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Managing Investment Disputes: A Critical Analysis of Investor State Dispute Settlement Mechanism in Bilateral Investment Treaties

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Abstract

This paper reviews institutional and procedural aspects of the investor state dispute settlement (ISDS) mechanism in bilateral investment treaties (BITs). The problems of international arbitration system under ISDS are the main focus of the paper. ISDS was initially created to de-politicize the investment dispute settlement mechanism. However, in the actual practice, this system came under strong criticism for its flaws like confidentiality, inconsistency, non-transparency, expensive etc. Although, several alternate mechanisms at national and regional level were proposed, however, results are insufficient. Therefore a free and fair system for investment dispute settlement, based on the consent of all stakeholders (states, investors and development objectives) is need of the hour.

Keywords: Investment Disputes, Investor State Dispute Settlement Mechanism, Bilateral Investment Treaties

Investor State Dispute Settlement (ISDS)

Bilateral Investment Treaties (BITs) are the main legal instruments for protecting and promoting foreign direct investment (FDI) worldwide. These treaties provide number of investor friendly clauses to attract investors. However, one the most contentious provision they BITs provide is ISDS. While introducing the ISDS, Eberhardt[1] (2016) writes "*In an old fable, a wolf dresses in sheepskin to deceive the shepherd who indeed locks the hungry wolf up with the sheep. In global trade policies, the equivalent of the wolf is called investor-state dispute settlement or ISDS, a special tool for multinational companies to bully and squeeze money out of governments (P.13)*". ISDS was created to function as a de-politicized forum for settlement of disputes and to offer other advantages such as possibly cheaper, swifter, and fair than other dispute settlement mechanisms. On ground, however, the actual working of ISDS has led to fears about systemic flaws in the system. Majority disputes in ISDS involve issues of public policy as actions challenged by foreign investors increasingly include matters such as public health, environmental protection, human rights, labour rights or other development related measures (UNCTAD 2014c).According to Gaukrodger and Gordon (2012), till the mid twentieth century, prior to the mechanism of the ISDS system, investment related disputes were decided by direct dialogue between investor-and State or proceedings in domestic courts or were handled via diplomatic procedures or, at

[1] Eberhardt Pia is a researcher and campaigner at Corporate Europe Observatory, a campaign and research group, at Brussels.

times, by the use or threat of armed force (Johnson and Gimblett 2011). Provisions on ISDS have been a part of the international investment agreements (IIAs) for decades. Most of the BITs provide ISDS mechanism. Analysts such as Eberhardt and Cecilia (2012) argue that, in investment disputes MNCs can litigate sovereign governments if the government has done something that the MNC conceived damaging to its profits. Author further elaborate that historically, 'BITs were put in place by Western countries to protect their investors when they invested abroad. The western idea of ISDS as a free, fair and autonomous system for the resolution of disputes between MNCs and sovereign governments is one of the main justifications for a mechanism which has took huge amount of taxpayers money and challenges the ability of independent governments to act in the people's interest'. Similarly, Schill (2015) points out 'that ISDS is looked as depoliticizing international investment disputes and leading to improving the rule of law in State-investor relations. However, with the abrupt rise in investment arbitrations particularly during the last decade, ISDS has been fronting a significant criticism, including the withdrawal of some countries from it and starting of worldwide debates to reform or revoke ISDS mechanism. Frequent concerns include inconsistencies in investment arbitration decision making, deficient regard by arbitration tribunals to the host country's right to regulate in inferring and interpreting treaty texts, concerns of bias of ISDS system in favour of foreign companies, issues of lack of impartiality and independence of arbitrators, mechanism to control IATs and to guarantee impartiality of their decisions, third party funding, and very expensive resolution of disputes'.

Investor-state disputes filed under ISDS may challenges essential laws and regulations of any government, such as those guarding the health and environment, governing the essential services, addressing social, political and economic welfare issues and governing the use of domestic natural resources. The disputes have also a major financial effects on the public money (Osterwalder and Johnson 2011). Similarly, analysts like Wellhausen (2016) argues that one of the exceptional features of ISDS is that only foreign investors can file arbitration against State, were as host State can't do this.

