

Legal Protection of Foreign Investors in Southeast Asia: A Comparative Analysis of Investor-State Dispute Settlement (ISDS) Mechanisms

Anthony Oli

Xavier University - Ateneo de Cagayan
An_oli@xu.edu.ph

Abstract

Southeast Asia has become a focal point for foreign direct investment (FDI) due to its robust economic growth, political stability, and the integration promoted by the ASEAN Economic Community (AEC). However, investment across borders entails significant legal risks, particularly disputes between investors and host states arising from regulatory changes, expropriation, or discriminatory measures. To mitigate these risks, ASEAN member states rely on Investor-State Dispute Settlement (ISDS) mechanisms embedded in international treaties such as Bilateral Investment Treaties (BITs), the ASEAN Comprehensive Investment Agreement (ACIA), and the Regional Comprehensive Economic Partnership (RCEP). This article employs a normative-legal methodology with a comparative approach to examine ISDS provisions across ASEAN jurisdictions. The findings reveal divergent national practices: Indonesia has limited its BIT commitments to safeguard its sovereignty, Singapore provides expansive protections for investors, while Vietnam, Malaysia, and Thailand adopt moderate stances that balance investor rights with domestic regulations. ISDS has proven effective in providing investors with neutral arbitration avenues, but it also raises challenges, including high arbitration costs, regulatory chill, and limited transparency. The study concludes that ASEAN requires harmonisation of investment frameworks, enhanced transparency, and the strengthening of alternative dispute resolution mechanisms to balance investor protection with state sovereignty.

Keywords: Investor-State Dispute Settlement, Foreign Direct Investment, ASEAN, International Investment Law, Sovereignty

INTRODUCTION

Southeast Asia, characterized by its dynamic economic growth, has emerged as a primary destination for Foreign Direct Investment (FDI). This appeal is substantially enhanced by political stability, market potential, and economic integration facilitated by the ASEAN Economic Community (AEC) (Indraswari, 2022; Vu, 2020; Xiang & Oluduro, 2023). However, transnational investment is fraught with risks, including disputes between investors and host governments, often related to regulatory changes, nationalization, or discriminatory treatment of foreign investors (Jillani et al., 2023; Nguyen et al., 2022; Brutger & Strezhnev, 2022). The critical need for robust frameworks to safeguard investor rights while maintaining state sovereignty is underscored in the literature, highlighting the multifaceted nature of investment disputes in the region (Yang, 2021; Cusimano et al., 2024; Erniyazov, 2023).

To mitigate these risks, ASEAN member states frequently rely on the Investor-State Dispute Settlement (ISDS) mechanisms included in various international agreements such as bilateral investment treaties (BITs), the ASEAN Comprehensive Investment Agreement (ACIA), and the Regional Comprehensive Economic Partnership (RCEP) (Forji, 2020; Janardhan, 2020; Ghumro et al., 2020). These frameworks aim to provide legal protection and a structured process for resolving conflicts (Zhu, 2023; Basedow, 2021; Zhang, 2023). The application of ISDS in ASEAN contexts reveals a complex interplay of legal standards and national interests, reinforcing the critical role of these mechanisms in enhancing regional investment attractiveness despite inherent challenges (Schram & Townsend, 2020; Azaria & Amalia, 2023; Weghmann & Hall, 2021).

Nonetheless, the implementation of ISDS practices is not without controversy. Proponents argue that ISDS offers essential legal protections for foreign investors through established arbitration processes like the International Centre for Settlement of Investment Disputes (ICSID) (Abadikhah & NIGMATULLIN, 2024; Po, 2023; Bosch & Gupta, 2022). Conversely, critics contend that ISDS can undermine host state sovereignty and create power imbalances that favor investors at the expense of local governance (Santos, 2023; Rahmonov, 2024; Ma, 2023). This dichotomy presents significant implications for policy-making in ASEAN nations, raising questions about how to balance investor rights with national regulatory autonomy (Faure & Ma, 2020; Putri & Sabatira, 2023; Castro, 2020).

