DO WE REALLY NEED AN INTERNATIONAL INVESTMENT COURT?

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The Investor-State Dispute Settlement (ISDS) system continues to be the most prevalent form of dispute resolution for settlement of international investment disputes. The ad hoc arbitral mechanism is virtually part of 3000 odd international investment agreements entered so far. However, lately, the system has come under a lot of criticism from several quarters. Primarily, the system is criticized for not being transparent, consistent, predictable, independent, and most notably for encroaching upon sovereign rights of states. Against this backdrop, some states have argued for the establishment of a multilateral investment court more or less on the lines of the International Court of Justice. The present paper is aimed at assessing the need and viability of an international investment court and the possible shortcomings of the proposed model.

Keywords: Investor-State Dispute Settlement System, Arbitral Mechanism, Multilateral Investment Court, International Investment Court.

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I. Introduction

The current system of international investment dispute resolution is exceptional in that, unlike other international frameworks, it grants an individual investor the right to sue a sovereign nation for protection of its investments. Drawn out of a long battle between sovereign rights of nations to regulate their economies and rights of foreign investors to safeguard their investments, the ISDS system represents a compromise between national interest and investor rights. The popularity of the system can be gauged from the fact that 93% of Bilateral Investment Treaties (BITs) concluded so far have ISDS as the system for resolution of investment disputes.[1] For decades, the system has served as a major component of International Investment Agreements (IIAs) and provided a benchmark for international dispute resolution. The ISDS system has served as the major tool for bridging the trust gap between the developing and the developed countries.[2] Essentially, the mechanism ensures mutual respect and observation of commitments made under bilateral treaties and investment agreements.[3] As a result, the world has witnessed a phenomenal growth in foreign investments and consequent economic growth in the developing countries.[4] However, in spite of its pro-investment and investor-friendlier framework, the ISDS system of dispute resolution has been a subject of intense debate and criticism.

The effectiveness of the mechanism in enabling individual investors, often claimed as its success, has created its own problems and generated a sort of 'legitimacy crisis'.[5] This crisis is visible in the backlash and withdrawal by many countries, especially developing countries, from prominent arbitration mechanisms like ICSID Convention, International

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[1] Joachim Pohl, Kekeletso Mashigo and Alexis Nohean, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* OECD Library (2012), https://www.oecd-ilibrary.org/finance-and-investment/dispute-settlement-provisions-in-international-investment-agreements_5k8xb71nf628-en (last visited Feb. 25, 2021).

[2] Caio Cesar Soares, *Investor-State Dispute Settlement: An Analysis of the Reform Proposals on Its Institutional Structure,* SSRN (2017), https://www.ssrn.com/abstract=2984581 (last visited Feb. 24, 2021) (hereinafter 'Soares').

[3] *Id.*

[4] Malebakeng A. Forere, *The New Developments in International Investment Law: A need for Multilateral Investment Treaty?*, 21 PELJ 1,1-43 (2018).

[5] Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 Chic. J. Int. Law 29 (hereinafter 'Brower & Schill').

Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs).[6] India, too has unilaterally withdrawn from its two-decades old BIT following the filing of increased number international investment claims against it beginning 2011. The staggering increase in investor claims over the past decade[7] have fueled the debate as to the efficacy of the system particularly from the point of interests of developing nations. As a matter of fact, the list of respondent states has only lengthened with time[8] together with greater claims for damages and on new grounds. Following extensive debates and research, many scholars have mooted the idea of an International Investment Court (IIC) on the lines of WTO's Dispute Settlement Body as a unified and permanent body for adjudication of international investment disputes.

The idea of having a permanent institution for settlement of international investment disputes is not new and has been gaining momentum for quite some time now.[9] With the rising criticism against the present Investor-State Dispute Settlement (ISDS) system, there has now been a greater emphasis on establishing an International Investment Court (IIC). The efforts in this direction are largely being undertaken under the aegis of the United Nations Commission on International Trade Law (UNCITRAL).

The present paper is an attempt to highlight these strategic shortcomings and loopholes in the present investment arbitration regime and analyze whether a Multilateral Investment Court (MIC) is the solution to these problems. To such an extent, this paper is structured as follows. Section 1 highlights the problems/issues with investor-state dispute mechanisms in the present investment treaty regime. Section 2 discusses the viability of having a permanent international investment court in place of ad hoc arbitral tribunals. Section 3 explores other alternatives to the international arbitration system and finally section 4

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[6] Karl Sauvant, *The Evolving International Investment Law and Policy Regime: Ways Forward*, International Centre for Trade and Sustainable Development (ICTSD) (2016), https://www.ssrn.com/abstract=2721465 (last visited Jan. 5, 2022).
[7] *Investor-State Dispute Settlement Cases: Facts and Figures 2020, IIA Issues*, UNCTAD (2021), https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf.
[8] *Id.*
[9] Johanna Braun et al., *Creation and Implementation of a Multilateral Investment Court*, IILCC (2020), https://iilcc.uni-koeln.de/sites/iilcc/reports/IILCC_Study_Group_on_ISDS_Reform_-_MIC_Report_-01-2020.pdf.

concludes by suggesting the way forward in the international investment dispute resolution framework.

