

Challenges and Responses to International Investment Rule-making

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ABSTRACT

The world economic pattern is experiencing a great change that has not been seen in a hundred years, and the construction and adjustment of the international investment rules system is an important manifestation of the multipolarity of the world economy, which plays an important role in promoting the healthy development of the investment pattern. However, in the process of development, the international investment treaty rule system is facing many difficulties, such as "fragmentation", too many bilateral investment treaties, intensified conflicts between developed and developing countries, and unsound dispute settlement institutions, etc. In this regard, the establishment of a "de-fragmented" international investment treaty rule system is a major challenge. For this reason, it is important to establish a "de-fragmentation" mechanism, reform the investment dispute settlement bodies and enhance the influence of developing countries, with a view to promoting the liberalisation and facilitation of international investment and improving the international investment treaty rules system.

KEYWORDS

International Investment Rules; Investment Treaties; Investment Arbitration.

1. INTRODUCTION

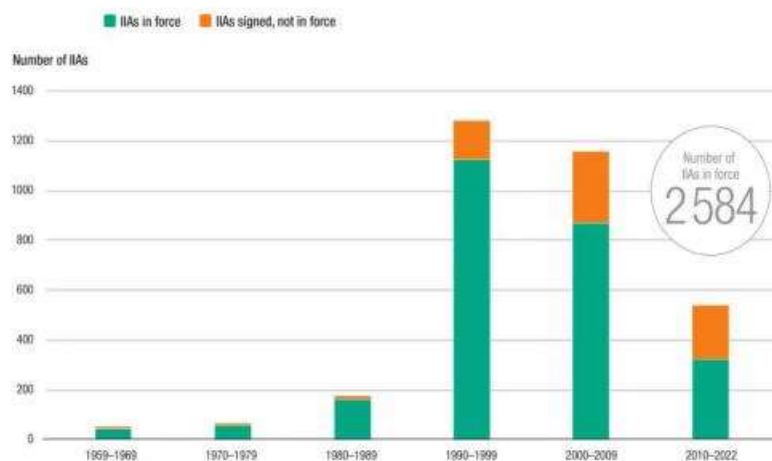


Figure 1. (Source: UNCTAD, IIA Navigator)

In the era of economic globalisation, the speed of transnational capital flows has accelerated, and international investment treaties (IITs), as an important link in the international investment landscape, have presented a complex situation. According to the statistics of the United Nations Conference on

Trade and Development (UNCTAD), the total number of international investment treaties in 2022 will be 3,265 (2,830 bilateral investment treaties and 435 other investment treaties), and the current international investment treaty system is still dominated by the old generation of treaties (Figure 1). Developed countries have always been in a dominant position in the international investment landscape, and despite China's gradual transformation from a "capital-importing country" to a "capital-exporting country", China has always been in a passive position in the international investment system. Therefore, by analysing the current situation and problems of the rules of international investment treaties and proposing relevant solutions, we can help to grasp the development trend of international investment and promote the development of China's economy.

2. THE REALITY OF INTERNATIONAL INVESTMENT TREATIES

The current system of international investment rules lacks a comprehensive global multilateral agreement on investment, but rather is characterised by rules at the bilateral, regional and multilateral levels. It constitutes a multilayered and fragmented system of international investment rules.

2.1. Bilateral Investment Treaties

Bilateral Investment Treaty (BIT) has been a major component of the international investment rules system. BITs involve only two economies and are highly relevant to the protection of investment and the settlement of trade disputes. Since the 1980s, developing countries have signed a large number of BITs with developed countries in order to improve the domestic investment environment by seeking foreign investment in the context of economic globalisation, and BITs have been developing rapidly.

In the process of the rapid development of BITs to form a huge system, the shortcomings of the imperfections of the system have also been gradually exposed. First, in order to attract foreign investment for economic development, developing countries often have to make compromises and concessions when signing BITs with developed countries, which leads to an imbalance in the interests of BITs. Secondly, because of the large number of BITs, some of them overlap or even conflict with each other, further aggravating the trend of "fragmentation" of international investment treaties. Thirdly, BITs are so focused on issues that they lack constraints on the investor side, for example, few BITs contain specific, clear and adequate provisions on investor obligations in the areas of employment relations and environmental protection, with the result that investor behaviour still needs to be regulated by other means of rule-making. [1].

There are limitations in the application of BITs by Governments, which play a limited role in protecting the interests of investors and attracting foreign investment, and it is therefore unrealistic to rely on the development of BITs to regulate both sides of the investment equation and to construct a global system of rules.