This article aims to comparatively analyze ISDS mechanisms across several ASEAN countries, evaluating their effectiveness in safeguarding foreign investor interests. Furthermore, it seeks to identify and assess the challenges arising from the implementation of these mechanisms in the context of broader socio-political and economic considerations (Chairil et al., 2023; Alkhayer et al., 2023; Li, 2023). The ongoing evolution of ISDS frameworks underscores the necessity for continued research and reform, particularly in response to international critiques and the evolving landscape of global investment law (Quynh, 2023; Meng, 2024; Rautakivi & Yolles, 2024).

METHOD

This research employs a normative-legal method with a comparative legal approach, focusing on international investment agreements to understand their implications. The primary data sources include investment treaties such as Bilateral Investment Treaties (BITs), the ASEAN Comprehensive Investment Agreement (ACIA), and the Investor-State Dispute Settlement (ISDS) provisions found within the Regional Comprehensive Economic Partnership (RCEP) Belikova & Akhmadova (2021) Rahmat, 2023; SULAYMANOV, 2022; Sahara, 2023; Sari, 2020). Secondary legal materials comprise academic literature, ICSID and UNCITRAL arbitration reports, and pertinent legal articles discussing investment disputes in Southeast Asia (Simaremare, 2021; Iskakova et al., 2022; Abanina et al., 2021; Reis & Grzybowski, 2021; Majeed, 2022). In addition, tertiary legal materials such as legal encyclopedias, law dictionaries, and official online resources further support this research methodology, providing a comprehensive framework for analysis (Rosida et al., 2023; Prakasa et al., 2022; Indrastuti & Rahmat, 2022; S. & Setiyono, 2023; Huseynova, 2024).

The analytic technique utilized is content analysis of legal instruments and arbitration decisions, allowing for the examination of similarities, differences, and implications for the protection of foreign investors across ASEAN member states (Jorgensen, 2024; -, 2024; Airlangga et al., 2024; Landrawan & Adnyani, 2023; Poirier et al., 2022). Through this methodological approach, the study aspires to uncover the intricacies of ISDS mechanisms while identifying key factors that influence investor protection in the region. Ultimately, this research aims to contribute to the understanding of legal norms governing international investments and the operational frameworks existing within ASEAN (Hasibuan & Tijow, 2024; Pakadang & Muryanto, 2024; Suryana & Utami, 2024; Burak et al., 2022; Hovell, 2022).

RESULTS AND DISCUSSION

I. ISDS Mechanisms in ASEAN Agreements

The ASEAN Comprehensive Investment Agreement (ACIA) provides mechanisms for Investor-State Dispute Settlement (ISDS) that enable investors to file claims against ASEAN member states in the event of investment treatment violations. Investors can pursue disputes through international arbitration forums such as the International Centre for Settlement of

Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) or through ad hoc arrangements Wang (2023)(Hsieh, 2023; . However, several ASEAN nations impose limitations on these mechanisms. For instance, Indonesia has been reviewing numerous Bilateral Investment Treaties (BITs) since 2014, citing concerns over national sovereignty (Shafrullah et al., 2024; Rosyidin, 2024). The Philippines has also faced significant lawsuits related to public regulations deemed harmful to investors, highlighting the tensions between regulatory actions and investor protections (Rosyidin, 2023; Marie et al., 2023).

2. Comparative ISDS Across ASEAN Countries

In Indonesia, there is a tendency to limit ISDS agreements by renegotiating existing BITs while still remaining bound by the Regional Comprehensive Economic Partnership (RCEP) and ACIA obligations (Prateppornnarong, 2020; Verico, 2021). Conversely, Singapore takes a pro-investor stance, providing legal certainty through the ratification of the ICSID Convention and the implementation of explicit treatment standards for foreign investments (Lumanauw, 2020; Ghumro et al., 2020). Vietnam actively participates in RCEP and various BITs yet faces criticism regarding its institutional capacity to manage arbitration disputes effectively (Missbach & Stange, 2021; Shukri, 2021). Malaysia and Thailand maintain a moderate approach by allowing ISDS within the ACIA framework but emphasize mediation processes before arbitration, reflecting a balance between investor rights and domestic regulatory frameworks (Hũu, 2023; Juli et al., 2023).