II. Issues with Investor-State Dispute Settlement (ISDS) System

The ISDS framework for dispute resolution grew as a by-product of increased BITs between the developed North and the underdeveloped South, riding on the greater need for foreign capital by the Third World countries. Providing adequate safeguards and enforcement against infringement, ISDS was hailed for establishing a level playing field between the resource-rich developed and the resource-poor developing nations.[10] Prior to the coming into force of the ISDS mechanism, the primary means for settlement of investment disputes was either through the national courts of the host country or through the diplomatic channels, including at times, use of force or military by the states.[11] To such an extent, the Investor-State Dispute Settlement (ISDS) mechanism marks an improvement over the earlier regime. The supporters of ISDS points to its ability in depoliticizing investment disputes[12] and thereby its contribution to improved relations between the nations, leading to an increased flow of foreign capital. Others argue that an investor-state arbitration system is an effective tool for good governance creating long-term interests and growth in economic, human and natural resources.[13]

In spite of several positive effects, ISDS has been at the center of major controversies in the international investment regime. Critics of the system point to the various fallacies and shortcomings that have been alleged to be the main reason behind the increased investment claims against the developing nations largely from the wealthy investors

[10] Soares, *supra* note 2.
[11] O. Thomas Johnson Jr & Jonathan Gimblett, From Gunboats to BITs: *The Evolution of Modern International Investment Law*, 44 Yearbook on International Investment Law and Policy 649 (2011); Andrew Paul Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Wolters Kluwer Law & Business 2009).
[12] I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev. 1,1-25 (1986); Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?*, SSRN (Sept. 17, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455511.
[13] Brower & Schill, *supra* note 5.

of the West. The current ad hoc system of dispute settlement has many flaws; to name a few – the awards by arbitral tribunals lack consistency, transparency and legitimacy.[14] Selection of arbitrators by parties to the dispute raises questions of independence and impartiality of the tribunal. Further, different awards by tribunals on similar issues leads to incoherence which is detrimental to the establishment of the universal body of international investment law. This section will deal with some of these issues in more detail.

A. Regulatory Interference: Legitimacy Concerns

The fact that ISDS mechanism, unlike the private commercial arbitration, focuses more on the public international law,[15] the aspects of the dispute and the resultant award by the arbitral tribunal have wider ramifications.[16] The judicial overreach exercised by the arbitrators in investment disputes challenges the rule-making powers of sovereigns and undermines the democratic ethos of a nation.[17] The net effect is the emergence of a conflict between the sovereign and the tribunal, raising questions on the legitimacy of the arbitration mechanism under the ISDS system. The enhanced claims by foreign investors on grounds of violation of treaty provisions have acquired a new dimension. Recently, investor claims have raised crucial policy questions involving state's rights to regulate critical domestic sectors touching issues of public interest and state sovereignty.[18] The case in point is Vattenfall v. Germany (I),[19] wherein Vattenfall, a Swedish energy company launched a $1.9 billion arbitration claim against Germany

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[14] David M. Howard, *Creating Consistency through a World Investment Court*, 41 Fordham Int. Law J. 53 (2017) (hereinafter 'Howard'); Lone Wandahl Mouyal, International Investment Law and the Right to Regulate: A Human Rights Perspective, 6 (Routledge 2016).

[15] Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 Penn State Law Rev. 1269 (2009).

[16] Anron K. Schnyder, Establishing Judicial Authority in International Economic Law 188-212 (Cambridge University Press 2016).

[17] Ivica Kelam, *Investor to State Dispute Settlement: A Challenge for Democracy, Ethics, the Environment, and the Rule of Law*, 34 Synth. philos. 59-71 (2019).

[18] David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD iLibrary (Dec. 31, 2012), https://www.oecd-ilibrary.org/finance-and-investment/investor-state-dispute-settlement_5k46b1r85j6f-en (last visited Feb. 24, 2021).

