

## FDI RELATED DISPUTE SETTLEMENT AND THE ROLE OF ICSID: STRIKING BALANCE BETWEEN DEVELOPED AND DEVELOPING ECONOMIES

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### I. INTRODUCTION

ICSID, as an independent arbitral institution, has been involved in FDI related dispute resolution since its very inception in 1960s. During this span of time it has achieved a wide recognition and unique position as a neutral platform amongst the adjudicatory institutions dealing with the settlement of commercial and investment disputes. Its significance lies with the fact that it is the first truly international institution which administers tribunals with judicial power to allow a private investor to bring the equivalent of an action against a state and therefore may be compared with International Court of Justice and Permanent Court of Arbitration.

The rapid increase in cross-boarder investments through Bilateral Investment Treaties (BITs) is deemed to be one of the vital reasons for the rapid growth in ICSID activity. The significant aspect of BIT regimes intended for creating favorable conditions for investment is to require the signatory parties to submit in advance to binding international arbitration of investment disputes where ICSID is the most frequently chosen mechanism in recent years.<sup>2</sup> By the end of 2011, the total number of investor-state disputes had reached 450 and the total number of the countries that have responded to one or more arbitration rose to 89.<sup>3</sup> In 2011, 46 new dispute resolution proceedings were initiated, the highest number in a single year.<sup>4</sup> As the number of BITs has grown exponentially, so has the number of arbitrations under the ICSID.<sup>5</sup>

The practical reason why ICSID has gained the confidence of the investors and state parties, as many commentators view is that it has provided sufficient equitable safeguards for the contracting parties and thereupon they are not accused of north-bias like other arbitral institutions.<sup>6</sup> The administrative and arbitral procedures are devised so carefully that balances the interests of investors and host states. The consent-based jurisdictional procedure, private investors' right to direct access into this international forum, renunciation of diplomatic protection, appointments

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<sup>2</sup> Ibrahim F.I. Shihata, "The Settlement of Dispute Regarding Foreign Investment: The Role of the World Bank with Particular Reference to ICSID and MIGA", (1986) 1 American University Journal of International Law & Policy, 97 at 101.

<sup>3</sup> International Centre for Settlement of Investment Disputes, "The ICSID Caseload Statistics" (June 2011) Online: ICSID World Bank Group, <http://www.icsid.worldbank.org/icsid/frontServlet>. See also Biswjit Dhor, "Local Courts and Foreign Investor" (10 September 2012), online: Live mint <<http://livemint.com/opinion/3YdjyIfGNHB7jiNjolNDK/Local-courts-and-foreign-investment>>.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Dr. K.V.S.K. Nathan, ICSID Convention: The Law of International Centre for Settlement of Investment Dispute, 1st ed. (JP Juris, New York, 2000) at 51.

of arbitrators and also equal representation in voting are evident for careful devise of a balanced system balancing the investors and host countries. On the other hand parallel argument has been established that the ICSID's investor-state dispute process gives the investors superior bargaining power vis-à-vis host governments that reveals its pro-investor bias character in arbitration process. This pro-investor bias character under the cover of certain apparent equitable safeguards has been detriment to its institutional impartiality and independence. This growing concern as regards ICSID arbitration process needs to be studied for mending and correction to retain its brand image as an arbitral institution solely mandated to arbitrate the investment disputes in order to ensure the ultimate goal of foreign investment in developing host countries.

This paper is an effort to show the way in which the ICSID's arbitral procedures appear to be pro-investor bias and thereby the interests of developing host economies are affected particularly in the cases of the exercise of jurisdictional scope, application of laws, and other arbitral proceeding by ICSID in the settlement of foreign investment disputes and therefore put forward some recommendations so as to balance between the interests of developed and developing economies. The suggestions for mending proposals balancing the interests of the parties concerned may carry an academic value for further study and also be of practical importance for legal professionals involved in international commercial arbitration, particularly in foreign investment dispute settlement arising out of bilateral agreements.

In achieving this objective, the paper firstly focuses in brief on the background of the emergence of ICSID regime and its objective. Secondly it discusses the arbitration procedures as claimed to be balancing the interests of investors and state parties. Thirdly it shows how some of the procedural practices under ICSID affect the interests of host states and favour the pro-north investors with evidences. Finally it recommends for striking balance between the interests of contracting parties irrespective of their economic status.

## II. THE BACKGROUND AND THE OBJECTIVES OF THE ESTABLISHMENT OF ICSID

ICSID is an international arbitral institution which was established in 1666 under a Convention (popularly called the Washington Convention) at the sponsor of World Bank<sup>7</sup> to handle the settlement of disputes of foreign investments. The establishing Convention was the result of four-year effort to draft an international legislative framework acceptable to both capital exporting and capital importing states to establish an arbitral institution to resolve disputes between investors and host states. The idea of separate agency came in 1961 from the then President of the World Bank, Mr. Eugene Black following the requests to the World Bank to act as an intermediary in the settlement of disputes over variety of matters including investment made by nationals of member states in other states.<sup>8</sup> As the Bank had no clear policy towards the settlement of

<sup>7</sup> The World Bank originally referred to the International Bank for Reconstruction and Development (IBRD), established in 1945 following the so called Bretton Woods Agreement which also set up the International Monetary Fund (IMF).

