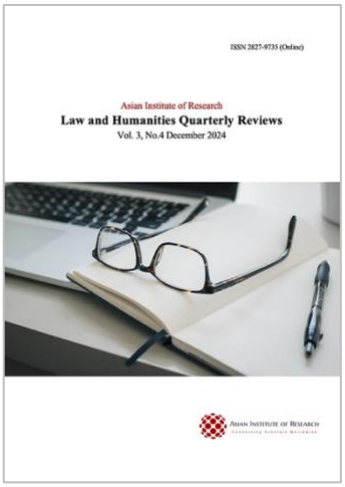

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Settling Investor-State Disputes in the GCC: A Critical Analysis of the Challenges under International Investment Law

Abdulelah Alsahli[1]

[1] Collage of Sharia and Law, University of Jeddah

Correspondence: Collage of Sharia and Law, University of Jeddah, PO Box: 34, Dahaban, 21959, Jeddah, Saudi Arabia, E-mail: aaalshle@uj.edu.sa

Abstract
The study critically analyses the challenges and obstacles encountered in resolving investor-state disputes within the Gulf Cooperation Council (GCC) states under the framework of international investment law. The number of established bilateral investment treaties involving GCC states has increased over the past decade to promote foreign direct investment. Most treaties include arbitration provisions as a method of dispute resolution, often governed by international institutions such as the International Centre for Settlement of Investment Disputes (ICSID). However, the difficulty lies in balancing state sovereignty with investor protection in accordance with international investment law. The analysis reveals several anticipated challenges faced by host states due to the growing number of bilateral treaties, particularly as foreign investors raise claims that challenge the host state's regulatory rights. GCC states must adopt measures that limit the risks associated with the Investor-State Dispute Settlement (ISDS) mechanism. The study outlines a series of recommendations to address these challenges while also protecting foreign investors.

Keywords: Investor State Dispute Settlement, ISDS, arbitration, GCC, ICSID

1. Introduction

Trade agreements between countries considered an effective mechanism to promote international trade and to reduce barriers between countries. Under the merits of globalization, developed and developing countries utilize such trade agreements in the form of bilateral and multilateral treaties to encourage and promote investments from foreign parties. The aim of International Investment Law is to govern matters related to Foreign direct investment (FDI) and to settle disputes that arise between foreign investors and host states (Dolzer & Schreuer, 2012). As a result, methods have been set forth to protect investors rights and encourage FDIs in host states. Such methods include the development of Investor-State Dispute Settlement (ISDS) mechanisms (Jennings, 2016).

Investor-States disputes are mostly covered by international investment conventions, treaties, and agreements, either between host states or a host state and investors. Typically, a clause is included that refers the parties to the agreed method of dispute resolution. Most Investor-State Disputes are governed under international investment law and referred to the Centre for the Settlement of Investment Disputes (ICSID) (Sornarajah, 2010).

The ICSID and other similar institutions are responsible for the settlement of investor-state disputes under its adopted rules upon the agreements of the parties. However, under the covenants of international investment law and the practices of the ICSID number of critical challenges hinder the procedures and settlement of such disputes.

The purpose of the research is to analyse the recent critical challenge associated with investor-state disputes, based on the legal framework and practical case laws, with particular focus on the GCC states. These challenges are associated directly with the host state sovereignty and the protection of investor rights, which are considered as fundamental pillars under the rules of international investment law. The article aims to discuss the legal intricacies, procedural issues and complexities related to the settlement of investor-state disputes. Furthermore, reform measurements will be recommended to improve the current legal mechanisms and promote the effective settlements of these disputes.

2. Investor-State disputes resolution mechanisms

Methods of dispute resolution vary and have developed in recent years to accommodate the need for a coherent procedure that is fair and equitable for the disputed parties. The increasing rate of foreign direct investment internationally embraced the necessity for an internationally acknowledge and recognized alternative dispute resolution mechanisms. National courts are perceived to be complex in certain jurisdictions whilst other jurisdictions require further legislative development to resolve disputes involving foreign parties (McLaughlin, 1979).