[19] Vattenfall A.B. v. Federal Republic of Germany (I), ICSID Case No. ARB/09/6.

for delaying permits for coal-fired plants in Hamburg following the ministry's clean environment requirements. The claimant alleged that Germany has violated its commitments under the Energy Charter Treaty through its new environmental rules, which amounted to expropriation and violation of 'fair and equitable treatment' provision. Whereas, in essence, the said regulations were the result of the latest report by the Intergovernmental Panel on Climate Change (IPCC) on climate change. However, fearing payment of a massive amount of compensation, the German government came to a settlement with Vattenfall and rolled back environmental requirements. The case is a classic example of various limitations imposed by the ISDS system on the positive role of the states. That ISDS mechanism encroaches upon sovereign rights of the nation is best brought out in the words of then Germany's deputy environment minister, Michael Müller, "It's really unprecedented how we are being pilloried just for implementing German and European Union (EU) laws."[20]

Another case of significant interest is Philip Morris v. Uruguay[21] The claimant, Philip Morris, in the case, alleged that the new tobacco packaging and labelling requirements introduced by Uruguay, aimed at discouraging smoking by public by prohibiting extravagant advertisements, violated the terms of the 1988 Switzerland-Uruguay BIT and claimed damages for the beach via an international arbitral tribunal. Although the tribunal upheld the legislation and directed Philip Morris to partially reimburse Uruguay for legal expenses, it is significant in the fact that it highlights the growing tension between investor rights and states' right to regulate. The issue at hand is one of states' right to regulate domestic policy issues against the growing investor claims under BITs and the adverse effect such claims may have on issues of wider public importance. The case is also symbolic of the restraints on the regulatory powers of the states in view of immense powers in the hands of Multinational Enterprises (MNEs) by virtue of the ISDS

[20] Sebastian Knauer, *Vattenfall vs. Germany: Power Plant Battle Goes to International Arbitration*, SPIEGEL International (Jul. 15, 2009), https://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html (last visited Feb. 24, 2021).
[21] Philip Morris Brand Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.

system. It has the potential to create a sort of 'regulatory chill',[22] wherein the governments may defer issues of public interest in view of possible investment claims under ISDS.

B. Inconsistency and Incoherency: Unpredictable Outcomes

Another aspect of the ISDS system that has been the major basis for criticism is the inconsistency by arbitral tribunals in rendering decisions in similar cases involving similar facts, parties and investment agreements. The well-known example in this respect is the famous *Lauder* arbitrations,[23] wherein two different UNCITRAL arbitral tribunals heard claims involving similar facts between identical parties involving similar levels of investment protection and yet reached quite opposite decisions. While in the arbitration initiated by Mr. Lauder under the US-Czech BIT as an American investor in CME, the London tribunal rejected the expropriation claims raised by the claimant. However, in a claim brought by CME under the Dutch-Czech BIT as a company registered in the Netherlands, the Stockholm tribunal held Czech Republic of expropriation and awarded $270 million in damages to the claimant. The fact that the arbitration claims under the cases were identically similar and yet the tribunals arrived at different conclusions, the only difference being the claims brought under different investment treaties, reflect the inherent inconsistency and incoherency in the ISDS system.[24]

Another example of inconsistency are the arbitral awards in the five cases filed against Argentina by American companies under the US-Argentina BIT.[25] It is noteworthy that the question under consideration before tribunals was same – whether imposition of stabilization

[22] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 Transnatl. Environ. Law 229-250 (2018).
[23] CME Czech Republic BV v. Czech Republic, Partial Award of 13 September 2001, Final Award of 14 March 2003; Lauder v. Czech Republic, Final Award, 3 September 2001.
[24] Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System*, 7 J. App. Prac. & Process 19 (2005).
[25] Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (hereinafter '*CCS* Award'); Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) (hereinafter '*Sempra* Award'); Enron Corpn. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) (hereinafter '*Enron* Award'); LG&E Energy Corpn. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (Oct. 3, 2006) (hereinafter '*LG&E* Liability Decision'); CMS

measures by Argentina met the necessity requirement under customary international law and emergency clause under the BIT[26] – the tribunals reached quite contradictory decisions. While three of the tribunals held Argentina not meeting any of the defense requirements, the other two held that Argentina met the emergency requirement under the BIT, though the two applied the emergency clause differently.[27] There are many similar inconsistent decisions[28] rendered by tribunals that cast doubts on the legitimacy of the ISDS system. The ad hoc system of arbitration with little value for precedents devoid the system of a unified approach for interpretation and dispute settlement.[29] Inconsistency and incoherency in decisions contributes to the unpredictability in the system that is detrimental to the development and sustenance of a stable international investment regime. Considering the fragmented and unpredictable nature of ISDS, some scholars have suggested for establishment of a global investment framework[30] laying down uniform guidelines and methods of interpretation for dispute resolution and investment promotion. To what extent a multilateral investment treaty will make the system consistent and predictable is a matter of another debate, the fact remains that the present international investment arbitration system continues to be highly inconsistent and incoherent.

C. Independence of Arbitrators: Partiality Issue

Unlike commercial arbitration, there are greater stakes involved in international treaty arbitration because the award in question affects a large number of people who are residents of the host state.

Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) (hereinafter '*CMS* Award').

[26] William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, SSRN (2008), http://www.ssrn.com/abstract=1088837 (last visited Feb. 27, 2021).

[27] Howard, *supra* note 14.

