

Legitimacy Crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward.

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Abstract- In recent years, investor – state arbitration system (ISA) has received a lot of attention and criticism in academic writings. A section of stakeholders have labelled this system as machinery for advancing foreign investors interests at the expense of the host state interests. It is contended that the system is overshadowed with flaws and lacks the necessary values of a legitimate adjudicative system. The often cited flaws in the system includes: lack of mechanism to avoid inconsistent decisions, lack of rules to ensure impartial and independent adjudication process, confidentiality of proceedings despite the fact that the disputes are public in nature and expensive adjudication process. Furthermore the system is condemned for encroaching on governments’ regulatory powers.

In the efforts to remedy the situation, a number of solutions have been suggested by different stakeholders. The most cited solutions include; consolidation of related disputes; invoking res judicata and lis pendens principles; use of mediation / conciliation technique; adopting the margin of appreciation standard in interpretation of BITs and creating an appellate structure at ICSID. Another suggestion has been creating a standing international investment court.

The purpose of this article therefore is to make a critical analysis of the solutions suggested. The main objective is to find out whether the suggested solutions are strong enough and capable of addressing all flaws in the ISA system. To get a satisfying answer to this question the article proceeds by looking at the strengths of each suggested solution and identify the possible weaknesses which befalls them.

In the last part the article proposes its own recommendations. It is concluded that in order to serve the system from collapsing, establishing a single permanent court with permanent members stands out to be the panacea to all legitimacy issues haunting investor – state arbitration system.

Index Terms- Investor – State arbitration, legitimacy crisis, international investment court, international investment appellate court.

I. INTRODUCTION

Foreign investor – state arbitration (ISA) is not carried out by a single omnipotent body or court; rather, it is carried out by a number of different bodies; permanent and ad hoc. Most of the times these dispute are settled under the International Centre for

Settlement of Investment Disputes (ICSID) arbitration,¹ or under the Additional Facility arbitration² or the ad hoc arbitration under UNCITRAL rules.³ The dispute is settled at ICSID where it involves a member state to the convention and a national from another member state.⁴ Where one of the parties to the dispute is not a member to the Convention, the dispute can then be settled under the ICSID Additional Facility rules.⁵ Where neither the host state nor the foreign investor home state is a member to the convention, the dispute is normally settled on ad hoc basis under the UNCITRAL Arbitration rules.⁶

The UNCTAD 2013 World Investment Report indicates that ICSID constitute 61% of all investor – state disputes while UNCITRAL constitutes 26% and the remaining 13% is left for the International Chamber of Commerce (ICC) established in 1923⁷, the Permanent Court of Arbitration (PCA)⁸ and the Stockholm Chamber of Commerce.⁹

II. ISA LEGITIMACY ISSUES

As pointed out in the introduction, the lack of a single omnipotent body which is responsible for supervising investment disputes, has led to the cropping up of a number of issues. Under the current ISA there is no mechanism in place to avoid

¹ Governed by the Washington Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965 hereinafter referred as “the ICSID Convention” read together with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter ICSID Rules) available at <http://www.worldbank.org/icsid.htm> accessed on 21/05/2013.

² The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes ICSID/11April 2006 available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf accessed on 21/02/2013.

³ The UNCITRAL Arbitration Rules, 2010, available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/02/2013.

⁴ See the ICSID Convention, note 1 above, Art.25.

⁵ See the Additional Facility Rules , note 2 above, Art 2(a).

⁶ UNCITRAL Rules 2010, note 3 above, Art. 1 (1).

⁷ See ICC Rules of Conciliation and Arbitration, 1998 available at <http://www.jus.uio.no/lm/icc.conciliation.arbitration.rules.1988> accessed on 20/07/2014 (hereinafter ICC Arbitration Rules).

⁸ Established by the Hague Convention for the Pacific Settlement of Disputes of 1899 available at http://www.pca-cpa.org/showpage.asp?pag_id=1027 accessed on 18/07/2013.

⁹ See UNCTAD *Latest Developments in Investor-State Dispute Settlement*, [2013] IIA Monitor, No. 1, at 1–2, U.N.Doc UNCTAD/WEB/ITE/IIA/2013/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 23/07/2013.

inconsistent decisions,¹⁰ there are no adequate rules to ensure an impartial and independent adjudication process, there are no rules to ensure transparency despite the fact that the disputes are public in nature, expensive adjudication process and there is no appellate system to rectify errors.¹¹

In addition, the tribunals at times encroach on governments' regulatory powers by rendering awards which challenges or illegalize legitimate laws passed by states. This can be substantiated by a number of decided cases challenging the host states basic regulatory functions and sometimes states duty to provide public services to its citizens.¹² In some cases the main function of the state; security and peace is put at jeopardy but still the standard of review applied by the tribunals does not take these factors under consideration.¹³ Furthermore, state regulatory measures on environmental issues, health and other service delivery to the citizens have been declared illegal in favour of foreign investors' interests.¹⁴

III. SYSTEMIC FLAWS CONSEQUENCES

In reaction to the above mentioned flaws in the system, some stakeholders have started running away from the investor – state arbitration system. Latin America countries; Bolivia, Ecuador, and Venezuela have led the way by withdrawing from the ICSID

¹⁰ See *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* ICSID ARB/01/13 (Decision on objection to jurisdiction) (hereinafter *SGS v Pakistan*) and *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID ARB/02/6 (Decision on objection to jurisdiction and separate declaration) (hereinafter *SGS v Philippines*); See also *Lauder v The Czech Republic*, 9 ICSID Reports 66 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports 121.