With particular focus on investor-state disputes, the traditional path of state litigation is considered less desired by foreign investors in case an investor-state dispute arises (Papanastasiou, 2015). As a result, such disputes became essentially governed by international investment law and preferably resolved by alternative dispute resolution mechanisms. Such mechanisms include the use of arbitration, mediation, conciliation, or negotiation (Dotzauer, 2023). Nonetheless, under the scope of cross-border trade agreements and for the settlement of foreign investment disputes that arise between the state and foreign parties' international arbitration is positioned as the primary preferred dispute resolution mechanism (Papanastasiou, 2015). According to a study conducted by Daphna Kapeliuk which questioned the effectiveness of investment arbitration it was found that "*investment arbitrators usually do what they are supposed to do-issue an unbiased decision based on the evidence in each case*" (Blythe, 2013). The use of international arbitration in state-investor disputes assists in limiting biased decisions issued by national courts as well as providing confidence for foreign investors who prefer the use of arbitration as the main dispute resolution mechanism. Moreover, states that agree to resolve disputes with foreign investors via international arbitration have witnessed an increase in foreign direct investment. The use of arbitration in international investment is considered an effective tool by states to attract foreign investors (Myburgh & Paniagua, 2016).

The ISDS system provides foreign investors with the right to bring claims against a state before an international tribunal that is privately composed of contracted arbitrators (Dotzauer, 2023). These rights are granted and standardized within provisions of bilateral investment treaties between governments to encourage cross-border foreign investment. The International Centre for Settlement of Investment Disputes (ICSID) was created in 1965 and validated by the 165 signatory states to the ICSID convention. Article 25 of the convention stipulates that *"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally...*". neutrality in overseeing the dispute and imperiality of decision making are fundamental pillars of the ICSID that aims to promote fair and equitable treatment for foreign investors and eliminate concerns related to home-state bias. This is reflected under article 14 of the convention in relation to the selection of the arbitral tribunal which states that *"(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the*

case of persons on the Panel of Arbitrators…". The Article is indicative of the parties' rights for a fair and equitable treatment under the supervision and protection of the ICSID. Furthermore, the issued awards are considered binding and enforceable within the signatory states providing further significance to the ICSID decisions while protecting investors' rights to seek enforcement on the assets held by the host state.

Cases decided by the ICSID are steadily increasing on an annual basis. The surge of cases is related to effective use of international bilateral and multilateral treaties that are under the scope of international investment agreements and subsequently governed by international investment law. As a result, most disputes arising between foreign investors and states that are submitted to arbitration fall under the jurisdiction of the ICSID, as well as other arbitration institutions.

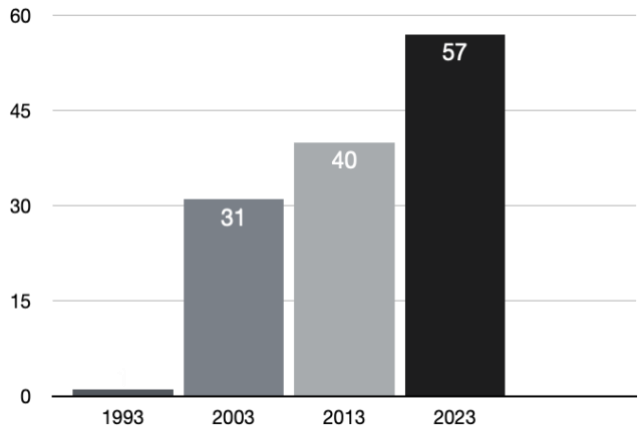

Chart 1: ICSID registered cases by calendar year

The chart above indicates the stable increase within the number of cases registered by the ICSID during the past three decades. in 1993 only one case was registered and governed by the ICSID whilst the number has increased annually reaching to 57 registered cases in 2023 only. It could be said that factors associated with such an increase in registered cases are due to the increasing numbers of foreign direct investment within host states and the ratification international investment agreements by host states to promote such investments. Furthermore, the ICSID has established its effectiveness in resolving disputes between investors and states during the past three decades manifesting the centre as a primary institution to resolve disputes referred to arbitration.

