Balancing Sovereignty and Investor Protection: Explore how reforms can balance the sovereign rights of host states with the protection of investors' rights, ensuring a fair and equitable arbitration process.

Sadeem Abdullah Alassaf

Department of Public Law, College of Law, Princess Nourah bint Abdulrahman University (PNU), Kingdom of Saudi Arabia.

E-mail: **saaalassaf@pnu.edu.sa**

- **Abstract:**

Over the past few decades, Investor-State Dispute Settlement (ISDS) strategy has attracted a strong criticisms over its insufficiency in achieving its mandates. The criticisms ranges from legitimacy crisis, lack of transparency, and inadequate credentials of the arbitrators that make tem rule the cases in unfair manner. Consequently, there have been threats from member states to withdraw their membership and some have even formerly withdrawn. Although some reforms are already being implemented, there is still call for more changes to make the arbitration mechanism sufficient and effective. This paper has recommended further reforms like establishment of standalone appellate body, change of rules that govern code of conducts and credentials of the arbitrators, and permitting public participation to enhance

transparency. This study is structured into three sections. First section discusses of major goals of ISDS, second section discuses weaknesses of the ISDS, and the final section discusses viable recommendations.

Kewwords: Transparency, Arbitration, Investor-State Dispute Settlement (ISDS), International Investment Agreements (IIAs), Bilateral Investment Treaties (BITs).

تحقيق التوازن بين السيادة وحماية المستثمرين: استكشاف كيف يمكن للإصلاحات أن تحقق التوازن بين الحقوق السيادية للدول المضيفة وحماية حقوق المستثمرين، وضمان عملية تحكيم عادلة ومنصفة.

سديم عبدالله العساف

قسم القانون العام، كلية الحقوق، جامعة الأميرة نورة بنت عبد الرحمن (PNU)، المملكة العربية السعودية.

البريد الإلكتروني: saaalassaf@pnu.edu.sa

ملخص البحث

على مدار العقود الماضية تعرضت آليات تسوية المنازعات بين المستثمر و بين الدول إلى انتقادات عديدة, حيث اعتبرت غير فعالة في تحقيق أهدافها وتركزت هذه الانتقادات على ضعف الشفافية ،الافتقار للعدالة واعتماد أحكام صادرة عن محكمين غير مؤهلين بشكل كاف، أدى ذلك إلى ظهور مطالبات مستمرة من الدول الأعضاء بإجراء إصلاحات جذرية مما دفع بعض الدول الآن إلى الانسحاب وهددت دول أخرى أيضا بالانسحاب ورغم تنفيذ بعض الإصلاحات لا تزال هناك حاجة ملحة لإجراء تغيرات إضافية لرفع كفاءة آليات التحكيم وزيادة مصداقيتها.

تقترح هذه الورقة عددا من الحلول منها إنشاء هيئة الاستئناف مستقلة، تعديل قواعد اختيار المحكمين وتعزيز الشفافية من خلال السماح بمشاركة الجمهور.

تنقسم الورقة إلى ثلاثة أقسام رئيسية، يناقش القسم الأول الاهداف الرئيسية لنظام ISDS ، بينما يستعرض القسم الثاني نقاط الضعف في الآليات الحالية و يقدم القسم الثالث توصيات عملية قابلة للتنفيذ .

الكلمات المفتاحية: الشفافية، التحكيم، اليات تسوية النزاعات بين المستثمرين والدول، اتفاقيات الاستثمار الدولية ، معاهدات الاستثمار الثنائية.

Introduction

Notwithstanding the presence of numerous avenues of solving disputes such as local courts, investment dispute arbitration is increasingly becoming an effective way of resolving differences between host nations and overseas investors.[١] By and large, investment arbitration facilitates international investors to regularly table their disagreements against host countries to investor-state settlement courts for determination with no requirement of seeking solutions from local courts of host countries. In general, the three known types of instruments that permits investment arbitration process between host countries and foreign investors. These instruments are: international investment agreements (IIAs) or bilateral investment treaties (BITs), national legislations, and investor-state contracts.[٢] Most of the undertaken investment arbitrations has been started on the ground of certain clauses in IIAs rather than national legislations. For all its intended purposes, the International Centre for Settlement of Investment Disputes (ICSID) symbolises investment arbitration system. Majority of completed treaty-founded investment arbitrations are established on the bases of the ICSID Convention and other related ICSID arbitration

(١) Weinstein and Manukyan comments that arbitration is an effective choice or settling investor-state disputes. Making Mediation More Attractive For Investor-State Disputes https://arbitrationblog.kluwerarbitration.com/٢٠١٩/٠٣/٢٦/making-mediation-more-attractive-for-investor-state-disputes/

(٢) See Bonnitcha, J., Poulsen, L.N.S. and Waibel, M., ٢٠١٧. The political economy of the investment treaty regime. Oxford University Press.

rules.[١] As well, IIAs provide international investors with United Nations Commission on International Trade Law (UNCITRAL) and other applicable arbitration guidelines, which they may use to trigger investment arbitration process. Although during the previous three decades the number of cases related to ICSID after its establishment has been low, the amount of cases significantly starting early ١٩٩٠. The amount of treaty-based investment arbitration court proceedings as at July ٢٠٢٤ is ١٣٣٢, out of which ٩٥٨ are concluded, ٣٥٤ are pending, and ٢٠ are unknown.[٢] This significant growth of investment arbitrations is however not without criticism from all walks of life concerning its perceived insufficiency. In rejoinder, a number of developing nations for instance South Africa, Latin American nations, and Indonesia consistent in shifting from investment arbitration process to court litigations in solving investment issues by terminating current IIAs and reproving the ICSID Conventions. The addition of investor-state dispute settlement (ISDS) in investment treaties continues to attract public debates and scrutiny.