¹¹ See Van Harten et al 'Public Statement on the International Investment Regime' Aug. 31, 2010 available at <http://tinyurl.com/3qhnjwr> (hereinafter Public statement) accessed 23rd January 2013; See also Brower C N et al 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415 at 417; Mann H 'Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?' in Alvarez JE and Sauvart KP (eds.) *The Evolving International Investment Regime: Expectations Realities, Options* (2011) 22-29; Gaiger R 'Multilateral Approach to Investment' in Alvarez J and Sauvart K P (eds.) *The Evolving International Investment Regime* (2011) 153-173; Reinisch A 'The Future of Investment Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916; Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658; Peterson L 'Out of Order' in Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 483 – 488; Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126.

¹² See *Agua del Tunari S A v Bolivia* ICSID ARB/02/3 2005 (decision on jurisdiction) and *Azurix Corp v Argentina* ICSID ARB/1/12 2006 (final award) (all cases concerned governed measures to protect water services).

¹³ See *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (final award), *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 (final award) and *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 (final award).

¹⁴ See *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 in which the claimant is suing the government of Australia for enacting a legislation which require plain cigarette packaging on public health reasons; See also *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, (Award) ICSID Case No ARB/09/6. The case is commenced by *Vattenfall against Germany* as a result of Germany's nuclear opt-out decision to protect the environment and health.

convention.¹⁵ In April 2011, in an effort to seek more policy space, Australia issued a trade policy statement announcing that it would stop including investor – state dispute settlement clauses in its future International Investment Agreements (IIAs).¹⁶ In March 2014, Indonesia after facing a number of treaty-based claims in recent years, has decided to terminate the BIT with Netherlands.¹⁷ It has further indicated that it intends to terminate all 67 BITs entered with other countries.¹⁸

The United States, has also revised its Model Bilateral Investment Treaty (BIT) in order to constrain the expansive interpretations by tribunals. The revised model BIT empowers the US government more to regulate on different issues; health, safety, environment, and the promotion of internationally recognized labour rights without interference from the investor – state tribunals.¹⁹ In addition to that, the US 2012 Model BIT mandate the Parties to "consider" whether arbitral awards under the BIT should be subject to any new appellate mechanism to be introduced in the future.²⁰

South Africa has also shown its dissatisfaction with the current dispute settlement system.²¹ The government in 2009 issued a policy statement with regards to BITS. In the effort to balance interests between host state and foreign investors, the government has denounced a number of BITs with European countries and is pushing for utilization of host state courts in the event of any disputes between South Africa and foreign investors.²² In another move, the South African government in November 2013 published its draft Promotion and Protection of Investment Bill 2013 in the Government Gazette for public comment.²³ The bill discourages ISA and provides for domestic litigation, domestic arbitration and mediation of investment disputes.²⁴

¹⁵ UNCTAD *World Investment Report* 2012 at 84.

¹⁶ *Department of Foreign Affairs and Trade of Australia Trading our way to more jobs and prosperity, April 2011 available at www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html accessed on 25/01/ 2013.*

¹⁷ See Indonesia Statement on *Investment Treaty News*, May 2014 Issue at 16 available at

http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

¹⁸ See the Dutch Ministry Statement on Indonesia Termination of BIT at <http://indonesia.nlembassy.org/news/2014/03/bilateral-investment-treaty%5B2%5D.html> accessed on 16/05/2014

¹⁹ The Office of the U.S. Trade Representative, *Model Bilateral Investment Treaty* (2012), Art.12 available at

http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 23/02/ 2013.

²⁰ 2012 U S Model BIT, as above, Article 28(10).

²¹ The Department of Trade and Industry Republic of South Africa *Position Paper on Bilateral Investment Treaty Policy Framework Review*, June 2009, available at http://www.thedti.gov.za/ads/bi-lateral_policy.pdf accessed on 7/02/2013.

²² See the Speech delivered by the Minister of Trade and Industry of South Africa Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand on 26th July 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861> accessed on 07/03/ 2013).

²³ See the Draft Bill on Promotion and Protection of Investment, 2013 available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> accessed on 07/03/2014.

²⁴ See the Draft Bill, as above, Article 11.

In addition, Zimbabwe,²⁵ Liberia,²⁶ Russia,²⁷ Thailand,²⁸ Senegal,²⁹ Kyrgyzstan³⁰ and Venezuela³¹ have shown dissatisfaction with the ICSID system and refused to pay the awards issued against them.³²

Not only developing countries are reacting, in March 2014 Germany has also announced its dissatisfaction with the investor – state arbitration system and is opposing the inclusion of the system in the EU – US trade pact which is currently under negotiations.³³ Germany is advancing the idea of adjudicating investor – state dispute in the host state courts. According to the Financial Times, the Junior Minister of Economy, Brigitte Zypries, believes that foreign investors “have sufficient legal protection in the national courts.”³⁴ It is submitted here that this new Germany stance, which was the first country to pioneer for BITs and signed the first BIT with Pakistan in 1959, shows that the dispute settlement provision in the BITs indeed has problems.

