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HUMAN RIGHTS PARADIGMS IN ICSID INVESTMENT DISPUTE SETTLEMENT: A COMPARATIVE ASEAN STUDY

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Abstract

This research examines the dynamics of the relationship between the enforcement of Human Rights (HR) and the role of the International Centre for Settlement of Investment Disputes (ICSID) as the principal international arbitration institution in investment disputes. The background of this study is grounded in the tension between the protection of foreign investors primarily through bilateral investment treaties—and the obligations of host states to safeguard public interests and the human rights of their citizens, which are often overlooked in conventional investment arbitration awards. The research raises two main questions: first, how human rights are positioned within ICSID jurisprudence; and second, how ASEAN countries integrate human rights clauses into their international investment agreements in order to balance economic and social interests. The research employs a normative juridical method, utilizing a conceptual approach, a statutory approach, and a comparative approach across several ASEAN member states. Secondary data in the form of ICSID arbitral awards and international investment agreements are analyzed qualitatively. The findings indicate that although ICSID has traditionally been investor–state centric, there is a discernible shift in which human rights issues are increasingly considered through state counter-claims. From a comparative perspective, several ASEAN countries have begun updating their model bilateral investment treaties to allow greater regulatory space for public policies related to human rights. In conclusion, harmonization between the international investment law regime and human rights law is crucial to prevent fragmentation in international law. This study recommends procedural reforms within the ICSID framework to accommodate third-party participation (amicus curiae) and the standardization of human rights clauses in investment treaties at the ASEAN regional level in order to strengthen the bargaining position of member states.

Keywords: Human Rights, ICSID, International Investment, Arbitration, Bilateral Investment Treaties

INTRODUCTION

Economic globalization has encouraged investors to undertake cross-border investments. Such investments aim to expand markets by increasing efficiency in production processes through the utilization of favorable regulatory frameworks, lower labor costs, and the availability of easily accessible natural resources. For host states, foreign investment brings benefits such as job creation, tax revenues, technology transfer, and various other economic advantages (Indriawati & Kbarek, 2025). Consequently, investors demand that host states provide protection for their assets in the form of legal certainty, political stability, and a conducive business climate.

In practice, disputes frequently arise between investors and host states due to fundamental issues such as climate change, economic crises, and losses suffered by local communities as a result of investors' business operations. Host states often respond by enacting or amending policies to protect the state and its population, but these measures may adversely affect investors' business activities. This situation has led to the emergence of the international investment law regime, which was historically designed to protect foreign investors' assets from arbitrary actions by host states (Bonnitcha et al., 2017). Investors who consider themselves aggrieved often bring their disputes before the International Centre for Settlement of Investment Disputes (ICSID), where disputes are resolved within a commercial framework that is frequently confidential in nature.

However, conflicts arise when state policies aimed at protecting human rights such as the right to water, a healthy environment, or the rights of indigenous peoples are perceived as forms of "indirect expropriation" that harm investors. This can be seen in the case of *Urbaser v. Argentina* (Urbaser v. Argentina, 2016), in which the Spanish investors Urbaser and CABB held investments in the drinking water and sanitation sector in the Province of Buenos Aires through their shareholding in the concession company Aguas del Gran Buenos Aires S.A. (AGBA). Following Argentina's economic crisis in 2001, the Argentine government implemented emergency measures, including tariff freezes, currency conversion, and regulatory changes, which ultimately led to the termination of the ongoing concession contract by local authorities. The investors viewed these governmental actions as violations of investment protection obligations under the 1991 Bilateral Investment Treaty (BIT) between Argentina and Spain.

The Argentine government raised an objection to the Tribunal's jurisdiction based on Article X of the Argentina–Spain BIT. This provision requires that any dispute arising between an investor and the state must first be submitted to the domestic courts of the host state and remain there for a period of 18 months before it may be brought to international arbitration. In this case, the investors acknowledged that they had never initiated proceedings before Argentine courts and had instead brought the dispute directly to ICSID.

In this regard, the Tribunal affirmed that the obligation to submit disputes to domestic courts for an 18-month period is not merely a waiting period, but rather a jurisdictional requirement inherent in the state's consent to arbitration. This requirement was considered an integral part of the dispute settlement mechanism consciously and explicitly negotiated by the parties in the BIT. The Tribunal emphasized that the fundamental principle of international arbitration is the consent of the state, and therefore any conditions attached to that consent cannot be unilaterally disregarded by investors. Accordingly, the investors' claims were dismissed at the jurisdictional stage without proceeding to an examination of the merits.

The tension between the protection of investors' property rights and states' obligations toward their citizens has generated a legitimacy crisis within the global investment arbitration system. Against this backdrop, this research addresses the following issues: (1) how human rights instruments are positioned within the jurisprudence of dispute settlement under the ICSID framework; and (2) how ASEAN countries comparatively approach the balance

between investment protection and the enforcement of human rights within international investment agreements.

