

United Nations

Economic and Social Commission for Asia and the Pacific

Typical Dispute Preventive Provisions in International Investment Agreements

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2 Nov. 2017

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Why investment prevention needed?

- Why dispute prevention---(1) Proliferation of ISA disputes in the recent years (ICSID & UNCTAD); (2) Sharp increase of IIAs in recent decades, makes ISDS more probable (UNCTAD); (3) around one third of investment disputes are settled or discontinued, the majority are arbitrated (UNCTAD). [**Pics.1 & 2**]
- Why needed --- (1) financial burden to states and private parties; (2) administrative difficulty of states; (3) lengthy proceedings; (4) legitimacy crisis, esp. regulatory limit on host states.
- Dispute prevention is often a “neglected” area, while much attention has been devoted to ISA by states, investors, practitioners and academics. [**Pic. 3**]

The explosion of IIAs and ISDS

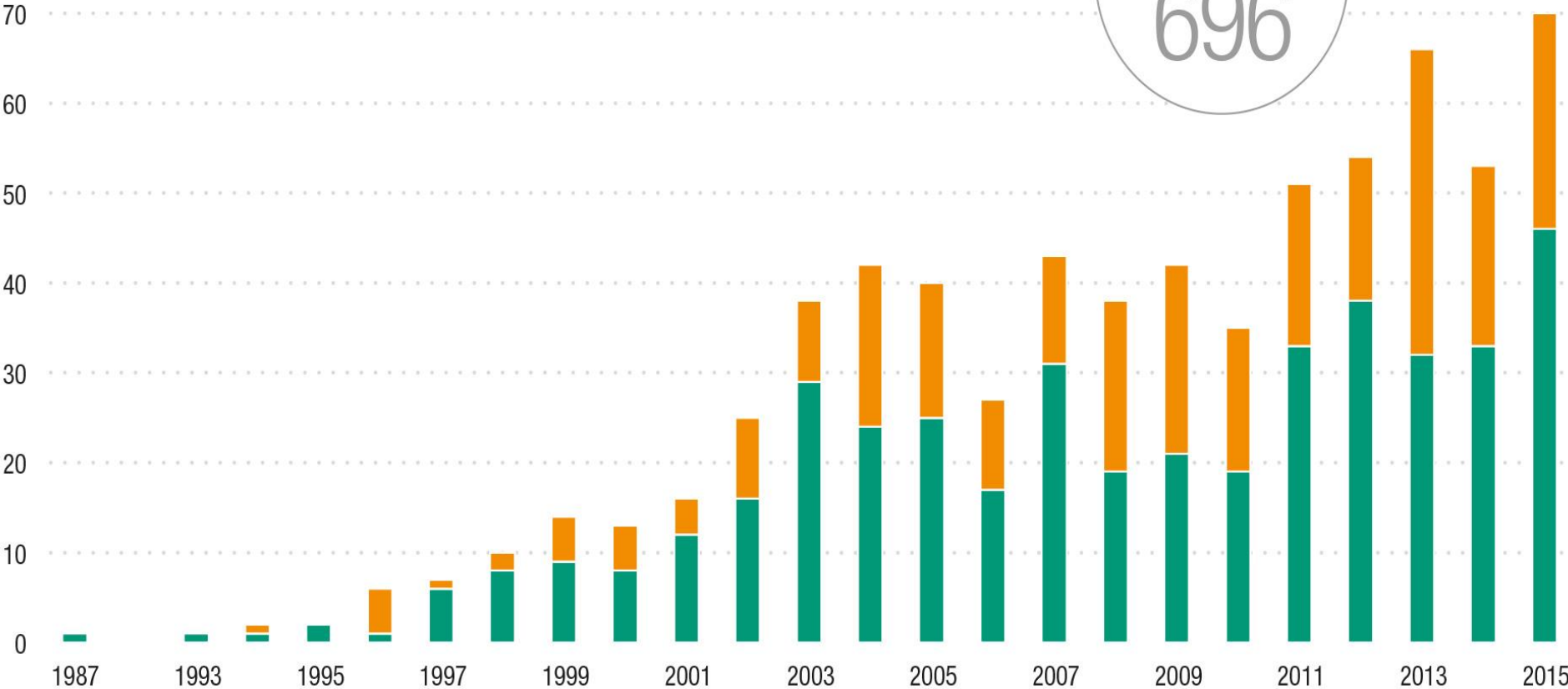


The explosion of ISA cases of ICSID and beyond

Annual number of cases

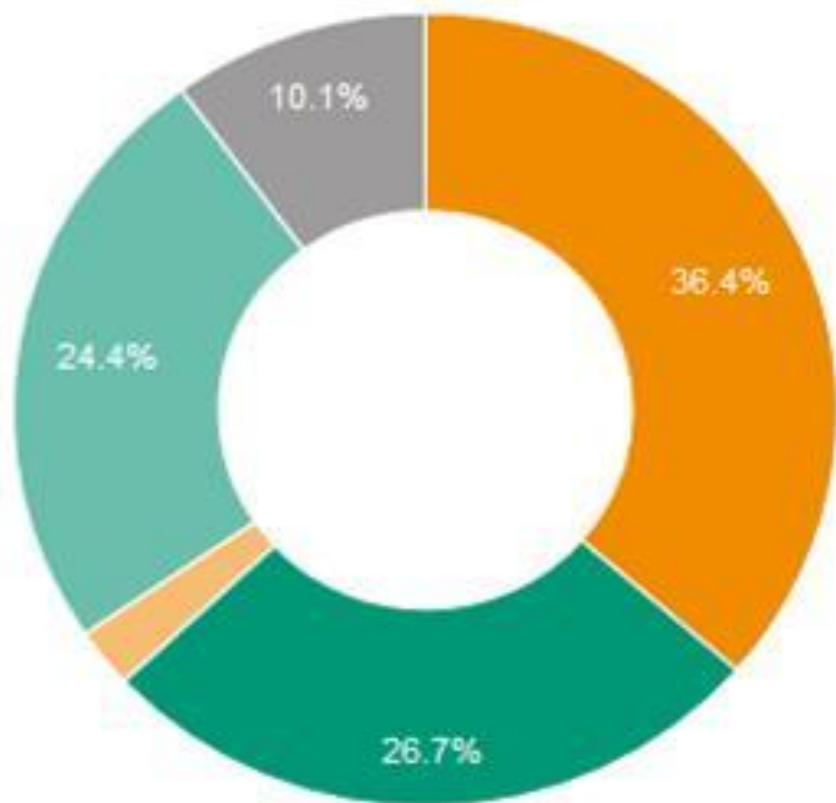
ICSID Non-ICSID

Cumulative number of known ISDS cases
696



ISDS cases settled or arbitrated

Concluded original arbitration proceedings



- Decided in favour of State
- Decided in favour of investor
- Decided in favour of neither party (liability found but no damages awarded)
- Settled
- Discontinued

Typical dispute prevention provisions in IIAs

- There is no uniform definition of the term “dispute prevention” in international investment law/IIAs or dispute settlement. Three possible understanding of DPP.
 - (1) To prevent a dispute between foreign investor and the host state from being submitted to international dispute settlement, i.e. ISA;
 - (2) To prevent a dispute from being submitted to any kind of formal confrontational dispute settlement mechanism, including ISA and court proceedings; and
 - (3) To prevent a dispute from developing to an IIA dispute, especially one that claims state’s violation of IIA standards.
- UNCTAD: *DPPs are meant to give the government advance notice of a problem and enough time and flexibility to address investor concerns, either unilaterally or in coordination with the investor. DPPs ought to be considered as a very promising approach to addressing the problem of increasing ISDS cases. Usually DPPs apply before a dispute becomes an IIA dispute.*

Dispute filtering provisions

- Restrictive consent provisions: states may limit their consent arbitration to a limited types of disputes, limiting the admissibility of disputes. Some provision are in the form of exception provisions: exclude certain types of issues by denying their arbitrability, e.g., TPP tobacco provision.
- Limited MFN application: exclude MFN to be applied to procedural issues.
- Restrictive jurisdictional coverage: limit the coverage of qualified investor, investment under the IIA, or limit the territorial application scope of the IIA. These provisions may potentially filter certain disputes to be submitted to arbitration. Such as denial of benefit provision, China-Russia BIT, etc.

Early alert provisions

