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Systemic Bias in Investor-State Dispute Settlement: Moral for the South Asian Host States

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Abstract

The International Investment Arbitration (IIA) method, known as the ISDS mechanism, is majorly divided into two devices: ICSID and non-ICSID arbitrations. The ICSID arbitration mechanism has been the most recognized dispute settlement mechanism formed by the ICSID convention. Non-ICSID arbitrations mainly comprise ways available other than ICSID arbitration, e.g., UNCITRAL, International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce, etc. The organic nature of the International Investment regime has led to the progressive practice of dispute settlement mechanisms all over the world since the rise of Bilateral Investment Treaties (BIT) in the nineties. However, the scholarships and empirical studies show that the arbitration panels are not devoid of systemic or institutional biases. This conception is resulting in an era of resistance among the State parties to any BIT. This paper attempts to find out and justify the critique of institutional biases with the help of some secondary data and cases. In addition, the paper shall also include the approaches of South Asian countries as host states in foreign direct investment under specific BIT protection.

Keywords: *Arbitration; Investment; South asia; ICSID; Systemic bias; BIT.*

Introduction

Arbitration became a more popular means of resolving international commercial disputes following WWII as a consequence of the expansion of worldwide commercial activity. Consequently, articles and agreements pertaining to arbitration began to appear more frequently in international contracts about the sale of commodities, technology transfer, and foreign investment projects [1]. Particularly, the amount of foreign investment had been significantly increasing following the neoliberalism consciousness among the states. A growing global consensus emerged in the late 1980s, arguing that economic liberalism within closed national or regional borders promised greater growth and innovation than economic protectionism [2]. The era of current international investment law emerged with the first BIT signed on

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November 25, 1959, and came into effect in 1962 between Germany and Pakistan [3]. However, the growth of the BITs from 1959 to 1989 was not so significant; rather, the number was only 385, an average of around 13 per year [4]. That shows the slow growth and less awareness among the states regarding the investment regulations. But in the next just ten years, this number jumped from 385 to 1857 by the end of 1999 [5].

It continued its pace for a few more years, but later on, the slow growth rate was significantly noticeable in the data provided by UNCTAD in 2018. After that, the withdrawal of ICSID membership by a few countries, e.g., Bolivia (2007), Venezuela (2007), Nicaragua (2007), and the Republic of Honduras (2024), can be marked as the start of a downslide in the growth of BITs. Scholars frequently refer to this period as the era of resistance to the current arbitration procedure, which only grants governments the ability to defend and promote investors and does not grant states the ability to take action against investors. Moreover, the arbitrators are independent, but most of them have a certain reputation for making either state-friendly or investor-friendly decisions and awards.

Origin of ICSID as Investor-State Arbitration Mechanism

The ICSID Convention was adopted in 1966, but it was 1975 when ICSID rules and regulations were adopted. ICSID is not an international court. It is important to observe investor-state disputes, from contract-based disputes to treaty-based disputes. In 1972, the first dispute was reported to ICSID [6]. It views postcolonial states' attempts to actively participate in the creation of international investment law (IIL) and to modify the regulations to suit their interests better, as evidenced by their nationalizations and the promotion of the New International Economic Order (NIEO) in the middle of the 20th century [7].

The concept of public justice has been called into question by the swift growth of international arbitration. English courts have recently permitted the referral of all family disputes, including those involving child custody and contact, to arbitration, with the caveat that "it is up to parents to agree how their children should be brought up and, if they cannot agree, they should be entitled to choose how their disagreement should be resolved without state intervention" [8]. Two categories of jurisdiction must be handled by the dispute settlement system: international and hybrid. We shall be limiting our discussion to the hybrid type of investment dispute settlement mechanism, ISDS. The reason for terminating the ISDS mechanism as a hybrid system of arbitration is precisely the fact that both the parties, hailing from different territorial