<sup>8</sup> Nathan, *supra* note 5, at 49.

disputes between member states and between member states and private entities and it had bad experiences of failure in settling disputes through mediation or conciliation<sup>9</sup>, the Bank began to work on the convention to establish ICSID in 1961. A preliminary draft was prepared by Bank staff followed by discussions at four regional consultative meetings consisting of legal experts from countries in the regions of Africa, Asia, Europe and Latin America and reviewed by a special legal committee in Washington. Then the final draft was formulated with the title of the Convention on the Settlement of Investments Disputes between States and Nationals of Other states and placed to the Board of Governors in March of 1965 “for consideration with a view to signature and approval in 1965. Later, the Convention came into force with the ratification of twenty countries on October 14, 1966. Thus ICSID was established under this Convention as an independent international agency having the status of judicial institution to entertain foreign investment related disputes.

The purpose of the Centre is ‘to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention’.<sup>10</sup> Although settlement of the dispute in investments by conciliation or arbitration is apparent objective of ICSID, it is not to sell an arbitral facility in competition with other arbitral institution but to encourage private investment in the economic development of developing countries originating from the developed countries, by providing facility to resolve disputes removed as far as possible from political power and judicial control of the state concerned. To achieve this ultimate goal, the ICSID Convention has sought to establish a system which remains neutral and finely balanced between the interests of the foreign investors and the host states.

### III. ICSID SYSTEM OF ARBITRATION AND FEATURES BALANCING THE INVESTORS AND HOST STATES INTEREST

In an effort to balance the interests of all parties involved in dispute settlement, the relevant procedures are devised carefully so as to maintain balances of interests among the disputing parties. The procedural arrangements made for this purpose include mainly the equal voting right of the participating state representative, renunciation of the right of diplomatic protection, investor’s right to direct access to the arbitral forum, consent based jurisdiction, application of the law, formation of the arbitrators and the enforcement of arbitral award. All these discussed briefly in the following.

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<sup>9</sup> For example, Anglo-Iranian Oil Co. Case first came to World Bank for mediation. Mediations by the Bank failed because the Iranian Government felt, inter alia, that the Bank was acting as the agent for the UK.

<sup>10</sup> “in submitting the Attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it”

*A. Equal voting right of the representative*

For the adoption of administrative regulations, rules governing the institution of proceedings and rules of procedures for conciliation and arbitration proceedings, ICSID forms an Administrative Council with the President of the Bank to chair. Actions on all these matters are decided by the two-third majority of the members of the Council.<sup>11</sup> There is one representative of each contracting state on the Council and each representative casts one vote on behalf of states in all matters before the Council.<sup>12</sup>

*B. Investor's right to direct access*

The ICSID Convention allows private investor's direct access to an international forum against the state party. It was recognized at the time the convention was finalized.<sup>13</sup> Moreover, the provisions of ICSID rules, assure investors that refusal or abstention by the state party to the dispute to take part in the proceedings after it has consented to ICSID arbitration can not frustrate the ICSID arbitral process, the proceedings can continue and lead to an award. Even if one of the parties refuses to cooperate in the appointment of arbitrators, the President of the Bank in the capacity of the Chairman of the Administrative Council may participate in the appointment of the arbitrators.

This access to ICSID tribunal is a matter to be agreed upon in investment agreement in terms of choice of forum for settlement of dispute consistent with the provision of bilateral treaty between the host state and the investor's state. Here in the respective investment agreement, the host state as a condition of its consent to ICSID arbitration may require prior exhaustion of local remedies as a sovereign matter. This requirement is not against the advantages of the investors, rather balances their rights, provided it is already stipulated in the bilateral treaties between host states and home state of the investor.

The consideration of direct access of investing individual in ICSID gives an advantage for a state party to a contract with a private party that country of nationality of the private party will not intervene on behalf of that party. Act 27(1) of the Convention states that "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted under this Convention unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute". This provision expressly prevents investor's home state from extending diplomatic protection or instituting international claim in general at the event the dispute resolution. The home state has a right to intervene only if the adjudicatory process has not been fair and just and there is no compliance with the arbitral award by the

<sup>11</sup> ICSID Convention 1966, Section. 2, Art. 7(4). ( the council consist of 15 members).

<sup>12</sup> Ibid , Art. 7(2).

<sup>13</sup> The report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) states: "When a host state consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so."

state party to contract.<sup>14</sup> The renunciation by ICSID convention of diplomatic protection is one way in which the ICSID system contributes to the depoliticisation of investment disputes. The depoliticisation is intended to promote a mutual confidence between states and foreign investors favourable to increasing flow of resources to developing countries.