- Research Plan

١. Introduction

---

(١) See Investment Policy Hub. https://investmentpolicy.unctad.org/investment-dispute-settlement

(٢) See Investment Policy Hub. https://investmentpolicy.unctad.org/investment-dispute-settlement

a. Background Information: Overview of ICSID and its major responsibilities
b. Defining Research Problem: Identifying major challenges undermining ICSID process and how those issues affect host states and investors.
c. Objectives:
    - To determine and analyse the grounds for main issues affecting ICSID
    - To appraise the effects caused by those issues on the landscape of investment arbitration
    - To offer viable recommendations for necessary reforms.

٢. **Literature Review**

a. Reviewing the present literature on problems facing ICSID, which includes:
    - Current legal structure governing issues
    - Case studies of major problems
    - Theoretical views on arbitration process
    - Knowledge gap in the current studies

٣. **Methodology**

a. Research Design: Use of qualitative methods to analyse case laws and legal texts
b. Data Gathering:
    - Analysis of case laws of ICSID problems during the past two decades
c. Data analysis:
    - Findings' thematic analysis to get common issues and trends

٤. **Major areas to focus on**

- Ground for problems facing ICSID
- Patten in those challenges over the last two decades
- Impact of those problems to stakeholders, and ICSID's credibility

٥. **Expected Outcome**

- A full understanding of the major ICSID problems
- Recommendations of reforms that can boost effectiveness and efficiency of the ICSID process.

٦. **Conclusion**

- A summary of the importance of the study
- Reflection on the probable effects of findings on prospect ICSID process

٧. **References**

  - List of law related texts, scholarly journals, and case laws

٨. **Defining the problem**

The International Centre for Settlement of Investment Disputes has played a crucial role in the resolution of investment-related disputes since its establishment in ١٩٦٦. However, the Center has faced a number of significant challenges in recent years that merit closer examination.
One key challenge is the increase in the complexity and diversity of the cases brought before the Centre. The number of investment disputes has risen sharply, with a growing number of cases involving multifaceted issues such as environmental concerns, human rights, and labor rights. (Radi, ٢٠١٥) This has placed significant strain on the Centre's resources and procedures, necessitating a review of its operational framework.
Further, the legal framework governing international investment law has faced increasing scrutiny, with concerns raised about the balance between protecting investor rights and upholding other public interests. There have been calls for the Centre to address these uncertainties and innovate its approach to dispute resolution.
Additionally, the issue of non-compliance with ICSID rulings has emerged as a significant challenge. Some states have been reluctant to abide by the Centre's decisions, raising questions about the enforceability and effectiveness of its awards.

To address these critical issues, this research plan proposes to:

٩. **Identifying goals**

١٠. **Choosing research methods**
١١. **Recruiting participants**
١٢. **Preparing the brief or summary**
١٣. **Establishing task timelines**
١٤. **Defining how you will present the findings**

- **Research Objective**

This research paper aims at analysing the effectiveness or sufficiency of investment arbitration in achieving ISDS goals. Precisely, this study critically looks at what has hindered investment arbitration from achieving all its ISDS goals. This paper adopts a goal-based strategy to give a clear reflection of the current state of ISDS. The paper further offers recommendations on how ISDS can be improved toward achieving goals.

- ISDS Goals

○ *Fair and Effective Dispute Determination*

The main agenda of ISDS is to resolve differences or disagreements between host nations and international investors in a fair and effective way. Most of these disputes are related to host states' failure to comply with investment treaties and agreements, which make foreign investors to experience harm to their economic interests. If these investment disputes are not fairly and effectively determined, international relations between the two countries and economic interest of international investors, and economic activities in the host countries would affected negatively. The covered foreign investors table complain against host nations before the international investment tribunals without the backing of their hoe government.[١] The goal of fair and effective dispute settlement fits in the legal traditions and sources its backing from IIAs.[٢] For example, the ٢٠١٢ US Model Bilateral Investment Treaty acknowledges the significance of offering an efficient ways of affirming claims and imposing rights regarding investment through international arbitration and under national laws.

---

(١) This is well documented by Matveev, Arseni in his "Investor-state dispute settlement: The evolving balance between investor protection and state sovereignty" article. p.٣٤٨.

(٢) See Brada, Josef et al. ٢٠٢١ in the quest to know whether investor protection increase foreign direct investment. They conducted a meta-analysis. *Journal of Economic Surveys*, *35*(١). This is in page ٣٤-٧٠.

Guaranteeing impartiality in ISDS necessitates an unbiased and independent platform where people who make decisions are not influenced by either side particularly considering that the two disputing sides (investor-state) are not an equal in almost all areas including power. As well, impartiality should be seen in how the society at large is treated, including indigenous people and local communities. For this reason, involvement of third party should be guaranteed to make sure that all foreign investor' interests and public interests are not compromised. Fundamentally, the capability of the decision-makers or arbitrators, as an institutional element of all adjudicative procedure, is inseparably connected the quality of dispute settlement. Therefore, competent and experienced arbitrators are crucial if fair and effective dispute resolution is to be achieved. It is also imperative to note that effective process of disagreement resolution is the one that is not characterised by inflated costs and prolonged proceedings.[١]

- ***Rule Compliance***

Global arbitration processes are mostly guided by established inter-state agreements. Accordingly, all stakeholders are required to strictly apply all rules included in those treaties. The major objectives of those arbitration processes is to monitor how all stakeholders involved in the treaty, pinpoint the breach of the set rules, and give a ruling to reinstate compliance and normalcy. By ensuring there is

(١) See Jeon, J., ٢٠١٦. Drafting an Optimal Dispute Resolution Clause in Investment Treaties. *Peking U. Transnat'l L. Rev.*, *4*, p.١٧٦.

compliance with the set global rules, the credibility of those actions is essential. In the alike manner, ISDS can be perceived as a legal approach to enhance IIAs' compliance by stakeholders in the treaty. This narrative imitates the prevalent perception in the investment law sphere that ISDS is an execution strategy for global investment law.[١] The goal ensuring there is absolute compliance with the set investment rules and agreements is consistent with the expectations of stakeholders for ISDS treaties since compliance is the heart of responsibility of the prevailing international law in managing global relations.[٢] Failure to comply with the rules contained in IIAs would cause externalities such as bloated costs for dispute settlement and lack of political goodwill, among others.