In light of globalization and the evolving necessity to promote foreign investment for the purpose of development all the GCC states have joined and signed the ICSID convention. Nonetheless, the significance of the ICSID convention and its hub as an international arbitration institution became effective towards the GCC states at the beginning of the 21st century. In particular, the past five years have indicated surge in the number of cases related to GCC states either as a home state or a respondent state.

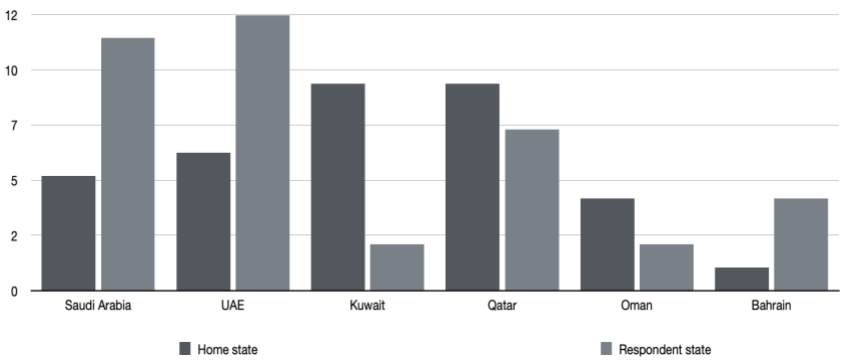

Chart 2: Registered cases in the ICSID

The chart above indicates the number of registered cases in the ICSID which involves member states of the GCC. Currently, Saudi Arabia has recorded 5 cases as home state, whilst 11 cases recorded as a respondent state. The UAE has recorded the highest number of registered cases combined whilst Bahrain recorded the lowest number of registered cases by the ICSID. Nonetheless, most of the recorded cases within the GCC states have been registered during the past decade. Promoting foreign investment within the GCC countries has been constituted as a priority for prosperity and economic development (International Monetary Fund, 2018). As a result, number of international investment agreements have been established between GCC countries and other states to encourage foreign direct investment. For instance, Saudi Arabia has signed more than 150 international investment agreements with other states during the past five years. The increasing number of such agreements is bound to raise the number of foreign investments between the states which subsequently increases the possibility of disputes arising that are governed by the ICSID. Similarly, other GCC member states have established investment relations with other states either in the form of bilateral or multilateral trade agreements. In general, encouraging foreign direct investment within the GCC states is important whilst foreign parties will be attracted to investing in the GCC states considering that neutrality and impartiality are granted by the ICSID in case a dispute resolution requirement (Cleis, 2017).

The advantages of ISDS governed by the ICSID convention for foreign investors are not limited to the aforementioned reasons. There are number of benefits and special features rendering ISDS mechanism as advantageous under the ICSID. Disputes are resolved by a specialized institution with experience in resolving international investment disputes. The awards reached by the ICSID are considered internationally recognized and enforceable within the signatory states. The mechanism ultimately aims at providing a fair and equitable treatment for the disputed parties. As for host states, including the GCC states, becoming a signatory to the ICSID indicates their commitment to the application of international law as well as promote alternative dispute resolution mechanisms that are accepted internationally and considered essential for foreign investors.

3. Challenges and implication of ISDS on the GCC states

The GCC states are unified in many aspects, such as economically, politically, and culturally, rendering similarities within the faced challenges and implications of ISDS to a great extent. There are number of critical challenges associated with ISDS as a mechanism that affects the GCC states, particularly through the use of international arbitration under the governance of the ICSID. The challenges to be addressed in this section are imperative to the legitimacy of international institutional arbitration between states and investors toward achieving its core benefits.