Apart from countries, other stakeholders have also shown concern about the current dispute settlement mechanism. The Committee on International Trade of the European Parliament, on 22nd March 2011 issued a report on the future of International Investment Policy of the European Union.³⁵ The report put to light the problem relating to: different interpretation of investment principles by different tribunals which lead to conflict between private interests versus regulatory tasks of public

authorities,³⁶ existence of BITs which focus on the interests of investors alone and disregard the host state interests in regulating for other development goals,³⁷ the lack of the model BIT for member states which can enhance certainty and consistency of interpretation.³⁸ In addition, the report raises concerns on the wide discretionary powers granted to arbitrators on interpretation of the investment principles.³⁹ The report raises more concerns on lack of transparency on the current system, lack of an appellate option and the absence of the requirement for exhaustion of local remedies before resorting to international arbitration.⁴⁰

Further still, the Law professors from different parts of the world in 2010 issued a public statement condemning the current investment arbitration system.⁴¹ Among the concerns raised in the public statement are: the need to have an independent judicial system responsible for investment disputes; recognition of the state’s fundamental right to regulate on behalf of public welfare; the need for arbitrators to consider public interest in their interpretation of investment principles and that the current adjudication system is not a fair, independent and balanced system for settlement of investment disputes.⁴²

IV. THE SUGGESTED SOLUTIONS

As stated in the introduction above, in the efforts to address the above discussed ISA systemic problems, stakeholders have put forward a number of solutions to curb the shortcomings in the ISA system. The most cited solutions include; consolidation of related disputes, invoking *res judicata* and *lis pendens* principles; use of mediation/ conciliation technique; adopting the margin of appreciation standard in interpretation of BITs and creating an appellate structure at ICSID.⁴³ Another suggestion is to create a standing international investment court.⁴⁴

In the section that follows, the strengths and weaknesses of each solutions are discussed.

1.1 Consolidation of related disputes

Christina Knahr proposes consolidation of related proceedings as a means of curbing inconsistent decisions in ISA.⁴⁵ She argues that in order to avoid duplication of proceedings and conflicting outcomes, parties should consolidate related proceedings which have a common question of fact or law for the purposes of minimizing costs but also avoiding inconsistent decisions. August Reinisch and Crivellaro also

²⁵ *Funnekotter v Republic of Zimbabwe* ICSID Case No ARB/05/6, Award (2009) <http://italaw.com/documents/ZimbabweAward.pdf> accessed on 20/10/2013.

²⁶ *Liberian Eastern Timber Corp v Republic of Liberia* ICSID Case No ARB/83/2, Award 2 ICSID Rep. 346 (1994) accessed on 20/10/2013.

²⁷ *Sedelmayer v Russian Federation*, Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), http://italaw.com/documents/investment_sedelmayer_v_ru.pdf, accessed on 20/10/2013.

²⁸ *Walter Bau AG (in liquidation) v Kingdom of Thailand*, Award (UNCITRAL Arbitration July 1, 2009), <http://italaw.com/sites/default/files/case-documents/ita0067.pdf> accessed on 20/10/2013.

²⁹ *Sociéte’ Ouest Africaine des Be tons Industriels v Senegal*, ICSID Case No ARB/82/1, Award, 2 ICSID Rep 190 (1994) accessed on 20/10/2013.

³⁰ *Petrobart Ltd. v Kyrgyz Republic*, Arbitration No 126/2003, Award II (Arbitration Institute of the Stockholm Chamber of Commerce Mar. 29, 2005), 13 ICSID Rep. 387 (2008) accessed on 20/10/2013.

³¹ *Mobil Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (June 10, 2010), <https://icsid.worldbank.org> accessed on 20/10/2013; see also CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, available at <http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html> accessed on 20/10/2013

³² For more on this see Peterson LE & Hepburn J ‘Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh’ (2011) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20111231_7; see also Baldwin E ‘Limits to Enforcement of ICSID Awards’ (2006) 23 *Journal of International Arbitration* 1 at 7; see also Peterson LE ‘Zimbabwe Not Paying ICSID Award’ (2010) *Investment Arbitration Reporter* http://www.iareporter.com/articles/20100507_5 accessed on 21/10/2013.

³³ See the Germany Ministry Announcement in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 15th February 2013.

³⁴ Financial Times quoted in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 15th February 2013.

³⁵ European Union Parliament Report on the Future European International Investment Policy, A7-0070/2011 of 22 March 2011 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN> accessed on 15th February 2013.

³⁶ European Parliament Report on Investment 2011, note 35 above, para G.

³⁷ European Parliament Report on Investment 2011, note 35 above, para J (1) and para 25.

³⁸ European Parliament Report on Investment 2011, note 35 above, para J (4) and (10).

³⁹ The European Parliament Report on Investment 2011, note 35 above, para 17.

⁴⁰ The European Parliament Report on Investment 2011, note 35 above, para 31.

⁴¹ Van Harten, note 11 above.

⁴² Van Harten, note 11 above.

⁴³ See note 11 above.

⁴⁴ UNCTAD ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’ IIA Issue Note No. 2, June 2013 at 1.