There are presently more than 3,286 IIAs (2,928 BITs and 358 other IIAs) (UNCTAD 2016). By the end of March 2017, there were 767 known investor-state dispute cases, the majority of these cases are filed by companies from developed countries against countries from developing South.[2] However, most of the arbitration institutions are subjected to confidentiality, so the actual number of disputes filed is likely to be much greater. The exact passage of an ISDS case depends on the relevant institution and the rules conducting the case (Eberhardt and Cecilia 2012).

Investment Arbitration Institutions

International arbitration for investment disputes under ISDS starts with a foreign investor's notice of arbitration to a host State. During the proceedings, both the parties, the State and the investor are assisted by counsel (lawyers). Both the parties mutually select the tribunal for arbitration. Generally each party selects one arbitrator and both mutually appoint a third to serve as tribunal chairman. Proceedings may last for years. However, a very limited or no information is shared to the public, sometimes even public remains unaware, of the fact that a case is going on. Finally, the arbitrators decide the size and type of the remedy and allocate the legal expenses of the proceedings (Eberhardt and Cecilia 2012). However, most of the modern BITs mentions more than one dispute settlement instrument.[3] Some BITs mention the arbitration under the Arbitration Rules of The United Nations

[2] UNCTAD .2017. Investment Policy Hub: International Investment Agreements navigator, available at http://investmentpolicyhub.unctad.org/IIA (accessed on 12 April 2017).

[3] See Dolzer, Rudolf and Stevens Margrete.1995.

Commission on International Trade Law (UNCITRAL)[4] either alone or together with the references to the International Centre for Settlement of Investment Disputes (ICSID) arbitration, a small number of BITs also refer to the arbitration of the Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC)[5] , The Permanent Court of Arbitration (PCA), London Court of International Arbitration (LCIA), the Cairo Regional Centre for International Commercial Arbitration (CRCICA) or some other regional or international arbitration[6] (Begic, 2005).

Problems of ISDS System

The UNCTAD (2013) in its *World Investment Report*, notes that the working of ISDS has shown grave deficiencies. Crisis are related to legitimacy, absence of consistency and inaccurate decisions, issues of transparency, the way of arbitrator appointment, arbitrator's impartiality and independence and huge financial stakes. According to Eberhardt and Olivet (2012), 'ISDS is a partial system that puts the rights of investors over common interests, allowing foreign investors to bypass domestic legal mechanism of the host countries, and placing their self-interests above policy decisions and legal systems of sovereign governments.[7] Only investors can initiate litigation against host States through the ISDS system, making an inequality in the system and discrimination to domestic investors. Author further elaborate that 'arbitrators are not free and fair, each arbitrator gets huge amount on a case-to-case system, and arbitrators may also act as legal consultants for the foreign investors when not handling a case'. Once an arbitration tribunal has given a decision, there is no system of appeal or revision for loosing party. Huge compensations can be demanded from States that are judged by arbitrators to have harmfully affected profit of investor (UNCTAD 2014)**.** Analyst such as Schill (2015) has highlighted following problems of ISDS. First, the raising number of inconsistent and conflicting interpretations by IATs of agreed clauses of investment protection, not only under different BITs, but also in almost identical disputes initiated under the same BIT. Second, the broad worded investment treaties pay way for IATs to expensive interpretation of formulated principles of investment treaties, which creates unpredictability and uncertainty in IAT's decision making .Third, the inadequate respect paid by some arbitration tribunals to the necessity of host States to rule and regulate in the common public interest, like to protect public health, the environment, labour standards, or to react to financial and economic emergencies. Fourth, ISDS management problems particularly the confidentiality of proceedings, the impartiality and independence of arbitrators, and the issue that dispute settlement under ISDS creates a one party-owned business, in which other-party, even if impacted, is voiceless. Fifth, the absence of instruments to guarantee 'correct' interpretations of treaty clauses in line with the intents of the contracting parties. Sixth, the large expenses and extensive length of many arbitration proceedings, including in cases that are abusive or frivolous or are clearly lacking of merits.