jurisdictions, any specific treaty between two formed an exclusively non-international, non-municipal kind of arbitration tribunal termed ISDS. Now, this mechanism has twofold practices, i.e., ICSID arbitration and another is non-ICSID arbitration.
The modern-day Bilateral Investment Treaty (BIT) first emerged in 1959 through the German-Pakistan BIT. Scholars often believe that the BIT has incepted from the limited practice of the Friendship, Commerce, and Navigation (FCN) treaty that was prevalent between the USA and other developed like-minded states. The *raison d'etre* of international investment agreements (IIAs) and a priority of international investment law have encouraged investment since Germany and Pakistan signed their first bilateral investment treaty in 1959 [9].

Based on geographical patterns and the World Bank Group's (WBG) area classification, data indicates that the majority of investor-state disputes occur in two different parts of the globe: Eastern Europe and Central Asia (ECA) and Latin America (LAC). When combined, these two regions account for approximately 55% of all ISDS cases that have been filed with ICSID throughout the period [10].

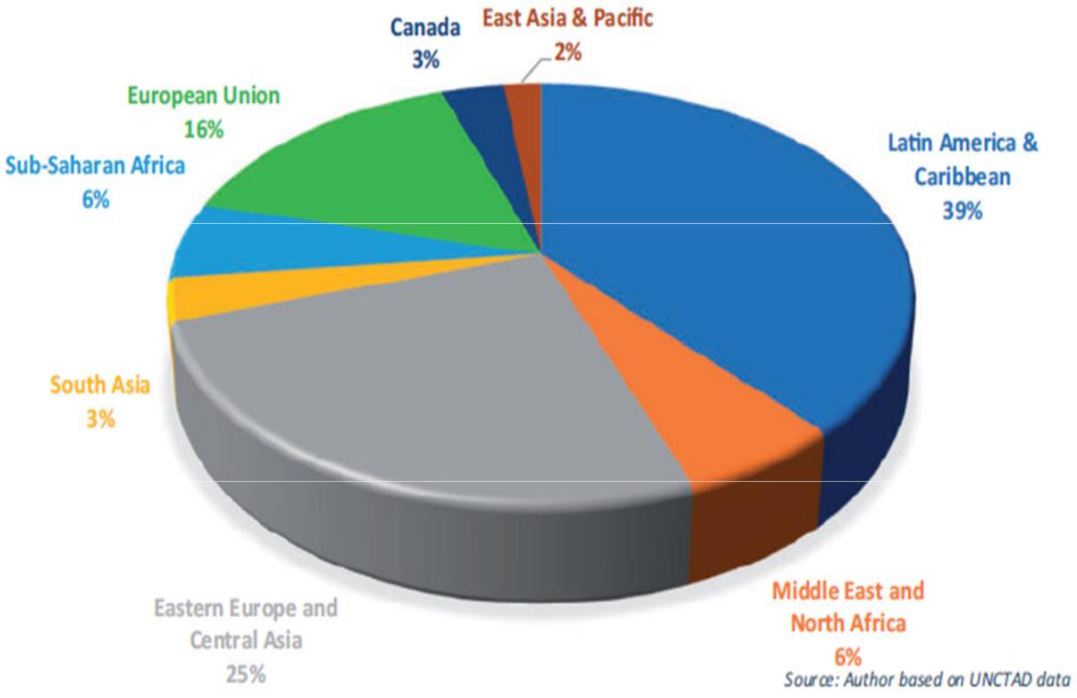

Figure 1. Adverse Awards by Region (based on WBG Region Classification and expressed as percentages of the global total) for Treaty-based ISDS Awards 1987–2017

The Public-Private Nature of ICSID Arbitration

Another criticism focuses on investor-state arbitration. Ad hoc appointees rather than permanent domestic judges make up investment arbitrators [11]. Hearings before the ICSID are frequently held in secret (ICSID Convention Article 53 (a) [12]. One effect of ad hoc awards and private hearings is a lack of public awareness of the procedures used by arbitration organizations such as the ICSID [13]. The boundaries between state authority and investor rights are unclear, and ICSID tribunals may award different amounts of compensation or other remedies in expropriation cases. Moreover, the uncertain enforcement mechanisms are an existing issue.

