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The current system of investment treaty arbitration is capricious, lacking in transparency, and badly in need of reform.

Kuunal Bakshi

INTRODUCTION

With the widespread of globalization, the trade boundaries between nations have shattered and each nation is involved in cross border investment and trade. The cross-border transactions entail with it arising of differences between the contracting parties, that are, states in this scenario. A mechanism was sort after by the parties to the contracts, mainly the investor-state, to resolve its disputes in a more neutral, comprehensive and efficacious manner.

The influx of foreign direct investment and exponential growth of the bilateral investment treaties and free trade agreements from the mid-1990s has resulted in multiple disputes being arisen. International arbitration from the past two decades has been seen as a mode of dispute resolution, especially by the investor-state. When an investor-state invests in the host state, they sign international investment agreements (IIAs). There is an ominous clause called an 'Investor-state arbitration' also known as Investment Treaty Arbitration. These investment treaty arbitrations to a very large extent are inherited in the International Investment law on the concept of Investment protection treaty known as the Bilateral Investment Treaty (BIT). By operation of the BIT, the investor obtains a derivative right to initiate arbitration.[1] In this way BITs create an international forum for investors, not available under customary international law.[2]

The essence of formulation of BITs is to provide protection to the investor by entitling him to his derivative right to commence an arbitration against the host nation. In addition to the BITs, there are a number of multilateral investment protection treaties, for example the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA),[3] which includes the arbitration clauses in the investor-state arbitration. These investment treaties act like economic bills of rights, which grant foreign investors substantive protections and procedural rights to facilitate investment.[4]

[1] INVESTMENT TREATY ARBITRATION AND ITS FUTURE – IF ANY, available at https://elibrary.law.psu.edu/cgi/viewcontent.cgi?Article=1030&context=arbitrationlawreview (last visited on Jan 17, 2020)
[2] See supra note 1
[3] See supra note 1
[4] THE NATURE AND ENFORCEMENT OF INVESTOR RIGHTS UNDER INVESTMENT TREATIES: DO INVESTMENT TREATIES HAVE A BRIGHT FUTURE, available at

With the surge in international investment laws in the past couple of decades, there has been an explosion of investment treaty arbitration and it has become a common phenomenon. Virtually at this point of time, there are hundreds of arbitrations pending throughout the world. The most widely adapted governing regime for these investment arbitration is the International Center for Settlement of Investment Disputes (ICSID) and the other being the UNCITRAL Arbitration Rules, or the SCC Rules.

By large, the investment treaty arbitration, to a great extent, is an attractive and successful form of dispute resolution for the investor state, in comparison to the dispute resolution in the local courts of host state. Another reason for the widespread adaptation of investor-state arbitration clause is that it depoliticizes a dispute and the influential clutches of host state government are avoided. The investor -state arbitration in a rapid expanding of foreign investment has directly led to an increase of dispute as to investor's rights and remedies. With the multiple years of investment arbitration regime being implemented, lacunas, inconsistency and cracks have started to surface leading to discord and public scrutiny.

CRITICISM

Despite the fact that the investor treaty arbitration has been overwhelmingly accepted by the investor and the host state over the years, there has been a public uproar, denunciation and opprobrium against the current system of investment treaty arbitration. This has severely impacted the inconsistency, efficiency and transparency in the investment treaty arbitration, thereby causing a legitimate threat to the proprietary of investment treaty arbitration. Through this paper we seek to better understand the barriers faced by investment treaty arbitration and provide potential solutions for the same.

https://poseidon01.ssrn.com/delivery.php?ID=233094095078071070070021115086122090096053008001005052086020069024066095121029067064114100125059114059052110017106119113064049004004079002002006125019021086025071060060065066109123120070016099069073084096069080025003119080075072065019124084026120&EXT=pdf (last visited on Jan 17, 2020)

LACK OF EFFICIENCY

Inefficiency goes to the root of investor state arbitration. The concern of inefficiencies are usually dealt before a case is decided on merits. The inefficiency in investor state proceedings may be due to the length and cost of the arbitration proceedings, delay in conducting the cases, complexities of cases, multi staged proceedings, etc. The impartiality and independence are of grave concern in order to achieve efficiency, as by default mechanism parties appoint arbitrators who in turn appoint the third arbitrator, which causes ample delay in proceedings as both the parties keep objecting on the choice of arbitrator to constitute the full strength of the tribunal. Also, in order to achieve efficiency in arbitration, the arbitrators number should be fixed in the contract between the parties, that is, a sole arbitrator or a maximum three arbitrator tribunal as this could save time and expense and lead to faster redressal of the complex disputes.