[28] SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (2003), Award (Aug. 6, 2003); SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/6 (2004), Award (Jan. 29, 2004); Metalclad Corp. v. Mexico, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000); S.D. Myers, Inc. v. Canada, UNCITRAL Arbitration, First Partial Award, 263 (Nov. 13, 2000).

[29] Juan Pablo Charris Benedetti, *The Proposed Investment Court System: does it Really Solve the Problems?*, Rev. Derecho del Estado 83-115 (2018) (hereinafter 'Charris Benedetti').

[30] Nicolette Butler, *Possible Improvements to the Framework of International Investment Arbitration*, J. World Invest. Trade 613-637 (2013) (hereinafter 'Butler').

Consequently, there is a greater need for accountability and impartiality on the part of arbitrators. Despite this fact, the international investment system for dispute resolution is one system that is rigged with partiality and unaccountability of arbitrators. The system of ad hoc appointment of arbitrators by parties to the dispute smacks of the independence doctrine in judicial appointments. The practice raises issues of credibility for ISDS system for in most cases arbitrators may feel obliged to the parties appointing them,[31] although the rules of arbitration have a strong mandate for impartiality and independence of arbitrators. Therefore, the practice of appointing arbitrators for investment disputes on the lines of commercial arbitration is dubious for the very fact that the repercussions of investment dispute arbitration under ISDS reach far beyond the parties involved and affect the larger public interest.[32] Secondly, several arbitrators are found to be performing more than one role in the arbitration process. They have been accused of donning several hats as arbitrator, counsellor, witness and tribunal secretary, a practice described as 'double hatting'.[33] As arbitrators perform several roles in the same process, double hatting significantly undermines the impartiality of arbitrators and independence of the arbitration process. A prominent example of double hatting is the *Azurix, Seimens* and *Duke Energy* cases[34] filed against the state of Argentina. While in *Azurix* and *Seimens*, Guido Santiago Tawil acted as a counsel to the parties and Andres RigoSureda acted as the president of the tribunal, in *Duke Energy*, Mr. Tawil acted as an arbitrator appointed by the claimant, the claimant notably represented by the law firm for which Mr. Sureda worked. While questions remain as to the independence of Mr. Sureda following the decision in *Seimens*, there is no denying the fact that there was ample evidence of conflict of interest and one could not shy away from the possibility of biasness creeping in the case representing

[31] George Kahale III, *Rethinking ISDS*, 44 Brook. J. Int'l L. 11 (2018) (hereinafter 'Kahale').
[32] *Id.*
[33] Antonia Eliason, *Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform*, 50 Georget. J. Int. Law 45 (2018); Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. Int. Econ. Law 301-332 (2017).
[34] Azurix Corpn. v. Argentine Republic, ICSID Case No. ARB/01/12; Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8; Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador, ICSID Case No. ARB/04/19.

only the tip of the iceberg. There are numerous instances where the impartiality and independence of arbitrators have been challenged.

Various scholars[35] suggest that the system is inherently biased against the state due to the fact that arbitrators favor the investors and because the system has been modelled upon commercial arbitration despite elements of public international law. The fact is major players of the ISDS system generally have their roots in private commercial arbitration with long histories and connections with the investors.[36] Besides, the majority of the arbitrators belong to a close-knit group dominated by countries like the US, EU and Canada.[37] It is not surprising then to see many developing countries accusing ICSID-administered investor-state arbitration systems of biasness and have withdrawn or threatened to withdraw from the system.[38] Further, the opaqueness of the system contributes to the suspicion on free decision-making abilities of the arbitrators.[39] With many arbitral awards and ratio in arriving at the decisions remaining hidden from public scrutiny, there are legitimate fears of biasness and partiality.

D. Lop-sided System: Unequal Bargain

Following the great Argentinian financial crisis of the early 2000s that opened the floodgates of arbitral claims against the states, there has been increased debate on the lop-sided nature of the system itself. It is noteworthy that ISDS mandates a host of obligations on the part of the state and authorizes investors to bring claims in cases of violation, but assigns no obligations to investors. As a result, despite apparently being designed as a mutual dispute resolution framework, ISDS solely enables investors to bring disputes and claim damages before the tribunal.

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[35] Kahale, *supra* note 31; Howard, *supra* note 14; Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, Mich. J. Int. Law 1 (2020); Michael Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 Am. Univ. Bus. Law Rev. 18 (2015).

[36] Kahale, *supra* note 31.

[37] Soares, *supra* note 2.

[38] Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, Law and Business Review of the Americas (2010), http://www.ssrn.com/abstract=1348016 (last visited Feb 28, 2021); Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. Int. Bus. & Law 55 (2012).

[39] William W. Burke-White, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 65 (2009).

