to this, international arbitration has confidential proceedings, and the public is given little or no access to their proceedings. Almost all investors state that arbitration proceedings are carried out behind closed doors, and the awards of such proceedings also usually remain unpublished and are published only if both the parties give consent. This confidentiality gives a perception of lack of transparency and favours international investors over states. Such secret proceedings result in undermining public trust.

Enforcement of Decisions: The relatively easy and convenient cross-border enforcement of international arbitral awards under the New York Convention (1958) is an established advantage of international arbitration. (SALDANA SOLARI, M. B. 2022. Enforcement of domestic court decisions at the international level has more legal complexities. Enforcement of one country's court's decision in another country requires bilateral or regional treaties. This limits the global enforceability of national courts' judgments in investor state disputes.

However, several recent conventions, including the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019), mark a landmark step forward. This is a multilateral treaty that aims at streamlining and standardising the recognition and enforcement procedures of foreign courts' judgments on legal lines similar to the New York Convention on arbitral awards. If the Hague Convention can be widely ratified, the implementation of foreign courts' judgments can become significantly easier, and the efficiency and attractiveness of national courts can be increased. This will lead to legal certainty and enforceability of national courts' decisions at the global level.

CHALLENGES AND OPPORTUNITIES IN ENHANCING DOMESTIC COURT ROLES

Capacity Building: If the legal capacity of domestic courts is enhanced, it can be essential for their conducive and effective role in investor -state dispute settlement (ISDS). (Kumar, S. 2024). This can be done by comprehensive training for judges and legal counsel on

international investment law, interpretation of treaties, and issues related to arbitration. Moreover, upgrading the courts' infrastructure, case management, utilising digital means, and technological legal research tools can also improve efficiency. Ensuring judicial independence and impartiality is also pivotal for fostering trust among investors and states. Cooperation at the international level, technical assistance, and exchange of international knowledge are more ways of enabling courts to be more reliable, gain competence and establish trustful adjudication in investment disputes.

Legal Reforms: Legal reforms are crucial players in the empowerment of domestic courts within the ISDS framework. If national laws are amended to reflect the international investment law standards and treaty obligations, states will be able to ensure that their courts are well equipped to adjudicate international disputes (Newcombe, A. P., & Paradell, L. 2009). Such reforms should be focused on the integration of substantive protection provided to investors and also the recognition of a nation's right to safeguard public interests like health, environment and social welfare. Procedural reforms such as mechanised litigation processes and improved access to justice can also improve the credibility of the domestic legal framework. Ultimately, a comprehensive and reformed legal framework can reinforce a well-balanced, transparent, and certain legal environment that strengthens investors' confidence as well as preserves national sovereignty and public policy.

Investor Confidence: Building investors' confidence is the key factor to the successful resolution of investment disputes framework. (Echandi, R. 2011). Undoubtedly, legal reforms are required to strengthen the domestic courts, but the cultivation of such a judicial environment that is perceived as fair, reliable, and efficient by investors is also of utmost importance. Transparent legal procedures, impartial decisions, and effective implementation of legal principles help ensure predictability and certainty of the legal system. Various other factors such as regular publications of judgements, adherence to international laws, interpretation of treaties and conventions, and independence from political influences also bolster the credibility of courts. If domestic courts build competence and integrity and an effective enforcement mechanism of their judgements, they can become a preferred forum for resolving disputes, and costly and opaque proceedings of international arbitration can be avoided.

Hybrid Models: By establishing hybrid models between typical ISDS and reliance on domestic courts, a middle ground can be created. Such systems have a combined mechanism of local adjudication with an international law oversight (Katz, R. L. 2016). This framework

may include prior adjudication by national courts and appeals, or review forums that are international bodies. For instance, under Brazil's Cooperation and Facilitation Investment Agreements (CFIAs), international investor-state disputes are first addressed in local courts and domestic judicial remedies are availed at first instance. These adjudications also include state-to-state consultation and dialogue to improve legitimacy through constructive engagement. Hybrid models address key criticisms of lack of transparency and potential bias and avoid the overburdening of domestic courts with complex investment law adjudication. These forums also foster the legal capacity of domestic institutions. These hybrid institutions can restore balance between domestic and international courts, protect regulatory sovereignty of both forums, improve efficiency of dispute resolution, and maintain investors' trust in national and international institutions.

CONCLUSION

All the above discussion suggests the conclusion that role of domestic courts in investor state Disputes Settlement (ISDS) is evolving through a significant shift in international investment law landscape. Initially sidelined, domestic courts are now experiencing worldwide recognition for their potential contribution to a balanced, legitimate, certain and transparent legal system of investment dispute resolution. Several factors are playing their role in this paradigm shift such as growing criticism of international arbitration for its capacity of undermining the National sovereignty and public interest policies.

Domestic courts offer many advantages over international arbitration forums. The legal framework of domestic courts is relatively more transparent; they have an embedded public legal order, and they reflect the social and economic priorities of host states in true letter and spirit. A number of recent developments in jurisprudence and legal reforms show that states have started to reinforce their regulatory sovereignty, and they seek re-integration of domestic adjudicating authority into the ISDS framework. EU's proposed Investment Courts System (ICS) and the Multilateral Investment Court (MIC), along with major national reforms in countries like South Africa, India and Brazil, showcase a systematic movement towards institutionalising domestic courts instead of relying on traditional arbitration.

However, this process of Re-emergence of domestic courts has many challenges to overcome. Building capacity, ensuring judicial independence, harmonising domestic law with international standards, treaty and convention obligations and international law norms, and maintaining investors' confidence are essential requisites for domestic courts to handle ISDS

matters in effective ways. Hybrid models that present a combined legal infrastructure comprising both domestic courts and international arbitral forums also offer a middle path of investor protection while safeguarding the state's sovereignty.

Lastly, the future of ISDS may lie in safety if a complementary system is established where both national and international forums establish inclusive and constructive roles in investment dispute resolution. The meaningful integration of national and international frameworks can offer a mechanism for more equitable, transparent, unbiased, and accountable investor-state dispute resolution. This system can safeguard both international investment law norms as well as national sovereignty and public interest.

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