2.2. Regional Investment Treaties

Regional investment treaties (RITs) have developed actively in recent years as a transitional form of multilateral investment treaties (MITs), compensating for the weaknesses of multilateralism that make coherence difficult. A RIT is a regional multilateral treaty concluded by a regional international economic organisation with the aim of coordinating investment activities among its member countries. They are divided into three main types, namely, investment agreements that are specific to FDI, regional economic integration agreements that deal specifically with FDI, and, finally, those that apply their specific provisions to FDI in a particular economic area. [2].

Compared with BITs, RITs are characterised by two aspects: first, RITs cover a wider range of subjects and scopes, with RITs targeting mainly individual member States in the region and involving multiple members. It covers not only the fields of investment and trade, but also non-investment

directly related issues such as intellectual property rights, environmental protection and labour relations. Second, RITs can better balance the interests of all parties. Member States within a region have similarities in political, economic and cultural aspects, which makes it easier to communicate and dialogue in order to achieve a reasonable distribution of benefits.

Regional investment treaties (RITs) are flexible and can meet the different needs of member States within a region, as well as accelerating the demand for integration within a given region. However, at the same time, regional investment treaties are highly heterogeneous and exclusive, such as the investment treaties of the North American Free Trade Area (NAFTA) and the European Union (EU), which do not apply to non-member countries.

2.3. Multilateral Investment Treaties

Multilateral investment treaties (MITs) are fewer in number and slower in development than bilateral and regional investment treaties. There is currently no comprehensive global MIT, and existing MITs cover only one or a few aspects of the direction of investment trade. At present, the only truly binding MITs are the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the Multilateral Investment Guarantee Agency Convention (MIGA Convention) and the WTO Agreement. Multilateral investment treaties are characterised by the following features: first, they are transparent and fill the loophole of overlapping and conflicting bilateral and regional investment treaties. Secondly, MITs mostly focus on the protection of investors' interests from their perspective. Compared with bilateral and regional investment treaties, multilateral investment treaties are conducive to reducing regional frictions and trade barriers, and are an important supplement to bilateral and regional investment treaties. However, as multilateral investment treaties involve a large number of countries, the cost of reaching consensus is huge, and there is still a long way to go in establishing a comprehensive multilateral investment treaty.

3. ISSUES FACING INTERNATIONAL INVESTMENT RULES

The components of the international investment rules system (i.e. bilateral, regional and multilateral investment treaties) have limitations, and therefore international investment rules face many problems, dilemmas and dilemmas in the process of their conclusion and operation.

3.1. The Predominance of BITs and the Accelerated Fragmentation of the Rules Regime

The current system of international investment rules is dominated by bilateral investment treaties (BITs), which are huge, overlapping and interacting with each other, lacking uniform standards, and presenting a "multilayered" character. Secondly, there are different historical backgrounds and large differences in the level of economic development between countries. Each economy seeks different interests, investment protection standards and investment liberalisation and investment regulation and regulatory capacity requirements and other issues there are differences, resulting in countries in the process of seeking foreign investment cooperation, most of the "one case, one discussion" principle, that is, separate negotiations with different countries to form a bilateral investment agreement. [3] Although this practice is sound and feasible, and facilitates the signing and implementation of treaties, the limitations of bilateral investment treaties themselves will create trade barriers in the long term, fragment the international investment market, and accelerate the fragmentation of the international investment rules system.

The fragmentation of the international investment rule system can bring about a series of problems, creating obstacles to the facilitation of investment by investors on a global scale, increasing the costs for investors, and being detrimental to the free flow of capital. At the same time, the fragmentation of international investment rules will bring about a series of regulatory difficulties, the rules of

investment treaties have different standards, international arbitration tribunals are faced with difficulties in obtaining evidence and many other difficulties, and their arbitration results lack accountability and are not fully binding on the parties to the dispute. The current fragmentation of the system of investment rules makes it unrealistic to establish an investment dispute settlement body of a global nature.

3.2. Imbalance between the Interests and Rights and Obligations of Developed and Developing Countries

Taking the United States' revision of the model bilateral investment and protection agreement (BIT) as an example, it requires the host government not only to take on the task of investment protection, but also proposes restrictions on domestic policy transparency, government behaviour and state-owned enterprises. This shows that when signing BITs with developing countries, developed countries, in addition to seeking most-favoured-nation (MFN) treatment, also intervene in the business environment of developing countries in order to remove obstacles to the entry of foreign capital and to seek to maximize their interests. At the same time, developed countries use environmental standards, security reviews and other measures to impose restrictions on developing countries and even discriminate against investors from developing countries. [4]For example, the Committee on Foreign Investment in the United States (CFIUS) can review any foreign investment transaction. Huawei and other Chinese companies' acquisitions in the United States have been frequently blocked due to CFIUS reviews. Developed countries use their dominant position to forcefully reverse trade balances and force developing countries to accept their investment propositions, causing turmoil in the economic development of developing countries.