- ***Expediting Purposes of Investment Rule Regime***

Majority of international resolution mechanisms are section of recognized legal regimes that in most cases are comprised of set agreements. Due to this fact, the dispute resolution processes maybe characterised by biasness as the adjudicators attempt to meet the objectives of other originators or certain law regime.[٣] For instance, the World Trade Organization (WTO)' dispute settlement mechanism

---

(١) Gaukrodger, D. and Gordon, K., ٢٠١٢. Investor-state dispute settlement: a scoping paper for the investment policy community.

(٢) Andrew T. Guzman, *A Compliance-Based Theory of International Law*, ٩٠ CAL. L. REV. ١٨٢٣, ١٨٣٠ (٢٠٠٢).

(٣) Shany, supra note ٢٩, at ٢٤٦.

is characterised by multifaceted WTO legal structure that is supposed to perpetuate the operations and facilitate the attainment of WTO's goals and objectives. Likewise, ISDS being structured resolution mechanism of IIAs, is mandated to facilitate that achievement of the set investment legal regime. Primarily, IIAs is set to offer protection to international investors and their economic activities.[١] Most prefaces of investment agreements or contracts are also points to the provision of favourable conditions for all investors. For this reason, the ISDS meets a significant roles of sinking administrative interferences by exposing foreign investors to rule of law rather than political ideologies.

In summary, this paper has established a clear expectations of Investor–state dispute settlement (ISDS). ISDS is expected to facilitate fair and effective investment disputes adjudications without incurring outrageous costs. As well, Investor–state dispute settlement process is also supposed to facilitate law compliance in the host countries. In addition, ISDS is regarded as a significant mechanism that facilitate roles of investment legal regime, especially to undertake the role global investment law or rule of law rather than depending on political ideologies.

---

(١)Salacuse, J.W. and Sullivan, N.P., ٢٠٠٥. Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain? *Harv. Int'l LJ*, *46*, p.٦٧.

- Major Weaknesses of ISDS

o *Concerns about Partiality and Inefficiency in ISDS*

The traditional opinion that ISDS is determined to bring impartial and efficient investment dispute resolution has in recent time received constant criticism and empirical evidence suggest so. First, the perception that arbitrators and mediators are neutral has been undermined both the system of party selection and the system of reimbursing arbitrators. Since the disputing sides enjoy the freedom to select their preferred arbitrators to the hearing tribunal, ICSID judges are significantly divided into two groupings. That is, many have either pro-state or pro-investor position.[١][٢]This bigoted opinion of selected appointed arbitrators has possibly continued to undermine the entire supposed integrity on an investment dispute resolution tribunal, which have made some arbitrators to fail to apply facts and available rules. As a result, they become biased when solving investment disputes.[٣] Meanwhile, investment dispute arbiters ae far better paid for the work they have done compared to WTO

(١) Pauwelyn, J., ٢٠١٥. The rule of law without the rule of lawyers? Why investment arbitrators are from Mars, trade adjudicators from Venus. *American Journal of International Law*, *109*(٤), pp.٧٦١-٨٠٥.

(٢) See Rao, W., ٢٠٢١. Are arbitrators biased in ICSID arbitration? A dynamic perspective. *International Review of Law and Economics*, *66*

(٣) Id. At ٧٨١

arbitrators. This payment is done by disputing sides themselves rather than coming from public coffers. These financial incentives cause an inherent risk that continues to influence investment dispute adjudicators, especially since their reward increases when the disputes they are overseeing are merited.[١] However, the extent to which this financial rewards cause pro-investor and pro-state bias is still not determined empirically. According to Colin Brown (٢٠١٧), what actually matters in this situation is the opinion about the impact of those financial incentives.[٢]

- ***Absence of Appellate Review***

Although the finality of arbitral processes may significantly lower the aggregate arbitration financial expenses and the time taken to conclude the dispute, absence of appellate review demonstrates that errors when interpreting and applying facts and rules are not corrected. If the dissatisfied side have no effective remedies after receiving flawed decision from the arbitral judges, then justice to disputing sides in the judicial process is undermined. As well, it is essential to note that absenteeism of appeal services would like deteriorate efficient of the ISDS by creating an environment that facilitates extended litigation process subsequent the issuing of awards. For example, in relation to process of annulment in ICSID

---

(١) Pauwenlyn stated that ICSID arbiters are remunerated U.S. $٣,٠٠٠ every day worked on an investment dispute case. ١٥٤.

(٢) Brown, C.M., ٢٠١٧. A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches. ICSID Review-Foreign Investment Law Journal, ٣٢(٣), pp.٦٧٣-٦٩٠.

adjudication, involved parties enjoy unlimited request and this intensifying inefficiency of the arbitral procedure. The aspect of efficiency of arbitration that is facilitated by specialised arbitrators is partly counterbalanced because disagreeing parties are not allowed to appeal against issued awards.

The resolve of if and how the principle of impartiality can be achieved in arbitral procedure is achievable through arbitral process is complicated by frequent contradictions and inconsistences that occur in investment arbitral jurisprudence.[١] Additionally, investment adjudication often do not work as a one-stop forum for resolving investment disputes, further raising eyebrows to its capacity to achieve considerable efficiency. In majority of already determined cases, tribunals have not heard counterclaims that have been submitted by host countries because of both inadmissibility and lack of jurisdiction reasons. The obvious counterclaims refutation shows that host countries are forced to look for relief from judicial system, which further causes inconsistency in the awards and increased cost and duration before the final determination. Since the process of dispute resolution is not often publicised for public to follow and having to incur huge costs to access arbitral proceedings, other stakeholders such as citizens of the host country are not able to submit their claims to the tribunal. Plausibly, if all stakeholders were allowed to submit their claims, arbitral processes would slow down.