Besides, the reasoning that the increased number of arbitration claims under ISDS is testimony to the efficiency and efficacy of the system[40] is grounded in misconception. The reality is most of these claims should never have been brought in the first place but for the third-party funders promoting the claim, betting on the pro-investor attitude of the arbitrator.[41]

Notably, the latest trend in ISDS marks a significant departure from the underlying reasons for which the system was established. Traditionally, ISDS was designed to curb unjust expropriation of foreign investments or discrimination by states on pretext of national interest or otherwise and the process kick-started only when the investor may have suffered any losses. However, beginning with the 21st century, investors have been increasingly bringing claims on grounds of losses due to possible earnings. There are numerous instances where the tribunal has gone beyond the mandate of the system (because of its undefined boundaries) to admit and enquire claims arising out of loss of earnings or loss of future earnings. Shockingly, not only arbitral tribunals have found merit in these claims but have awarded huge compensation to investors. Cases like *Yukos Universal*[42] *v. Russia* and *Veteran Petroleum v. Russia*[43]wherein the tribunals have awarded investors billions of dollars in compensation raises the specter of budget mismatch and burden of default for many small and medium sized economies. It is this lop-sided nature of the system and undue interference in regulatory matters that have prompted states to call for reforms within the system. Fearing innumerable claims from foreign investors involving compensation on dubious grounds, many states have already debunked the ISDS system and have substituted it with local courts, and negotiation and conciliation. While others have changed the language of their BITs to make investment arbitration difficult in practice. For instance, India has changed its Model BIT[44] to mandate exhaustion of

[40] Soares, *supra* note 2.
[41] Howard Mann, *ISDS: Who Wins More, Investors or States?*, 2 JDIA, 2 (2015); Kahale, *supra* note 31.
[42] Yukos Universal Ltd. (Isle of Man) v. Russian Federation, UNCITRAL, PCA Case No. ý2005-04/AA227.
[43] Veteran Petroleum Ltd. (Cyprus) v. Russian Federation, UNCITRAL, PCA Case No. ý2005-05/AA228.
[44]MODEL INDIA BIT, 2016, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

all local judicial and administrative remedies for at least a period of five years before a claim can be brought before the tribunal, unlike the previous regime, where investors can bring the claim directly before the tribunal.[45]

While developing nations have largely either withdrawn or watered-down the scope of ISDS, many developed countries in Europe have called for a systemic overhaul of the system and establish an International Investment Court (IIC) that will supposedly rid the system of its present limitations. The next section will deal with the prospect of replacing the ISDS system with an IIC and proposed features of an international investment court.

III. International Investment Court

Traditionally, the problem with ISDS has been associated with the South, who have historically complained about the deficiencies and partiality of the ISDS system.[46] However, beginning in 1999, when a host of private companies started filing arbitration claims against European countries, the European Union (EU) took note of various lacunas present in the present regime.[47] There were wide ranging debates and consultations on the subject and the method for implementation of the new system. A broad list of reform proposals were compiled in the UNCTAD's World Investment Report 2015[48] that listed Alternative Dispute Resolution (ADR), International Investment Court (IIC) and a State-State Dispute Settlement organas some of the proposals for reforms. Notwithstanding the merits of the reform proposals, the critics of ISDS have promoted the idea of establishment of an International Investment Court (IIC).[49] In this sphere, the EU has taken the lead and the European Commission (EC) has been authorized to represent

[45] Martin Söderman, *India's 2016 Model Bilateral Investment Treaty: A Backlash to the Calvo Doctrine and Legal Nationalism?*, Northwest. J. Int. Law Bus. 80 (2020).
[46] Brower & Schill, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham Law Rev. 108 (2005).
[47] Alvarez Zarate, *Legitimacy Concerns of the Proposed Multilateral Investment Court: is Democracy Possible?*, 59 B. C. L. Rev. 27 (2018).
[48] Secretary General of the United Nations, *Reforming International Investment Governance*, U.N. Doc UNCTAD/WIR/2015 (June 25, 2015).
[49] Soares, *supra* note 2.

EU and member states at the UNCITRAL working group, formed for reforming the present investor-state arbitration system. The EU has supported the establishment of a multilateral investment court in place of ISDS with a two-tier appellate mechanism, manned by permanent adjudicators appointed following a code of conduct.[50]The EU has already entered into investment agreements that provide for a bilateral Investment Court System (ICS) as the main mechanism for dispute resolution, a supposed precursor to a fully-fledged Multilateral Investment Court (MIC). Beginning with the Transatlantic Trade and Investment Partnership (TTIP) negotiated with the US, the EU has charted its course towards establishing a permanent tribunal for investment disputes. Accordingly, ICS was included as the main dispute settlement system in the FTA concluded between the EU and Vietnam. It is pertinent to note some of the distinguishing features of the dispute resolution system established under the EU-Vietnam FTA.