The *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID arbitration from 2002 serves as a prime example of the concerns raised about the unpredictable public access to ICSID deliberations. In that case, three hundred representatives of social organizations from all across Bolivia asked to be allowed to file amicus curiae briefs and to have access to the prosecution and defense testimony. They maintained that the arbitrators ought to travel to Cochabamba, Bolivia, where the disputed investment is said to have had the greatest impact, and that the ICSID hearings ought to be open to the public [14].

Institutional Formation of ICSID

Tribunals for ICSID arbitration normally consist of three members. Tribunals shall be composed of one or more arbitrators, according to Article 37 of the Convention. Three arbitrators will make up the tribunal: one will be chosen by each party, and if the parties cannot agree "upon the number of arbitrators and the method of their appointment," the third arbitrator, who will also act as the tribunal president will be chosen by mutual consent [15]. A law degree is recommended but not a prerequisite for participation in ICSID arbitration proceedings; as stated in Article 14(1), "[c]ompetence in the field of law shall be of particular importance" [16].

Systemic Bias in the ISDS

Systemic biases have been considered to be the cracks in the investment regime. In the age of rapid economic and investment growth, arbitration is very important in spreading the comparatively younger regime of investment treaties by resolving disputes of bilateral and multilateral nature. However, concerns about this substitute for the traditional adjudication procedure are frequently raised, including how arbitrators make their decisions. Do they have a preference for particular party classes? These are apparent bias concerns that are neither so evident in the regime nor the subject matter of our discussion; rather, the quest is to dig into the existence of

systemic or institutional biases that are a concern among many scholars and suffering host states. Thus, the institutional design that comprises the arrangement of arbitration in investment disputes is in a way that creates bias by itself.

The impartiality and independence of international investment arbitration are frequently questioned in discussions concerning investment treaties. The suspicion that arbitral tribunals appeared to favor investors over States, or more precisely, developed state investors over developing state investors, grew as more investors brought and won treaty claims against states, were awarded substantial damages by arbitral tribunals, and actively publicized their victory [17]. In general, arbitration law and practice have placed a strong emphasis on the individual conduct of arbitrators. Because it focuses on the thoughts of those serving as arbitrators, laying out the proper criteria of prejudice and providing explicit ethical strategies on conflicts of interest are crucial.

A comparative view between Frank's (2009) study [18] and van Harten's (2012) study [19] shows a contrast in their findings. Gus van Harten looks at the interpretive trends in arbitral awards and suggests that there is noticeable bias on the part of tribunals in favor of investors from developed countries, whereas Franck looks at the results in investment treaty arbitration and suggests that there is no direct connection between the development status of a respondent State and the result of the dispute.

The following are the main conclusions drawn from the academic discussion on systemic biases: treaty limitations are only justified by the parties to the investment treaties, not the other way around. Investors have the only right to file a claim against the State. The theme of any investment treaty is to protect the investor's right in the course of investment in a foreign state that is well-grounded yet not devoid of abuse of the right theory, which signifies, if not literally, substituting 'protection' for the investors with the 'right' to the investors, which happens to be the problematic discourse among the scholars of investment law concern.

A few experts, including Sergio Puig and Gus van Harten, have produced empirical evidence regarding the arbitrators who have a reputation for favoring either party. The selection of arbitrators based on their track record of arbitral awards is the central contention in this case. Some arbitrators have the reputation of awarding in favor of states mostly in their careers, and some arbitrators have the reputation of awarding in favor of investors in their careers. Professor Brigitte Stern has been the arbitrator with most arbitration cases, followed by other arbitrators, mostly hailing from the West. Arbitrators are mostly from developed countries, which are mostly the capital-

exporting countries, which means the investor's home state and the arbitrators' homelands are from the same group of countries, having a similar kind of interest in general. Arbitrators mostly graduated from certain high-ranking law schools of developed nations with or hailing from a certain religious background. Franck (2009) discovered that states had a higher win rate (58%) in investment treaty arbitrations than investors (39%) [20].