### *C. Consent-based jurisdiction*

The application of ICSID jurisdiction is fully consent-based and consensual. There is no scope for a single party to seek ICSID jurisdiction for the settlement of any legal dispute without the consent of other party. The consent of the investors and the host states may be given in a separate clause of the respective investment agreement or in a compromise regarding a dispute which has already arisen, or in a bilateral treaty between the host state and investor country or through host state legislation<sup>15</sup> Consent to arbitration takes place when a sovereign state signs an investment treaty that allows investors from another states submit claims against it. According to Article 25 of the Convention the unilateral derogation from the consent binding the ICSID jurisdiction is prohibited. Both the parties can conjointly derogate from the consent for their particular needs.<sup>16</sup> The mutuality approach through separate provision in the investment agreement or legislation under the Convention and ICSID Rules and the prohibition of unilateral derogation from consent reflects on a jurisdictional system to ICSID arbitration that balances interests of both investors and host states.

Similarly the autonomy given to the parties involved under the convention in the creation of tribunal for dispute resolution testifies the non-bias feature of the tribunals. In fact, ICSID has no permanent adjudicatory body, the arbitral tribunals are convened at the request of contracting state or national of another contracting state<sup>17</sup> where the number and methods of the appointment of arbitrators depend on what the parties agree upon. If the parties have not previously agreed upon, as per the Arbitration rule2, 60 days are allocated for the disputing parties to arrive at a consensus in respect of the arbitrators. Failing this, a three member panel is created, one appointed by each party and third one appointed by the two initial arbitrators.<sup>18</sup> If conflict arises for the third one, one is appointed by the Centre.<sup>19</sup> The tribunal may not consist of a majority of arbitrators with the same nationality as, unless the arbitrators are selected by Party consent. The Centre has also a panel of arbitrators, parties may appoint from this panel,

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<sup>14</sup> Nathan, *supra* note 5, at 58.

<sup>15</sup> In addition, consent may be given through national legislation on investment offering certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing. ( see Report of the Executive Directors of the Convention ( as amended 10 April,2006).

<sup>16</sup> See, ICSID, Report of the Executive Directors on the Convention ( IBRD, March 18, 1965) <http://www.icsid.worldbank.org>.

<sup>17</sup> ICSID Convention, *supra* note 11, art.36-40.

<sup>18</sup> *Ibid*, Art.37

<sup>19</sup> *Ibid*, Art. 31.

but are not obliged to do so<sup>20</sup> Once a tribunal is constituted on consensual basis, the convention provides specific procedures consistent with the nature of the dispute to govern the arbitration. Each case is decided individually and is binding only on the parties.

#### *D. Application of substantive law*

As regards the application of substantive law to decide the dispute the ICSID provisions as claimed to be seemingly flexible with respect to choice of law. The general principle is that the parties to investment agreement will specify the law to be applied in settling the disputes. Where the parties have not specified the applicable law, the ICSID convention provides for the application of the law of the Contracting state party to the dispute and 'such rules of international law as may be applicable'.<sup>21</sup> The contracting state party to the dispute has been interpreted to mean the host state. However, the Convention represents public international procedural law. The host state substantive law will apply in conjunction with international law principles provided the host state law is not repugnant to a rule of international law. If there is a conflict between state law and the principles and rules of international law the later will prevail. This principle is well settled in *Amco Case*.<sup>22</sup> The application of state law as well as rules of international law in the absence of any specification by the parties concerned will not prejudice the power of the ICSID tribunal to decide a case *ex aequo at bono* if the parties agree in so doing.<sup>23</sup> Although it can be argued that deciding a case *ex aequo at bono* is an unnecessary provision in ICSID, it provides a way for establishing equity and fairness on the basis of the parties' mutual consent. In his discussion of aspects of the practice of the International Court of Justice, Justice T.O. Elias writes:

*"it remains to say that the provisions granting the Court the discretion to decide a case ex aequo et bono with the consent of both parties is a useful device for enabling the Court to apply princip[les] of equity and fairness when none of the other four sources enumerated above is found to be inapplicable. It at least precludes the Court from pleading non liquet in any given case before it".*<sup>24</sup>

The power to exercise discretion is not unlimited. The Tribunal in a decision *ex aequo et bono* will have to give a reasoned award which will involve enunciating a rule to justify its decision.<sup>25</sup>

As regards award over the dispute in question, the Tribunal will follow the majority principle as it is the common standard accepted across the world. The award will be in writing and has to be signed by the all members who have voted for this. The award must ascribe reasons upon which

<sup>20</sup> Ibid, Art. 12-16.

<sup>21</sup> Ibid, Art. 42 (1).

<sup>22</sup> *Amco Asia Corporation et al v. Republic of Indonesia*, 1986, 25 I.L.M 1439.

<sup>23</sup> ICSID Convention, *supra* note 11, Art. 42 (3).

<sup>24</sup> Taslim Olawale Elias, *The International Court of Justice and Some Contemporary Problems*, 1sted. (Martinus Nijhoff, the Hague, 1983) at 14.

<sup>25</sup> Nathan, *supra* note 6 at 72.

it is based. If any legal point is missed after the award is rendered, the Tribunal upon the request of a party, after notice to the other party may undertake to correct it. The publication of award shall require the consent of the parties.