Problems start with in the origin of ISDS system itself, as Legal basis of ISDS system is varied and complex, while various other dispute settlement instruments are fastened in well-defined treaty bases. ISDS's legal source is based on dispute resolution mechanisms or provisions contained in more than 3000 investment treaties, international conventions[8] and different arbitration rules. Majority of BITs offer for ISDS. There are big differences in the detail and contents of these provisions (Gaukrodger and Gordon 2012). These ambiguous provisions are interpreted by arbitrators in a very expensive manner.

[4] Decision on UNCITRAL Rules, UN. Documents. A/CN.9/IX/CRP. 4/Additional. 1, amended by UN. Documents. A/CN.9/SR. 178 (1976), reprinted in 15 *International Legal Materials701* (1976).

[5] ICC Arbitration Rules1998, 36 *International Legal Materials* 1604 (1997).

[6] See Parra, A. R.2000.

[7] Friends of the Earth Europe.2014.

[8] Notably the ICSID Convention

Analysts such Roberts (2013) argue, that private dispute settlement system has been grafted into the public international investment law, and this according to Garcia *et al* (2015) has resulted into a non-transparent investment dispute settlement system, in which, it is impossible or very hard to know basic facts such as the name of disputing parties or the number of disputes or their results.[9] These issues reflect the ISDS system's roots in private commercial dispute settlement, where secrecy is justified for the sake of business. However the major and critical problems of ISDS can be summarized as under.

Confidentially or non-Transparency

ISDS is conducted under rules that are mostly secretive .This secrecy violate the international human rights to public participation and information. Confidentiality or secrecy of cases is the critical problems of ISDS (Magraw 2015). In several occasions, it is impossible or at least very hard even to know that an investment dispute has been initiated, what the arguments and issues are and what conclusions or awards have been delivered to resolve the case. This absence of transparency has numerous negative effects. Like, it deteriorates the supposed legitimacy of the ISDS, and the decisions and awards given under it. Also, it prevents the States, public and investors from assess to what the responsibilities set forth in investment treaties actually mean in practice. It also creates tension between the ISDS system and the fundamental right to information. In any democratic State, public has fundamental right to know, were taxpayers money is used? (Osterwalder and Johnson 2011).

Most of the investment treaties do not oblige foreign investors to make public, their intention to file a dispute in IATs. Public release of dispute cases mostly depends on the arbitration rules selected by the disputing parties. For example, when ICSID is opted as the arbitration court, the confidentiality of arbitration process is protected by art. 48(5) of ICSID Convention, *"Centre shall not publish the award without the consent of the parties"* and by ICSID Arbitration Rules (Tahyar 1986). Although the ICSID has a policy of registration of cases. However, that register includes only the name of the disputing parties, the date of case registration and a very brief description of the dispute. Similarly, if the institution like (ICC or SCC) is chosen as arbitration facility there is no rule of making any information, public. Non-institutional or Ad hoc arbitration rules have no prerequisite of registration (OECD 2005). UNICTRAL rules are the most commonly used in an *ad hoc* arbitration, however, like other rules, they also have no provision for transparency as, *Article. 34(5) of UNCITRAL rules 2010 provide that it will not be make awards public, unless otherwise agreed by the parties,.* Although UNCITRAL in 2014 adopted a set of Rules on Transparency, but these rules do not apply to cases filed under BITs existing before 1 April, 2014 unless the agreed by Parties. The majority of ISDS cases are/will based on pre-2014 BITs, So UNCITRAL transparency rules may not apply in most of cases under ISDS (Magraw 2015).