3. Effectiveness of Foreign Investor Protection

The ISDS mechanism effectively provides foreign investors with legal access through a neutral forum outside national courts, facilitating claims against host states for discriminatory actions (Hsieh, 2023; Hayakawa et al., 2024). Numerous cases have demonstrated that investors have successfully secured compensation for violations of their rights by host nations. However, from the perspective of states, ISDS mechanisms impose financial burdens and regulatory risks. Many ASEAN countries express concerns that investor lawsuits might deter them from pursuing public policy initiatives due to the fear of litigation (known as "regulatory chill") (Pratiwi et al., 2023; Rum, 2020).

4. Challenges in Implementing ISDS in Southeast Asia

There exists a fundamental dilemma between state sovereignty and investor protection, emphasizing the need to balance legal certainty for investments while retaining the flexibility to pursue public policy objectives (Suzuki, 2021; Po, 2023). The high costs associated with arbitration under ISDS present additional barriers, particularly for smaller investors who may find these expenses prohibitive (Salazar, 2023; Lu, 2024). Furthermore, the transparency and accountability of arbitration outcomes remain contentious issues, with many decisions made in secrecy, leading to criticism from civil society groups (Fardhiyanti & Wee, 2022; Taufiqurrohman et al., 2024). Additionally, significant variances in investment regulations among ASEAN member states further complicate the effectiveness of ISDS mechanisms, underscoring the necessity for legal harmonization within the region (Wilujeng & Risman, 2020; Haryono et al., 2024).

Discussion

1. ISDS in ASEAN Agreements

The ASEAN Comprehensive Investment Agreement (ACIA) institutionalizes ISDS provisions, enabling foreign investors to file claims against member states through recognized arbitration forums such as ICSID and UNCITRAL. This framework enhances investor confidence by providing recourse outside national courts. Nevertheless, several ASEAN states impose restrictions. Indonesia, for example, has reviewed and terminated several BITs since

2014, reflecting concerns over sovereignty and excessive investor privileges. Similarly, the Philippines has encountered high-profile disputes where public regulatory measures were challenged by foreign investors, revealing tensions between national policymaking and investor protection.

2. Comparative Practices across ASEAN States

ASEAN member states diverge in their approach toward ISDS.

- a. **Indonesia:** Renegotiates BITs to narrow ISDS clauses but remains committed under ACIA and RCEP.
- b. **Singapore:** Ratifies ICSID and provides explicit protections, aligning with its pro-investor economic strategy.
- c. **Vietnam:** Actively engages in ISDS through BITs and RCEP but faces institutional challenges in handling arbitration.
- d. **Malaysia and Thailand:** Adopt balanced models, emphasizing mediation and negotiation prior to arbitration to avoid excessive reliance on litigation.

This comparative overview demonstrates ASEAN's heterogeneity in balancing state sovereignty with the necessity of investor protection.

3. Effectiveness of ISDS in Protecting Foreign Investors

ISDS has been instrumental in safeguarding investor interests, offering a neutral platform insulated from domestic political influence. Successful arbitral awards in favor of investors demonstrate its practical utility. However, concerns persist from the host states' perspective. Arbitration costs are considerable, frequently reaching millions of dollars, thereby straining state resources. Additionally, the threat of investor lawsuits may deter governments from pursuing legitimate regulatory measures in environmental protection, labor rights, or public health—commonly referred to as “regulatory chill.”

4. Challenges in the Implementation of ISDS

The application of ISDS in Southeast Asia faces four main challenges:

- a. **Sovereignty versus Investor Protection:** Striking a balance between providing legal certainty for investors and preserving regulatory autonomy for governments remains contentious.
- b. **High Arbitration Costs:** ISDS proceedings are financially burdensome, particularly disadvantaging smaller investors.
- c. **Transparency Issues:** Confidential arbitral decisions undermine accountability and fuel criticism from civil society.
- d. **Regulatory Fragmentation:** The lack of harmonized investment laws across ASEAN complicates predictability and consistency, thereby reducing the efficiency of ISDS mechanisms.