A. EU-Vietnam Free Trade Agreement

The agreement establishes a fully independent and permanent tribunal for resolution of investment disputes in relation to expropriation, non-discrimination and fair and equitable treatment. The members of the tribunal are to be appointed in advance with strict adherence to the principles of judicial independence and integrity. The tribunal shall consist of nine members with both EU and Vietnam appointing three members each and the rest three appointed from third countries. The bench for hearing disputes consists of 3 members, one each from EU and Vietnam and the third belonging to a neutral country. Decisions of the tribunal can be appealed before a permanent appellate tribunal in case of disagreement with the findings of the tribunal.[51] Further, the agreement lays down the procedure and qualifications of persons for appointment as members of the tribunal. In this respect, the FTA provides that the members of the tribunal shall be jointly appointed by EU and Vietnam and will have the requisite qualifications

[50] Issam Hallak, *Multilateral Investment Court: Overview of the Reform Proposals and Prospects*, EPRS 8 (2020).
[51] Guide to the Eu-Vietnam Trade and Investment Agreements (EU), p. 71. https://eeas.europa.eu/sites/default/files/eu_fta_guide_final.pdf.

to be appointed as judicial officers in their respective countries and expertise in international investment law.[52] The agreement also lays down a time-bound redressal of disputes. Every investment dispute has to be finalized within six months by the Appellate Tribunal with a further extension of three months and the total cumulative period of three years from the date when it was first brought before the tribunal.[53] With respect to the nature of the new redressal mechanism in the EU-Vietnam FTA, EU has made it clear that it has significant elements of domestic as well as international court system and is bound by the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules.[54]

B. EU-Canada Comprehensive Economic and Trade Agreement

Likewise, Article 8 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides for a two-tiered court administered dispute resolution mechanism. The tribunal, under CETA, consists of 15 publicly appointed judges, 5 nationals each of Canada and EU and the remaining five nationals of third countries. The bench hearing the dispute consists of 3 judges selected on a rotational basis by the President.[55] However, under CETA, the tribunal is not the only forum for dispute resolution. Besides the tribunal, investors have two more choices – they can go for dispute settlement under jurisdictions of domestic courts or international courts or they may choose mediation under Article 8.20 of the agreement.[56] The appellate tribunal, established under CETA, may uphold, modify or reverse the tribunal's award on grounds of errors of application of law or errors of appreciation of facts,

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[52] *Id.*

[53] Arif Ali et al., *The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treaties with Canada and Vietnam*, Deckert LLP (2016), https://www.dechert.com/knowledge/onpoint/2016/3/the-eu-succeeds-in-establishing-a-permanent-investment-court-in.html.

[54] Hyoeun Yang, *The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System*, SSRN (2017), https://www.ssrn.com/abstract=3063843 (last visited Mar. 5, 2021) (hereinafter 'Yang').

[55] Laura Puccio & Roderick Harte, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules : In Depth Analysis*, European Parliamentary Research Service (2017), https://data.europa.eu/doi/10.2861/856144 (last visited Mar. 5, 2021).

[56] *Id.*, p. 15.

or on grounds set forth in Article 52(1) (a) to (e) of ICSID Convention.[57] Notably, the agreement seeks to avoid the regulatory chill of the ISDS system by explicitly providing for states' right to regulate within their territories issues of policy and public interest relating to public health, safety, environment, public morals, consumer protection and protection of cultural diversity.[58] It further clarifies that in the absence of any specific commitment under law and contract, the power to regulate extends to policy measures that may negatively affect an investment or threaten future profits.[59] With a view to limit discretion by adjudicators, CETA limits the grounds for raising claims against public policy measures, including claims under Fair and Equitable Treatment (FET), Expropriation and Most Favored Nation (MFN) clauses. As a result, a claim for breach under fair and equitable treatment can be raised only when there has been a clear denial of justice, breach of due process, targeted discrimination, manifest arbitrariness, or abusive treatment.[60] In order to avoid claims of legitimacy and reliability, characteristic of ISDS, CETA lays down detailed standards and qualifications for appointment as members of the tribunal. The agreement requires members of the tribunal to possess qualifications for appointment as judicial officers in their respective countries or be a competent jurist, preferably having expertise in public international law and international investment law.

IV. Critical Appraisal of the International Investment Court Model

One of the chief arguments against ISDS pertains to its overarching character that limits state's sovereignty and creates equality between unequal parties. A state's right to regulate foreign investment often comes into conflict with investor's right to protection that has a spillover effect on the growth and development of both the host and

[57] EU-Canada Comprehensive Economic and Trade Agreement art. 8.28.2, Oct. 30, 2016 (hereinafter 'CETA').
[58] *Id.*, art. 8.9.1.
[59] CETA, *supra* note 57, art. 8.9.1; Yang, *supra* note 54.
[60] CETA, *supra* note 57, art. 8.10.

the home countries.[61] This conflict has wider ramifications, unlike the commercial arbitration, as it directly checks the legality of actions and policies formulated by a democratically elected government. Further, in the light of inconsistent and incoherent decisions by arbitral tribunals, there are no predictive outcomes of tribunals' decisions, raising claims of legitimacy. Whereas, on the other hand, an international investment court would supposedly unify international investment dispute settlement laws bringing in consistency and predictability in the working of the resolution mechanism. What needs to be noted, however, is that judicialization of arbitral mechanism if not more, then equally threatens the sovereignty of nations.[62] The establishment of a supranational organization in itself involves delegation of some of the sovereign rights of nations, calling into question the legitimacy of nation-states themselves.[63] Either way, sovereignty of nation-states is threatened by the decisions of international bodies that sit in to hear challenges against state's power.