Many recently concluded treaties also remain silent on issue of transparency in proceedings. Rather, they just refer to pre-existing arbitration rules, such as those under the ICSID, the rules developed by UNCITRAL, and less frequently, those issued by the ICC, the Arbitration Institute of the SCC, and other related arbitration bodies. SCC arbitration Rules also impose an obligation of confidentiality on the tribunal and the SCC itself as the article 45 says *", The SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award, unless otherwise agreed by the parties"*.[10] (Osterwalder and Johnson 2011).The ICC arbitration rules have a presumption of secrecy for awards and proceedings, and protect trade secrets and confidential business facts. Article 22 (3) of ICC Rules 2012 enables the

[9] Like ICSID, UNCITRAL consent of disputing parties is prerequisite for publishes results

[10] ICC, Arbitration Rules (2010), available athttp://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf (accessed on 1 Nov 2016)

arbitration tribunal to make instructions regarding confidentiality and to take due actions to protect secret information. [11] .LCIA is also in favour of confidentiality of awards and hearings. Article 19 and 30 of the LCIA Rules 2014 has provisions to impose duties of confidentiality [12](Levander 2014). According to article of 19 (4), *"All hearings shall be held in private, unless the parties agree otherwise in writing".* Also article 30 (1) says that *"The parties undertake as a general principle to keep confidential all awards in the arbitration*", Similarly Article 30 (3) says that "*The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal*". The simple idea is that all aspects of the arbitration proceedings, including the arguments and the final award, will be confidential. Similarly, PCA, which mostly uses UNCITRAL rules, were Art. 34(5) of UNCITRAL provide that it will not be make awards public, unless otherwise agreed by the parties, also follow confidentiality.

Absence of Review or Appeal system

Review or appeal system for awards, is almost absent under ISDS mechanism. For example, according to Article 53 (1) of ICSID Convention, the most used arbitration rule "*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention".* Although a party can file for annulment under ICSID. However, annulment process does not determine error in the arbitration tribunal's in applying of the respective law. Rather, request for annulment can only be approved on errors in process of law, not in the award itself, for example, an error in the constitution or procedure of tribunal.[13] So annulment is not an alternate for an appeal (Wellhausen 2016). Also if an award under annulment is upheld by the annulment committee, member States of ICSID under Article 54 are obligatory to deal it as a final national judgment (Gaukrodger and Gordon 2012)[14]. However, according to UNCTAD (2014c) report 'an ICSID annulment committee may not be able correct or annul an award, even after knowing the obvious errors of law. Furthermore, annulment committees are formed on an *ad hoc* basis for each dispute, they may also arrive at inconsistent decisions, thus further weakling the predictability of investment law. The report further points that the ICSID Convention drafters intentionally chose an annulment, not appeal mechanism. This reflected their intention of finality of awards. The role of annulment committee is not to correct errors or of law, but to guard the finality of the award and also to police the procedure of award. This has create a powerful and privileged path through which investors can contest the any policies of host States'.

Analysts such as Schreuer (2001) points that Article 52, requires annulment committee to turn a blind eye on a possibly erroneous decision and national laws tend to confine the grounds for review of awards.[15] However, under non-ICSID Convention arbitrations, awards can be challenged under the commercial arbitration system created by national law, the New York Convention and other applicable treaties. National arbitration rules provide a list of grounds on which awards can be challenged (Katia 2006). However, most of national arbitration measures offer a list of grounds for non-enforcement of awards, contained in Article V of the New York Convention*: (1) the arbitrated agreement was not valid (2) denial of the losing party's right to present its case (3) award was outside the scope of arbitration (4) the arbitral procedure was against parties' agreement (5) the award has been set aside (6) arbitration*

[11] ICC, Arbitration Rules (1998), articles. 20.7, 21.3, 28.2

[12] Article. 36 and LCIA Arbitration Rules (1998). Article. 19, 30.

[13] ICSID Convention, Rules and Regulations, chapter VII Interpretation, Annulment and Revision of the Award, Art. 50, (1) (c) (iii).

[14] Article 54 of ICSID Convention

[15] Article 52 of ICSID Convention, grounds for annulment.

was not needed for dispute (7) enforcement of award is not against public policy. Among these, first five grounds are related to procedural matters, and obviously do not permit national courts to appeal or review the Additional Facility awards [16] rather, they are mostly same as grounds for annulment provided by ICSID Convention. Although ICSID once proposed for study of feasibility of Appeals Facility, however, in 2005, the proposal was dropped by ICSID,[17] announcing that it was premature for such an attempt.[18] According to Walsh (2006), the appeal provision would increase the scope of review from procedural (as provided under annulment) to correctness of an error in award itself.