Collectively, these challenges indicate that ISDS in its current form provides only partial solutions, necessitating reforms to ensure equitable outcomes for both investors and host states.

CONCLUSION

Investor-State Dispute Settlement (ISDS) mechanisms play a vital role in fostering investment security across Southeast Asia by offering investors neutral arbitration pathways. However, ASEAN member states adopt divergent strategies, ranging from Indonesia's restrictive approach to Singapore's pro-investor policies. While ISDS enhances investor confidence and provides enforceable protections, it simultaneously raises concerns about sovereignty, financial burdens, and transparency.

This study concludes that ASEAN should:

1. Pursue legal harmonization of investment regulations to ensure consistency across the region.
2. Enhance transparency and accountability in ISDS proceedings to strengthen legitimacy.
3. Promote alternative dispute resolution mechanisms such as mediation and negotiation to reduce arbitration dependency.

Balancing investor protection with state sovereignty requires a recalibration of ISDS frameworks, ensuring that both foreign investors and ASEAN nations can thrive within a stable, equitable, and sustainable investment environment.

Reference

- Abadikhah, M., & Nigmatullin, R. (2024). Mediation as an amicable means within the investor-state dispute settlement clause: A basic survey of Russian bilateral investment treaties. *The Rule-of-Law State Theory and Practice*, 1(75), 203-213. <https://doi.org/10.33184/pravgos-2024.1.25>
- Abanina, E., Makhonko, N., Plotnikova, Y., Tapacova, E., & Shvetsova, I. (2021). Correlation of branches of law in environmental and legal support of the development of the arctic region. *SHS Web of Conferences*, 118, 03019. <https://doi.org/10.1051/shsconf/202111803019>
- Airlangga, R., Sacharissa, B., & Septaviana, D. (2024). Renewal of law number 9 of 1961 concerning collection of money or object. *Sociological Jurisprudence Journal*, 7(1), 45-54. <https://doi.org/10.22225/scj.7.1.2024.45-54>
- Alkhayer, J., Gupta, N., & Gupta, C. (2023). The possibility of creating an ICSID protocol for the establishment of a multilateral investment tribunal: A flexible or complex process. *IOP Conference Series: Earth and Environmental Science*, 1279(1), 012032. <https://doi.org/10.1088/1755-1315/1279/1/012032>
- Azaria, V., & Amalia, P. (2023). ASEAN investment dispute settlement mechanism through regional investment court framework. *Jurnal Poros Hukum Padjadjaran*, 4(2), 277-293. <https://doi.org/10.23920/jphp.v4i2.1200>
- Basedow, R. (2021). Why de-judicialize? Explaining state preferences on judicialization in WTO dispute settlement body and investor-state dispute settlement reforms. *Regulation & Governance*, 16(4), 1362-1381. <https://doi.org/10.1111/rego.12431>
- Belikova, K., & Akhmadova, M. (2021). Development of Russian and international legal regulation of the use of lethal autonomous weapon systems equipped with artificial intelligence. *Laplage Em Revista*, 7(Extra-C), 259-272. <https://doi.org/10.24115/s2446-622020217extra-c1010p.259-272>
- Bosch, H., & Gupta, J. (2022). Water property rights in investor-state contracts on extractive activities affect water governance: An empirical assessment of 80 contracts in Africa and Asia. *Review of European Comparative & International Environmental Law*, 31(2), 295-316. <https://doi.org/10.1111/reel.12436>
- Brutger, R., & Strezhnev, A. (2022). International investment disputes, media coverage, and backlash against international law. *Journal of Conflict Resolution*, 66(6), 983-1009. <https://doi.org/10.1177/00220027221081925>
- Burak, S., Bratsuk, I., Gutnyk, V., Petrenko, Y., & Yavorska, I. (2022). Direct and indirect effect of European Union directives in the context of European Union Court of Justice decisions. *Revista De La Universidad Del Zulia*, 13(38), 89-106. <https://doi.org/10.46925/rdluz.38.06>