It is upon the institutions to take some actions and try amending their rules to create a sanction mechanism for those parties who create undue delays in selecting an arbitrator.[5] Sanctions could mirror those enumerated in Article 18.6 of the London Court of International Arbitration Rules, which include a written reproach, a written warning concerning future conduct in arbitration, or any additional measures required to ensure a fair and expeditious arbitration.[6] For example, as per its Article 38, although ICSID has fixed a deadline of 90 days to let the parties decide upon the tribunal, the parties are still allowed to approach to ICSID Administrative Council for the appointment according to the ICSID Arbitration Rule 4, creating room for the delay. Unfortunately, under the default mechanism, each party to the investment arbitration tends to invest a lot of time in cherry-picking the tribunals and likely arbitrators, thereby, severely affecting the independence, impartiality of the arbitrator.

The current system in international arbitration to decide prima facia on a claim petition is tedious and involves numerous steps before the tribunal can decide whether there is a valid claim or claim is meritless. Currently, in the arbitration process, to argue and decide upon the validity of a claim, parties are required to submit necessary documents along with the written statements, expert witness and hearing on the disputed issue, which seems to be a long process

[5] Chapter 2- Efficiency in investor-state arbitration, page 38, available at https://www.threecrownsllp.com/wp-content/uploads/2018/12/InvestmentTreatyArbitrationReport2018.pdf (last visited on Jan 17, 2020)
[6] See supra note 2, page 38

for deciding upon the question of maintainability. This mechanical system causes a great deal of time and expense which in further leads to inefficiency and needs to be concise.

In order to allow the arbitration to move on quickly on the other issues while guaranteeing a high quality of the awards, decisions on applications for expeditious determination of manifestly unmeritorious claims, it is very important for the tribunals to scrutinize them 'as promptly as possible'.[7] For example, SIAC has explicitly laid down in its Rule 29, any party may, at any time, apply to the tribunal for the early dismissal of a claim or defense that is 'manifestly without legal merits' or 'manifestly outside the jurisdiction of the tribunal'.[8] Also, the ICC in 2017, in respect of the same, published note to the parties aiming to ensure that only the relevant claims be reviewed in full by the arbitrators and that the claims manifestly devoid of merits, or the unmeritorious parts of a claim, be subject to expedited determination and dismissed.[9]

Though a lot of institutions are dealing with this issue in an effectively laid down manner, still it has been witnessed in certain cases that this has not led to an increase in the efficiency of the system. The most efficacious way to do away with the inefficiency in the investment arbitration is by making a standardized arbitration clause that is, one size fit all clauses, wherein, time structure as well as the cost efficiency has been tailor made in respect of the claim, if it arises in the future.

LACK OF CONSISTENCY

Consistency in reference to dispute resolution refers to the ability refers to predictability, legitimacy and credibility of a verdict of a case. It has been noted that there is no coherence in the investment arbitration in relation to the decision-making process as there are contradictory and pre-existing decision in the same field of law, thereby causing failure to create concrete precedents.

The catalysts for inconsistency under investment treaty arbitration are due firstly, the multiple interpretations of legal concepts leading to divergent conceptualization of legal concept in a

[7] Increasing the efficiency of ICC arbitral proceedings with expedited determination of manifestly unmeritorious claims, available at https://www.august-debouzy.com/en/blog/1107-increasing-the-efficiency-of-icc-arbitral-proceedings-with-expedited-determination-of-manifestly-unmeritorious-claims (last visited on Jan 17, 2020)

[8] SIAC's New Rule 29 Early Determination Procedure, available at https://www.whitecase.com/publications/alert/new-dawn-summary-determination-international-arbitration-revised-siac-rules (last visited on Jan 17, 2020)

[9] See supra note 6

legal issue which causes disarray in investment arbitration proceedings. Secondly, as each dispute is decided by different arbitrators, this has led to concurrent ruling with opposing views thereby causing inconsistent determination of the matter. Although it has been many decades since investment treaty arbitration has been in operation, but a major setback to it is that it does not cover all the areas of domestic laws which are in-conformity with the investment laws.

