



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

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## **Avinash Kumar**



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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ISSN

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# **RECENT REFORMS IN INVESTOR-STATE DISPUTE SETTLEMENT**

AUTHORED BY - MANSI BENIWAL

## **ABSTRACT**

The world of international investment has recently undergone a seismic shift, long defined by intricate webs of agreements and the pursuit of economic prosperity. The essential aspect of this shift is the changing story around Investor-State Dispute Settlement (ISDS) processes, which have historically played a crucial role in protecting the interests of international investors against alleged unfair treatment by host nations. The concerns and critiques about the efficacy and impartiality of ISDS processes, however, vary in accordance with changes in the global economic environment. This article kicks off a comprehensive examination of recent ISDS reform developments, dissecting the multifaceted dimensions of change that are reshaping the very foundations of international investment treaties. The paper will walk through the key pillars of change, shedding light on increased transparency, arbitrator codes of conduct, the potential for an appeals process, and the intricate equilibrium between safeguarding investors and allowing regulatory independence for the host country. The paper will critically recognize the critical juncture in which the international community finds itself—a juncture at which the re-calibration of ISDS not only responds to previous criticisms but also shapes the trajectory of future investment relations. The delicate dance between investor rights and host state regulatory space necessitates nuanced consideration, requiring a delicate balance that fosters international investment while respecting nations' sovereign prerogatives. Recent developments in ISDS reforms serve as guideposts in this pursuit of equilibrium, providing insights into the transformative potential of a system in flux.

**Keywords-** Investor-State Dispute Settlement, Transparency, Regulatory Autonomy, Arbitrator codes of conduct, Appellate Mechanism.

## Introduction

ISDS is a key component of investment treaties. “*The procedural mechanism through which an investor may seek redress for a violation of a substantive investor-protection standard, whether included in a bilateral investment treaty (BIT) or a trade treaty with investment safeguards, determines the robustness of those safeguards*” is known as ISDS. Recently, several individuals and organisations have been targeting the conventional method of investment arbitration, which is based on commercial arbitration and involves disputes between investors and host states. Adversarial to the conventional model, which has broadened from academia to politics, has resulted in changes to solitary treaties as well as broader reform initiatives. ISDS has its origins in bilateral investment treaties (BITs) signed in the mid-twentieth century, primarily to encourage and protect foreign investment. These treaties usually included provisions that allowed investors to sue host countries if their investments were subjected to unfair treatment or expropriation.<sup>i</sup>

### Navigating the Legal Landscape: Recent Reforms in ISDS

While significant changes are taking place, the vast majority of existing investment treaties, approximately 90%, were signed prior to 2012 and adhere to traditional ISDS provisions. From 2012 onwards, the newer generation of treaties introduced various reforms, both substantive and procedural. Significant changes include the refinement of investor and investment definitions, restrictions on fair and equitable treatment standards, clarification of indirect pre-emption standards, and an increased focus on corporate and social responsibility. Procedural changes include changes to ISDS provisions ranging from removing ISDS in favour of alternative dispute resolution mechanisms to improving the traditional model. Some treaties restrict ISDS to specific treaty violations, include provisions to strengthen arbitrator impartiality, allow for early dismissal of frivolous claims, and include transparency measures that allow public access to ISDS proceedings.

Significant reforms have taken place in specific regions. For example, the USMCA replaced NAFTA, with Canada withdrawing from ISDS entirely, restricting its application just to conflicts between the United States and Mexico, rather than extending it to a broader range of problems. The European Union (EU) has led the charge against the traditional ISDS model. Recent treaties, such as those with Canada (CETA), Singapore, and Vietnam, have substituted an Investment Court System (ICS) for the traditional model. The International Court of Justice (ICS) envisions a permanent and institutionalized court, with members appointed in advance by treaty parties. To

replace bilateral investment courts established by various treaties, the EU intends to establish a Multilateral Investment Court (MIC).

