



The Future of Investor-State Arbitration in Light of Changing Geopolitical Dynamics and Shifting Global Economic Powers

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Annotation: This article explores the evolving landscape of investor-state arbitration (ISA) in the context of shifting geopolitical dynamics and changing global economic powers. As the world undergoes significant transformations in its political and economic spheres, the traditional framework of ISA faces unprecedented challenges. This study employs a comprehensive analysis to investigate the future prospects of ISA, considering the influence of emerging economic superpowers and their impact on the international investment regime. The findings suggest that ISA is at a crossroads, demanding innovative reforms and adaptability to maintain its relevance in the rapidly changing world order.

Keywords: Investor-State Arbitration; Geopolitical Dynamics; Global Economic Powers; International Investment Regime; Future Prospects

Introduction

Investor-state arbitration (ISA) has been a cornerstone of the international investment regime for decades, offering investors a platform to seek redress against host states for perceived violations of investment treaties. However, in recent years, the landscape of ISA has been significantly altered by shifting geopolitical dynamics and the rise of new global economic powers. This article examines how these transformative changes are reshaping the future of ISA and the international investment landscape.

Methodology

This research employs a multi-faceted methodology to assess the future of investor-state arbitration. It combines qualitative analysis of existing investment treaties and arbitration cases with a comprehensive review of geopolitical trends and economic power shifts. Additionally, the study incorporates expert interviews and surveys of legal practitioners, policymakers, and scholars in the field of international arbitration to gain insights into their perspectives on the subject.

Results

The preliminary findings of this study reveal that the future of investor-state arbitration is fraught with challenges and uncertainties. Shifting geopolitical dynamics, characterized by the waning influence of traditional powers and the ascendance of emerging economic giants, have created a complex environment for ISA. The results indicate that:



Emerging economic powers are increasingly shaping the direction of international investment norms, potentially leading to a reconfiguration of the ISA framework. The legitimacy of ISA mechanisms is being questioned by some states, leading to calls for reforms and modifications in the existing system. The rise of regional economic blocs and alternative dispute resolution mechanisms may further impact the relevance of ISA.

Discussion

Investor-state arbitration (ISA) has long been a critical component of the international investment regime, offering investors a platform to seek redress against host states for perceived violations of investment treaties. This mechanism has played a pivotal role in promoting foreign direct investment (FDI) and providing investors with a sense of security when investing in foreign countries. However, the landscape of ISA is undergoing a profound transformation, influenced by changing geopolitical dynamics and the ascent of new global economic powers. In this article, we delve into the implications of these transformative changes for the future of ISA, considering how emerging economic superpowers are reshaping the international investment regime.

Shifting Geopolitical Dynamics: A New World Order

The geopolitical dynamics of the 21st century are witnessing a significant shift from the post-World War II era. Traditional global powers, particularly the United States and Europe, are facing challenges to their dominance, both economically and politically.¹ Meanwhile, emerging powers like China, India, and Brazil are asserting their influence on the international stage. These geopolitical shifts have far-reaching consequences for ISA. One key aspect is the reconfiguration of economic alliances and blocs. The rise of regional economic powers has led to the formation of new trade and investment agreements, bypassing traditional Western-centric structures. For example, China's Belt and Road Initiative (BRI) has created a vast network of investment opportunities and infrastructure development projects, challenging the dominance of Western-led investment institutions. Moreover, the geopolitical realignment has raised questions about the legitimacy of ISA mechanisms. Some countries, particularly those from the Global South, argue that ISA has been used as a tool for advancing the interests of Western corporations and states. They call for reforms to address perceived imbalances in the system.²

Shifting Economic Powers: Emerging Giants

The global economic order is also undergoing significant changes. Emerging economic giants, led by China, are challenging the economic supremacy of the West. China, in particular, has become a major player in international investment, both as a host country and as a home country for investors. This economic shift has profound implications for ISA.³ One of the key changes is the rise in the number of disputes involving emerging economic powers as either investors or host states. China, for instance, has seen a surge in ISA cases involving its state-owned enterprises. As these countries become more active in the international investment arena, they are also becoming key stakeholders

¹ Gong, X., 2022. Energy security through a financial lens: Rethinking geopolitics, strategic investment, and governance in China's global energy expansion. *Energy Research & Social Science*, 83, p.102341.

² Aggarwal, A., 2023. Analysis of Multilateralism in the Light of the Historical Change Towards Bilateralism. Available at SSRN 4529957.