The desire of the tribunal has been encapsulated in the case Tribunal in *Saipem v The People's Republic of Bangladesh,* expressly referred to consistency as a duty of arbitral tribunals and a necessary requirement to meet 'the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[10] Therefore, a majoritarian view is inclined towards inconsistency in applying and interpreting investment law in a unanimous manner but in the case In *Burlington Resources v Ecuador,* co-arbitrator, Professor Brigitte Stern, wrote that arbitrators have a duty to 'decide each case on its own merits, independently of any apparent jurisprudential trend'. If there is no harmonious construction of the investment laws, then there is only one certainty, that is, there will be no rule of law.

BITs have throughout the decades paved the way for foreign direct investment in host countries, but there are certain limitations to the implementation of BITs. As a consequence, mega-regional treaties were introduced which diluted the BITs. The introduction of mega regional treaties was meant to usher in a new era of harmonization for international investment law with the hope that disparate obligations would converge, common approaches to interpretation would be formalized, and arbitral decisions would become more consistent over time. The perceived difficulties of a regime 'too big and complex to handle for governments and investors alike' would be overcome[11]. But these treaties instead created more obligation and deterioration of the investment arbitration as inconsistency crept in due to the factor of multiple parallel proceedings. This further has led to convergence and overlapping of investment law and trade which has resulted in multilateralism, which has further raised separate concerns that the obligations in those instruments create duplicate or contradictory standards, thereby increasing, rather than decreasing, the risk of inconsistent results and

[10] Taipem SpA v The People's Republic of Bangladesh, Decision on Jurisdiction, 21 March 2007, ICSID Case No ARB/05/07 67, available at https://www.italaw.com/sites/default/files/case-documents/ita0733.pdf (last visited on Jan 17, 2020)

[11] Wolfgang Alschner, 'Regionalism and Overlap in Investment Treaty Law - Towards Consolidation or Contradiction?' (2014) 17 JIEL 271 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430242 (last visited on Jan 17, 2020)

parallel proceedings. The scepticism now whether large multilateral relationships between states will shape the future is coupled with a renewed critique that ISDS is illegitimate and not sufficiently 'fit for purpose' as an ad hoc mechanism.[12]

Cautious approach as to interpretations of investment laws must be done in the light of and in coherence with the regional investments. The inconsistency in award is due to the regional interpretations and multilateralism. In order to tackle the problem of multilateralism and regionalism, certain tools are provided to the tribunal which helps to avoid conflict and bring about unisons. State should exercise control, via tools, the tribunal so that consistent interpretation to legal concepts and instruments can be carried out in a predictable manner.

A solution to better interpretation is first and foremost, by demarcating in the draft, the substantive provisions as to interpretation. A collective effort should be taken by the co-arbitrators to provide joint interpretations to create unisons, where there is clarity as to right and obligation needed in the investment law.
When BITs are entered, there is always a complexity of numerous variation in language for better understanding by the parties, which sometimes leads to misunderstanding. Therefore terms of substantive interpretation should be incorporated in such a manner to cause balance when a discernible language are subjected to multiple interpretations.

Investment treaty decisions become binding upon the parties to the contract. An approach should be adopted to create a jurisprudence of stare decisis to help better interpretation. For example, in the case of Canadian Cattlemen v United States, the tribunal noted that case law could be considered as a supplemental means of interpretation under Article 32 of the Vienna Convention. In other cases, this approach has evolved into a doctrine known as 'jurisprudence constante', whereby tribunals strive to follow prior relevant decisions.[13]

The failure to adjudicate consistently upon legal issues has led to the denunciation of the doctrine of stare decisis in public international law. Due to the decentralized system of decision making, certain discrepancies have crept in, in respect to investment awards as with time they

[12]Consistency, efficiency and transparency in investment treaty arbitration report 2018, page 9, available at https://www.threecrownsllp.com/wp-content/uploads/2018/12/InvestmentTreatyArbitrationReport2018.pdf (last visited on Jan 17, 2020)
[13] *Canadian Cattlemen for Fair Trade v United States*, Award on Jurisdiction (UNCITRAL 2008) www.italaw.com/sites/default/files/case-documents/ ita0114.pdf (last visited on Jan 17, 2020)

are not getting clearer, thereby causing uncertainty. Some tribunals have evaluated a similar textual provision in a similar commercial and governmental context, but nevertheless come to different conclusions about the existence, applicability, or contours of a claimed right.[14] The *Lauder* cases provide a tangible example of the impact of inconsistency, in the form of different results, where there are related parties, the same facts, and textually indistinguishable substantive rights.[15] The case involved parallel proceedings brought by a single investor against the same state, based upon the same set of facts and under two different BITs. The two arbitral tribunals in both cases reached opposite conclusions – one found that the actions of the government entity at issue caused the destruction of the investment and awarded damages, while the other found insufficient proof of causation and dismissed the claim.[16]Therefore, it can be summed up that due to multiplicity of awards which may or may not be on the same facts are becoming more and more incoherent as these decisions are not made public due to confidentiality, which has led to the unpredictability and uncertainty over the years.