---

(١) Puig and Shaffer, supra note ١٣٠.

○ *Arbitrators' Inadequate Expertise of Local Rules*

Often, appointed investment judges may have inadequate an *ex ante* indulgent of the complexity local rules of the host country.[١] In the process of closing this knowledge gap, the arbitrators require more time and attention, which may lower efficiency. In cases related to investment between investor and host state, it is almost impossible to avoid local law-related matters because international investments are based on laws and rules of the host states. In reality, ICDS judges have repeatedly local rules and laws chiefly to applicable owing to the sovereignty of the host state. For this reason, some commentators consider investment tribunals as gents of both national judicial system of the host country and transnational law.[٢] Nevertheless, the limited knowledge of local laws amongst arbitrators is a serious issue that continues to undermine efficiency and therefore it should be relooked.

Recently, there have been several incidences of investment arbitration inefficiency during compliance and implementation of ISDS awards.[٣] This is largely contributed by the issuance of significantly large awards by the

---

(١)See Jarrod Hepburn,
'Domestic Law in International investment arbitration". ١٠٨—١٠٩. ٢٠١٧. He explain s this point in depth.

(٢) Another key explanation is done by Hege E. Kjos in his hournal "Applicable Law in Investor-state arbitration" The Interplay between National and international law. ٢٩٩, ٢٠١٣.

(٣) OECD

appointed tribunal. For example, in the *Yukos* case, Russia was fined US$٥٠ billion. This huge amount made Russia fail to voluntarily comply with the issued order. In the case the party is not willingly complying, the enforcement process becomes imperious. High value issued awards mean that the enforcement body would incur substantial costs in terms of money and time as it seeks to reclaim collaterals equal to the issued awards. Enforcing an award in such cases is said to be possibly the most problematic, time consuming, and costliest stage of ISDS.

- ***Lack of Guiding Principles for Arbitrators***

The lack of guiding principles that limit arbiters when overseeing a dispute determination process between investor and host nation is a vital problem that significantly undermine ICSID. Some commentators view ICSID arbitral procedure as more investor friendly tribunal. Factually, ICSID arbitrators often make inconsistent interpretations because there is no regulations. The empirical evidence points the need for tribunals to follow set of rules or guiding principles to standardize their undertakings. Some of the critics argue that there is need to have regulations like the ١٩٩٦ WTO code of conduct and the ECHR'S ٢٠٠٨ resolution on judicial ethics that guide how dispute settlements are conducted. Absence of such regulations in ICSID makes arbitrators to flexibly issue awards, making them easily compromised by disputing parties.[1] With the hug

---

(١) See the study by D. Gaukrodger, K.Gordon (٢٠١٧), Investor-state Dispute Settlement: A Scoping Paper for the Investment Policy

=

space of interpretation, the key conflict among disputing parties is the affluence of behaviours of the host state, either simple breach against the written contract or soundly administrative enforcement. Such conflicts are only decided by the tribunals. Empirical evidence further point out that is such cases, arbitrators mostly favour investor's side leaving the host country to seek relief to other judicial avenues such as local courts. Since arbitrators are mostly knowledgeable about the international; investment law rather than local laws, they lack capacity to adequately address investors' issues using local public laws.[١] In the field where tribunals work, political influence by the host state is often insignificant. Being an investment case, the host state is often considered as a corporation with no single privilege or sovereignty. Nin similar situation, some mandatory actions are inevitable can be wrongly be perceived as "breach". This case also partly why there are few successes for international investors in the tribunal.

- ***Lack of adequate Arbitrators' Credibility***

Arbitrator's credibility is a persistent issue affecting ISDS, particularly on the role-issue disputes whereby arbitrators act as investment lawyers. In such case, arbitrators would have to make a decision on a specific issue where they would be needed to represent or advise their clients regarding similar issue. Herein, it is inevitable to

---

Community, vol. ٩

(١) See the argument by S.Puig, A.Srtezhnev (٢٠١٧), The David Effect and ISDS, European Journal of International Law,. vol. ٢٨, pp. ٧٣١–٧٦١.

have a conflict of interest, which brings a perception that they are biased and this compromise the principle of neutrality. Additionally, some commentators argue that there is inadequate attention on the qualifications and expertise of arbitrators. Both procedural structures and IIAs are silent regarding qualifications of the members of the tribunal.[١] For example, the ICSID Convention only states that arbitral juries ought to be *"of high moral character and [have] competence in the field of law, commerce, industry, or finance and may be relied upon to exercise independent judgement"*.[٢] Likewise, United Nations Commission on International Trade Law (UNCITRAL) merely call for arbitrators to reveal situations that would bring doubt in their neutrality.[٣] Even though, some contemporary treaties have attempted to address this problem by clearly prescribing arbitrators' qualifications.[٤]

- ***Norm Compliance: Reality against Expectations***

Full state passivity with substantial principles of handling of international investors and their businesses is vital to the goal of the investment treaty regime`. Failure to have total compliance of norms means that IIAs network lose its significance in the international investment

---

(١) Lisa Diependaele et al, supra n ١٦.

(٢) ICSID Convention, Article ١٤.