A Very Expensive System

Dispute settlement under the ISDS is an expensive one. A huge amount of public money is at the stake. According to UNCTAD (2014c) data, in ISDS cases, on average, expenditures, including arbitrator's fees (which is almost amount to 82% of total expenditures) and tribunal costs are 8 million US$ per case per party exceeding 30 million US$ in some cases,[19] but particularly for developing ones, this is a major burden on public money. Even if the host State ends up winning the case, arbitration tribunals have generally refrained from asking the foreign investor to pay the respondent's expenses. Sovereign governments are ordered by arbitration tribunals, to pay million dollars of amount to MNCs. In one such case in 2006, Occidental Petroleum[20] won the expensive award of 1769.00 million US$ to date. This award generated a worldwide debate (Wellhausen 2016). Similarly, in 2003, the Czech Republic paid a company an amount 354 million US$, (equal to than Czech's health budget). Republic of Ecuador has paid 1.1 billion US$ to a US based MNC (which is equal to 90% of Ecuador's social welfare budget for 2015. According to Eberhardt (2016) while 95% of awards go to corporations with at least 1 billion US$ in yearly revenue. In one dispute case, Libyan government was ordered to pay 905 million US$ to a firm which had invested 5 million US$ only (Eberhardt 2016). The Republic of the Philippines spent 58 million US$ to defend two ISDS cases against a German investor – the equal to pays of 12,500 teachers for one year or the immunisation for almost 38,00000 children for prevention of diseases such as tetanus, TB, polio or diphtheria (Olivet 2011). According to Scherer (2011) 'in arbitration costs, the lion's share goes into the pockets of the lawyers. It is estimated that almost 80% of all legal costs are spent on counsel'. Table 4.1 gives few examples of highest paid compensations by States to foreign investors.

[16] John and Vaughan1999.

[17] ICSID 2004, Discussion Paper 23, "Possible Improvements of the Framework for ICSID Arbitration", dated 22 Oct 2004), available at http://www.worldbank.org/icsid/highlights/improve-arb.pdf (accessed on 8 Sept. 2016)

[18] ICSID 2005, Working Paper 4 "Suggested Changes to the ICSID Rules and Regulations", ICSID Secretariat, dated 12 May 2005, available at http://www.worldbank.org/icsid /052405-sgmanual.pdf.(accessed on 7 July 2016)

[19] See Gaukrodger and Gordon 2012.

[20] A BIT based case between Occidental Petroleum vs. Republic of Ecuador.

Table 4.1, an Overview of Highest Compensation Paid in Investment Disputes at Global Level

Year of initiation	Case name	IIAs Used	Amount awarded (or settled for)
2011	Crystallex International Corporation v. Bolivarian Republic of Venezuela	Canada - Venezuela, Bolivarian Republic of BIT (1996)	1202.00 million US$
2007	Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela	Netherlands - Venezuela, Bolivarian Republic of BIT (1991)	1600.00 million US$
2006	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)	Ecuador - United States of America BIT (1993)	1769.00 million US$

Source, UNCTAD 2016d, authors self-analysis.

Third Party Litigation

Similarly, a grave problem of third party litigation funding is also a part of the ISDS system. This is has been defined as 'a novel industry of institutional investors who invest or provide finance to litigation in return of a share in award and a contingency in the recovery' (Steinitz 2011). A usual funding organisation comprises 'a professional funding firm which pays client's legal expenses on an interim basis. If he win, he pay a contingency expenses out of the damages, usually 20 to 50 percent of the damages. The huge expenses and potentially huge compensations characteristic of ISDS system could make it potential market for third party funders. At least two United Kingdom (UK) listed funds, Burford[21] and Juridica[22] and one Netherlands based, Omni Bridgeway, have explicitly targeted IIA claims for funding (Gaukrodger and Gordon 2012).[23] Banks, such as Citigroup [24] or Credit Suisse [25] and insurance corporations, such as Allianz,[26] are also having divisions to invest in investment and commercial disputes. Also some financial corporations like GE Capital have occasionally invested in lawsuit (Martin 1999). Usually, Burford or Juridica may invest 3 million to 10 million US$ in a 25-100 million US$ lawsuit[27] in exchange 10 to 45% of the damages awarded (Atherton 2009; Cremades 2011). Support for foreign investors by companies and individuals for political and economic reasons is also possible. However, third party funders mostly choose not to reveal their role to the opposing parties or to the arbitrators. So, it is difficult to determine the exact role of third party funders in ISDS. However, third party funding has been a serious issue in several ISDS cases recently. [28] Funders have regular interaction with ISDS arbitrators and also sponsor or attend arbitration industry events (Gaukrodger and Gordon 2012).