³ Desierto, D.A., 2017. Shifting Sands in the International Economic System: Arbitrage in International Economic Law and International Human Rights. *Geo. J. Int'l L.*, 49, p.1019.



in the reform of ISA. Additionally, emerging economic powers are promoting alternative dispute resolution mechanisms. Some are establishing their own arbitration centers and institutions to reduce reliance on traditional ISA mechanisms. This diversification of options for investors and states has the potential to reshape the ISA landscape.

The Future of ISA: Challenges and Opportunities

In light of these changes, the future of ISA is fraught with both challenges and opportunities. The challenges include the need to adapt to shifting geopolitical dynamics and address concerns about the legitimacy and fairness of the system. The rise of alternative dispute resolution mechanisms and regional agreements may fragment the existing framework, potentially leading to a less predictable investment landscape. However, there are also opportunities for ISA to evolve and remain relevant. Reforms that address the concerns of developing countries and enhance the inclusivity and transparency of the arbitration process can help restore confidence in the system. Collaboration between traditional and emerging powers in shaping the future of ISA could lead to a more balanced and effective mechanism. Furthermore, ISA can benefit from the expertise and experiences of emerging economic powers, which are increasingly involved in arbitration cases. Their participation can contribute to the development of best practices and the creation of a more diversified and adaptable system.⁴

Investor-state arbitration, whereby private investors can seek recourse against host governments for alleged treaty breaches, has long been a crucial component of the international investment regime. However, in recent years, changing geopolitical dynamics and shifting global economic powers have posed significant challenges to the future of this arbitration mechanism.⁵ This article explores the potential implications of these evolving dynamics on investor-state arbitration and offers insights into potential future directions for the resolution of investment disputes.

The rise of emerging economies, such as China, India, and Brazil, has created a more multipolar world, disrupting the traditional dominance of Western economic powers. As these emerging economies attract greater foreign investment, their governments seek to assert their economic sovereignty and protect their national interests, at times leading to conflicts with foreign investors. Such shifts in global economic powers necessitate the evolution of investor-state arbitration to accommodate the interests and perspectives of these emerging economic powers.⁶

With the changing dynamics of global economic powers, regionalization of dispute resolution mechanisms is gaining momentum. Regional trade and investment agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the African Continental Free Trade Area (AfCFTA), and the Regional Comprehensive Economic Partnership (RCEP), are increasingly incorporating provisions for alternative dispute resolution mechanisms within their frameworks. These regionalized approaches hold the potential to provide more tailored and context-specific solutions to investment disputes.

⁴ Roberts, A., Choer Moraes, H. and Ferguson, V., 2019. Toward a geoeconomic order in international trade and investment. *Journal of International Economic Law*, 22(4), pp.655-676.

⁵ Puig, S., 2012. Emergence & dynamism in international organizations: ICSID, investor-state arbitration & international investment law. *Geo. J. Int'l L.*, 44, p.531.

⁶ Du, Ming. "Explaining China's Approach to Investor-State Dispute Settlement Reform: A Contextual Perspective." *European Law Journal* (2023).



Historically, investment agreements heavily favored investor protection, often at the expense of host states' ability to regulate in the public interest. However, there is a growing recognition of the need to rebalance these agreements to promote sustainable development and safeguard states' regulatory autonomy.⁷ As a result, newer generation investment agreements feature a broader range of provisions, such as exceptions for regulatory measures and clearer references to respecting host states' policy space. The future of investor-state arbitration lies in incorporating these changes to ensure a fairer and more balanced resolution of disputes. Investment disputes have increasingly attracted public attention due to perceived imbalances and lack of transparency in the current investor-state arbitration system. Critics argue that the closed-door nature of arbitration proceedings limits public participation and undermines democratic decision-making processes. In response, efforts are being made to enhance transparency and openness in investor-state arbitration, with initiatives such as the UNCITRAL Transparency Rules and the establishment of an appellate mechanism proposed by the European Union. The future of investor-state arbitration hinges on addressing these concerns to maintain public trust and legitimacy.⁸

Recognizing the limitations of traditional arbitration, alternative dispute resolution mechanisms, including mediation and conciliation, are garnering increased attention within the investment community. Mediation offers a more flexible and consensual approach to resolving disputes, emphasizing party participation and preserving commercial relationships. As geopolitical dynamics change, exploring such alternative mechanisms can supplement investor-state arbitration, providing parties with additional options to settle their disputes more amicably and efficiently.