⁴⁵ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2.

support this suggestion.⁴⁶ They submit that big nations including the US Model BITs provides for consolidation of related proceedings.⁴⁷ The US Model BIT spirit has been reflected in the recent US - Rwanda BIT.⁴⁸ They further submit that Canadian Model BIT also provides for consolidation.⁴⁹ The Canadian Model BIT spirit on consolidation is reflected in the Canada – Tanzania BIT which came into force on 09 December 2013.⁵⁰ Article 27 of Canada – Tanzania BIT empowers the tribunal to consolidate related disputes where it is of the view that there are similar questions of law or fact involved.⁵¹ Consolidation is also provided for and has been applied under NAFTA Chapter 11.⁵²

1.1.1 Strength

Reinisch argues that if consolidation is done properly, it can provide very effective remedies against inconsistent decisions.⁵³ For example, it is submitted that had the *Lauder* and *CME* cases been consolidated, the problem of inconsistency would have been allayed.⁵⁴

1.1.2 Weaknesses

It should be borne in mind that while consolidation addresses the problem of inconsistency properly, there are currently very few BITs which provides for consolidation of proceedings. Most of the existing BITs do not have a provision for consolidation of related proceedings.⁵⁵ Therefore even where the Tribunal desires

⁴⁶ Reinisch A 'The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration' in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126; See also Crivellaro A 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *Law & Practice of International Courts & Tribunals* 371 at 371.

⁴⁷The Office of the U.S. Trade Representative, note 19 above.

⁴⁸ See for example Article 33 of the US – Rwanda BIT, 2008 which came in force 2012 available at

http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/pdf-agreements/RwandaBIT.pdf accessed on 19/05/2014.

⁴⁹The Department of Foreign Affairs and International Trade *Canada's Model Foreign Investment Protection Agreement*, 2004 Art. 32(2) (hereinafter Canada Model BIT) available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 20/01/2014.

⁵⁰ See the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng> accessed on 19/05/2014.

⁵¹ See Article 27 of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments available at

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng> accessed on 19/05/2014.

⁵² Knahr C, note 45 above at 4.

⁵³ Reinisch A, note 46 above at 912.

⁵⁴ *Lauder v The Czech Republic*, 9 ICSID Reports 66 award of 03/09/ 2001 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports Partial Award of 13/ 09/ 2001 respectively.

⁵⁵ See for example the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at http://unctad.org/sections/dite/ia/docs/bits/south_africa_zimbabwe.pdf. see also An Agreement between the Government of the Kingdom of Sweden and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment 01/09/1999 available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_sweden.pdf; (hereinafter Tanzania –Sweden BIT); see also the Agreement between the Government of

to consolidate, it may not succeed where the BIT and the rules concerned do not mandate it to do so.

In addition, it may also happen that consolidation becomes more expensive than dealing with separate claim especially when the cases were in different stages before the formation of the consolidation Tribunal. In *Canfor Corp. v. United States*⁵⁶ it was held that consolidation should not be ordered where the cost of consolidation becomes 'excessive'.⁵⁷ Therefore, while consolidating the disputes can be beneficial to one party; it might as well be disadvantageous to the other party hence inefficient and unfair.⁵⁸

It is further submitted here that consolidation cannot be a panacea to all problems relating to inconsistency in international investment dispute settlement system as it only applies to same treaty disputes. Under the current system with 2850 BITs and 350 IIAs,⁵⁹ consolidation will only cure a small portion of the problems.

Another notable weakness is that consolidation can only be a useful tool where all disputes are settled under one institution hence the possibility of relating the disputes in question. Under the current system, consolidation of proceedings at ICSID will not help to bring consistency if there is a similar case but adjudicated at LCIA or ICC under the UNCITRAL Rules.

Therefore, it can be concluded here that, although consolidation can be a useful tool for disputes emanating from the same treaty, it will do very little to solve the inconsistency problem in the present situation where there are about three thousands autonomous BITs which have no consolidation provision. Worse enough, the ICSID and UNCITRAL Rules are also silent on the matter. Unless the rules are amended to that end consolidation stand a small chance of curbing inconsistency in investor – state arbitration system.

1.2 Effective application of res judicata and lis pendens principles

Another suggested solution is the application of the principles of res judicata and lis pendens.⁶⁰ Res judicata means that the matter has already been determined by another competent body hence it cannot be adjudicated upon again while lis pendens means that the matter is being adjudicated in another

United Republic of Tanzania and the Government of Italian Republic on the Promotion and Protection of Investment of 21/08/2001 (hereinafter Tanzania – Italy BIT) available at

http://unctad.org/sections/dite/ia/docs/bits/tanzania_italy.pdf and the Agreement between the Government of United Republic of Tanzania and the Government of Republic of Finland on the Promotion and Protection of Investment of 19/06/2001 (hereinafter Tanzania - Finland BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_finland.pdf. All these BITs have no provision for consolidation of proceedings.

⁵⁶ *Canfor Corp v United States, Tembec et al v United States, and Terminal Forest Products Ltd. v United States*, Order of the Consolidation Tribunal, 7 September 2005, available at

<http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.

⁵⁷ *Canfor Corp v United States*.

⁵⁸ Knahr C, note 45 above at 11.

⁵⁹ See the UNCTAD World Investment Report 2013 'Towards a New Generation of Investment Policies' at 4 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 23/07/2013.