[21] See website of Burford, available at http://www.burfordcapital.com/ (accessed on 9 Sep. 2016)

[22] See website of Juridica, available at http://www.juridicainvestments.com/about-juridica.aspx (accessed on 3 July 2016)

[23] See Website of Omni Bridgeway, available at http://omnibridgeway.com/international-investment-treaty-disputes-2/(accessed on 12 October 2016)

[24] See Appelbaum 2010. Citigroup (Counsel Financial) division.

[25] See Glater 2009. Credit Suisse with (Litigation Strategies Group) division

[26] See Herman 2007

[27] Supra 32 and 33

[28] Like dispute of Abaclat v. Republic of Argentina, Decision on Admissibility and Jurisdiction, ICSID (4 August 2011), Opinion of dissent of Prof. Georges Saad (28 October 2011).

This has raised a number of legal issues regarding confidentiality, disclosure, legal privilege, conflicts of interests, attorney-client relationship and cost issues.[29] However, the most serious problems of this can be summarized as: (1) third party funder's influence on arbitration hinders the possibility of a fair settlement of disputes. As funders need to get a huge profit, a settlement of dispute can be thwarted by the funder if there is unsatisfactory scope for them to be fully compensated. The control of litigation funders to influence dispute settlement only based on its monetary benefits is a cause that most times transcends arbitration.[30] (2) The litigation funder could possibly not only have the influence to select the lawyer but also to transform itself into an significant fee and work provider, inviting the favour of lawyers and weakening the lawyer´s zeal to the client, hence adversely affecting the legal profession.[31] (3) The litigation funding can also delay the dispute settlement and may 'artificially exaggerate' the dispute, because the claimant investor knows that if he wins, he have to give substantial amount of award to the funder. (4) Litigation funding could rise the number of investment disputes and could have huge economic costs for developing countries in view of the ample compensations generally awarded in investment arbitration according to Morpurgo (2011). (5) Any issue in the relationship between the funder and the investor or sudden refusal of the funder to pay amount can result in the discontinuation of the arbitration process (Brabandere and Lepeltak 2012). (6) According to Beisner *et al* (2009) third party financing encourages abusive and frivolous litigation. Litigation funders unlike contingency fee lawyers, lack the incentives like, (a) the moral duty to inform clients when potential dispute claims would be abusive or frivolous and (b) when attorneys are employed on contingency, they apparently spend much time on cases that are probable to be successful, as opposite to disputes with a low chance of success. (Beisner *et al* 2009; Cremades, 2011).

Unfair System and Lake of Expertise or Specialization

The study by Waibel and Wu (2010) proposes that two groups of frequently appointed investment dispute arbitrators, one appointed by States and the other by investors, were expressively more likely to make conclusions that were favourable to States and investors, respectively. It is also argued by some that ISDS is an unfair system, were most of the arbitrators are from developed countries. For example, investment arbitrators at ICSID are mostly from Europe and North America, and almost 75% belong to OECD countries (Frank 2009), were as most of the respondent States are from the developing south. Several researchers agree that ISDS system has legitimacy crisis. These crises are fuelled by the rising number of inconsistent decisions by arbitration tribunal. Staunch defenders of the system, such Dolzer (2014) even acknowledges that 'the current system of ISDS has not been designed to promote consistency or uniformity of either interpretation or rule-making, with the expansive costs we have seen'. According to Magraw (2015) 'mostly members of the three-member arbitration tribunal handling ISDS cases are white men. ISDS has grave ethical problems and BIT obligations are so ambiguous that they are incapable of expected application and give IATs too much discretion. It can be also observed that none of the investment arbitration rules mostly used by IATs require arbitrators to be experts of international law. The UNCITRAL, ICC and SCC Rules even do not require their arbitrators to be general legal experts. Although ICSID Convention needs its arbitrators to have some competency in law, but having being created specially to deal with investor disputes, it still makes no requirement for expert