When developed countries signed investment treaties with developing countries, they would have an impact on the domestic environment of developing countries, and the additional obligations imposed on developing countries by the investment treaties made it possible for developing countries to temporarily trade off economic and social security and a green environment for the stimulation of their economies by foreign investment. The impact of investment treaties sometimes spilled over into the domestic affairs of developing countries, causing developed countries to intervene in the internal affairs of developing countries, which exacerbated the conflict between developed and developing countries. Transnational corporations from developed countries sometimes pursued economic interests to the exclusion of developing countries, directly implanting the investment operation models of developed countries, interfering with the space for autonomous development of developing countries and causing damage to the interests of developing countries, which, coupled with the inadequacy of communication and dialogue, had undoubtedly exacerbated the conflict between developed and developing countries.

3.3. Dilemmas in International Investment Dispute Settlement Mechanisms

The settlement of international investment disputes is an important part of international investment activities. At present, the Investor-State Dispute Settlement Mechanism (ISDS) takes international arbitration as its main means, and international arbitration has the advantages of neutrality, autonomy and finality, but many drawbacks and dilemmas have arisen in the course of its development and application. The first is the lack of transparency provisions for the arbitration process. [5]International investment disputes mostly involve issues of public interest, which creates a need for transparency. Increased transparency in international investment treaty arbitration can also prevent improper arbitration procedures and maintain the normal development of international investment activities. Secondly, although international investment treaty arbitration is legally binding, some countries may refuse to recognise and enforce the award on the grounds that the award has been set aside, and the arbitration does not have the effect of enforcement.

4. PROPOSALS FOR IMPROVING INTERNATIONAL INVESTMENT RULES

4.1. Establishment of Mechanisms for "De-fragmentation"

4.1.1. Harmonisation and Unification of Treaty Standards

As countries have different national conditions, they have different understandings of international investment treaties, which is one of the reasons for the "fragmentation" of the system of investment rules. In this context, it is important to harmonise and unify treaty standards. At a superficial level, it is important to set up a unified standard in terms of the format, language and key provisions of the treaty, so as to reduce misunderstanding and differences in the interpretation of the treaty by all parties to the investment process. At a deeper level of analysis, invoking the prevailing standards in the specific rules of international investment treaties is crucial to overcoming differences between different economies in the process of negotiating and applying treaties.

4.1.2. Regional Economic Organisations Play a Role

Foreign scholars have found, through a study of more than 1,600 BITs, that a multilateral investment treaty (MIT) with 27 basic provisions can replace 50 per cent of BITs. Although regional investment treaties are specific to a certain region, they play an important role in the consolidation of BITs and the multipolarity of the world economy, and also play a transitional role in the evolution of the "de-fragmentation" of the international investment rules system.

Regional economic organisations have the capacity to incubate large free trade agreements. An example is the North American Free Trade Agreement (NAFTA) under the North American Free Trade Area (NAFTA). The agreement consolidates overlapping and redundant bilateral investment treaties in the region, and the content of the agreement extends from the area of investment and finance to a wide range of areas such as the environment, energy and education. Second, the working mechanisms of regional economic organisations also have advantages. For example, the annual APEC Leaders' Meeting provides a platform for communication and dialogue and consensus-building among the leaders of individual countries, and the political commitments they make at the meeting propel APEC member countries to act together to eliminate unilateral acts in the region.

The effective implementation of IITs stems in part from the mutual trust between States and their confidence in the future of the treaty. If a BIT is concluded, the behaviour of one of the countries is likely to trigger a crisis of confidence between them, making it difficult for the BIT to move forward properly. However, in a regional multilateral framework, a country's unilateral behaviour is subject to the control of regional economic organisations, and even if a country acts in violation of a regional economic agreement, the regional economic treaty can still continue and will not lead to a crisis of confidence among member countries. The establishment of more RITs through REOs in order to eliminate the "fragmentation" caused by BITs is the best transition path to promote the development of the world's investment economy towards multipolarity.

4.2. Developing Countries Making an Impact

Most of the existing international investment treaties are dominated by developed countries and focus on protecting the interests of developed countries, which can easily lead to an imbalance between the interests of home and host countries. Developing countries should use their influence to create a fairer international investment environment.

4.2.1. Improving Domestic Investment Governance Capacity

When developed countries invest in developing countries, they have to take into account the political environment, the level of the rule of law, the quality of labour and other factors in the developing countries. Therefore, developing countries should endeavour to improve themselves in order to attract

more foreign investment and gradually increase their influence. Developing countries should improve investment-related legal mechanisms, raise the level of foreign investment protection, consciously accept supervision, and achieve a good linkage between domestic and foreign supervision. The domestic investment policies of developing countries should not deviate from the general direction of international investment, but should be actively integrated into the system of international investment rules.