(٣)UNCITRAL, Article ١١

(٤) See for example, EU-Canada Comprehensive Economic and Trade Agreement and Transatlantic Trade Investment

governance. Since majority of the significant provisions contained in investment agreements are not in accommodating language, contracting countries plausibly regard investment arbitration processes as a central component in facilitating host state compliance with stated rules. Likewise, investment arbitral mechanism is seen as an enforcing tool for host states to honour their obligations as required in the IIAs. Ideally, investment arbitral mechanism is represented as a seeded player in inducing host state's amenability with set good governance criterions contained in investment treaties. Herein, the rationale is to provide arbitration forum that is neutral and unbiased. Notwithstanding the plausible potential of investment arbitration of facilitating host states' compliance of set norms, empirical evidence show the contrary.

- ***Inconsistency in ISDS Arbitration***

A legal mechanism is said to be consistent if it produces coherent decisions and awards. Inconsistency harms predictability, consequently contributing to the incredibility and illegitimacy of the entire legal system. As a result, disputes escalate and associated financial expenses go high. There are several feature of the investment law is prone to frequent inconsistent decisions. Predominantly, its dependence on wide-ranging legal conceptions and own decentralisation are the cause of inconsistent awards and decisions. Because the legal matters answered in arbitration mainly encompass legal notions, which are structured to be utilised in wide range of situations, they welcome diverse interpretations. For example, full protection and security (FPS), fair and equitable treatment (FET), and

discriminatory treatment.[١] One of the notable illustration of inconsistent arbitration is *Metalclad v Mexico*[٢] and *SD Meyers v Canada.*[٣] In both case, the respective tribunals applied diverse interpretations for FET derived from the same treaty that is NAFTA. Such inconsistencies in decision making, especially when the decisions directly involve the public is serious problem to the ISDS regime. In relation to this, opponent specified that "*...mantra of one case not being binding on any other, each one being an individual, one-off, ad-hoc process, has no place in a legal system that passes judgment on a vast range of government measures affecting international investments*."[٤] As well, decentralization of the dispute arbitration mechanism under existing treaties causes inconsistency. Investment treaties are broad because they are made based on different contexts, which have diverse set of rules, more so, due to the fact that disagreeing parties have a significant influence to determine who is chosen as a member of the panel. Every investment dispute is heard by tribunals that are made of different

---

(١) Christoph Schreuer, 'Coherence and Consistency in International Investment Law' in Robert Echandi and Pierre Sauvé (eds), World Trade Forum: Prospects in International Investment Law and Policy ١ (Cambridge University Press ٢٠١٣).

(٢) Metalclad Corporation v United Mexican States (٢٠٠٠). ICSID Case No. ARB(AF)/٩٧/ ١ (٢٠٠٠)

(٣) SD Meyers v Canada,٢٠٠٠

(٤) H. Mann, et al, Comments on ICSID Discussion Paper», Possible Improvements of the Framework for ICSID Arbitration, International Institute for Sustainable Development (IISD), ٢٠٠٤, p. ٦.

arbiters who are appointed by parties. Arbitrators often have different views on the material issues.[1]

Another contributing factor to the inconsistency nature of the arbitration system is the newness if the international investment law. In it is current form, this international investment law was constituted in ١٩٥٩ and became active in ١٩٦٢ following the adoption of a bilateral agreement by Pakistan and Germany. It is important to note that the ICSID was established later in ١٩٦٥ and material case law involving international investment law started to take shape early ١٩٩٠. Because norms contained in investment treaties are mostly put in vague and open-ended language, tribunals enjoy the independence of not only interpreting but also applying the set treaties.[2] The wide discretion together with the absence of *stare decisis* and lack of an appeal process are the major causes of inconsistent of both awards and arbitral jurisprudence. This is a clear indicator of states that are deprived of the significant benefits from international investors. In the event the host states experience inconsistent arbitral jurisprudence, resulting into a contradicting information, the objective of investment arbitral mechanism in facilitating total

(١) Christoph Schreuer, 'Coherence and Consistency in International Investment Law' in Robert Echandi and Pierre Sauvé (eds), World Trade Forum: Prospects in International Investment Law and Policy ١ (Cambridge University Press ٢٠١٣).

(٢) Robert states that the arbitral jurisprudence given by the tribunals is often like a house of cards that is constructed by referencing previous awards and views from academicians without involving states' practices.

compliance of norms becomes uncertain.

- ***Lack of Transparency***

Lack of transparency and insufficient representation of the majority of people in matter that directly involve the public have further worsened the ISDS. Currently, ISDS is a closed system of dispute arbitration. This means that dispute are mostly solved without publicising the process. Under the existing ISDS system, non-disputing parties enjoy no legal rights to directly get involved in the ISDS proceedings or determine how award is issued.[١] In this ISDS system, amicus curie briefs still remain infrequency. Those investment contracts and subsequent investment disputes have significant impacts on social, economic, and political spheres, and therefore they attract public interest. It is thus important to note that excluding the community from participating in those dispute procedures is shutting out their interests. Most ISDS cases are related to governmental rules and public policy measures that are often challenged by foreign investors. Just to mention, governmental regulations on health and environment that either indirectly or direct affect investments can be challenged. For example, in the *Philip Morris* case,[٢] the plaintiff, in this case Philip Morris took legal action against both Australia and Uruguay for

---

(١) See Jandhyala, Srividya, "Why Do Countries Commit to ISDS for Disputes with Foreign Investor?" ٢٠١٦ (١٦).

(٢) See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/١٠/٧.

their demands to have health warnings on all cigarette packages. Another example is *Vattenfall* case.[١] This case involved a Swedish energy that sued German government for passing a regulation that phased out nuclear energy. The extent to which a government's may exercise authority or right to outlaw a potentially unsafe things or activities has been equally challenged in Methanex case.[٢] As rightly illustrated in those cases, the awards by the arbitral tribunals have implications that are beyond investment impacts to the objectives of public policies such as limiting activities that may destroy the environment. Under these situations, the subsequent result of arbitral process is experienced by not only disputing parties but also non-disputing parties like the communities.

