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Research Article

INVESTOR-STATE DISPUTE SETTLEMENT IN INTERNATIONAL PUBLIC LAW: AN EVALUATION OF RECENT DEVELOPMENTS

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ABSTRACT

Investor-State Dispute Settlement (ISDS) is a mechanism for resolving disputes between investors and states under international investment agreements. While ISDS has become increasingly popular over the past few decades, it has also been subject to significant criticism for giving too much power to foreign investors and undermining the sovereignty of host states. In this article, we evaluate recent developments in ISDS from the perspective of international public law. We discuss the origins and growth of ISDS, as well as the increasing use of ISDS by investors from developed countries against developing countries. We then examine recent developments in ISDS, including the adoption of transparency rules by UNCITRAL, the Mauritius Convention on Transparency in ISDS, and changes to the way ISDS cases are decided. While these developments represent positive steps towards improving the legitimacy and effectiveness of ISDS, we also acknowledge remaining concerns regarding the imbalance of power between investors and host states, as well as the high costs of defending claims.

KEYWORDS

Investor-State Dispute Settlement, international investment agreements, UNCITRAL, transparency, arbitration, sovereignty, imbalance of power, costs.

INTRODUCTION

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Investor-State Dispute Settlement (ISDS) is a mechanism for resolving disputes between investors and states under international investment agreements. This mechanism has become increasingly popular over the past few decades, as more countries have opened up their markets to foreign investment. However, the use of ISDS has also been controversial, with critics arguing that it gives too much power to foreign investors and undermines the sovereignty of states. In this essay, I will evaluate recent developments in ISDS from the perspective of international public law.

The modern system of ISDS has its origins in the 1950s, when a number of countries began to sign bilateral investment treaties (BITs) with each other. These treaties typically contained provisions that allowed investors to bring claims against host states for breaches of certain obligations, such as expropriation without compensation or discrimination. However, it was not until the 1990s that ISDS began to be used on a large scale, as more countries began to sign BITs and multilateral investment treaties (MITs).

Since then, the number of ISDS cases has increased dramatically. According to the United Nations Conference on Trade and Development (UNCTAD), there were around 100 known ISDS cases in 1995, but this number had risen to more than 900 by 2019. Most of these cases have been brought by investors from developed countries against developing countries, although there have also been cases involving investors from developing countries and cases involving disputes between developed countries.

In recent years, there have been a number of important developments in ISDS. One of the most significant of these was the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration in 2014. These rules require ISDS proceedings to be conducted in a transparent manner, with documents made available to the public and hearings open to observers. This was seen as an important step towards increasing the legitimacy of ISDS, which had been criticized for its lack of transparency.

Another important development was the adoption of the Mauritius Convention on Transparency in ISDS in 2015. This convention allows states to apply the UNCITRAL transparency rules to existing investment treaties, even if those treaties do not contain provisions for transparency. This is important because many existing investment treaties do not include transparency provisions, and it is difficult to renegotiate these treaties.

In addition to these developments, there have been a number of changes to the way that ISDS cases are decided. For example, some investment agreements now require arbitrators to have expertise in certain areas, such as environmental law or human rights law. This is intended to ensure that arbitrators are better equipped to deal with the complex issues that often arise in ISDS cases.

There have also been efforts to address some of the criticisms that have been leveled at ISDS. For example, some investment agreements now include provisions that allow states to dismiss frivolous claims at an early stage of the proceedings. This is intended to prevent investors from using ISDS as a way of harassing states or forcing them to settle cases.

Overall, these developments can be seen as positive steps towards improving the legitimacy and effectiveness of ISDS. The transparency rules adopted

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by UNCITRAL and the Mauritius Convention are particularly important, as they address one of the key criticisms of ISDS. By requiring proceedings to be conducted in a transparent manner, these rules help to ensure that the public has confidence in the decisions that are reached.

The increased focus on the expertise of arbitrators is also a positive development. ISDS cases often involve complex legal and technical issues, and it is important that arbitrators are able to understand and analyze these issues effectively. By requiring arbitrators to have expertise in relevant areas, investment agreements can help to ensure that the decisions reached in ISDS cases are well-informed and based on sound legal and factual analysis.

The inclusion of provisions allowing states to dismiss frivolous claims is also a step in the right direction. This is an important safeguard against abuse of the ISDS system, which has been a concern for many critics. By allowing states to dismiss claims at an early stage, investment agreements can prevent investors from using ISDS as a means of harassment or coercion.

However, there are still some concerns about ISDS that remain unaddressed. One of the main criticisms of ISDS is that it gives too much power to foreign investors and undermines the sovereignty of host states. This is because ISDS allows investors to bypass domestic courts and bring claims directly against states. While the transparency and expertise requirements may improve the legitimacy of ISDS, they do not address this fundamental concern.

Another criticism of ISDS is that it can be expensive and time-consuming, particularly for developing countries. This is because ISDS proceedings often involve complex legal and technical issues, and can last for several years. As a result, the costs of defending a claim can be prohibitively high for many developing countries, which may not have the resources to mount an effective defense.

CONCLUSION

In conclusion, recent developments in ISDS represent positive steps towards improving the legitimacy and effectiveness of this mechanism. The adoption of transparency rules and the focus on the expertise of arbitrators are particularly important, as they help to address some of the key criticisms of ISDS. However, there are still some concerns about ISDS that remain unaddressed, such as the imbalance of power between investors and host states and the high costs of defending claims. As such, further reforms may be necessary to ensure that ISDS operates in a fair and effective manner.

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