⁶⁰ See Reinisch A, note 11 above at 912.

competent court.⁶¹ In order to apply these two principles it must be proved that the matters before the two courts are the same and involve same parties. *Res judicata* and *lis pendens* are very useful and are frequently applied in many countries in civil litigation and they help a lot to avoid parallel proceedings and inconsistent results.⁶²

1.2.1 Strengths

The principle of *res judicata* aims to serve three purposes. At first, it aims at bringing to an end of a legal dispute. It is used to ensure that no defendant is tried twice on the same case. Secondly, the rule intends to serve judicial economic interest as it aims at preventing relitigation of a previously decided case. Thirdly, the rule aims at ensuring legal certainty by preventing the possibility of having divergent conclusions on cases of the same nature and facts.⁶³

Lis pendens, on the other hand, aims at barring initiation of a new proceeding where there is another proceeding pending in another competent court involving same parties and same subject matter. The principle serves or aims at achieving the same goals as *res judicata*. It aims to bring judicial economy by preventing costly parallel proceedings and ensuring legal certainty by avoiding parallel conflicting decisions.

1.2.2 Weaknesses

While the arguments put forward in favour of *res judicata* and *lis pendens* are to a large extent, overwhelmingly convincing, there are a number of obstacle in its way. The preconditions for the applicability of *res judicata* and *lis pendens* pose a great challenge for the two principles to be applied successfully in investor – state arbitration. The first challenge is that the two principles require that both the parties and the subject matter be the same in both proceedings and the dispute has to arise in the same legal setting. In investor – state dispute these requirements may not be easily met as most of the time Corporations and shareholders are considered different legal entities hence capable of suing on their own names. In addition, at times Corporations forms subsidiary companies to operate in the respondent state country and such companies can sue or be sued without necessarily involving the parent corporation. Furthermore, different disputes could be filed in different legal settings each with autonomous jurisdiction. This could be the case where one dispute is filed in the local court while the other at an international adjudicative body. Neither body between the two will have the mandate in the circumstances to order *res judicata* or *lis pendens* over the other.

Therefore, while the subject matter could be the same, the disputes may fail to meet the *res judicata* and *lis pendens* requirements due to the lack of same or identical parties to the dispute. These scenarios can be well elaborated by the previously discussed cases *CME V Czech Republic* and *Lauder v Czech Republic*.⁶⁴ In *CME V Czech Republic* and *Lauder v Czech Republic* the facts and the respondent state were the same except

that the claimants were different. In the former Mr. Lauder sued Czech Republic through a company he controlled while in the later he sued the same Respondent State in his own capacity as an investor in the Czech Republic. Furthermore, there is the possibility of multiple arbitrations and local court proceedings in parallel with different seats, different institutional or ad hoc rules, different substantive and procedural laws and identical parties. In the *Lauder* cases, there were parallel arbitration proceedings running under UNCITRAL Rules, at the same time there was another arbitration proceeding filed under ICC Rules and other numerous court cases in the Czech Republic courts and one in the US pertaining almost the same dispute.⁶⁵ The principles of *res judicata* and *lis pendens* could not be applied because the disputes emanated from different autonomous legal settings as well as different parties.⁶⁶ A dispute at ICSID is not a bar to another dispute under the UNCITRAL Rules or even other proceedings in a local court. Under this scenario multiple inconsistent awards may be rendered and multiple enforcement proceedings may take place.

Another possible hindrance to the application of the two principles could be the difficulty of establishing same cause of action. Investors could have different available remedies against host states, one under the contract entered with the state authorities and another under the applicable BIT. Nothing prevents both the contract and the treaty claims to be brought simultaneously by the same investor, in different proceedings and forums.⁶⁷ In *Biwater Gauff v Tanzania*⁶⁸ a British-German joint venture Biwater Gauff Tanzania (hereinafter “BGT”) won a bid from the World Bank to renovate and upgrade the water system in the city of Dar es Salaam Tanzania.⁶⁹ The firm miscalculated the cost for the project when bidding. After 18 months the firm was in deep financial difficulties caused by the miscalculation. The water supply services in Dar es Salaam deteriorated as a result. The government of Tanzania decided to take charge of the management and the supply of water in the city.⁷⁰ BGT was aggrieved by the government move and decided to institute a claim at ICSID pursuant to the Tanzania – UK BIT alleging breach on expropriation, fair and equitable treatment, full protection and security, discrimination and unrestricted transfer of capital guarantees.⁷¹ BGT also, through its subsidiary company incorporated under Tanzanian Law, DAWASCO, initiated a parallel proceeding under UNCITRAL Rules before a separate tribunal and alleged Tanzania breached its obligations under the project contract.⁷²

That is to say, there were two proceedings concurrently running against the same respondent in relation to the same dispute. In December 2007, that tribunal under UNCITRAL Arbitration

⁶⁵ See *Lauder*, note 54 above at para 143.

⁶⁶ Reinisch A, note 60 above at 52.

⁶⁷ Cremades BM and Madalena I ‘Parallel Proceedings in International Arbitration, (2008) 24 *Arbitration International* 509.

⁶⁸ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Final Award of 24th July 2008 available at

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVa l=showDoc&docId=DC770_En&caselD=C67.

⁶⁹ See *Biwater Gauff*, as above, para 3.

⁷⁰ *Biwater Gauff*, as above note 68, para 15

⁷¹ *Biwater Gauff*, as above note 68, para 205.

⁷² *Biwater Gauff*, as above note 68, para 476.

⁶¹ Reinisch A ‘The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes’ (2004) 3 *Law & Practice of International Courts & Tribunals* 37 at 43.

⁶² Knahr C, note 45 above at 4.