A. Quality and Reliability of Decisions

Critics have time and again pointed to the partial and non-independent nature of arbitrators. The practice of double hatting is a serious threat to the integrity and legitimacy of the investor-state dispute settlement system and has been frowned upon by experts, academicians and states alike. In this sphere, the idea of establishing a multilateral investment court seems a plausible solution insofar as the judges of the court, being on a regular payroll, will have little incentive to be pro-investor.[64] With little outside influence, the decisions of the investment tribunal will carry more legitimacy and reliability. However, the critics of the investment court model point to the possible unreliable and inefficient working of the permanent tribunal. As is the case with WTO appellate body, where states failed to provide sufficient financial

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[61] Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 ABA 19 (2013).
[62] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. Law Rev. 1, 4-5 (2005).
[63] Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71, 126 (2000).
[64] Howard, *supra* note 14, p. 26.

resources, the members of the permanent tribunal will likely be paid poorly, which in turn will not attract highly qualified experts in the field, raising doubts over the quality and reliability of decisions by the tribunal, raising yet again claims of legitimacy.[65]

B. Finality versus Consistency

Another criticism of the ISDS system is that it sacrifices correctness of the award in the face of finality of judgment. UNCITRAL Working Group III, working on ISDS reforms, noted that the existing review mechanism in ISDS by way of providing for annulment and setting aside of awards contributes to the 'integrity and fairness of the process', but the mechanism falls short of addressing issues of consistency, coherence and correctness of decisions. The essence of finality inbuilt in the mechanism acts as a barrier to comprehensive remedies against incorrect decisions.[66] This raises crucial questions of correctness of decisions by arbitral tribunals and legitimacy of the ISDS system. The discussions to establish an appeal mechanism in ISDS have borne little fruit with most of the provisional statements and declarations remaining a dead letter. A case in point is the US Model BIT (2004) that provides for two types of appellate mechanisms – a multilateral agreement establishing an appellate body and a bilateral appellate tribunal. Subsequently, US dropped plans of establishing a bilateral appellate body in its Model BIT (2012) leaving the establishment of an appellate body via a multilateral agreement alone. However, so far, the conclusion of such a multilateral agreement remains only on paper and establishment of an appellate body is a distant dream.[67]

Against this background is the demand for an appellate mechanism within the IIC system that will ensure procedural and substantive correctness of decisions and improve predictability in investment

[65] Wolfgang Koeth, *Can the Investment Court System (ICS) Save TTIP and CETA?*, EIPA 15 (2016) (hereinafter 'Koeth').
[66] Albert Jan van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*, ICSID Rev. 16 (2019); UNGA, *Possible Reform of Investor-State Dispute Settlement (ISDS)*' ¶ 10, U.N. Doc A/CN.9/WG.III/WP.149 (2018) (hereinafter 'UNGA').
[67] *Id.*, Albert Jan van den Berg, p. 161.

laws.[68] Experts have advanced two requirements to establish an effective appellate mechanism. The appellate tribunal must be a single comprehensive review forum, capable of hearing appeals from all investment disputes and secondly, it must be a permanent body consisting of a few members in comparison to the first instance tribunal.[69] The uniformity in appellate structure will create consistency in decision-making and remedial framework to check incorrect decisions. However, on the other end of the spectrum is the probable increase in litigation costs and time involved in resolution of investment disputes. High net worth investors will more likely go for appeals in every case not decided in their favor, particularly under pressure from their stakeholders.[70] Similarly, in most of the cases, states will appeal against the decision of the tribunal with the hope of getting a favorable outcome.[71] This will eventually overburden the appellate tribunal leading to increase in costs and delay in settlement of disputes. In a counter to this argument, the proponents of the international investment court highlight the delays in the ISDS system associated with annulment proceedings within the ICSID framework and the review mechanism in the non-ICSID awards.[72]

C. Uniformity in Diversity

The system of ad hoc appointment of arbitral tribunals without any precedential value has been argued as one of the serious drawbacks of the system that lead to inconsistency and unpredictability in the decisions of arbitral tribunals. In this regard, one of the main contentions of the critics is that the ISDS system of dispute settlement is overly flexible and devoid of strict procedural controls. Varying interpretation of similar protection measures involving similar facts is a great barrier to creation of a unified international investment law regime that will enhance trust and confidence between the parties and promote greater investment flows. An international investment court will identify