3.1 Regulatory limitation

The balance between investor protection and state sovereignty is a significant concern in the application of ISDS. Mechanisms that seek to enhance investor protection under international investment law may impose regulatory limitations on the host state (Taniguchi & Ishikawa, 2016). Such an approach can place states in a compromising position as they seek to attract foreign investors. As a result, participation in ISDS under international investment agreements may limit a state's sovereignty (Taniguchi & Ishikawa, 2016). As a mechanism, ISDS grants investors the right to challenge national regulations. Therefore, hindering national legislative developments to be enacted due to conflict with existent international agreements that are beneficial for the investors. Nonetheless, states inherently have the right to regulate and enact legislation and policy measures for the benefit of the public. This falls within the sovereignty of the states and recognized under Article 2(1) and Article 2(7) the UN Charter . Limiting the state's ability to regulate can lead to possible conflict between the state and investors that are reliant on international investment agreements.

ISDS restricts states of their right to regulate by providing investors with the ability to challenge the states actions that contradict with international commitments (Tienhaara, 2011). Further, the mechanism may lead to the state's “regulatory chill”, thus abstaining from enacting regulations due to its conflict or the threat of arbitration. In such circumstances, ISDS impacts the sovereignty of the contracting states. Number of case laws have indicated such effects. The *Ethyl Corporation V Canada (1997)* case demonstrates how an anticipated legal

challenge by foreign investors can affect regulatory decisions by the state. Importantly, the case outlined the conflict between public interest regulations and the investor protection in accordance with international trade agreements. Furthermore, such hesitance to regulate by the states may affect specific sectors such as environmental protection. A specific example of this is the experience faced by Costa Rica which highlighted the risks associated with ISDS. The government in Costa Rica has deemed environmental protection a priority and declared a moratorium on oil exploration (Shekhar, 2016). This decision has impacted foreign investors leading Harken energy to threat the government with legal actions. Harken Energy raised a claim before the ICSID for damages and loss of profit amounting to more than USD 50 million. However, the claim was withdrawn after the government presented its willingness to settle the case outside of the ICSID (Shekhar, 2016).

The case demonstrators the Costa Rician government intention to settle the dispute via negotiation rather than international arbitration as a less costly dispute resolution method. Subsequently, the case declares the risks of tension between environmental protection and foreign investments that are based on international investment agreements. Therefore, leading to regulatory chill that promoted a cautious attitude by the Costa Rican government in implementing and enforcing stricter laws related to environment protections to avoid lawsuits by the investors.

3.2 Balancing national interest with investor protection

Investment disputes concerning public utilities or natural resources are of significant concern and importance in the GCC. In particular, the oil and gas sector is a critical industry that impacts the economies of all GCC states. Therefore, it is essential to protect sectors that are considered imperative to the states and safeguard their public interests and policies. Regulatory limitations and 'regulatory chills' resulting from international arbitral awards can be effective in certain situations. However, GCC states will not enforce awards that contradict their public policies and national interests. As a result, it is important to strike a balance between national interests and investor protection. This is especially significant in the context of ICSID arbitration and represents a complex challenge faced by many states. Many international investment agreements, particularly bilateral investment treaties, contain provisions aimed at protecting foreign investors.

Number of international treaties that the GCC states are a party to includes provisions that protect fundamental aspects of international investment law, such as fair and equitable treatment. Article 4 of the UAE-Mexico investment treaty provides that "*Each contracting party shall accord to investment made by investors of the other contracting party treatment that is fair and equitable and not less favourable then that it accords to its own investors of investors of third countries in similar situations".* The article essentially ensures that the treatment of foreign investors fair and equitable rather than discriminatory and bias. Furthermore, articles in international investment agreements may include a clause to protect foreign investors against expropriation. This includes providing compensations if for instance the state takes the investor's property or considers the foreign investment for public use. Thus, a provision against expropriation becomes essential for foreign investors where the states provide adequate, prompt, and effective compensation in case such actions occurred. An example of protection against expropriation within a GCC state is found within the Kuwait-India bilateral investment treaty. Article 6 stipulates that *"investments of investors of either contacting state shall not be nationalized, or expropriation, except for a public purpose related to the internal needs of the contracting state, on a non-discriminatory basis and against compensation"*. The Article provides an expressed term for the protection of investors against expropriation unless specific conditions occurred. This specific condition limits expropriation to public purpose for a non-discriminatory reason with compensation from the state.