⁶³ Reinisch A, note 61 above, at 43.

⁶⁴ *Lauder* and *CME*, note 54 above.

Rules rejected BGT's claim and instead awarded 3 million Pounds to Tanzania.⁷³ A year later the ICSID tribunal also rendered its decision. While no compensation was awarded in the end the arbitrators held Tanzania liable for breaching the BIT but awarded no damages to the claimant. This shows that under the current investor – state dispute system multiple inconsistent awards could be rendered and multiple enforcement proceedings by the same claimant against the same respondent can also occur. This only occurred because there were two different cause of action; rights accruing from the contract and the other accruing from the BIT. It can be said that the parties were different. Therefore under the strict application of the principles of *res judicata* and *lis pendens*, these two cases cannot qualify for the defenses.

It can be concluded that with such multiple nationalities of individual investors and corporations the principle of *res judicata* and *lis pendens* will hardly find room of application in investor – state arbitration.

1.3 Use of Mediation/Conciliation Techniques

This is another suggestion which has received attention and could be vital in enhancing the legitimacy of the investor – state system. The ICSID system provides for two alternate mechanisms for settlement of investor – state disputes.⁷⁴ The dispute can be settled by way of conciliation or arbitration.⁷⁵ Currently, conciliation is almost redundant in investor - state dispute settlement. For the last twenty years only 7 cases have been resolved through conciliation.⁷⁶ It is argued that the redundancy is caused by the fact that the mechanism lacks mandatory force and is mostly considered informal.⁷⁷ Mediation and conciliation are normally used interchangeably and they both mean a dispute resolution technique under which the mediator/conciliator attempts to bring the parties to agreement using many different styles and techniques to facilitate settlement.⁷⁸ In mediation or conciliation, the mediator's role is to bring the parties to their own agreed decision. In many jurisdictions today, mediation precedes any litigation or arbitration. It is only when the parties are unable to settle their dispute through mediation that the matter is referred to the court for litigation.

UNCTAD in 2009 considered the use of Mediation and Conciliation as an alternative in resolving investor – state

disputes.⁷⁹ The Report suggests that with the surge of investor – state claims annually, mediation may be used a tool to reduce such a rapid increase of claims. It is further argued that the longevity of arbitration disputes which leads to costly inconsistent awards may be avoided if the parties turn to mediation instead.⁸⁰

In a 2010 Joint Symposium on Investment and Alternative Dispute Resolution organised by UNCTAD and Washington and Lee University School of Law stakeholders discussed the ways in which ADR could help to improve the investor – state legitimacy. The symposium resulted in the UNCTAD ADR Resolution.⁸¹

1.3.1 Strengths

A number of advantages exist in mediation over arbitration and litigation. The first advantage is that mediation is speedier than litigation and arbitration as can hardly take a year before the parties reach an agreement.⁸² Another advantage associated with mediation is that it costs less when compared with arbitration or litigation. Recent research indicates that the investor – state arbitration system is so expensive.⁸³ Argentina is currently faced with awards which run over USD 430 million and pending claims to the tune of 65 billion USD.⁸⁴ The amount claimed against Russia by the three majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings is USD 114 billion.⁸⁵ It is submitted that mediation proceedings would not lead to such costs as the parties resolve the dispute

⁷⁹ United Nations Conference on Trade and Development, Latest Developments in Investor– State Dispute Settlement, IIA Issues Note n. 1 (2010) (“UNCTAD Latest Developments 2010”) at 1 available at http://unctad.org/en/docs/diaeia200911_en.pdf accessed on 10/03/2014.

⁸⁰ Salacuse JW ‘Is There A Better Way? Alternative Methods of Treaty-Based, Investor State Dispute Resolution’ (2007) 31 *Fordham International Law Journal* 138.

⁸¹ UNCTAD ‘Exploring Alternatives to Investment Treaty Arbitration and the Prevention of Investor-State Disputes’ *UNCTAD Series on International Investment Policies for Development United Nations*, 2010 available at <http://investmentadr.wlu.edu/deptimages/UNCTAD/UNCTADAlternativesArbitrationAdvancedDraft.PDF> accessed on 10/03/2014.

⁸² Coe JJ Jr ‘Settlement of Investor-State Disputes through Mediation: Preliminary Remarks on Processes, Problems and Prospects’ in Bishop RD (ed.) *Enforcement of Arbitral Awards Against Sovereigns* (2009) at Chap. 4

⁸³ See Jagusch S & Sullivan J ‘A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern’ in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110; see also Coe JJ ‘Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch’ (2005) *University College of Davis Journal of International Law and Policy* 7 at 10; see also United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* (WIR) (2012) at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 14/08/2013.

⁸⁴ See UNCTAD *World Investment Report* 2012 at 87; see also Peterson LE ‘Argentina by Numbers: Where Things Stand with Investment Treaty Claims Arising out of the Argentina Financial Crisis’ available at http://www.iareporter.com/articles/20110201_9 accessed on 05/10/2013; see also *Merco Press* ‘Argentina Faces 65 billion dollars in claim: plans to abandon international litigation court’ 28th November 2012 available at <http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigation-court> accessed on 08/10/2013.

⁸⁵ See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228.

⁷³ *Biwater Gauff*, as above note 68, para 477.

⁷⁴ See the ICSID Convention, above note 1 Article 1(2).

