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INVESTOR-STATE DISPUTE SETTLEMENT AND THE PROTECTION OF FOREIGN INVESTMENT: TREATY PRACTICE, ARBITRAL CASE LAW AND THE REFORM AGENDA FOR UZBEKISTAN

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Abstract
The article examines investor-State dispute settlement as the enforcement mechanism of international investment law and assesses its operation in respect of the Republic of Uzbekistan. The author analyses the treaty architecture of consent to arbitration, the jurisdictional requirements of the ICSID Convention and the case law arising from claims against Uzbekistan, in particular Romak v. Uzbekistan and Metal-Tech v. Uzbekistan. The current reform agenda is reviewed, including the work of UNCITRAL Working Group III, the 2022 amendments to the ICSID Rules, the Mauritius Convention on Transparency and the proposal for a multilateral investment court. On this basis the author formulates proposals for a model bilateral investment treaty and for the prevention of disputes at the domestic level.

Keywords: Foreign direct investment, investor-State dispute settlement, ICSID, bilateral investment treaty, arbitration without privity, indirect expropriation, corruption defence, UNCITRAL Working Group III, transparency, Uzbekistan.

1. Introduction

A guarantee without a remedy is a declaration. The distinctive feature of international investment law is that it attaches to substantive guarantees a procedural mechanism allowing the private investor to sue the host State directly before an international tribunal, without the intermediation of its own State.

The relevance of this mechanism for Uzbekistan is proportional to the volume of capital at stake. In 2025 the total volume of foreign investment absorbed exceeded 43.1 billion US dollars, of which 38.2 billion consisted of foreign direct investment. Investment of this magnitude generates disputes as a statistical certainty, and the question is not whether they arise but how they are resolved.

The purpose of this article is to describe the legal architecture of investor-State dispute settlement, to examine how it has operated in the practice concerning Uzbekistan, and to identify the reforms that would reduce both the frequency and the cost of such disputes.

2. The architecture of consent

The classical model of international arbitration requires an arbitration agreement between the parties. Investment arbitration dispenses with it. The host State expresses its consent in advance and in general terms, in the text of a treaty; the investor accepts that offer by filing a request for arbitration. This construction is known in the doctrine as arbitration without privity.

Three instruments normally interact. The bilateral investment treaty contains the substantive guarantees and the offer of consent. The ICSID Convention of 1965 supplies the procedural framework and, most importantly, an enforcement regime under which an award is treated as a final judgment of a court of each Contracting State, thereby excluding review at the enforcement stage. Where ICSID is unavailable, the UNCITRAL Arbitration Rules serve as the alternative.

Uzbekistan has been a Contracting State to the ICSID Convention since 1995 and is a party to more than fifty bilateral investment treaties. It is also a party to the

New York Convention of 1958, which covers the parallel track of commercial arbitration arising from contracts rather than treaties.

3. Jurisdictional filters in the practice concerning Uzbekistan

The first filter is the definition of investment. In Romak S.A. v. Republic of Uzbekistan, decided under the UNCITRAL Rules in 2009, the tribunal held that a one-off supply of wheat with deferred payment did not constitute an investment, notwithstanding the broad asset-based wording of the applicable treaty. The tribunal insisted on the objective features of an investment: a contribution, a certain duration and the assumption of risk.

The second filter is legality. In Metal-Tech Ltd. v. Republic of Uzbekistan, an ICSID tribunal declined jurisdiction in 2013 after establishing that the investment had been secured through payments that could not be justified as genuine consultancy services. The corruption defence operated against the investor, and each party bore its own costs. The lesson is symmetrical: the treaty protects only an investment made in accordance with the law of the host State.

These two decisions are of practical value for legislative drafting. They show that the definition of investment and the legality requirement, if expressly formulated in the treaty text, perform a filtering function more reliably than the general good faith principle.

4. The criticism and the reform agenda

Four objections are advanced against the existing system. The cost: legal and tribunal expenses in a single case regularly reach several million US dollars. The duration: proceedings frequently exceed four years. The inconsistency: tribunals constituted ad hoc have reached divergent conclusions on identical treaty language. And the regulatory chill: the fear of claims may deter legitimate public interest regulation.

Three reform tracks respond to these objections. UNCITRAL Working Group III has been mandated since 2017 to work on the reform of investor-State dispute settlement, examining a standing mechanism, an appellate body and a code of conduct for arbitrators. The ICSID Rules, amended with effect from 1 July 2022, shortened procedural deadlines, introduced expedited arbitration and imposed disclosure of third-party funding.

The third track concerns transparency. The UNCITRAL Rules on Transparency of 2014 and the Mauritius Convention, which extends them to treaties concluded before that date, provide for the publication of submissions and awards and for the participation of third parties. Accession to the Mauritius Convention is a low-cost signal of institutional confidence.

5. Options for Uzbekistan

The first option is a model bilateral investment treaty. Its function is to standardise the negotiating position. The elements that merit inclusion are: an enumerated definition of investment incorporating the objective criteria applied in Romak; an express legality requirement; an exhaustive clarification of the fair and equitable treatment standard rather than an open-textured formula; a list of factors for assessing indirect expropriation; and a denial of benefits clause excluding companies without substantial business activity in the State of origin.

The second option is dispute prevention at the domestic level. An inter-agency mechanism that identifies a grievance before it crystallises into a treaty claim is substantially cheaper than arbitration. The institution of the business ombudsman, operating since 2017, provides an existing platform for such a function.

The third option is a mandatory consultation period combined with an offer of mediation. Investment mediation remains underused in the region although the relevant institutional rules exist. Its advantage is that it preserves the commercial relationship, which arbitration ordinarily destroys.

The fourth option concerns the domestic forum. Where the national judiciary and domestic arbitration provide an effective remedy, the demand for treaty arbitration declines. The Law on International Commercial Arbitration adopted in 2021 and the Tashkent International Arbitration Centre are the institutional basis for this development.

6. Conclusions

Investor-State dispute settlement should not be evaluated as a threat or as a concession. It is a price mechanism: the State pays in sovereignty flexibility and receives a reduction in the risk premium demanded by capital.

The task of legislative policy is to make that price explicit and controllable. Precise treaty drafting, a functioning domestic prevention mechanism and a credible national arbitration forum together achieve that result more effectively than either the unconditional acceptance or the wholesale rejection of investment arbitration.

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