[68] UNGA, *supra* note 66, para 40.
[69] Christian J. Tams, *Is There a Need for an ICSID Appellate Structure?*, ICSID Rev. 223, 223-250 (2009); Charris Benedetti, *supra* note 29.
[70] Koeth, *supra* note 65.
[71] Butler, *supra* note 30.
[72] *Id.*

key rules for interpretation of investment treaties and enhance investor confidence by following a systematic approach to arriving at final decisions, leading to consistency and predictability in the international investment dispute settlement system. While others argue that settlement of investment disputes through an international court will make the system rigid and inflexible[73] to take into account varying needs of investors and that of states.

In the absence of a multilateral agreement on investment and greater regulatory support to states, scholars fear the flexibility and privacy of investors will be sacrificed at the altar of greater state control and openness. In contrast, any tribunal or court needs to have elements of both flexibility and rigidity in determining issues of economic interest. The bilateral nature of investment treaties is indeed a challenge to the development of a unified system of dispute resolution mechanism and in the urge to develop uniform principles of treaty interpretation, an international investment court runs the risk of infringing the rights of investors.

D. Balance of Power

The underlying idea behind establishing an IIC is to gain greater control over the adjudication process by the states. Although there is not much evidence to prove the pro-investor bias of the system, it is the general perception of the states that ISDS is pro-investor and hence need to be discarded. In this process, the balance of power dramatically shifts from disputing parties to contracting parties, having ramifications for the investor-party in particular.[74] As a result, one party to an investment dispute loses control over the selection process, while the other gains complete control over it.[75] Associated with the selection process is the increased complexity of the mechanism. Unlike the ad hoc tribunal system involving appointment of qualified arbitrators by disputing parties, the appointment of permanent members to the tribunal will

[73] Yang, *supra* note 54, p. 53.
[74] Gabrielle Kaufmann-Kohler & Michele Potesta, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, SSRN Electronic Journal (2017), https://www.ssrn.com/abstract=3457310 (last visited Mar. 8, 2021).
[75] *Id.*, ¶ 177-183.

necessarily involve a greater degree of formalization and rule-based procedures.[76] Together with it, the appointment of tribunal members by the states will possibly politicize the appointment process and the tribunal may feel more inclined to decide in the favor of the state at the cost of the investor, undermining fair trial by the tribunal.[77]

V. Conclusion

The idea of establishing an international investment court is undoubtedly a revolutionary one that has its origin in the cumulative resentment towards ISDS on account of the lack of legitimacy, transparency and consistency of the system. While the proposed IIC promises to create legitimacy in the international investment dispute resolution regime, the fact is the new model has its own set of limitations that are hard to ignore. Critics have pointed to the enhanced encroachment on the sovereign rights of nations by virtue of limited control by the states over the appointment process in the IIC. Further, scholars[78] highlight that too much emphasis on consistency by the IIC devoid the system of its accuracy and sincerity since judges will be more inclined to follow the precedent rather than appreciate the facts of the case. More importantly, the establishment and effectiveness of an international investment court depends to a large extent on its acceptance by developed and developing countries alike. Already a number of developing countries, notably Latin American countries, have denounced any sort of international interference in issues relating to international investment. A number of them have modified their BITs and changed their respective protective and dispute resolution mechanisms to lay more emphasis on domestic resolution of investment disputes including negotiation and conciliation.[79] Countries like India, Brazil, Argentina and Japan have out rightly rejected the idea of a

[76] *Id.*
[77] Yang, *supra* note 54, p. 52.
[78] Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 Colum. J. Transnat'l L. 418, 420 (2013).
[79] Trishna Menon and Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, Kluwer Arbitration Blog, (Feb. 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/ (last visited Feb. 24, 2021).

multilateral investment court.[80] Surprisingly, even countries within the EU are not on the same page on the question of establishment of a multilateral investment court, some of which have raised questions on its compatibility with the principle of autonomous EU legal order.[81]

Although an international investment court will bring in more transparency and legitimacy, in the light of the experiences gained of the working of other international court systems like the WTO dispute settlement body, it is more likely to be dominated by Western interest and issues. The selection and appointment of the judges to the international tribunal being the most crucial one, it is highly likely to be influenced by powerful Western forces, negatively affecting the independence of the system. The ISDS system as it stands today definitely calls for improvements and reforms, however, an international investment court is not a solution especially when the political and economic sphere has still to reach a certain level of maturity not attained yet.

[80] *India Rejects Attempts by EU, Canada for Global Investment Agreement*, The Hindu, (Jan. 23, 2017), https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece (last visited Mar. 12, 2021).
[81] Charris Benedetti, *supra* note 29, p. 112.