⁷⁵ Articles 28 – 35 of the Convention provides for conciliation proceedings while Article 36 – 55 provide for arbitration proceedings.

⁷⁶ Between 1982 and 2011 see the *Background Information on the ICSID*, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

⁷⁷ UNCTAD *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 13.

⁷⁸ Sussman E ‘Investor State Dispute Mediation: The Benefits and Obstacles’ *The Fordham Papers* 2009 available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQfjAA&url=http%3A%2F%2Fwww.sussmanadr.com%2Fdocs%2FFordham%2520Investor%2520state%2520mediation%2520-%2520pros%2520%26%2520cons%2520as%2520sent%2520in%25209-4-09.doc&ei=HNsdU9O8Otu2X7ObNq4G4Cw&usq=AFQjCNHS89xsEukJCylO2YORYPvh6UQUQQ&bvm=bv.62578216.d.ZGU> accessed on 10/03/2014.

amicably and within a short time frame agreed by the parties themselves.

The third advantage is that the dispute under mediation ends amicably as the parties engage the mediator as a facilitator of the discussion and not an adjudicator. The parties, in other words, control the resolution of their dispute as a result they leave the negotiation sessions as friends and not antagonists as it would turn out in arbitration proceedings. Therefore considering the fact that the parties in investor – state disputes normally need each other to ensure the project ends well, with future re engagement, mediation serve both parties interests and their relationship may even improve due to the parties ‘engagement in the mediation process.

1.3.2 Weaknesses

Just like the previously discussed solutions, mediation also has flaws. The first practical issue is that normally parties go for arbitration after trying to resolve the dispute with the host state in amicable ways and when those amicable ways have failed. Therefore mediation or negotiations as many BITs requires ought to have been exhausted and proved futile before an investor approaches the ICSID. Therefore asking the parties to go for mediation would seem like a waste of time.⁸⁶

Another flaw is that mediation, as a technique, is based on the principle of confidentiality of the proceedings. The modern approach in resolving investor – state dispute is to resolve the dispute in a transparent manner which allows the citizens and other interested parties to fully participate in the adjudication of public interest disputes. Therefore mediation can be seen, by today’s standards, as obsolete in resolving public interest disputes.

Lastly is that mediation does not result into a final award or decision which binds the parties. Therefore it becomes difficult for either party to enforce what is agreed in mediation. In other words, mediation does not always resolve the dispute once and for all. That may attract the unscrupulous party to resist the resolution after time and resources have been spent on mediation.

1.4 Margin of appreciation standard in the interpretation of bilateral Investment treaties

It is contended by some that narrow scope in interpretation of treaty provisions which is based on commercial law principles is another hurdle in developing a stable international investment law regime.⁸⁷ It is submitted further that despite the fact that much broader variety of regulatory matters are adjudicated by the investor - state Tribunals, the line of reasoning is still based on law of contract principles.⁸⁸ It is therefore argued that there is a need of adopting a new standard of reasoning grounded in public law rather than private contract law.

It is on the basis of these grounds that the recommendations are made to change the way of thinking of investor – state arbitrators. The standard of review suggested is the margin of appreciation standard which has been developed in the

⁸⁶ Salacuse J, above note 80 at 141.

⁸⁷ Burke White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010, 689 at 695.

⁸⁸ Harten G V *Investment Treaty Arbitration and Public Law* (2007) at 124.

international human rights sphere.⁸⁹ Margin of appreciation is a deference the court is willing to grant to the national decision makers and recognizes that the normative requirement articulated in the convention text can often be legitimately met by a range of different measures that may strike different but still normative acceptable balance between individual rights and government interests.⁹⁰ The margin also recognizes that some state measures against any international convention obligation are justifiable to protect national interests such as security, public health, public morals and order.

1.4.1 Strength

In applying the margin, the respective court show the proper degree of respect for the objectives that contracting state parties may wish to pursue, and the trade-offs that it wants to make while at the same time preventing unnecessary restrictions on the fullness of the protection which the BIT can provide.⁹¹ According to this standard, state’ identification of a legitimate aim in pursuit of social and economic policies is rarely reviewed and the burden of proof showing that an initiative does not pursue a legitimate aim falls upon the applicant.⁹² The scope of the margin to be accorded to the state authority depends on the extent to which the measure intends to address the public interest at issue. The Court in so doing acknowledges the fact that state authorities because of their closer proximity to social reality are better placed to know what constitutes public interest.⁹³

1.4.2 Weaknesses

While the adoption of this solution would help to a large extent to widen the reasoning and create a balance between the public interests and the private investor interests in investor – state disputes, still there are obstacles in making this option successful.

The first obstacle could be the fact that the current rules of ICSID, UNCITRAL SCC and the rest provide for party appointed tribunals. With the current rules in place, the margin of appreciation principle cannot be consistently applied as some of the presiding arbitrators are not aware of the principles requirement as they do not have a public law background. ICSID, for example, maintains a list of potential arbitrators who to a large extent have the contract law background. A recent report reveals that only 40% of the current arbitrators in the ICSID roster have public law background and the remaining 60% comprises of lawyers with commercial law background.⁹⁴ The report further reveals that 12 arbitrators have been repeatedly

⁸⁹ Burke White W & Von Staden A , above note 87 at 696.

⁹⁰ Choudhury B ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest contributing to the Democratic Deficit?’ (2008) 41 *Van J Tran L* 775 at 823.