3.3 Scope of treatment

Treatment of foreign investors by states is a concern under international investment law that requires protection. Differential treatment that is not in accordance with international investment agreements or subject's foreign investor to discrimination are causes for disputes between investors and states. Bilateral agreements between states may include a clause that indicates the level of treatment expected towards investors from each state. For instance, a provision may include a Most Favoured Nation treatment which provides specific investors with

favourable treatment in comparison to other investors that are not signatory to the investment agreement between the parties. An example of such clauses within the GCC states can be found within Article 3 of the Bahrain-UK bilateral agreement. The article states that *"Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of investors of any third State."* The clause protects British investors in Bahrain from being treated less favourably in comparison to non-signatory state parties to the agreement. As of yet, there are no published cases related to the practices of Most Favoured Nation Treatment clause that involves. a GCC state. However, the case of *Siemens A.G v Argentina (2007)* demonstrates the outcome once a Most Favoured Nation treatment clause is successfully invoked by the investor. The tribunal ruled in favour of the investor to settle the dispute via arbitration rather than domestic court litigation as stipulated in the Argentina-Germany Bilateral treaty by borrowing a more favourable dispute settlement provision from the Argentina-Chile bilateral treaty.

The scope of treatment between states that are governed under international investment law can extend to national treatment. A clause or national treatment indicates that foreign investor will be treated similarly to domestic investors with no less favourability to their operations and investment in the host state. An example of such clause is indicated under Article 3 of the Qatar-Turkey Bilateral treaty. The article stipulates that "*Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favourable than that accorded to its own investors in like circumstances*". Therefore, Turkish investors in Qatar are required to be treated alike to and equalled with domestic investors. Such a clause aims to prevent discriminatory treatment of foreign investors by the host state. Although no ISDS cases recorded in relation to provisions determining the scope of treatment that included a GCC state its principles considered critical and essential within investment treaties with other states. Disputes may include discriminatory treatment raised by foreign investors in major sectors, such as energy, construction, and infrastructure.

3.4 Security and transfer of funds

Protection of foreign investors under the covenant of international investment agreements is not limited to fair and equitable treatment. States may agree on provisions that provide full protection to foreign investors. This is not limited to physical protection but also in terms of legal protection with ease of access to the justice system. For example, Article 2 of the Oman-US bilateral treaty obliges both parties to provide the utmost protection and security to foreign investors and that appropriate measures be conducted to protect their assets. Furthermore, provisions that seek to protect investors' funds are typically included within bilateral investment treaties. It aims at protecting and ensuring foreign investors' right to transfer funds concerned with their investment in a free manner that is not subjected to delays. such agreement is evident within the Saudi Arabia-Japan bilateral treaty. Article 6 of the treaty states that "*Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments related to their investments, including but not limited to: (a) capital, (b) profits, (c) dividends, and (d) proceeds from the sale of an investment, without delay and in a freely convertible currency*". As a result, Japanese investors in Saudi Arabia may freely repatriate their profits and other financial flows without facing concerns related to capital control barriers.