To bring out consistency in award delivering, one of the proposed solutions is, to bring about structure by providing an appeal mechanism/procedure in the ICSID rules. The other reason to create an appellate body is to deal with the lack of predictability in order to bring about inconsistency in the legal system. Also, by reviewing the merits of the inconsistent decisions. The appellate body also brings a sense of coherence in the investment related disputes, as it helps to provide a unanimous approach to interpretation. Several appellate mechanisms have been incorporated in various trade agreements. For example, the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) provides for the establishment of a 'Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals' within three months of the date of entry into force of the agreement.[17] The appellate mechanism also helps to tackle the complex issues which require specialty and applicability of substantial and procedural law which are independent in itself. But, having an appeal mechanism in arbitration is against its substratum. Another solution might be to give choices to the parties to choose between international arbitration or domestic courts, so that parties do

[14] *The Nature and Enforcement of Investor Rights, available at* https://poseidon01.ssrn.com/delivery.php?ID=233094095078071070070021115086122090096053008001005052086020069024066095121029067064114100125059114059052110017106119113064049004004079002002006125019021086025071060060065066109123120070016099069073084096069080025003119080075072065019124084026120&EXT=pdf *(last visited on Jan 17, 2020)*

[15] See supra note 13, page 60

[16] See Supra note 11, page 15

[17] CAFTA-DR, annex 10-F, available at https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (last visited on Jan 17, 2020)

not end up litigating unnecessarily in all forums. Lastly, creating a specialized international investment court created by multilateral treaty for the investment dispute resolution whereby its main area of consideration and decide simultaneously the multifarious/ parallel proceedings in respect to issues and facts can also be one of the solutions. The setting up of international investment court would ensure the coherence in respect to arbitrators, review mechanism, enforcement of award and the cost efficiency in the investment courts. This investment dispute resolution has been able to tackle the multifariousness of the proceedings.

All these possible solutions have their *pros* and *cons*. The overarching problem, however, is that they all require amendments to, and changes of, existing investment protection treaties, as well as the creation of the new treaties. For this reason alone it is submitted that these suggestions are, from a practical point of view, unrealistic, at least for the foreseeable future.

LACKING TRANSPARENCY

Transparency is an integral part of the arbitration process in a whole. When the principle of transparency is involved with the investment treaty arbitration, the dimensions changes, does not bear the essentials of confidentiality and secrecy as a hallmark of arbitration. The reason behind eschewing the principle of confidentiality in international investment treaty is that public stakes of two states are involved. Therefore, the public as a matter of public policy is inclined to know all the affairs of public nature, involving the tax payer money. But surprisingly this has not been the case in international investment arbitration, as there is furore by the critics for the disturbingly lack of transparency at all stages of the dispute resolution. Demands for increased public access to hearings, materials and awards produced in arbitrations, third-party participation through '*amicus*' briefs, and disclosure of third-party funding have all become more widespread over recent years.[18]

Frequently complaints have been raised specifically to three criteria's of transparency in firstly, information and documentation as to arbitration, secondly, involvement of third party in arbitration and thirdly, publication of award..

The integral problems why transparency is not subsisting in investment arbitration is because of the appointment of arbitrators made by parties/counsels/law firms in an undisclosed manner.

[18] See Supra note 11, Chapter 3: Transparency in international investment arbitration, page 53

This calls for critical evaluation upon the decision-making process by the parties/counsel/law firms on the appointment of the arbitrator's qualifications and performance.

Also, if the third-party funding remains undisclosed, it will lead to conflicting interests. The participation of third party in a proceeding must be disclosed as it helps reduce the risk of the cost incurred in the arbitration otherwise it will impede the arbitration process.