In reviewing the core ICSID's arbitral procedures one thing apparently becomes clear that the consent based-approach has been pursued in all most all matters that evidences its effort to play an impartial role in investment related dispute resolution through balancing the parties' interests in arbitral proceedings. Despite all, a debate arose in the recent years over procedural concerns related to transparency including proposals to create an appellate body and to construct a mediation facility.<sup>26</sup>

ICSID, however, undertook a procedural reform in April 2006 to ensure greater transparency, but it rejected proposal for appellate body. The procedural development came to be of a help to address many concerns related to perceived procedural justice.<sup>27</sup> Nevertheless some pro-investor bias traits are noticed in the investor-state dispute process resulting both from ICSID provisions and treatment under BITs. Therefore a series of criticisms surround the ICSID arbitration implicating the integrity of its investor-state dispute settlement system. L. Sundra comments that international investment arbitration shows that "institutional bias" and fosters "a sense that the system is rigged".<sup>28</sup> He adds that in recent years , ICSID and ICSID Convention have increasingly become targets of criticism by countries facing liability under ICSID awards, who have accused ICSID of being biased in favour of investors, and have described the Convention as threat to their sovereignty.<sup>29</sup> The glaring example is the withdrawal of some Latin American developing economies from ICSID after the award is rendered such as Bolivia, Republic of Ecuador.<sup>30</sup> Bolivia withdrew from ICSID in 2007<sup>31</sup> in one proceeding, Bolivia challenge the entirety of ICSID tribunal with an utter denial of non-compliance with any award rendered in favour of foreign investors.<sup>32</sup> Ecuador restricted its participation in ICSID to issues other than disputes related to oil, gas and minerals.

<sup>26</sup> For example, this reform permits participation by amicus curie.

<sup>27</sup> Susan D. Frank, "The ICSID Effect: Considering Potential Variations in Arbitration Awards" (2011) 51 Virginia Journal of International Law 825 at 842.

<sup>28</sup> Sundra L.Cuba, "Resolving International Investment Disputes in Globalized World" (2007) 13 N.Z., Business Law Quarterly 128 at 50; see also George K.Foster, "Collecting from Sovereigns: The Current Legal Framework for Arbitral Awards and the Court Judgement Against States and Their Instrumentalities, and Some Proposals for its Reforms" (2008) 25 Arizona Journal of International Law and Comparative Law (2008)665 at 705.

<sup>29</sup> Steve Josselson, Pro-North Bias Seen at ICSID, Online: Steve Josselen < <http://tinyurl.com/4g2557>> (" [ICSID] is biased toward corporations based in Developed World."); see also Christian Teitje et al., "Once and forever ? The Legal Effects of Denunciation of ICSID", (2008) 6 Transnational Disp.MGMT, 1 at 5

<sup>30</sup> Silvia Karina Fiezzoni, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration (2011) 2 Beijing Law Review 134, at 138,139.

<sup>31</sup> International Centre for Settlement of Dispute [ICSID], History of the ICSID Convention: Documents concerning the origin and the Formulation of the Settlement of Investment Disputes Between States and Nationals of Other States (2001) (1968) <<http://icsid.worldbank.org>>.

<sup>32</sup> Syiriaki Karadelis, Bolivia Challenges Entire ICSID Tribunal (10May 2010) online: Global AARB Review, <<http://tinyurl.com/69unacq>>.

Some commentators hold “ICSID represents the inequities of an international system biased against the developing countries”.<sup>33</sup> It is also argued by some academics that the ICSID arbitration process has created “unduly pro-investor interpretations at the expense of the states,” and “investment treaty arbitration as currently constituted is not a fair, is not as fair, independent and balanced method for settling the investment related disputes and hence should be relied on for the purpose of arbitration.”<sup>34</sup> There are some statements that ICSID suffers currently the legitimacy crisis that in fact becomes a fundamental threat to its very existence as a tool for resolving investment disputes.<sup>35</sup> The President of Ecuador stated “he has no confidence’ in the World Bank arbitration branch, ICSID that is hearing a dispute against Ecuador”.

#### IV. FEATURES OF ICSID ARBITRATION SYSTEM CREATING ADVANTAGES FOR INVESTORS OF DEVELOPED STATES OVER DEVELOPING HOST STATES

Given the critics against ICSID arbitration, in a bid to prove its pro-investor biased character, some key concerns related to arbitral procedures and their practices are pointed out. These are inter alia include consent of investors for initiating arbitration of dispute under BITs, Exhaustion of local administrative and judicial remedies as a condition for arbitration, scope of judicial review of arbitration award, lack of institutional independence of ICSID, lack of impartiality of the proceedings and possible conflict of interest, lack of transparency, legitimacy crisis, imposed enforcement and execution policy, and above all high cost of defence in ICSID arbitration. Now, I would briefly focus on every point as to how it goes against the interest of the developing host countries.

