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Navigating Investor-State Dispute Settlement: Concerns from the Asia-Pacific Region

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The [Regional Arbitral Institutes Forum \(RAIF\)](#) held the 2023 edition of its annual conference on 10 November 2023 in Bangkok, Thailand. RAIF consists of nine professional arbitration institutes across the Asia-Pacific region. It serves as both a platform to share knowledge and best practices, and an avenue for collaboration among members and delegates from the region. The aforementioned 2023 edition, hosted by the Thailand Arbitration Center (THAC), featured two main sessions – one entitled “Investor-State Dispute Settlement (ISDS) Reform: Addressing Challenges and Ensuring Fairness” and another called “Intellectual Property and Arbitration: Protecting Innovation Through Alternative Dispute Resolution”. This post focuses on the session on ISDS reform and highlights concerns from the Asia-Pacific region.

In the panel discussion moderated by [Ms. Angela Abala](#) (Singapore International Dispute Resolution Academy), [Prof. Dr. Colin Ong KC](#) (President, Arbitration Association Brunei Darussalam), [Prof. Shin-Ichiro Abe](#) (Chairman, Japan Institute for International Arbitration Research and Training), [Mr. Jesusito G. Morillos](#) (Chairman, Philippine Institute of Arbitrators), and [Mr. Toby Shnookal KC](#) (Director, Resolution Institute) shared their thoughts on the current state of ISDS and potential reforms to address criticisms.

Challenges Facing Asia-Pacific Host States and Stakeholders

The panelists mentioned that the main concern of Asia-Pacific host states and other stakeholders regarding ISDS is regulatory chill, or the notion that states would be discouraged from enacting measures in the public interest for fear of exposing themselves to an investment arbitration claim. Given the increasing need to put in place legislation relevant to the areas of public health, human rights, and the environment, host states would like to have the flexibility to regulate the public interest.

Mr. Morillos added that host states are also concerned about the inconsistency and unpredictability of arbitral awards that ultimately affect the public at large and taxpayer money. Issues of corruption, investors coming in with unclean hands, as well as investors putting forward inflated claims are also some of the concerns of host states and other stakeholders. In terms of corruption, Prof. Dr. Ong said that there are currently no arbitration rules that define the standard of proof for

corruption. Given the involvement of public officials and the general public interest, he suggested looking into the standard of proof of corruption in investment treaty arbitration in Asia.

Reforming ISDS

There are currently several ISDS reform options being proposed and studied. But any modernization effort, according to Prof. Dr. Ong, should be able to balance both the investors' interests and host states' legitimate interests. He also said that reform efforts must consider that states involved in disputes need more time to give the cases the proper attention they need. As such, ISDS reform should be flexible enough to consider government bureaucracy, while also safeguarding the rights of investors.

To address the legitimacy crisis plaguing investment arbitration because of the [inconsistency of some arbitral awards, the creation of an appellate mechanism to review awards and establish precedent has been proposed](#). Prof. Abe said that the criticism against the current system is warranted. Yet, he believes that there is no need for an appellate mechanism. Instead, there must be an effort towards increasing the quality or trustworthiness of arbitral awards.

Another proposal to address the legitimacy crisis and the supposed untransparent nature of investment arbitration is letting [amicus curiae participate in arbitration proceedings](#). The [creation of an advisory center](#) to provide states with legal assistance in investment disputes has also been suggested. Mr. Morillos said that these proposals may help with depoliticizing ISDS and provide greater participation from other stakeholders.

[Investment mediation as an alternative to arbitration](#) is also gaining popularity. Mr. Shnookal, a mediator himself, said that mediation can be utilized in an investment dispute. Given that most investment treaties provide a cooling off period or a period of consultation, mediation can be done during this period. Drawing from his experience in Australia, Mr. Shnookal said that mediation can even run in parallel to arbitration proceedings.

Striking A Balance Between Protecting Investors' Rights and Ensuring Host States' Ability to Regulate

In today's world, society is facing a myriad of challenges that require modern solutions. Climate change threatens global security. The pandemic triggered public health and economic crises, the consequences of which are still experienced today. As such, it has been unavoidable for states to regulate more in environmental, public health, human rights, and national security matters. At the same time, investors believe that any new regulation introduced by states should not be discriminatory or go beyond the needs of the public at large. Thus, the members of the panel agreed that the main factor that should be taken into account towards reforming ISDS is striking a balance between protecting investments and upholding a state's legitimate interests.

The panelists also noted that modernizing bilateral investment treaties (BIT) to address the needs of society today would be one way to create a balance between investors' and states' interests. Mr. Shnookal suggested that there is a need to clarify the substantive provisions in BITs. Mr. Shnookal observed that most of the current substantive provisions are too broad.

Looking Forward

At the end of the session, panelists shared what they thought would be the emerging issues in the space of ISDS reform in a year's time. Mr. Morallos said we might be facing a world of extremes, with either more states withdrawing from BITs or finally having a consensus on the creation of a multilateral investment court. Prof. Dr. Ong noted that in today's rapidly changing world, with the divisiveness of the developed and developing parts of the world, it would be difficult to predict what topics would be considered in a year.

Conclusion

The panelists highlighted that Asia-Pacific host states and stakeholders are keen to understand how ISDS will further develop amidst the backdrop of continuing criticisms of the system. While there are several ISDS reform options under consideration, they stressed that there is a need to strike a balance between protecting investments and ensuring that a host state's ability to regulate in the public interest is not unduly restricted.

The challenges faced by society today in the fields of environmental protection, public health, and human rights are evolving. In addition, [foreign direct investments are now moving between developing and developed countries in both directions](#). New economic initiatives are also on the rise such as [China's Belt and Road Initiative](#). Considering these current trends, the panel agreed that modernizing BITs is a good step towards comprehensive ISDS reform.

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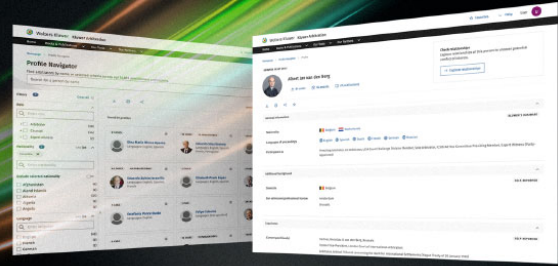
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