Recently the ICSID, in its case, directed the parties to the proceeding to disclose the sources of third-party funding, its details including the name and details of the sponsor upon which funding has been provided. In the case of *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan* ordered the claimants, two Turkish construction companies, to disclose whether their claims in the arbitration are being funded by a third party. In another PCA case under the UNCITRAL Rules, *South American Silver Limited v Bolivia*, the tribunal ordered the claimant to disclose the identity of the third-party funder that granted financing to the claimant in the arbitration.[19] The Tribunal in a case have apprised the proposition whether third party funding grants security as to the cost incurred by the parties in the proceeding. In *RSM v Saint Lucia*, the tribunal granted RSM's request for security stating that the presence of third-party funder 'supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it'.[20] More recently, in *Eskosol v Italy*, the tribunal rejected Italy's request for security for costs on the grounds Eskosol, with the assistance of a third- party funder, obtained an insurance policy from which costs could be paid.[21] Conversely, it has been reported that in *Luis García Armas v Bolivarian Republic of Venezuela*, the ICSID tribunal ordered the claimants to provide guarantee for Venezuela's costs in defending the investment arbitration on the basis that claimants' third-party funding agreement provides that the funder is not liable for any adverse cost orders and claimants have not established that they have the resources to pay an adverse costs order themselves.[22]

Due to the shroud of confidentiality, the information, open hearing and documentations relating to parties and award, use to remain redacted and not for public viewing. But with time, in order to create transparency in the publication of awards and records off the proceedings, various

[19] *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Procedural Order No 10 dated 11 January 2016
[20] *RSM Production Corporation v Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, para 83.
[21] E*skosol SpA in Liquidazione v St Italian Republic*, ICSID Case No ARB/15/50, Procedural Order No 3 of 12 April 2017, para 37.
[22] *Luis García Armas v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/16/1, Procedural Order No 8 of 20 June 2018.

judicial pronouncements have been made in the realm of International investment arbitration .Various steps have been taken and new developments have been made by ICSID, NAFTA, UNCITRAL, CETA, etc., during the arbitration proceedings in treaties and legal instruments in relation to publication of arbitral award, broadcasting of hearing and document production.

For example, with the adoption of the UNCITRAL Rules on Transparency in 2014, the work of UNCITRAL explicitly shows how transparency is beginning to outweigh privacy and confidentiality in the treaty based investor-state arbitration.[23] Also, in the current ICSID Arbitration rule, it is required by the center to publish excerpts of the tribunal's legal reasoning in cases where the parties do not consent to full publication of the award.[24] In the case of *Bear Creek Mining Co v Republic of Peru,* the hearings were held publicly and the parties agreed that Arbitration Rule 48(4) mandated that all documents be made public subject to the redaction of confidential information.[25] The initiative of holding open hearings in the under its Rule 32, by ICSID, is also a significant step in the improvement of transparency in the system. In certain cases, parties have also opted to video broadcast and live stream the hearings on the merits for the public on the ICSID website.[26]

These new developments clearly show how the treaties and arbitration rules have been striving to incorporate amendments and increase public participation along with transparency and efficiency in the investment arbitrations.

[23] Criticism of specific aspects of investment arbitration, See Supra note 1,

[24]ICSID, Arbitration Rules, Rule 48(4) dated April 2006.

[25] *Bear Creek Mining Corporation v Republic of Peru*, Procedural Order No 1, para 21.6 (ICSID Case No ARB/14/21)
[26] *Spence International Investments et al v Republic of Costa Rica,* (ICSID Case No UNCT/13/2)

CONCLUSION

The explosion of the global market has resulted in multiple disputes and the fore-runner to address these disputes is investment treaty arbitration. This provides a legal shield to the foreign investors in the host country. Despite its various shortcomings, investment arbitration's consistency, efficiency and transparency have stood as the three pillar of legitimacy. Despite being heavily publicly criticized, it still has a future ahead.

As we know, every system has its benefits and lacunas, in such cases the whole system shall be perceived in which the investment treaty arbitration has been successful.

Yes, there is a need for reform in the investment treaty arbitration as there is structural deficiencies are the result of attempting to reproduce a dispute settlement model conceived for the resolution of private commercial disputes, rather than it being tailored for disputes involving public policy and public law matters.[27] There is still room for improvement, rectification and advancement. As the amendments inculcated in the rules are pro-transparency, similar efforts have been made on realization to make investment treaty arbitration more efficient and efficacious dispute redressal mechanism between the investor state and host state. We can minimize the capricious nature of investment arbitration, we need to constantly keep surveying the challenges against potential abuse of the investment regime. Disputing parties may be able to maintain an effective, flexible, final and easily enforceable means of dispute settlement that has been subject to international scrutiny[28], while continuing to improve its legitimacy and consistency.

[27] The proposed Investment Court System: does it really solve the problems? , available at http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932019000100083#back_fn30 (last visited on Jan 17, 2020)
[28] See Supra note 23