Data Showing the Systemic Bias

419 different arbitrators served on ICSID courts and ad hoc Committees for the analysis, according to a detailed examination of the survey of appointments. On the other hand, almost 50% of the participants were assigned to just one case. Even more outrageous is the fact that half of the appointments are made up of 10 percent of the entire pool. Most of the appointments are with Professor Stern, a Frenchman. Her 48 appointment records—44 of which were from state appointments—might reveal something about her political preferences. Judge Brower, like Stern, amassed an impressive 25 appointments. However, claimants might assume that he is reputed as a "conservative" (or "pro-investment") based on his 23 appointments. One choice serves as an example of the possible problems brought about by this widening ideological gap [21]. What is notable, though, is that male arbitrators make up about 93% of all appointments, indicating a stark gender disparity. It gets worse: of the arbitrators in the network, only two women—Professors Stern and Kaufmann-Kohler combined—held three-quarters of the appointments made by women, resulting in an appalling 95 percent to 5 percent male-to-female ratio. There is also a glaring disparity in terms of nationality. Despite the fact that the appointees represent 87 different nationalities, the majority of arbitrators are from certain wealthy nations. Nearly half of the appointments are made up of people from seven different countries: New Zealand, Australia, Canada, Switzerland, France, the UK, and the US. Of course, this trend may be related to arbitrator nationality requirements, litigation tendencies, and worldwide FDI trends. Five Latin American countries account for about fifteen percent of the arbitrators appointed. A cursory examination of this subset of arbitrators' backgrounds suggests that obtaining a law degree from an English, French, or American university is crucial for building a reputation as an international arbitrator [22].

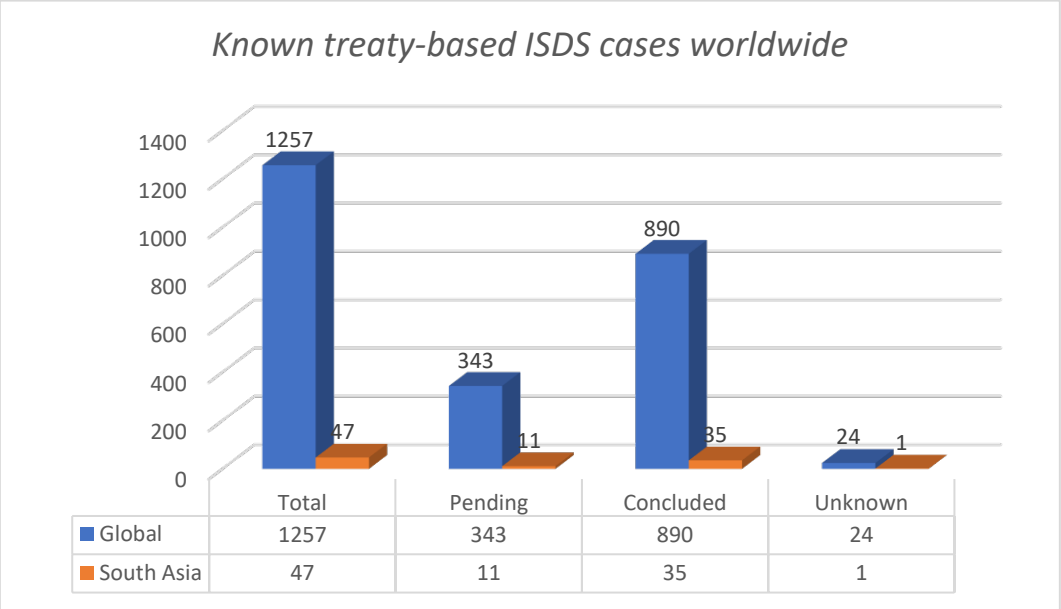

Figure 2. Known treaty-based ISDS cases worldwide and South Asia (Updated as of September 8, 2023).