Among the international organizations involved in multilateral reform initiatives are the OECD, WTO, UNCITRAL, and ICSID. UNCITRAL Working Group III is addressing ISDS concerns, with a focus on issues such as consistency in arbitral awards, arbitrators and individuals responsible for making decisions, the financial expenses and length of time involved in legal cases, and the provision of financial support from external sources. The group is currently developing solutions to these concerns.<sup>ii</sup> As a leading ISDS arbitral institution, ICSID is also reforming, with a focus on modernizing arbitration rules, increasing efficiency, and incorporating document transmission technology.<sup>iii</sup>

Some recent reforms propose the establishment of a mechanism for appellate jurisdiction within the ISDS framework to address the issue of inconsistent rulings. The appellate body would be responsible for reviewing legal errors as well as ensuring the consistency and coherence of ISDS decisions. This legal oversight mechanism aims to improve outcome predictability and contribute to the development of sound jurisprudence. The challenge is to strike the right balance between preserving the inherent flexibility of ISDS and establishing binding precedents. The legal application of an appellate mechanism must tread carefully in this delicate balance.<sup>iv</sup>

## **KEY CONCERNS AND CHALLENGES IN ISDS REFORMS**

With changes come criticisms as well as challenges, the ISDS system needs to be reevaluated as the recent reforms aim to achieve a equilibrium between the protection of investor rights and the accountability and legitimacy of the dispute resolution process. Historically the ISDS proceedings were held in private and with little transparency. Therefore, this raised concerns about secret deals and decisions being made without public scrutiny, casting doubt on the process's legitimacy. Access to case documents and proceedings was restricted to stakeholders, including affected communities and local governments. The lack of transparency created a hindrance to the ability to understand the reasoning behind decisions and undermined public confidence in the ISDS system.<sup>v</sup>

The ISDS tribunals consist of arbitrators having a background in investment law, there may have been a lack of diversity of perspectives. These circumstances have sparked worries over a

possible disparity in the decision-making process and a built-in preference towards investors. Hence, reservations were expressed over potential conflicts arising from the selection of arbitrators from a limited group of specialists.<sup>vi</sup> Arbitrator's financial ties to the industry, critics argued, would jeopardize their ability to render impartial decisions.

The ISDS lacked a binding precedent system unlike domestic legal systems and this omission resulted in inconsistent rulings, which also created uncertainty for both investors and host countries. Concerns about the arbitrary nature of the ISDS process were fueled by the lack of coherence in decisions. Due to the lack of a standardized legal framework, investors and states had difficulty predicting outcomes. This ambiguity discouraged prospective investors and hampered the development of a clear body of international investment law.<sup>vii</sup>

The host country's regulatory ability in the public interest determines the scope of investor rights granted under traditional ISDS, as this raises concerns about achieving an equilibrium between protecting foreign investments and ensuring the rights of different states to implement environmental, public health, and social welfare policies. The threat of legal action by investors dampened regulatory measures, as states were hesitant to implement policies that could be challenged through ISDS.<sup>viii</sup> The balance between safeguarding investor interests and the inherent authority of governments to regulate has emerged as a central topic of reform deliberations.

Recent reforms also emphasize the importance of preserving host states' regulatory autonomy while protecting investors' legitimate rights. Legal provisions are drafted to ensure that ISDS does not unduly restrict a host country's ability to regulate in the public interest. By establishing these boundaries, a state's ability to enact and enforce necessary regulatory measures is not jeopardized.<sup>ix</sup> The legal implementation of these safeguards necessitates delicate considerations of balancing economic interests with national sovereignty. Legal experts are critical in interpreting and applying these provisions to ensure a fair balance.

## CONCLUSION

Finally, the proposed appellate mechanism introduces a consistency and coherence element, aiming to correct the historical issue of inconsistent rulings. This potential addition to the ISDS framework would provide a mechanism for reviewing legal errors, promoting legal certainty, and helping to develop more predictable jurisprudence. However, difficulties may arise in designing

and implementing such a mechanism because agreement on its structure and function is required. Furthermore, the emphasis on regulatory safeguards in the reform process reflects a commitment to preserving states' sovereign right to regulate in the public interest. Creating a fair and equitable international investment regime requires striking a balance between investor protection and host countries' ability to enact legitimate regulatory measures. As these reforms progress, it is clear that the international community recognizes the need to navigate the complexities of ISDS.<sup>x</sup> Overcoming scepticism from some quarters, as well as fostering broad acceptance and implementation of the proposed changes, are the challenges ahead. Ongoing international cooperation and dialogue will be critical in this regard, as states work collaboratively to create a system that not only encourages but also protects foreign investment. In essence, recent ISDS reform developments represent a paradigm shift toward a more balanced and adaptive framework that addresses the shortcomings of the traditional system.<sup>xi</sup> ISDS's future is in the hands of policymakers, legal scholars, and the broader international community, who must work together to create a dispute resolution mechanism that meets modern expectations of transparency, fairness, and accountability.