Considering the aforementioned challenges of ISDS that could possibility affect GCC states, other significant challenges may arise in relation to the ICSID. Van Harten argued that *"The availability of investor-state arbitration under investment treaties creates powerful incentives for investors to engage in 'treaty shopping' by structuring investments to take advantage of favorable treaties, even if the connection between the investor and the host state is tenuous"* (Van Harten, 2007). Van Harten argument is a concern particularly for GCC states, that are eager to attract foreign investors. Therefore, a higher level of concern is created whereby some investors aim to abuse the ICSID procedures to gain higher level of compensation via arbitral awards. Furthermore, foreign investors might submit a dispute to the ICSID as a tactical tool to gain leverage or force settlement. Eberhardt and Olivet argued that *"Corporations have increasingly used investment arbitration not as a genuine legal mechanism to resolve disputes, but as a strategic tool to intimidate governments and extract compensation or concessions through settlement negotiations"* (Eberhardt & Olivet, 2012). The argument provides critical prospective on how foreign investors may adopt strategies to misuse their rights of submitting a dispute to the ICSID under the covenant of international investment law. It could be said that their core purpose shifts away

from settling the dispute with the host state and rather to exploit arbitration as a tool for financial gain. The *Vattenfall v. Germany (2009)* case demonstrated how submitting to arbitration within the ICSID can be exploited by foreign investors for financial gains. In his analysis of the case Khor argued that "the Vattenfall case is a clear example of how ISDS allows corporations to challenge sovereign decisions made for the public good, such as Germany's nuclear phase-out, purely for financial gain" (Khor, 2015).

4. Measures for GCC states to overcome the challenges

The effectiveness and efficiency of ISDS mechanisms are imperative to its success. Measures taken by GCC states that addresses the challenges will provide a positive perception of the mechanisms, in particular of international arbitration. It is important to revise, renegotiate or terminate treaties that poses risk to the host state. Old and outdated treaties may contain vague and bored provisions of investor protection. Such provisions expose the state to an increasing number of claims that could affect sustainable development or regulatory rights. Therefore, clearer definitions must be introduced with regards to foreign investors protection, which would substantially lower the risk of claims. A case example of such measure was adopted by the South African government (Dagbanja, 2022). A comprehensive review of investment treaties was undertaken, which resulted in finding several old treaties that provided broad investor protection without safeguarding the south African regulatory autonomy. In response, the Promotion and Protection of Investment Act 2015 was introduced to ensure a balance between investor protection and the government's right to regulate, as well as reducing the risks of ISDS claims (Dagbanja, 2022).

Foreign investors prefer to utilize arbitration as dispute resolution method within the ICSID. However, it is important for GCC states to consider integrating other alternative dispute resolution methods prior to arbitration within its investment treaty provisions with other states. For instance, an investment treaty clause could force the parties to resolve their dispute via negotiation or mediation prior to submitting the dispute to arbitration. negotiation and mediation are considered less adversarial methods of dispute resolution and integrating such methods in investor-state disputes assists in avoiding costly and lengthy international arbitration procedures. Another alternative is to incorporate an exhaustion of local remedies provision prior to perusing international arbitration. This provides domestic courts with right to resolve the dispute firstly, thus limiting the number of cases submitted to arbitration. A clear and precise example is found under Article 10 of the Argentina -Spain Bilateral investment treaty which directs the parties to resolve the dispute amicably first. If the dispute is not settled within six months the matter can be submitted to the competent tribunal. Finally, the dispute can only be submitted to an arbitral tribunal if the domestic court fails to reach a decision within eighteen months.

5. Conclusion

Methods set forth to settle investor-state disputes have developed under the framework of international investment law and ensure a high degree of protection for foreign investors. GCC states utilize investment treaties as a mechanism to attract FDI for the purpose of development. However, ISDS poses several challenges and risks to the host state, particularly within treaty provisions that are considered to provide broad investor protection. These challenges include limiting the state's ability to regulate, which can lead to potential conflicts between the state and investors. It is imperative to address the challenges of ISDS to ensure legal certainty and long-term economic stability between the GCC states and foreign investors. Whilst institutional arbitration, such as ICSID, is the preferred mechanism for investors in settling disputes, it is important for host states to include other dispute resolution methods, such as mediation, within the treaty provisions to limit the risks of costly and lengthy international arbitration procedures.

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