RESEARCH METHODS

This research applies a normative juridical method. The approaches employed include a conceptual approach to examine theories of sovereignty and human rights, a statutory approach to analyze the ICSID Convention and Bilateral Investment Treaties (BITs), as well as a comparative approach to review state practices within the ASEAN region. The data used in this study consists of secondary legal materials, including international conventions, investment treaties, and relevant academic literature, which are analyzed qualitatively. This normative-juridical method is adopted because the research problem is doctrinal in nature, focusing on the interpretation and assessment of legal norms governing the relationship between international investment law and human rights.

RESULT AND DISCUSSION

Human Rights in ICSID Jurisprudence: From Marginalization to Integration

Traditionally, ICSID arbitral tribunals have often declined to consider human rights arguments on the grounds of limited jurisdiction, which is confined to "legal disputes" arising directly out of an investment (Article 25 of the ICSID Convention). However, recent developments indicate a shift in the Tribunal's approach. States have increasingly been able to invoke human rights violations committed by investors as the basis for counter-claims, as illustrated in the case of *Urbaser v. Argentina* (Nedumpara & Laddha, 2020). Arbitration practice has witnessed growing criticism of the structural imbalance within the ISDS system, alongside states' gradual discovery of procedural mechanisms available in arbitration, particularly through the submission of counter-claims. Normatively, the possibility of submitting counter-claims in ICSID proceedings is provided under Article 46 of the ICSID Convention, which allows a tribunal to examine counter-claims insofar as they fall within the scope of the parties' consent, are directly connected to the subject matter of the dispute, and fall within the tribunal's jurisdiction.

In disputes involving human rights, a key juridical issue concerns the legal status of investors as subjects bearing human rights obligations. Under international human rights law, states are positioned as the primary duty bearers, while private investors are generally regarded as indirect objects of regulation. Consequently, when a state submits a counter-claim based on alleged human rights violations by an investor, the tribunal must address a fundamental question: whether investors possess human rights obligations that are directly enforceable within the ICSID forum. To address this issue, tribunals need to be receptive to submissions from non-governmental organizations providing a human rights perspective in arbitral proceedings through *amicus curiae* petitions. The legal basis for accepting *amicus curiae* submissions in ICSID arbitration is set out in ICSID Arbitration Rule 37(2), which affirms that a tribunal may consider whether such third-party submissions would assist in the resolution of the dispute without disrupting the procedural rights of the principal parties. In practice, non-governmental organizations (NGOs), civil society groups, and human rights advocacy institutions have emerged as the primary actors submitting petitions as *amicus curiae* (Giudicini & Puccio, 2014).

Comparative Study of the ASEAN Region

Investor claims brought before ICSID have prompted diverse responses among ASEAN countries. In Indonesia, following the mass termination of its older bilateral investment treaties (BITs), the latest Indonesian Model BIT has begun to incorporate explicit clauses recognizing the state's right to regulate in the public interest, including compliance

with human rights and environmental standards. Indonesia has tightened the definition of investment, clarified eligibility requirements, narrowed the scope of Fair and Equitable Treatment (FET) to encompass primarily the prohibition of denial of justice, and managed investors' access to arbitration. In addition, Indonesia has introduced clauses allowing the host state to initiate claims or file counter-claims against investors in draft BITs. Indonesia's experience in confronting ISDS cases has also triggered a review of high-value claims, such as the *Churchill Mining* case, as well as heightened concerns regarding frivolous claims.

Vietnam and Thailand have adopted relatively more progressive responses to ICSID claims. Vietnam has incorporated investment standards within the framework of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes dedicated chapters on labor and the environment that indirectly derive from human rights protection. Chapter 19 on Labour obliges State Parties to adopt and maintain core labor rights, referring to International Labour Organization (ILO) principles. Chapter 20 on Environment emphasizes a high level of environmental protection and the effective enforcement of environmental laws. Vietnam has operationalized a stronger conception of the "right to regulate" through policies on minimum wages, occupational safety, environmental impact assessment, emissions control, and ecosystem protection, all of which are supported by treaty commitments that explicitly incorporate public interests. This approach reframes state conduct from being perceived as a "violation of investment standards" to the exercise of a public mandate that is also recognized within the treaty framework. Vietnam manages ISDS exposure in new-generation free trade agreements by positioning CPTPP alongside other instruments to navigate investment disputes under modern treaty regimes.

Thailand has similarly demonstrated an active stance by participating in discussions under UNCITRAL Working Group III, signaling that it is not passive regarding concerns over the legitimacy, costs, and inconsistency of ISDS. Thailand has developed a network of modern free trade agreements, as reflected in policy analyses and OECD Investment Policy Reviews, which discuss Thailand's treaty practices and opportunities for alignment with contemporary standards, including sustainability considerations.

