

PERSPECTIVES OF INVESTOR-STATE ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN THE CONTEXT OF THE BELT AND ROAD INITIATIVE***Amina Akperlinova**

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Abstract

In the conditions occurring in the modern world with rapid changes and universal globalization trends, investor-state arbitration (ISA) has become fundamental as a major global dispute settlement tool, spanning the whole world. Although due to the globalization of the world economy, issues associated with ISA as a dispute resolution mechanism and its legal aspects cause many uncertainties and disputes, both at the national and international levels. In this article, the author will try to answer these

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INTRODUCTION

In the conditions occurring in the modern world with rapid changes and universal globalization trends, investor-state arbitration (ISA) has become fundamental as a major global dispute settlement tool, spanning the whole world. Although due to the globalization of the world economy, issues associated with ISA as a dispute resolution mechanism and its legal aspects cause many uncertainties and disputes, both at the national and international levels. In this article, the author will try to answer these questions in the context of the Belt and Road Initiative (BRI) as well as rise up issues for further discussion. Nowadays ISA is the most commonly used method of resolving disputes between foreign investors and the host states. According to statistics from the UN Conference on trade and development (UNCTAD), by 2022 the number of investor claims against States reached more than one thousand [1]. ISA, as a type of international arbitration, has gained a global distribution through the conclusion of international investment treaties (IITs). Most existing bilateral and multilateral investment treaties give investors the right to apply to international arbitration in the event of a violation by a state of foreign investment protection standards. Currently, more than 3,000 international investment treaties concluded by states [1], and the number is increasing every year, approaches of concluding such treaties are changing, and they are becoming more comprehensive. "To forge closer economic ties, deepen cooperation and expand development space in the Eurasian region, we should take an innovative approach and jointly build an "economic belt along the Silk Road". This will be a great undertaking benefitting the people of all countries along the route. To turn this into a reality, we may start with work in individual areas and link them up overtime to cover the whole region" [2], from Xi Jinping speech at the Nazarbayev University of Astana in 2013. There is a need to understand that investment disputes are unavoidable during the modern investment expansion era so the creation and development of investor-state arbitration becomes an urgent task, and requires government support from all the Belt and Road Initiative States.

The provisions of the Washington Convention of 1965 are successful examples of an international legal mechanism of a universal nature that effectively allows investment disputes to be resolved [3]. The heterogeneity of mechanisms allows a foreign investor to seek legal remedies, both under the auspices of the national legislation of his partner and based on bilateral and multilateral investment agreements. Investments made under the Belt and Road Initiative are quite different from normal investments made for executing infrastructural projects. China follows a model of state-controlled capitalism where government-owned enterprises play an important role in the economy. Most Chinese companies participating in BRI projects are Chinese state-owned enterprises which will often be acting under bilateral investment treaties signed between the People's Republic of China and the host government where the investment is being made. Many of China's early BITs stipulated that if an investor-State dispute could not be settled through negotiations, it should be submitted to the national courts of the host State. These BITs usually excluded the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) or stated that the parties would consent to ICSID arbitration after they had all become parties to the ICSID Convention [4]. However, things changed now, there are provisions of arbitration in BITs and that is why currently many issues in investment arbitration arose from the Belt and Road Initiative. Modern China international investment agreements contain provisions on the resolution of disputes regarding investments arising between the investor and the state accepting the investment in international arbitration. Host States in general suggest to the investors to send applications to local courts, but usually, investors submit applications to international arbitration. In many cases, states tend to voluntarily execute arbitral awards against them. Failure to comply with the decision of the arbitrators with a high probability may adversely affect the investment attractiveness of the state. Then the state risks its reputation, which, as a result, can lead to a decrease in investment, which is not preferable in the context of the Belt and Road Initiative. Today it is difficult to talk about the presence of a comprehensive and systematic study of legal issues of investor-state arbitration in the BRI context. Legal mechanisms regulating such activities are not sufficiently investigated and