##### *A. Consent of investors for initiating arbitration*

It has been mentioned earlier that the consent of investors is essential for initiating an investor-state dispute under BITs. The drafters view that the consent to the arbitration is a matter within the sole discretion of the contracting parties. Obligation arises only when they are agreed to submit. This element of consent, although looks to be balancing the interests of both, introduces a pro-investor bias in the system since the investor will participate only if it is in their interest to do so such as in expropriation, transfer of profit or any legal interpretation.<sup>36</sup> They will surely be reluctant if any dispute more related to development aspects of the host countries such environment, human rights and so on.

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<sup>33</sup> Josselson, *supra* note 29.

<sup>34</sup> Gas Van Harten et al., Public Settlement on the International Investment Regime (10 May, 2010) <<http://www.tinyurl.com/37bktl>>.

<sup>35</sup> W.M ark C. Weidemaier, “Toward a Theory of Precedent in Arbitration (2010) 51 WM&Mar Law Review, 1895 at 1945; see also Ibironke T.Odumosu, “The Antinomies of the (continued) Relevance of ICSID to the Third World(2007) 8 San Diego International Law Journal, 345 at 373 (providing examples that “reflect the legitimacy crisis that ICSID faces”).

<sup>36</sup> Bishwajit Dhar, Local Courts and Foreign Investors (September 10, 2012) online: Live mint <<http://www.livemint.com>>.

### *B. Condition of Exhaustion of local Remedies*

In arbitration process ICSID convention does not require an investor to exhaust local administrative or judicial as a pre-requisite for arbitration unlike UNCITRAL Model Law, whereas a country may require as a sovereign the exhaustion of such remedies.<sup>37</sup> Article 26 of the Convention states that “consent of the parties to the arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” The exclusion of the jurisdiction of local courts does not serve the interest of hosting country, rather would be favourable to a foreign investors who cannot be compelled to exhaust local administrative or judicial remedies before resorting to arbitration unless they have agreed to it in advance before the dispute has arisen.<sup>38</sup> The unconditional reference to ICSID arbitration with private investors seizes all rights of local administration or judiciary of the host state to intervene at any stage of arbitration. It is interesting that this dimension of the ‘pro-investor bias’ jurisdictional approach has been justified by the claim that a foreign investor may not have confidence in the impartiality of the local tribunals and the courts in settling any disputes that arise between him and the host state. Under this advantage, with the increase of BITs, there has been a ‘litigation explosion’<sup>39</sup> in the recent years and thereby the investors have seized the opportunity to bring claims involving billions of dollars and implicating questions regarding sovereignty.<sup>40</sup>

### *C. Lack of impartiality of the proceedings and possible conflict of interest*

If we look at the rules relating to the appointment of the arbitrator, we find, as discussed above’ it is the choice of the disputing parties to select the arbitrators on their own. The rules governing the choice and the challenge of the arbitrator give rise to objections in detriment of ICSID impartiality. Pursuant to ICSID Rules, the presiding arbitrator can be chosen on the basis of the agreement between both the parties, and in default of an agreement, the Chairman of the ICSID Administrative Council (Who is also the President of the World Bank) has authority for the final appointment.<sup>41</sup> Here it is important to consider the close tie between ICSID and World Bank Group, which may have an equity share or some regulatory influence over the investor. In addition, the entities of World Bank such as IMF, IDA which have been playing role in providing conditional loan directly favour the role of foreign investor in many cases. Sometimes, the Bank becomes the investor itself through its International Finance Corporation (IFC). For example in the case of *Aguas Argentinas SA vs Republic of Argentina*, the World Bank played a key role in designing regulatory framework for public services under concession and the IFC held a percentage of *Aguas Argentinas SA* equity share.<sup>42</sup>

<sup>37</sup> Nathan, *supra* note 5, 63.

<sup>38</sup> *Ibid.*

<sup>39</sup> Susan D.Farnk, “Integreting Treaty Conflict and Dispute System Design”, (2007) 92 MINN. L. Review 165

<sup>40</sup> *Ibid.*

<sup>41</sup> ICSID Rules of Procedures for Arbitration Proceeding (1966) s.11

<sup>42</sup> Silvia Karina Fiezzoni, “The Challenge of UNASUR Member Countries to Replace ICSID Arbitration” (2011) 2 Beijing Law Review <<http://www.SciPP.org/journal/bir>>.