## BIBLIOGRAPHY

1. Pohl, J.A.N., Mashigo, K. and Nohen, A. (2012) *Dispute Settlement Provisions in International Investment Agreements, OECD Working Papers on International Investment*.
2. *Special issue: Uncitral and investment arbitration reform ... - brill*.
3. *Dispute settlement - appellate body*. WTO. (n.d.).
4. *Investor-state dispute settlement - UNCTAD (2014) UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT*
5. *UNCTAD's Reform Package for International Investment Regime (2018) UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT*.
6. Bjorklund, A. (2014) *The diversity deficit in International Investment Arbitration, Academic Forum of ISDS*.
7. Bjorklund, A.K. et al. (2020) *The diversity deficit in International Investment Arbitration, Brill*.
8. Mundi, J. (2023) *Wiki note: Right to regulate in the public interest: Treaty practice, Jus Mundi*.
9. Jaime, Dr.M.-L., Betancourt, J.-C. and Vidyarthi, A. (2021) *Could an appellate review mechanism 'fix' the ISDS system?, Kluwer Arbitration Blog*.

10. *IIA issues note: Recent developments in investor-state dispute settlement: Publications: UNCTAD investment policy hub, IIA Issues Note: Recent Developments in Investor-State Dispute Settlement | Publications | UNCTAD Investment Policy Hub.*

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<sup>i</sup> Pohl, J.A.N., Mashigo, K. and Nohen, A. (2012) *Dispute Settlement Provisions in International Investment Agreements*, *OECD Working Papers on International Investment*. Available at: [https://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf) (Accessed: 04 December 2023).

<sup>ii</sup> *Special issue: UNCITRAL and investment arbitration reform ... - brill*. Available at: [https://brill.com/view/journals/jwit/21/2-3/article-p167\\_1.xml](https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml) (Accessed: 04 December 2023).

<sup>iii</sup> *Ibid.*

<sup>iv</sup> *Dispute settlement - appellate body*. WTO. (n.d.). [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm)

<sup>v</sup> *Investor-state dispute settlement - UNCTAD* (2014) *UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT*. Available at: [https://unctad.org/system/files/official-document/diaeia2013d2\\_en.pdf](https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf) (Accessed: 04 December 2023).

<sup>vi</sup> *UNCTAD's Reform Package for International Investment Regime* (2018) *UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT*. Available at: [https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD\\_Reform\\_Package\\_2018.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf) (Accessed: 04 December 2023).

<sup>vii</sup> Bjorklund, A. (2014) *The diversity deficit in International Investment Arbitration*, *Academic Forum of ISDS*. Available at: <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf> (Accessed: 04 December 2023).

<sup>viii</sup> Bjorklund, A.K. *et al.* (2020) *The diversity deficit in International Investment Arbitration*, *Brill*. Available at: [https://brill.com/view/journals/jwit/21/2-3/article-p410\\_7.xml](https://brill.com/view/journals/jwit/21/2-3/article-p410_7.xml) (Accessed: 04 December 2023).

<sup>ix</sup> Mundi, J. (2023) *Wiki note: Right to regulate in the public interest: Treaty practice, Jus Mundi*. Available at: <https://jusmundi.com/en/document/publication/en-right-to-regulate-in-the-public-interest> (Accessed: 04 December 2023).

<sup>x</sup> Jaime, Dr.M.-L., Betancourt, J.-C. and Vidyarthi, A. (2021) *Could an appellate review mechanism 'fix' the ISDS system?*, *Kluwer Arbitration Blog*. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/> (Accessed: 04 December 2023).

<sup>xi</sup> *IIA issues note: Recent developments in investor-state dispute settlement: Publications: UNCTAD investment policy hub, IIA Issues Note: Recent Developments in Investor-State Dispute Settlement | Publications | UNCTAD Investment Policy Hub*. Available at: <https://investmentpolicy.unctad.org/publications/61/iaa-issues-note-recent-developments-in-investor-state-dispute-settlement> (Accessed: 04 December 2023).