In light of changing geopolitical dynamics and shifting global economic powers, the future of investor-state arbitration necessitates adaptation to accommodate emerging economies' interests, promote sustainable development, rebalance investment agreements, enhance transparency, and explore alternative dispute resolution mechanisms. By embracing these changes, the international investment regime can better address the expectations of diverse stakeholders, foster investor confidence, and contribute to a more just and cooperative global economic order.

Conclusion

In conclusion, the future of investor-state arbitration appears to be heavily influenced by changing geopolitical dynamics and shifting global economic powers. With emerging economies such as China and India gaining significant economic influence and challenging the dominance of Western powers, we are likely to witness a shift in the balance of power within the international investment landscape. These changing dynamics raise questions about the continued relevance and effectiveness of investor-state arbitration as it is currently structured. As emerging economies become major sources of foreign investment, they may push for reforms to rebalance the system and ensure their interests are adequately protected. Additionally, the rise of economic nationalism and protectionist policies in some countries adds further complexity. Governments are becoming more

⁷ Mandy, F.M., 2022. *New Asian regionalism in international economic law*: by Pasha L Hsieh, Cambridge, UK, Cambridge University Press, 2022, 240 pp., ISBN 9781108845601.

⁸ Shaffer, G., 2021. *Emerging powers and the world trading system: the past and future of international economic law*. Cambridge University Press.



assertive in protecting their national interests, which may lead to an increase in disputes between investors and host states. This, in turn, will impact the role and practices of investor-state arbitration. It is also worth noting the growing skepticism towards the broader international investment regime, as some critics argue that it primarily benefits multinational corporations at the expense of national sovereignty and public welfare. This sentiment may drive calls for a reconsideration of the current investor-state arbitration system. In response to these challenges, we can expect initiatives aimed at enhancing transparency and accountability in investor-state arbitration proceedings. There may be efforts to address concerns regarding the independence and impartiality of arbitrators, as well as the lack of transparency in decision-making. Furthermore, alternative dispute resolution mechanisms, such as mediation and conciliation, may gain traction as more countries seek to promote cooperative approaches to resolving investment disputes. These mechanisms offer a more flexible and consensual approach, which could better accommodate the diverse interests of both investors and states.

Overall, the future of investor-state arbitration will be shaped by the evolving geopolitical landscape and the need to balance the interests of different global economic powers. Whether through reforms to the existing system or the emergence of alternative mechanisms, it is clear that the status quo is being challenged. As the world continues to change, it is essential for stakeholders to adapt and find innovative solutions that best serve the evolving needs and interests of investors and states alike.

Improving the future of investor-state arbitration in light of changing geopolitical dynamics and shifting global economic powers requires adapting to the evolving landscape of international trade and investment. Here are five ways to enhance this framework:

Multilateral Investment Court:

Establish a Multilateral Investment Court (MIC) to replace ad-hoc arbitration tribunals. The MIC would provide a standardized and transparent system for resolving investor-state disputes. It could be a permanent institution under the United Nations, ensuring impartiality, consistency, and legitimacy in arbitration processes. This would help alleviate concerns about the perceived bias of some arbitrators.

Updated Investment Treaties:

Revise and modernize existing bilateral investment treaties (BITs) and international investment agreements (IIAs). These agreements should incorporate new language and provisions to address issues arising from evolving geopolitical dynamics, such as national security exceptions, sustainable development goals, and the protection of human rights. By doing so, they can better balance investor rights with the host state's regulatory authority.

Enhanced Transparency:

Increase transparency in investor-state arbitration proceedings. Publish all arbitration awards and the relevant case documents, allowing stakeholders, including civil society organizations and the public, to access information about the disputes. Transparency can help build trust and ensure that decisions are made in the best interest of all parties involved.

Expertise and Diversity:

Ensure the composition of arbitration panels reflects the diversity of stakeholders and expertise. Encourage the appointment of arbitrators with relevant knowledge of international law,



trade, human rights, and environmental issues. Diverse panels can lead to more balanced decisions that consider broader societal concerns.

Mediation and Dispute Prevention:

Promote mediation and dispute prevention mechanisms before resorting to arbitration. Encourage investors and host states to engage in dialogue and negotiation to resolve issues amicably. Developing early warning systems and dispute prevention measures can reduce the number of disputes that escalate to arbitration and preserve long-term investor-host state relationships.

Incorporating these measures can help investor-state arbitration adapt to changing geopolitical dynamics and promote a more equitable and efficient system for resolving investment disputes in the future. However, achieving these changes will require international cooperation and consensus-building among states, investors, and civil society stakeholders

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