- ***Legitimacy Crisis***

Despite international investment law still in early stage after adoption, it continues to face persistent issues as investor-stat arbitration experiences several legitimacy challenges, which many commentators perceive as legitimacy crises. In fact, some commentators have predicted a series of backlash against the current international investment regime.[٣٤] In a general view, legitimacy is a

(١)Vattenfall AB and Others v Federal Republic of Germany, ICSID Case No. ARB/١٢/١٢.

(٢) Methanex Corporation v United States of America,NAFTA/UCITRAL Award,٠٣/٠٨/٢٠٠٥

(٣) See Susan D. Franck, "The Legitimacy Crisis in Investment in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions (٢٠٠٥).

condition for the existence of foreign organizations because countries or states can withdraw their membership from such institution if it becomes illegitimate. If there is a substantial withdrawals, then what would follow is the loss of public acceptance or confidence of the institution. The extensive view that this institution may be illegitimate is affecting the functioning of ICSDS and risking it to not only be rejected by many states but also totally fail.[١] As said by Thomas Franck, legitimacy is defined as, "*a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively'*.[٢] In an attempt to answer "why do states obey rules," Thomas Franck put across the following answer: *'because they perceive the rule and its institutional penumbra to have a high degree of legitimacy'*. [٣] In coming up with this answer, Thomas wrote four major indicators: symbolic, adherence, coherence, and determinacy.[٤] Despite its weaknesses, this theory was widely

(١) E.g. See Michael Waibel, et al. work titled "The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel, et al, The backlash Against Investment Arbitration: Perception and Reality (Kluwer Law International, ٢٠١٠): ٣٧

(٢) See Charles H. Brower, II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (٢٠٠٣) ٣٦ Vand J Transnatl L ٣٧, ٥١.

(٣) See the definition of legitimacy by Thomas M. Franck, "The Power of Legitimacy among Nations. ١٩٩٠, ٢٤.

(٤) Thomas M. Franck, The Power of Legitimacy Among Nations

(٥) See See Jose E. Alvarez, 'Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck' (١٩٩١-١٩٩٢) ٤ NYU J Intl L & Pol ١٩٩, ٢٢٨. Herein, Alvarez stated that Thomas' theory of legitimacy was not founded on

=

applied to explain contemporary tribunals' strategies to the foreign law of expropriation.[1] This theory has been applied to evaluate the investor-state intercession's legitimacy as a framework of international rules and understanding how common challenges of those rules continue to undermine legitimacy of ICSID. Applying this theory to assess investor-state arbitration is informed by the fact that investment stakeholders can freely scrutinize the legal reasoning and adjust themselves to be in line with the set standards and rules. This has contributed to the degree of transparency, which has been one of the major problems of legitimacy of ISDS.

---

mathematical facts but were only theories or hypotheticals. The theory was greatly criticised for its shortcomings.

(١) Patrick M. Norton, 'Law of the Future or a Law of the Past - Modern Tribunals and the International Law of Expropriation' (١٩٩١) ٨٥ Am J Intl L ٤٧٤, ٤٩٩-٥٠٢

- **Recommendations**

○ ***Formation of Standalone Appeal Court***

Among the common recommendations proposed by many commentators is creation of standalone appellate body. Appellate body would be responsible of reviewing appeals tabled by the dissatisfied parties after awards issued by the tribunals. The current ICSID system would retail most of its fundamental features but complimented by the newly formed appeal body. A standing or semi-permanent appeal court unlike when having an *ad hoc* tribunal, would solve the current problem of inconsistency and incoherence across existing different investment treaties. Despite that majority of arbitration systems are structured such that they issue final awards, there are a few regimes that offer appeal services. However, when structuring an appellate body, several factors should be put into consideration, which include but not limited to if a single appeal court should be formed to oversee appeal cases brought by dissatisfied parties regardless of the applied rules, and how far this system would be viable.[١] Certainly, this further raises important procedural queries about the arrangement of the appeal court or tribunal, selection of the members, and the standard code of conduct.

There is need to carefully consider composition and structure formation of appeal body, either semi-permanent or

---

(١) UN Secretariat, Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), para ٤, UN Doc A/CN.٩/٩١٧ (٢٠ April ٢٠١٧)

permanent needs. Among the most contentious issue is how the adjudicators are selected. There two viable options. One is to copy WTO's appeal system that has standing appellate body with permanent staffs and the second option is to depend on the creation of an ad hoc panel with members chosen from a list of arbitrators such as Annulment Committee. The two options however have flaws. For instance, a standalone appellate court would face problems related to costs and composition. Permanent appeal body would deny disputing parties their current freedom to appoint their representatives. On the other side, the roster system would face concerns related to roster membership and query of if member countries would be free to select pro-respondent judges.[١]

It is important to consider qualifications of appellate judges. Several factors should be considered during the appointment and election process, which includes but not limited to nationality, experience, gender, expertise, geographical balance, impartiality, and independence.[٢] Commentators argue that judges of the appeal body should not hear any case directly or indirectly touching their state of

---

(١) See Robert Howse, 'Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a Judicial System for Investment Disputes', Working Paper (٢٠١٥)

(٢) See Gabrielle Kaufmann-Kohler and 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? Dispute Settlement (٢٠١٦) para ١٦٨ www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf accessed ١٥ December ٢٠١٧

origin since, investment disputes mostly involve issues related to public interests and sometimes they are touch on local politics. For those reasons, adjudicators may be influenced to make biased decisions without following facts and rules. That is, while judges may be absolutely unbiased, judicial nationalism factor may influence their reasoning.[١]

- ***Enhancing then Aspect of Legitimacy***

To comprehensively ensnare an effective ISDS, the aspect of legitimacy has to be reformed through various avenues even though they have not been sufficient. Arbitrators have been using these avenues to lower critics' pressure by strengthening the ISDS' legitimacy.[٢]For example, in Philip Morris award,[٣] the arbitrators deliberated non-commercial values to try and arrive at a balance between investor's rights and government obligations.[٤]

---

(١) Gabrielle Kaufmann-Kohler and 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? Analysis and Roadmap', CIDS Geneva Ctr for Int'l Dispute Settlement (٢٠١٦) para ١٦٨

(٢) See generally, Annalisa M. Leibold , 'The Friction Between Investor Protection and Human Rights: Lessons from Foresti v South Africa' [٢٠١٥] Houston Journal of International Law, Forthcoming, available at https://ssrn.com/abstract=٢٥٨٦٢٥٢, accessed ٢٠ April ٢٠١٩.