[29] International Arbitration Attorney Network: Leading Legal Network of Independent International Arbitration Law Firms and Practitioners.2016. available at https://international-arbitration-attorney.com/third-party-funders-international-arbitration/, (accessed on 21 Sept.2016)

[30] Torterola1, Ignacio.2016. "Third Party Funding in International Investment Arbitration", available athttp://investmentpolicyhub.unctad.org/Upload/Documents/Torterola_Third%20Party%20Funding%20in%20Arbitration.pdf (21 Sept 2016)

[31] ibid

arbitrators. This apparently minor flaw has had a massive effect on the development of investment law to date (Marshall 2009).

Absence of Consolidation of Parallel Proceedings

The need for consolidation of claims arises when there are multiple and different arbitration proceedings initiated with common questions of fact or law which increase the chance of even conflicting or inconsistent awards. For example, after 2001Argentinean economic crisis, almost 40 investment cases were filed by foreign investors, all linking to the same actions of the Government of Argentina, but grounded on numerous different BITs. In such cases multiple claimants seek compensation under the same BIT against the same Defendant State for the same actions[32] (UNCTAD 2014c).

The most commonly used ICSID and UNCITRAL 1976 arbitration rules do not have provisions for the consolidation of multiple claims. Notably, they do not prevent such a motion either. In 2010, UNCITRAL amended its arbitration rules to address issue of joinder and new rules openly allow under Article 17 (5) "*one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds […] that joinder should not be permitted because of prejudice to any of those parties*." However, UNICITRAL arbitration Rules as amended in 2010 are silent on consolidation in conditions when all parties have not agreed to the same arbitration treaty (UNCTAD 2014c). For the first time, Consolidation provisions were found in BITs in the new model Canada FIPA [33] as well as new 2004 US Model BIT,[34] these model BITs provide for consolidation upon demand by a parties of dispute and not *ex officio* (Katia 2006). Scholars such as Tams (2006) point that one practical way of addressing issue of inconsistency in awards rendering is to consolidation of different but same fact based cases.

Inconsistent Decisions

However, the most critical problems of the ISDS system is of inconsistency. In several cases, IATs came with either inconsistent results or reasoning. Franck (2005a) argues that, some inconsistencies practically may be attributed to significant differences in conduct, situation, or text, however having the same facts but different results remain critically problematic, ISDS is a substantial example of this, were arbitration tribunals have evaluated a similar treaty provision in IIA, but still come with dissimilar conclusions about the applicability, existence or forms of a claimed right, making whole ISDS, a unreliable and doubtful system. Inconsistency is root cause of number of other problems at ISDS. For example, inconsistency gives rise to other challenges, including lack of reliability, predictability, and transparency as to the rule of law and its application (McGowan 2005).

Conclusion

ISDS was initially created to de-politicize the investment dispute settlement mechanism. However, in the actual practice, this system came under strong criticism for its flaws like confidentiality, inconsistency, non-transparency, expensive etc. Although, several alternate mechanism at national and regional level

[32] See Canadian Cattlemen for Fair Trade v. US, UNCITRAL, Award on Jurisdiction, dated January 28, 2008, available at http://www.italaw.com/sites/default/files/case-documents/ita0114.pdf (accessed on 9 Nov 2016)

[33]Article 32 of new model Canada FIPA , available at www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf (accessed on 24 July 2016)

[34] Article 33 of 2004 US Model BIT, available at in www.state.gov/documents/organization/38710.pdf. (accessed on 9 June 2016)

were proposed, however, results are insufficient. Therefore a free and fair system for investment dispute settlement, based on the consent of all stakeholders (states, investors and development objectives) is need of the hour.

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