Collectively, ASEAN BIT models have begun to shift away from first-generation treaties that were highly protective of investors toward more balanced frameworks aimed at avoiding the risk of massive ICSID claims that could undermine public finances. This shift represents a cumulative response to ASEAN countries' concrete experiences with international investment disputes, particularly through the Investor State Dispute Settlement (ISDS) mechanism under forums such as ICSID. First-generation BITs were primarily designed to attract foreign capital and therefore tended to include broad and indeterminate investor protection standards, such as expansive interpretations of Fair and Equitable Treatment (FET), overly broad definitions of investment, and Most-Favoured Nation (MFN) clauses enabling investors to import more favorable protections from other treaties. These early-generation BITs provided little explicit regulatory space for states to defend public policies in areas such as public health, environmental protection, labor regulation, or human rights.

Over time, ASEAN countries have ceased to view investor protection as a singular objective and have instead begun to situate it within a broader framework that balances investment interests with regulatory sovereignty. This shift is reflected in several emerging trends. First, there is a clear effort to narrow and clarify investment protection standards, particularly FET and expropriation, to prevent overly expansive interpretations by arbitral tribunals. Second, ASEAN states increasingly incorporate or reaffirm the state's right to regulate in the public interest, including in areas such as public health, environmental protection, and social stability. Third, there is a growing preference for new-generation investment agreements, whether in the form of FTAs or regional instruments, that integrate

labor, environmental, and sustainable development concerns. Fourth, ASEAN states show a tendency to manage or limit access to ISDS through procedural tightening, recalibration of dispute settlement clauses, and active participation in multilateral discussions on ISDS reform.

Although ASEAN countries pursue these reforms at different speeds and through distinct pathways, a common thread emerges: a shared effort to correct the structural imbalances of first-generation BITs and to avoid excessive exposure to investor claims that could severely constrain public budgets. This shift marks a transformation from an "investor-centric" paradigm toward a more policy-sensitive and fiscally conscious model, in which investment protection is placed alongside the state's obligation to safeguard broader public interests.

CONCLUSIONS

The position of human rights instruments in the jurisprudence of dispute settlement under ICSID demonstrates an increasingly dynamic relationship. Institutionally, ICSID was not established as a human rights tribunal, and its primary mandate remains the resolution of investment disputes based on state consent. Nevertheless, developments in arbitral practice and tribunal decisions indicate that human rights norms are no longer entirely excluded from investment arbitration. Human rights instruments have begun to appear as part of the relevant public international law context, whether in the interpretation of state obligations, the justification of public policies, or the broader discourse on investor responsibility. The relationship between human rights and ICSID is therefore in a transitional phase. While human rights have not become an independent basis of jurisdiction within ICSID, they increasingly function as a normative framework influencing the direction and legitimacy of investment dispute resolution.

A comparative assessment of ASEAN countries' approaches to balancing investment protection and human rights enforcement in international agreements reveals a collective shift away from first-generation investment treaties that were highly protective of investors toward more balanced models. ASEAN states have become increasingly aware of the fiscal and policy risks posed by older investment agreements, particularly the potential for high-value claims in international arbitration forums that may strain or even paralyze public budgets. These concerns have been addressed through reforms in treaty language, the explicit reaffirmation of the state's right to regulate, and the integration of labor and environmental issues into new-generation investment agreements. The incorporation of human rights considerations into investment disputes in the ASEAN region is increasingly reflected in treaty reforms that grant states greater discretion to safeguard public interests without the constant risk of adverse arbitral findings. This approach illustrates ASEAN countries' efforts to strike a balance between investment protection and their constitutional and international obligations to protect human rights and public interests in a sustainable manner.

As the interconnection between investment disputes and public interests continues to strengthen, ICSID should consider more explicit procedural reforms within its dispute settlement framework. Such reforms could be implemented through the adoption of rules or guidelines requiring arbitral tribunals to systematically consider human rights impacts when determining compensation. This consideration is not intended to transform ICSID into a human rights enforcement forum, but rather to ensure that investment compensation assessments do not disregard the social, economic, and humanitarian consequences borne by states and affected communities. By incorporating human rights impact analysis into the reasoning of arbitral awards, ICSID could enhance the legitimacy of its decisions and prevent compensation outcomes that may, in practice, undermine a state's capacity to fulfill its public and constitutional obligations.

ASEAN Standardization**.** ASEAN member states should pursue the establishment of a Regional Investment Agreement containing a dedicated chapter on investor obligations, particularly with respect to human rights, environmental protection, and labor standards. Through the explicit formulation of investor obligations, the ASEAN investment regime could evolve toward a more balanced legal relationship, in which protection is no longer unidirectional in favor of investors. This approach would also provide a stronger legal basis for states to safeguard public interests and to pursue investor accountability mechanisms without departing from the framework of international investment law.

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