(٣) See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/١٠/٧

(٤) Giovanni supra n ١٨, non-commercial values as those "not

=

During the hearing of this case, the arbitrators found that the state measures is dispute, that been approved bona fides to offer protection to public welfares, were proportionate and not discriminatory. This trend of tribunals' attempt to boost legitimacy is also exhibited in *Foresti case.*[١] In this award, the tribunal permitted non-disputing stakeholder to participate and transferred that cost to the plaintiff because of the friction that was generated by the conflicting rights of an investor and the state to ratify affirmative human rights law. Although these strategies have not been widely used in ISDS, it is a commendable inclination by the tribunals and a substantial step toward reviving ISDS's legitimacy. Introducing Public Participation

Involving the public or communities in issues that politically, economically, and socially affect them is a vital toward having a sustainable development of ISDS. As VanDuzer et al. state, to make sure there is sustainable development, *'they should be developed through wide consultation with people in the host country and decisions about the negotiation, application and interpretation of agreements should be transparent and consistent.'*[٢] This involvement of the public also applies to dispute arbitration.

---

pertaining to the protection of property but relating to the safeguard of other essential interests such as environment and human health" also see Mary E. Footer, 'Bits And Pieces: Social And Environmental Protection In The Regulation of Foreign Investment' (٢٠٠٩) ١٨(١) Michigan State Journal of International Law, ٣٣. ١١٦ Ibid at para ٣٠٥

(١) Foresti case, supra n ٤٣

(٢) Vanduzer et al., supra n ٩٨

Public participation in this sphere can be attained by welcoming amicus curie briefs or submissions. Amicus submission would help in protecting public interests, boosting the quality of the awards, and boosting the level of transparency. This study has discovered that in the existing ISDS system, amicus curie briefs are infrequency. To mention, there exists a substantial engagement in the ICSID rules on the permissibility of amicus curie briefs.[١] It is worth noting that amicus briefs are a significant pillar in making consideration on issues that involve public policy. One instance is the recent determination *of Achmea v Slovak case,*[٢] which is regarded as a substantial step in the history of ISDS on amicus curie briefs. During this case proceedings, the amicus briefs were submitted at the summons of the hearing trial.

- ***Enhancing Transparency***

It is widely known that arbitration as another mechanism of settling disputes is a process between a plaintiff and a respondent that is rarely published. Although,

---

(١) Rule ٣٧(٢)(a) requires that "the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties". On the other hand, unless the disputing parties give broad consent, the non-disputing party will have very limited rights and even more limited access. But how are the amici supposed to know what they might be able to add beyond what is already presented to the tribunal by the disputing parties, if they do not have access to the files?"

(٢) Manjiao Chi

in the scope of ISDS, a state is the respondent and the award issued unavoidably affect the public. In this regard, transparency can be boosted by publicising all documents of the disputes, allowing people to access the case proceedings, and accepting amicus submissions. There has been attempts to incorporate transparency clauses in the current era BITs. A good example is the U.S BIT of ٢٠١٢ model that have specific provisions known as "Transparency of Arbitral Proceedings."[١] This trend also evident in Comprehensive Economic and Trade Agreement (CETA) that has adopted UNCITRAL Transparency related Rules.[٢]

- ***Reforming Arbitration Rules***

The rules that govern international arbitrations to curtail current cases of inconsistency in ISDS arbitration awards are subject of substantial revisions. Such revisions should be made to also enable to have more transparency of arbitral processes and take in of review or appellate body to welcome counterclaims.[٣] This reform is practical and is likely to be implemented efficiently rather than attempting to amend existing treaties, which is a tedious exercise and sometimes ineffective. This paper suggests reforms such as

(١) ٢٠١٢ U.S. Model BIT.

(٢) EU-Canada Comprehensive Economic and Trade Agreement.

(٣) Nigel Blackaby, Public Interest and Investment Treaty Arbitration, in International Commercial Arbitration: Important Contemporary Questions (Albert Jan van den Berg ed., ٢٠٠٢) as quoted in Susan D. Frank, 'The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law through Inconsistent Decisions' (٢٠٠٥) ٧٣ Fordham Law Review ١٥٢١.

creating a pull of workers that have diverse backgrounds, comprising of former government officials, arbitration practitioners, and international lawyers and judges, among others. This group will be responsible of establishing a unified code of ethics and superlative practices of ISDS that would the existing distinctiveness of the system and public impacts of investment treaties adjudications. Some of the best practices may include allowing transparency by publicizing issued awards, and allowing the public to access ISDS documents, especially in issues directly affecting the public. Although, the creation of those guidelines would necessitate prompting of political goodwill to complement or change existing rules. For example, for ICSID regulations, the reforms could face restraints from the ICSID Convention.