#### *D. Lack of appeal system and limited judicial review of arbitration award*

A significant feature of arbitration rule that is generally seen in the dispute resolution process is scope of judicial review of ICSID award. There is no scope of judicial review of ICSID award by the domestic courts. The domestic court is bound to enforce the arbitral awards.<sup>43</sup> There is no ground for refusal an ICSID award not even on the grounds of public policy by a national court of a state that has acceded to the ICSID Convention.<sup>44</sup> Moreover, ICSID Convention does not provide for appeal system from the award. However, it provides for internal review of the award through annulment procedure under certain limited conditions that require 'a high threshold' for bringing request of review for annulment.<sup>45</sup> As a result, the number of requests is reportedly meagre<sup>46</sup> as the aggrieved parties who are mostly developing countries have felt reluctant to proceed for annulment. It is nevertheless noteworthy that several countries have revised their national laws to provide less rigorous judicial review of foreign arbitration award. As mentioned earlier, BITs confer the right upon investors to initiate dispute, and therefore at the moment of seeking jurisdiction, investors often choose the countries that restrict local judicial review of international arbitration.<sup>47</sup>

#### *E. Preferences to the application of international law in dispute resolution*

It is discussed earlier that in the application of substantive law ICSID has made an effort to balance between the host state and the investors. According to the Article 42(1), in absence of the rules of law agreed upon by the parties the Tribunal shall apply the law of contracting state and the rules of international law to the extent it is applicable. But the application of substantive laws in practice by ICSID has generated a debate over it. The general position as evidenced from different cases is that Third World states have favoured the applicability of their domestic law, while foreign investors and their home states have been more inclined to the application of international Law.<sup>48</sup> Although the ICSID provides for the application of the host state law (including its rules on the conflict of laws), many commentators held that the ICSID's

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<sup>43</sup> ICSID Convention, supra note 11, Article 53-55.

<sup>44</sup> Ibid. Art. 54 (1).

<sup>45</sup> ICSID Convention, supra note 11, Art. 52(1). ( It is noted that an application for annulment requires the party to show any of the five specific grounds: (i) the arbitral tribunal was not properly constituted, (ii) the tribunal has " manifestly exceeded its power." (iii) a member of the tribunal was corrupt, (iv) a serious departure had been made from a fundamental rule of procedure or (v) the award does not give the reasons on which it is based).

<sup>46</sup> For example, in its first sixteen years, ICSID handled nine arbitrations, three of which resulted in awards and none involved a request for annulment. The first review or annulment request occurred in 1981 in *Klockner v. United Republic of Cameroon*.

<sup>47</sup> Dhar, supra note

<sup>48</sup> M. Sornarajah, *the Settlement of Foreign Investment Disputes* (Cambridge, 2000) 28. This a North-South paradigmatic conflict on the applicable law, which is beginning to lose its fervor mostly because of the South's need for investment capital,

preference in practice to the international law favouring the interest of claimants.<sup>49</sup> For example, in *SPP v. Egypt* the Tribunal applied international law in favour of the claimant viewing that Egyptian law didn't cover every point in the dispute, despite the fact that suggests jurisdiction to be based on a domestic Egyptian legislation. In the interpretation of Article 42(1) Professor Weil has noted that, "the reference to the domestic law of the host state, even if designed only to ascertain whether it is or is not, compatible with international law, is indeed pointless exercise, the sole *raison d'être* of which to avoid offending the sensibility of the host state."<sup>50</sup>

#### **F. ICSID DEPOLITICIZATION AGENDA IN DISPUTE RESOLUTION PROCESS AND THE REALITY**

ICSID's depoliticization policy by renunciation of diplomatic protection of investors by their home state, as discussed earlier' is recongnized as laudable initiative in terms of power balance in international law. But in practice, the scenario is different as the depoliticization seems to have worked more in favour of the foreign investor within the realm of ICSID. Given the nature of international investment law generally, investment dispute settlement always remains politicized to an extent, at least at the international level.<sup>51</sup> Some author comments that despite the express condition in ICSID for those who have consented to it to renounce their right of diplomatic protection, ICSID Convention is perceived as an instrument for developed countries as a group to apply the equivalent of diplomatic protection of their nationals who invest or operate in the developing states.<sup>52</sup> In other words, ICSID and other arbitral bodies located in the developed states are seen as a surrogate for diplomatic intervention in the affairs of developing states.<sup>53</sup>

#### **G. LACK OF REFERENCES TO DEVELOPMENT CONCERNS IN ICSID ARBITRAL PROCESS**

Economic development through the promotion of foreign investment flows to the Third world is one of the primary purposes of the establishment of ICSID which is clearly indicated in the Secretary General Secretary of ICSID, Ibrahim Shihata's statement. Articulating the reason for the establishment of ICSID, he stated that "ICSID should not be viewed merely as a mechanism of conflict resolution. It should be regarded as an effective instrument of international public

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<sup>49</sup> See for example, Aron Boaches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", (1972) 136 RECUEL DES COURS 331 at 392. In Ibrahim Shahita & Antonio Parra, "The Case of Arbitration under ICSID Convention", (1994) 9 ICSID Rev. FILJ 183 at 192 [herein after Shihata & parra, Substantive ], the authors also adopt a similar view, arguing that under second sentence in Art.42(1) of the ICSID Convention, a tribunal could set aside applicable national law where it is inconsistent with international law.

<sup>50</sup> Professor Weil, "The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a ménage A Troise" (2000)15 ICSID Review, FILJ 401 at 409.

<sup>51</sup> Ibrionket T. Odumosu, "the Antinomies of the (Continued) Relevance of ICSID to Third World" (2007) 8 San Diego International Law Journal 345 at 370.