4.2.2. Introduction of Corporate Social Responsibility Provisions

In view of the environmental and social crises brought about by transnational corporations, developing countries can refer to the OECD Guidelines for Transnational Corporations and the United Nations Global Compact when signing investment treaties, and introduce CSR clauses in the negotiation of international investment treaties, [6]balancing the rights and obligations of investors in home and host countries, and at the same time, it will be beneficial to the improvement of the domestic investment environment and the enhancement of the international image of developing countries. At the same time, it will be beneficial to the improvement of the domestic investment environment of developing countries and the enhancement of their international image.

4.2.3. Towards an Efficient Multilateral Investment System

There is still much room for developing countries to explore FTAs, and under the new challenges of the new era, developing countries should unite and collaborate, intensify international cooperation, expand exploration of the multilateral investment system and reduce trade barriers. Only with greater openness and inclusiveness can developing countries have more and more influence on the international investment landscape in order to win a more favourable international environment for themselves.

4.3. Promoting Reform of Dispute Settlement Bodies

The legal mechanisms for investment disputes are not consistent across countries, so that the settlement of host country-investor disputes will always be influenced and constrained by the laws of other countries. The development of the international system of investment rules urgently requires reform of investment dispute settlement institutions.

4.3.1. Exploring a Combination of Arbitration and Mediation

Currently, the Investor-State Dispute Settlement (ISDS) mechanism is dominated by international arbitration, with mediation being applied relatively rarely. However, while arbitration procedures are complex, time-consuming and costly, mediation is flexible, less costly and can compensate for the shortcomings of arbitration. The combination of arbitration and mediation is conducive to promoting the reform of dispute resolution mechanisms. For example, the 2018 Cooperation Agreement on the Establishment of a Belt and Road Diversified Dispute Resolution Mechanism Converging Arbitration and Mediation stipulates that after an international commercial dispute has arisen, the parties to the dispute may prioritise the application of mediation procedures for the undisputed part, and then apply arbitration procedures for the disputed part. [7] This is conducive to resolving the dilemma posed by arbitration, improving the efficiency of dispute settlement institutions and stabilising the international investment rules system.

4.3.2. Construction of a Permanent Appeal Mechanism for ISDS

The construction of an appeal mechanism in international investment arbitration is an issue that has been mentioned repeatedly in recent years. In practice, arbitral awards are sometimes inconsistent, and it is essential to construct a mechanism to correct errors and strengthen the supervision of arbitration. After the conclusion of the first instance award, if the disputing parties do not appeal, the result of the first instance award shall be final. If the disputing parties disagree with the award, they may appeal to the arbitral tribunal within a specified period of time. During the period of appeal, the

validity of the first instance award is suspended. The outcome of the appeal is one of two things: first, the first instance award is confirmed as correct, in which case the appeal shall be dismissed and the original award shall be enforced. Secondly, if the first instance judgement is wrong, the original judgement should be modified or overturned, and the result of the appeal judgement is final. The establishment of the appeal mechanism can promote the reform of ISDS in a fairer and more reasonable direction, and has a certain degree of practicality.

4.3.3. Establishment of Implementation Monitoring Measures

In international investment disputes, the State has immunity, and the State, whether as a plaintiff or voluntarily as a defendant, may not impose enforcement against its property without its consent.[8] ISDS therefore does not have the ability to enforce the outcome of an arbitration, and the establishment of an official, semi-official enforcement body is not realistic in the current international investment framework.

The basis for concluding investment treaties is mutual trust and future confidence, and a way to deal with implementation issues is to start with the idea of establishing a "bad faith list", in which countries that refuse to honour arbitration outcomes are included in the "bad faith list". If a country is included in the "bad faith list", its international investment image will be greatly damaged, and its future investment will also be affected. For this reason, the State will honour the arbitration result as far as possible. The "bad faith list" could serve as a monitoring mechanism for enforcement.

5. CONCLUSION

The trend of globalisation and multipolarity in the world economy has been further strengthened, and international investment rules are facing a number of problems and challenges in the process of development. Because countries have different national conditions and diverse outward investment policies, the formulation of a globally comprehensive multilateral investment treaty is not possible at present. Exploring a way out of the dilemma is not aimed at pursuing globally uniform investment rules; the purpose of developing and reforming the international investment rules system is to better serve the investment and trade of all countries, thereby promoting the development of their economies and the prosperity of the global economy.

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