their volume satisfies only a superficial acquaintance with this topic. Here I should mention "Blue Book Dispute Resolution Mechanism for the Belt and Road" published by the International Academy of the Belt and Road, which is a great work of collaboration of scientists. However, it should be noted that the lack of a significantly large amount of work in the field of legal issues of the investor-state arbitration in the BRI context in International, Chinese, and BRI states domestic laws is caused by the fact that everyday globalization brings new challenges to this issue. Moreover, every year the number of existing problems becomes wider. The issues of legal regulation, practical problems, a suitable model, and even the appropriateness of the application of investment arbitration under the Belt and Road Initiative stay relevant. In addition, the issues raised in the study are discussed all over the world and especially in the BRI States: it can be argued with confidence that no country has found a universal means to eliminate the shortcomings of investor-state arbitration. However, the development of ISA as a mechanism for resolving investment disputes was not just a fashionable trend but was due to historical prerequisites, the need, and readiness for change. It is important to point out here that, most of the challenges arise because of the different legal systems involved in the Belt and Road Initiative projects (See the map below*). There is growing concern over the existing investment disputes resolution mechanisms in the international investment agreements concluded by the Chinese government and in accordance with Chinese national legislation are not enough to resolve all disputes arise with the Belt and Road Initiative. It is critically important for China and all States involved in BRI projects to design dispute settlement mechanisms to facilitate investment flows and legal cooperation.

Thus, the increase of ISA cases in recent years, as well as difficulties connected with the complex nature of BITs in the framework of the Belt and Road Initiative, choice of applicable law and arbitral institution, questions of jurisdiction, and others issues determine the significance of the chosen topic. At present, the issue of researching and studying ISA, as well as the issues of enforcement and recognition of arbitral awards, is particularly acute. In addition, a relatively small amount of international legal studies in the field of investor-state arbitration as a dispute resolution mechanism under the BRI leads to an ambiguous understanding of the legal nature of investment arbitration, as well as the very reality of the existing investment arbitration. This gap in the Chinese legislation, BRI States domestic law, and international law makes it necessary to study the field of relations that arise from issues of investment arbitration in the context of BRI. Therefore, there is still no consensus among lawyers, civil society, and governments on the various key issues. Moreover, in addition to regulatory issues, the problems associated with the investment arbitration in the context of the Belt and Road Initiative, also contain an economical, financial, technical, social, and political context, as well as the difficulties of understanding the contents of this law and its implementation, as well as defining its scope and limitation. In addition, there is an expectation of an increase in the number of international arbitrations arising from the Belt and Road Initiative. Moreover, Chinese enterprises traditionally turn to arbitration, especially when it comes to international investment disputes. It remains to careful observation of what place of arbitration the parties will choose for the proceedings. China is now making every effort to promote its own arbitration centers.

Map of BRI regions and projects



For example, at the end of 2017, the China International Commission on Economic and Trade Arbitration (CIETAC) adopted its arbitration rules for international investment disputes [6], intended for use in disputes under the Initiative. Nonetheless, decisions of international investment arbitration against States can be quite difficult due to the national nature of the procedural law of different jurisdictions of states involved in the Belt and Road Initiative. In addition to the difficulties faced by foreign investors, the enforcement of investment arbitration awards is a serious problem for states that, in order to enforce a decision, they have to pay substantial amounts of compensation to investors. At the same time, even if the arbitral tribunals found violated a norm of an international investment treaty, which is formulated ambiguously or was completely differently interpreted before another investment arbitration, the state will be obliged to pay a multimillion-dollar loss. It should also be borne in mind that the host States are often developing countries wishing to attract foreign investment, and the amount of compensation can easily drain treasuries of a poor State. However, now there is a clear need for reforming this institution, as evidenced by the desire of developed BRI countries to abandon this procedure for considering investment disputes in half the production in national courts, as well as a proposal to create an international investment court.

REFERENCES

1. Investment Dispute Settlement Navigator on UNCTAD official website: <https://investmentpolicy.unctad.org/investment-dispute-settlement>
2. Speech by H.E. Xi Jinping, President of the People's Republic of China at Nazarbayev University, Astana, Kazakhstan on 7 September 2013 "Promote People-to-People Friendship and Create a Better Future" on the official website of Ministry of Foreign Affairs of the People's Republic of China: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1078088.shtml
3. Washington Convention <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview>
4. Chinese Mechanisms for Resolving Investor-State Disputes. Wang Guiguo, Jindal Journal of International Affairs / Vol. 1 p213
5. Map of BRI regions and projects https://www.researchgate.net/figure/Map-of-BRI-regions-and-projects_fig1_327159506
6. China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>