<sup>52</sup> Nathan, *supra* note at 59.

<sup>53</sup> Alden F. Abbott, "Latin America and International Arbitration Conventions: The Quandry of Non-Ratification", (1976) 17 Harverd Law Journal 131 at 138.

policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions.”<sup>54</sup> Similarly ICSID reports state that ICSID is established to be more than an investment dispute settlement institution; it is meant to facilitate investment flows with a view of economic development.<sup>55</sup> All these statements appear to be bluntly illusory, and to an extent fraudulent. The development concerns of Third World states have not featured before ICSID tribunals. The references to economic development are sparse in ICSID’s jurisprudence; tribunals’ focus has gravitated mainly towards investment protection. The decision of the Tribunal in *Antoine V. Republic of Burundi* is an example in this context.<sup>56</sup> It noted at paragraph 126 that “ it is not the Tribunal’s role to substitute its own judgement for the discretion of the Government of Burundi of what are imperatives of public need...or of national interest.

One can , therefore, argue that as the Third World states often constitute the overwhelming majority of the ICSID’s defendants, ICSID jurisdiction should be replete with principles (of international law) of development or at least principles akin to this. But problem mainly lies with the nature of dispute to be settled by ICSID’ tribunal. Article 25 (1) requires that the dispute must be a “legal dispute arising directly out of an investment” and the legal issues are basically settled by the BITs which less often address issues concerning public interests such as environment, human health and safety, labour related human rights, (although trend is changing, of late). The Tribunal generally treats these issues extra-legal elements. As a result of avoiding the development concerns, in the interpretation of ‘legal disputes’ the foreign investors are in advantageous position in ICSID jurisdiction vis-a- vis developing host states. Violation of these issues are often dismissed by the tribunal on account of short of jurisdiction.<sup>57</sup>

## H. HIGH COST OF DEFENCE IN ICSID ARBITRATION

High cost of defence is a common contention made by the developing host states as the seat of ICSID being located only in the USA. Given the necessity to contract legal representation in the USA the state party has to spend huge amount of money. It is said that every case reportedly costs the state party 4 million dollars.<sup>58</sup> This is the reason Bolivia decided to denounce ICSID.<sup>59</sup> Even it is seen some times that revenues of suing companies are greater than the GNP of defendant countries. For example, *Aguas del Tunari/Bechtel* reported revenues three times greater than Bolivia’s GNP at the time it filed suit against Bolivia at ICSID.<sup>60</sup> *Shell*, at the moment it filed charges against Nicaragua, had revenues 62 times the GNP of the country.<sup>61</sup>

<sup>54</sup> Ibrahim F.I Shihata, Introduction by Secretary General, ICSID, 1984 Annual Report 5 ( 1984).

<sup>55</sup> Ibid.

<sup>56</sup> *Antonie Goetz v. Republic of Burundi* (2000) 15 ICSID Review –FILJ 457.

<sup>57</sup> *Antoine v. Republic of Burundi* (2004) is in point.

<sup>58</sup> Silvia Karina Fiezzoni, “The Challenges of UNASUR Member Countries to Replace ICSID Arbitration”, (2011) 2 Beijing Law Review, 134 at 136.

<sup>59</sup> World Bank Group, “ Bolivia Leaves the ICSID”, <<http://www.web.worldbank.org>>.

<sup>60</sup> Silvia supra note 52 at 136.

<sup>61</sup> Ibid.

## V. RECOMMENDATIONS FOR BALANCING INVESTOR-HOST STATES INTEREST IN ICSID PROCEDURES AND PRACTICE

Given the foregoing discussion, it is unlikely to claim that the features of dispute settlement process under ICSID are balanced, less investor biased on the whole. Due its investor's bias treatment as reflected in procedural interpretation and practical evidences of withdrawal from ICSID jurisdiction, prominently by Latin American countries, one major recommendation including others for the modification of existing provision and changes of ICSID current trend of arbitral is presented so as to creating a balancing situation between the interest of investors and host states for ensuring the ultimate goal of development in the Third World countries, not only serving the business gain of companies of developed economies.

The major recommendation is organising a robust analysis of dispute settlement process. Despite criticism against ICSID's direct or indirect bias for investors in different ways, ICSID currently is recognised as more acceptable international arbitral institution dealing with settlement of foreign investment disputes. So, in order to retain its international institutional legitimacy, it is important to review the ICSID's arbitration procedures developed under its convention adopted over forty years. There have been huge phenomenal changes that occurred during this long span of time in international economic and social order juxtaposing trade-investment and non-trade issues such as environmental protection and human rights, health and security concerns. A revision is required to keep pace with this changing situation in economic world and cater the need for development goal as it is one of ICSID promises. Therefore, at the auspices of the Administrative Council a periodic robust review session consisting of representatives of member states should organised be organised for comprehensive analysis of dispute settlement process with the equal representation of member states. The review session should be more focussed on some procedural and development concerns essential for striking balance between the interests of developing host states and foreign investors. These are mainly condition of exhaustion of local administrative and judicial remedies, application of substantive laws, enforcement and execution of Arbitral awards, conditions for annulment and introducing appeal system, nature of disputes and reference to development concerns.