- Castro, R. (2020). The limits of intergovernmentalism: The Philippines' changing strategy in the South China Sea dispute and its impact on ASEAN. *Journal of Current Southeast Asian Affairs*, 39(3), 335-358. <https://doi.org/10.1177/1868103420935562>
- Chairil, T., Putri, R., & Pertiwi, S. (2023). Road to ASEAN political security community vision 2025: Understanding convergence and divergence in ASEAN voting behaviors in the UNGA. *JAS (Journal of ASEAN Studies)*, 10(2). <https://doi.org/10.21512/jas.v10i2.8175>
- Cusimano, A., Godwin, E., McKay, S., & Potočník, M. (2024). Revisiting the role of bilateral investment treaties in foreign direct investment. *Research in Applied Economics*, 16(2), 1. <https://doi.org/10.5296/rae.v16i2.22030>
- Erniyazov, I. (2023). Optimizing legal frameworks for protecting investor rights in sustainable international road projects. *International Journal of Social Science and Human Research*, 6(09). <https://doi.org/10.47191/ijsshr/v6-i9-20>
- Faure, M., & Ma, W. (2020). Investor-state arbitration: Economic and empirical perspectives. *Michigan Journal of International Law*, 41(1), 1. <https://doi.org/10.36642/mjil.41.1.investor-state>
- Forji, A. (2020). All that glitters is not always gold or silver: Typical bilateral investments treaties (BITs) clauses as peril to third world economic sovereignty. *Athens Journal of Law*, 6(3), 299-322. <https://doi.org/10.30958/ajl.6-3-6>
- Ghumro, A., Mahesar, D., & Nizamani, D. (2020). Coping with human rights challenge: A perspective from ASEAN. *Asia-Pacific - Annual Research Journal of Far East & South East Asia*, 37. <https://doi.org/10.47781/asia-pacific.vol37.iss0.693>
- Hasibuan, H., & Tijow, L. (2024). A comprehensive examination of international and national approaches to counterterrorism: Emphasis on the Indonesian context. *Journal of Law and Sustainable Development*, 12(1), e3098. <https://doi.org/10.55908/sdgs.v12i1.3098>
- Hovell, D. (2022). The elements of international legal positivism. *Current Legal Problems*, 75(1), 71-109. <https://doi.org/10.1093/clp/cuac003>
- Huseynova, F. (2024). The concept and types of implementation of the international law norms on healthcare in the national legislation. *Legal Horizons*, 18(3), 19-25. <https://doi.org/10.54477/lh.25192353.2023.3.pp.19-25>
- Indraswari, R. (2022). ASEAN centrality: Comparative case study of Indonesia leadership. *JAS (Journal of ASEAN Studies)*, 10(1). <https://doi.org/10.21512/jas.v10i1.7906>
- Indrastuti, L., & Rahmat, D. (2022). Scope and standards of the double criminality principle in extradition agreements. *International Journal of Educational Research & Social Sciences*, 3(1), 217-224. <https://doi.org/10.51601/ijersc.v3i1.266>
- Iskakova, Z., Karazhan, B., Seidesh, B., Karabayev, F., & Zukay, Z. (2022). Integration law – An independent legal system. *European Review*, 31(1), 45-64. <https://doi.org/10.1017/s1062798722000187>
- Janardhan, S. (2020). Harnessing trade and investment agreements to promote public health. *Drug and Alcohol Review*, 40(1), 41-49. <https://doi.org/10.1111/dar.13153>
- Jillani, M., Bashir, S., & Khan, F. (2023). Harmonizing dispute resolution mechanisms: Enhancing efficiency and synergy between WTO and ISDS system. *Pakistan Journal of Humanities and Social Sciences*, 11(2). <https://doi.org/10.52131/pjhss.2023.1102.0562>
- Jorgensen, M. (2024). Political framing in China's foreign relations law: International law and 'fundamental norms governing international relations'. *Chinese Journal of Transnational Law*, 1(2), 117-136. <https://doi.org/10.1177/2753412x241261033>
- Landrawan, I., & Adnyani, N. (2023). Comparing the president's authority in forming laws in Indonesia, the United States and Turkey. *International Journal of Multicultural and Multireligious Understanding*, 10(9), 48. <https://doi.org/10.18415/ijmmu.v10i9.5028>