The Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?

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I. INTRODUCTION

Traditionally, investment disputes between foreign investors and host countries were resolved in the local courts of host countries since many developing countries insisted on the Calvo Doctrine. However, developed countries tried to protect their overseas investors by resolving investor-state investment disputes in the international arena through diplomatic protection or international arbitration. They insisted that investor-state dispute settlement provisions, such as international arbitration by the International Centre for Settlement of Investment Disputes (ICSID), be inserted into investment treaties, including bilateral investment treaties (BITS) and free trade agreements (FTAs) signed with developing countries. Since the 1980's, more and more developing countries have deviated from their traditional conservative position and have increasingly accepted highly protective investor-state dispute settlement mechanisms (ISDMS) in BITS or FTAs with both developed and developing countries.

The highest protective ISDMS is that of the North America Free Trade Agreement (NAFTA). In the last decade, some developing countries - such as Argentina and Mexico - were confronted by a number of investment lawsuits filed by foreign investors and thus realized the serious problems arising from highly protective ISDMS. Therefore, developing countries began restricting or withdrawing from the jurisdiction of ICSID. At the same time, the United States, the leading country of developed countries, after being challenged by several NAFTA investment cases, also changed its attitude toward NAFTA-style ISDMS. The US made several improvements to some of its 1994 Model BIT provisions concerning ISDMS and created a new indirect mechanism excluding ISDMS in the recently signed Australia-US Free Trade Agreement (AUSFTA). After a thorough review of these changes, the author concludes that both the improvements and the new mechanism echo the four “safety valves” once insisted on by many developing countries. The author opines that the new trends in both developed and developing
countries reflect the emerging consensus between them and thus recommends that ISDSMS not be covered in any future investment rules, either in the WTO or in UNCTAD in the 21st century.

II. NEW TREND IN DEVELOPING COUNTRIES TOWARDS INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS

The positions of developing countries regarding ISDSMS may be described in four stages. Before the 1960s, the traditional attitude was that investor-state disputes should be resolved by local remedies. From the 1960s through the 1980s, a conservative attitude insisted on four “safety valves” in ICSID arbitration. Almost full acceptance of ICSID jurisdiction and other arbitration occurred from the late 1980s to the early 21st century. The new trend in the early 21st century has reverted back to the traditional and conservative attitudes.

1. DEVELOPING COUNTRIES' TRADITIONAL ATTITUDES TOWARDS ISDSMS

In the 20th century, transnational capital gradually started to flow to developing countries, in addition to flowing among developed countries. The flow was a “one-way street”, for there was almost no investment from developing countries to developed countries. The investment issue was touched upon in the Treaty of Friendship, Commerce, and Navigation (FNC Treaty) between developed and developing countries, without mentioning the resolution of investor-state disputes. This was because investment issues were not a key issue in the treaty, and Latin American countries, which were the main body of developing countries at that time, insisted on the Calvo Doctrine.

After World War II, many newly independent developing countries exercised economic sovereignty to nationalize some foreign investments in order to further develop their national economy. As a result, tensions between foreign investors and host countries were created and gradually intensified. Under such circumstances, developed countries – as home countries – started to sign new types of treaties with developing countries so as to protect the interests of their overseas investors. The new types of treaties included the Investment Guarantee Agreement (IGA) by the United States with developing countries, and the Investment Protection Agreement (IPA) by Germany and other West European countries with developing countries. The focus of IGA is investment insurance and subrogation, while the focus of IPA is investment protection. Therefore, the IGA did not touch upon the settlement of investor-state disputes, while the IPA did.

The FNC Treaty, IPA and IGA are collectively called BIT, which from the very beginning was created as a treaty between developed and developing countries. Developed countries hoped to set the rights and obligations of developing countries

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