Firstly, as regards requirement of exhaustion of local remedies the current ICSID provision as indicated earlier in truest sense is not host state friendly, although cable of attracting more investment. This is because, there are some regulatory issues concerning public interest that state need to maintain at any cost and compromising of such issues will be detrimental to host state interests. So for issues concerning regulatory matters requirement for local remedies can be added to ICSID provision. Particularly in the case of joint-venture investment it is considerably significant.

Secondly, in the application of substantive law, international law is most often treated supreme bypassing state law on the ground of its weakness and insufficiency to cover the every points of dispute, while International law on foreign investment still is largely a contested site. There is a

plenty of room for the development of rules of international law on investment. International investment law as developed through BITs and multilateral non-binding instruments has not yet covered all development concerns. Under this situation, the rules of international law on investment should not write off the applicability of domestic law thereby precluding states from expressing conceptions of development developed locally, and similarly should not preclude states from maintaining their identities, their peculiarities and their difference, if any.<sup>62</sup> Because, the rights of states to determine their own destiny are recognized by international law provision like Article 1 of the Charter of the Economic Rights and Duties of States provides, “every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.”<sup>63</sup> In view of this laws relating financial, fiscal, human rights are environmental regulations developed locally should be respected duly if there is a relevancy.

Thirdly, in the enforcement and execution of ICSID’s arbitral award, national courts are precluded from refusing the award irrespective of nature of ground including public policy concern. This utterly is opposed to the judicial sovereignty of contracting states. Therefore, this provision needs to be modified and a provision for refusal of ICSID award by the national courts should be permitted only on the ground of public policy.

Fourthly, introducing appeal from award in ICSID dispute settlement process as per ICSID secretariat’s proposal seems to be very much relevant. The rationale of this may be based on two major points; one is, only annulment option can act as equivalent of appeal because of its restrictive and inaccessible conditions, in addition, annulment decree can not establish a win-win situation between investors and host states. Another is, designing an adjudicatory procedure without the provision of appeal appears to a undemocratic practice and appeal may pave the way for a scope to create a balanced situation between both the parties in arbitration. In the case of introducing appeal provision in ICSID, the Administrative Council can gather experience from WTO dispute settlement process. WTO experience suggests that the adoption of an appellate body can promote the development of a coherent, stable jurisprudence in the face potential political pressure.

Fifthly, whereas the provision of ‘legal dispute arising directly out of investment’ as required by the Convention to seek ICSID arbitral jurisdiction leaves very limited scope for the institution of arbitral proceedings. It particularly covers investment protection issues, not the non-investment regulatory issues. Thus it has become almost obsolete in the present global context due to having lack of references to the growing developmental issues, the term ‘legal dispute’ needs to be redefined with special reference to development issues so as to cover the rights and interests of all concerned parties to the ICSID proceedings.

<sup>62</sup> IBIRONKE *supra* note 51, at 381.

<sup>63</sup> The Charter of the Economic Rights and Duties (1974) Resolution 3281 adopted by the General Assembly.

Last, but not least when it is factually proved that the adjudication expense has become burdensome and unaffordable on the part of developing host states, the ICSID arbitration should not be centred in Washington only, rather regional arbitration centre under ICSID could be organised to resolve ongoing problem and also to facilitate FDI flow through settling dispute settlement by creating a win- win situation between the parties.

## VI. CONCLUSION

It is true that in relation to FDI related dispute settlement ICSID is playing the major role compared to other arbitral institutions and ICSID is the only organization that is meant for this purpose. It's uniqueness mainly rest upon comprehensive arbitral procedures that maintain a balancing attitude in providing award as claimed by world bank authority. It is drawn from the above discussion that the consent or agreement approach has been pursued in almost all procedural matters matters including invoking jurisdiction, appointment of arbitrators and application of the substantive laws as a vital element for balancing the competing interest between investors of capital exporting countries who are mainly developed world and the developing host countries. But it is not evidently whole truth that the consent-based approach alone is able to face the reality of the situation in terms of balancing interests between investors and host states. Under the cover of mutuality the provisions such as the exclusion of local remedies, limitation on the nature of investment dispute, disregard to the public interest of the contracting states in the enforcement and execution ICSID arbitral award, absence of appeal system and highly restricted annulment procedures frustrate ICSID claim of neutrality and impartiality and expose it to a legitimacy crisis as a mechanism for development through FDI by ensuring protection of invest. Protection is alright and duly considered for the benefit of investors, but the developmental concerns related to host countries often remain ignored in ICSID arbitration. Therefore, in the conclusion, it is fairly to say that recommendation for modification and changes by introducing appeal system, addressing the developmental concern in arbitration regime through broadening the nature and scope of investment dispute, regard for national laws of host countries related to public interest and decentralization of seat of arbitration can be a better way to create balances of interests between developing host countries and investors of developed economies in ICSID arbitration system and thus leading to the attainment of development objective through FDI.