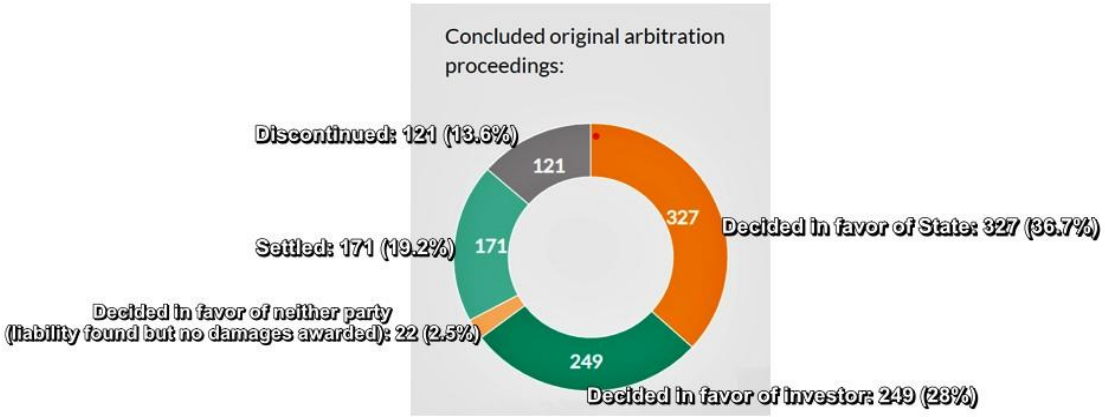

Figure 3. Concluded Original Arbitration Proceedings Worldwide (Updated as of September 8, 2023):

South Asian Host States

Data for seven of the eight SAARC countries Afghanistan, Bangladesh, India, Maldives, Pakistan, Nepal, and Sri Lanka are analyzed in this study. Bhutan has not yet ratified a BIT. As UNCTAD provides pertinent investment data, pertinent data for the seven nations under study has been gathered between 1959 and September 2023. During this time, many of these treaties were signed; just two South Asian nations signed a Bilateral Investment Treaty (BIT) prior to 1970.

Eight South Asian Countries	Policy Review	Policy Measures	Investment Laws	Bilateral Investment Treaties (BITs)	Treaties with Investment Provisions (TIPs)	Treaty Based Cases
Afghanistan	0	0	1	5	5	5
Bangladesh	1	2	1	34	4	1
Bhutan	0	1	0	0	2	0
India	0	90	1	87	16	40
Maldives	0	2	1	1	3	0
Nepal	2	6	1	6	3	1
Pakistan	0	6	1	53	7	12
Sri Lanka	1	11	0	30	6	5
Total	**4**	**118**	**6**	**216**	**46**	**64**

Table 1. The statistics of the legal & policy instruments on investment adopted by the South Asian Countries till August 7, 2023 (UNCTAD Investment Policy Hub) [23].