- Some IIA and national laws require (contracting) states to establish inter-state early alert mechanism. The main purpose of this mechanism is to enhance the awareness among government authorities of a possibly emerging conflict with an investor.
- It is possible for IIAs to require foreign investors to give notice (of various forms) to the host state with regard to a potential dispute. States may take necessary measures to help address the investors' concern before a potential dispute develops to an IIA dispute. It is especially necessary for states because states may need a lot of coordination to address the investor's concern in a proper way that also conforms to their interests. Few existing IIAs contain such provisions.

Dispute dispersing provisions

- Negotiation/mediation provisions. N/M between foreign investors and the host states is a typical way to prevent a dispute to be submitted to ISA or national court proceedings.
- Cooling off period requirement. Foreign investors are required to fulfill certain procedural requirements before the dispute can be submitted to arbitration. Often not of jurisdictional nature.
- State intervention provisions. Some IIAs have financial or tax measures provisions. If an investors wants to submit a dispute relying on these provisions, the contracting states should decide if this is allowed (whether the measure is an expropriation, etc.).
- Non-binding pre-ISA third party procedures (such as fact-finding, expert procedures). E.g. “In the event of an investment dispute the claimant and the respondent shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third party procedures” (2004 U.S. Model BIT).

Local remedies provisions

- Local remedies provisions may play two different roles: as pre-ISA requirement or/and as an alternative to ISA. Local remedies may be broadly or narrowly understood. Broad understanding would typically include litigation, administrative and other types of dispute settlement procedures of the host state.
- In the former case, some IIAs require foreign investors to submit the dispute to local remedies before ISA. If the investor deems that the dispute still exist after the exhaustion of the said local remedies, it can submit the dispute to ISA.
- In the latter case, some IIAs offer local remedies as an alternative to ISA for investors. Investors may only select one of the recourses. In practice, such provision should be read in light of a waiver or fork-in-the-road clause of the IIAs, if exists.

Balancing between ISA and DPP

- The advantages of DPP are obvious. But it is possible that DPP, if too strictly applied, may discourage FDI, and be viewed as the “return” of the Calvo doctrine. States should be careful in designing DPPs in IIAs:
- (1) The actual effects of DPP are insufficiently clear: whether DPP will discourage foreign investors and investments? Whether DPP is truly helpful in solving potential disputes.
- (2) When requiring local remedies, states must carefully assess their level of the rule of law, to make DPP as a real “alternative”. Foreign investors will not like DPP if
- (3) Necessary domestic law and institution building, e.g. administrative review, local compliant mechanism etc., to facilitate investment activities and provide easy access to foreign investors to the relevant government organs of the host states.

The End, Thank You
Q&A

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