– Conclusion

ISDS is regarded as a major mechanism of unravelling disputes arising from set investment treaties between international investors and host states due to its perceived impartiality and neutrality traits. ISDS has clear goals that its aims to achieve. Among those goals are ensuring host states and international investors fully comply with the rules contained in investment treaties and settling disputes between disputing parties in affair and effective manner, just to mention. However, ISDS continues to experience problems that have undermined it attempt to achieve goals. One major problem is the legitimacy crisis that is brought by numerous criticism of inconsistent awards and the issue of credibility of the arbitrators. The other major source of criticism is lack of transparency during the arbitration process. For example, non-disputing parties like the public do not have access to the award issues regardless of whether the award concerns public interest or not.. This paper has made several recommendations that can be implemented to improve ISDS. Among the proposed recommendations are allowing amicus submissions during the hearing process, establishment of standalone appellate body, and amendment of existing rules to accommodate important aspects like qualifications of arbitrators and their code of conducts. However, these reforms should be incorporated in a way that a balance between the sovereign right of the host government to protect public interest and protection of investors' rights is not affected. Therefore, a paradigm shift to sufficient ISDS considering the rights all parties, both disputing and non-disputing that affected by the arbitration is the most effective way of revising ISDS.

Bibliography

Alvarez, J.E., ١٩٩١. The Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck.

Brada, J.C., Drabek, Z. and Iwasaki, I., ٢٠٢١. Does investor protection increase foreign direct investment? A meta-analysis. *Journal of Economic Surveys*, *35*(١), pp.٣٤-٧٠.

Brower, C.H., ٢٠٠٣. Structure, Legitimacy, and NAFTA's Investment Chapter. *Vand. J. Transnat'l L.*, *36*, p.٣٧.

Brown, C.M., ٢٠١٧. A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches. ICSID Review-Foreign Investment Law Journal, ٣٢(٣), pp.٦٧٣-٦٩٠

Bonnitcha, J., Poulsen, L.N.S. and Waibel, M., ٢٠١٧. *The political economy of the investment treaty regime*. Oxford University Press.

Elisabeth Kjos, H., ٢٠١٣. *Applicable Law in Investor-State Arbitration* (p. ٣٤٣). Oxford University Press.

Franck, D., ٢٠٠٥. Susan." The legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Decision.". *Fordham Law Review*, *1584*.

Franck, S.D., ٢٠٠٤. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Publlic International Law through Inconsistent Decisions. *Fordham L. Rev.*, *73*, p.١٥٢١.

Footer, M.E., ٢٠٠٩. Bits and pieces: social and environmental protection in the regulation of foreign investment. *Mich. St. U. Coll. LJ Int'l L.*, *18*, p.٣٣.

Gaukrodger, D. and Gordon, K., ٢٠١٢. Investor-state dispute settlement: a scoping paper for the investment policy community.

Guzman, A.T., ٢٠٠٢. A compliance-based theory of international law. *Calif. L. Rev.*, *90*, p.١٨٢٣.

Gaukrodger, D. and Gordon, K., ٢٠١٢. Investor-state dispute settlement: a scoping paper for the investment policy community.

Howse, R., ٢٠١٥. Courting the critics of investor-state dispute settlement: the EU proposal for a judicial system for investment disputes. *URL: https://cdn-media. webview. Net/i/fjj3t288ah/Courting_the_Criticsdraft1. pdf.*

Hepburn, J., ٢٠١٧. *Domestic law in international investment arbitration*. Oxford University Press.

Leibold, A.M., ٢٠١٦. The friction between investor protection and human rights: lessons from Foresti v. South Africa. *Hous. J. Int'l L.*, *38*, p.٢١٥.

Ma, W. and Faure, M., ٢٠٢٢. Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes. *Brook. J. Int'l L.*, *48*, p.١.

Matveev, A., ٢٠١٥. Investor-state dispute settlement: The evolving balance between investor protection and state sovereignty. *UW Austl. L. Rev.*, *40*, p.٣٤٨.

Mann, H., Cosbey, A., Peterson, L. and von Moltke, K., ٢٠٠٤. Comments on ICSID Discussion Paper,"Possible Improvements of the Framework for ICSID Arbitration". *International Institute for Sustainable Development (IISD)*, *6*.

Norton, P.M., ١٩٩١. A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation. *American Journal of International Law*, *85*(٣), pp.٤٧٤-٥٠٥.

Pauwelyn, J., ٢٠١٥. The rule of law without the rule of lawyers? Why investment arbitrators are from Mars, trade adjudicators from Venus. *American Journal of International Law*, *109*(٤), pp.٧٦١-٨٠٥.

Potesta, M. and Kaufmann-Kohler, G., ٢٠١٦. 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?–Analysis and Roadmap. *Analysis and Roadmap (June 3, 2016)*.

Puig, S. and Strezhnev, A., ٢٠١٧. The David effect and ISDS. *European Journal of International Law*, *28*(٣), pp.٧٣١-٧٦١.

Rao, W., ٢٠٢١. Are arbitrators biased in ICSID arbitration? A dynamic perspective. *International Review of Law and Economics*, *66*

Rao, W., ٢٠٢١. Are arbitrators biased in ICSID arbitration? A dynamic perspective. *International Review of Law and Economics*, *66*, p.١٠٥٩٨٠.

Jandhyala, S., ٢٠١٦. Why Do Countries Commit to ISDS for Disputes with Foreign Investors?. *AIB Insights*, *16*(١), p.٧.

Jeon, J., ٢٠١٦. Drafting an Optimal Dispute Resolution Clause in Investment Treaties. *Peking U. Transnat'l L. Rev.*, *4*, p.١٧٦.

Salacuse, J.W. and Sullivan, N.P., ٢٠٠٥. Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain? *Harv. Int'l LJ*, *46*, p.٦٧.

Schreuer, C., ٢٠١٣. Coherence and consistency in international investment law. *Prospects in international investment law and policy. Cambridge University Press, Cambridge*, pp.٣٩١-٤٠٢.

Sàrl, C.P.M.B., Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/١٠/٧.

Waibel, M., ٢٠١٠. *The backlash against investment arbitration: perceptions and reality*. Kluwer Law International BV.