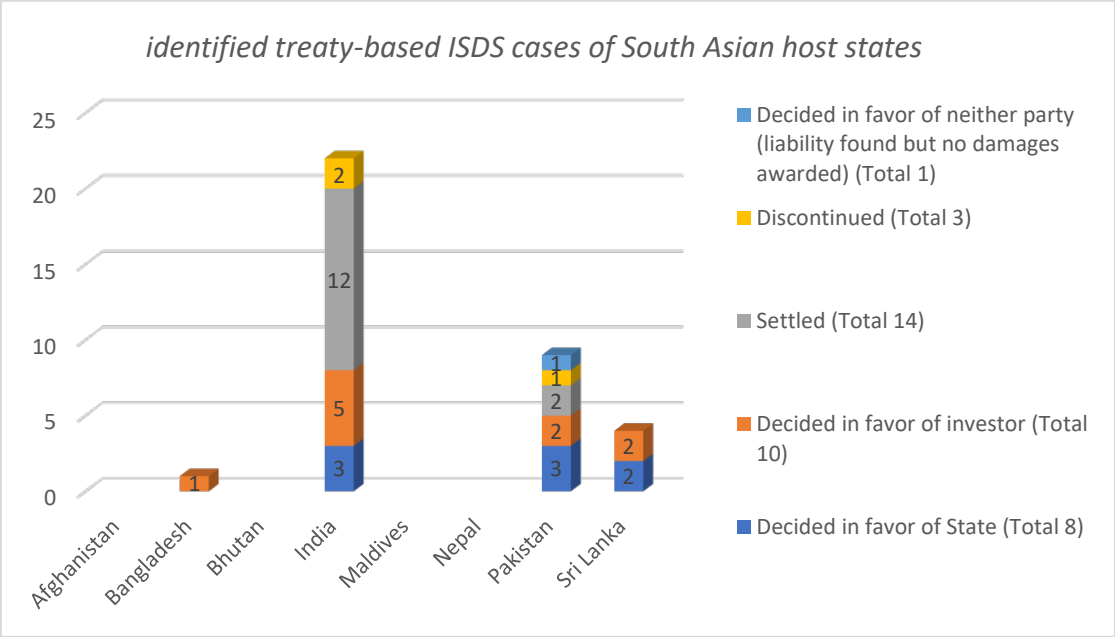

Figure 4. Statistics on the status of the identified treaty-based ISDS cases in South Asian host states [24].

There have been twice as many conflicts resolved in favor of investors as in favor of the State, even though the majority of rulings are still pending. The late 1980s saw a certain boom in investment treaties, especially among the developing countries of the

world. The statistics show that between 1990 and 2000, developing nations signed more than 2000 BITs, up from 200 at the beginning [25]. Between 2001 and 2024, only 885 BITs were signed worldwide, which proves the slow growth rate of BITs. Moreover, 68 of these BITs have been terminated [26]. South Asia has been the fastest-growing region in the world since mid-2014, according to a World Bank report. Growth is expected to pick up in the following years, but for that to be achieved, the region is required to accelerate exports and maintain its stability. It is anticipated that GDP growth will be slow in Bangladesh, Bhutan, the Maldives, Nepal, and Pakistan but will modestly accelerate in Afghanistan, India, and Sri Lanka [27]. India maintains one of the biggest BIT networks in the world, and other South Asian nations have not missed out on this trend, signing an astounding 208 treaties so far [28].

Conclusions

Recently, there have been proposals that argue that the party-appointed arbitration system should be eliminated. Prominent and influential arbitration practitioners and scholars endorse these ideas [29]. Rather, there has been a suggestion that arbitral institutions should appoint all members of the panel. This viewpoint holds that a system of institutionally selected arbitrators would provide more effective control over the caliber of arbitrators appointed as well as greater transparency in the process of choosing them [30]. Some academics have suggested that a new international investment court with tenured judges, overseen by municipal courts or an appeal body, should take the place of the multilateral selection paradigm of investment treaty tribunals [31]. Professional associations, courts, and arbitrators themselves have disregarded the fundamental issues of personal behavior and evident bias [32].

Many nations have chosen to supplement or replace one type of ISDS—arbitration—with another international investment court. This is an attempt to alleviate worries about possible conflicts of interest between lawyers who represent one party in a dispute and then act as arbitrators in another and to improve the transparency, predictability, and consistency of ISDS [33]. Therefore, the best possible way to escape from these biases is to move towards an international investment court mechanism that sets a common standard for the member states and disputant parties thereof. In light of this, a working group headed by UNCITRAL has been tasked with investigating potential changes to the current ISDS system [34].

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