⁹¹ Burke White W & Von Staden A, above note 87 at 305

⁹² Choudhury B , above note 90 at 823.

⁹³ Burke White W & Von Staden A, above note 87 at 309.

⁹⁴ Gaukrodger D and Gordon K ‘Investor-state dispute settlement: A scoping paper for the investment policy community’, *OECD Working Papers on International Investment*, No. 2012/3, (2012) OECD Investment Division at p. 44 available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreement/50291642.pdf> at 44; see also Schneiderman D ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcome’ available at http://works.bepress.com/david_schneiderman/1 accessed on 12/02/2014.

appearing in over 60% of all ICSID cases. This is to say the ICSID jurisprudence is dominated by few selected arbitrators with contract law background. In addition, the study indicates that 50% of arbitrators on the current ICSID roster have appeared as counsel for investors elsewhere.⁹⁵ This signifies that there is, to a large extent, a rotation of same contract law reasoning in the current investor – state arbitration. With the current dominance of commercial law Arbitrators, the margin of appreciation principle will hardly find a way to prosper.

1.5 The establishment of an appellate court under the International Centre for Settlement of Investment Disputes

There is yet another suggestion of introducing an appellate facility under the ICSID Convention.⁹⁶ Advocates for this argue that in order to avoid the requirement of creating a new convention, the appellate body can be established under the ICSID Appeals Facility Rules which can be easily adopted by the Administrative Council of ICSID without the requirement of approval from all member states.⁹⁷

The ICSID Secretariat in 2004 circulated a Discussion Paper to stakeholders seeking opinion on how best the appellate structure could be introduced under the ICSID Convention.⁹⁸ The Discussion Paper acknowledged the fact that there are inconsistent decisions existing in parallel and that the development of international investment law is jeopardized by such inconsistencies. While acknowledging the existence of inconsistency, the Secretariat was of the opinion that inconsistency was not the general feature of ICSID jurisprudence but the exception.⁹⁹ The Secretariat was skeptical about the introduction of an appellate structure. It opined that introducing the structure might affect more the legitimacy of the system as appellate structure may cause delay and interfere with the finality of the award.

1.5.1 Strength

The fact that ICSID constitute over 61% of all ISA dispute, speak volume about the viability of this suggestion. An appellate structure would therefore eliminate 61% of inconsistency issues in ISA. Proponents further argue that in order to maintain finality of proceedings, which is the key concept at ICSID; time limits could be stipulated within which the appellate body has to deliver its decisions.¹⁰⁰

1.5.2 Weaknesses

It is submitted here that establishing the Appellate structure under the ICSID without incorporating other institutions

involved in the investor – state adjudication system will do very little in solving the problem of inconsistency of decisions. Currently the arbitrations conducted under the UNCITRAL Rules, SCC or ICC has no connection with ICSID. The UNCTAD 2013 World Investment Report indicates that ICSID constitute 61% of all investor – state disputes while UNCITRAL constitutes 26% and others the remaining 13%.¹⁰¹ Therefore even after the formation of such a structure at ICSID 39% of investor – state disputes will be left out and these other institutions will still have the autonomy of rendering awards without necessarily subjecting them to the ICSID appellate body. Therefore while this proposal may benefit ICSID awards, it will do little to benefit the investor – state arbitration system as a whole. Creating an appellate system under ICSID will entail leaving out disputes settled outside the ICSID system. It is submitted therefore that this suggestion is not as unifying as it ought to be.

V. WAY FORWARD: ESTABLISHMENT OF THE PERMANENT INVESTMENT COURT

As seen above, several solutions have been considered by different stakeholders. It is undoubtedly clear that the solutions suggested are accompanied with obstacles or disadvantages which, as a result, overshadow the effectiveness of the respective solutions. In addition, the suggested solutions tend to address the issue of inconsistency but leave out other pertinent issues haunting ISA system. For the reasons stated herein below, this article proposes for the establishment of permanent court with permanent members which will be mandated to resolve all investor state disputes.

1.1 Advantages of Permanent Investment Court Structure

It is submitted here that one of the advantages of establishing the permanent court would be to reduce the litigation costs. Under the current investor – state adjudicative system the cost for litigating in one case is too high. The UNCTAD World Investment Report 2010 clearly state that the costs in investor – state disputes have skyrocketed.¹⁰² It is evidenced in research works that arbitrators' charges range from USD 350 – 700 per hour per arbitrator depending on the claimed dispute amount.¹⁰³ These exorbitant costs at times intimidate poor developing countries from litigating hence decides to give in to the foreign investor demands even where doing so interferes with its other policy objectives.¹⁰⁴ It is submitted here that with a permanent

⁹⁵ Gaukrodger D and Gordon K, above note 94 at p. 44; see also Commission J 'Precedent in Investment Arbitration: A Citation Analysis of Developing Jurisprudence' (2007) *Journal of International Arbitration* 129 – 58.

⁹⁶ See note 11 above.

⁹⁷ Gaiger R 'Multilateral Approach to Investment' in Alvarez J and Sauvank K (eds.) *The Evolving International Investment Regime* (2011) 153-173 at 170.

⁹⁸ ICSID Discussion Paper on Possible improvements of the framework for ICSID arbitration (2004) <http://www.worldbank.org/icsid/highlights/improve-arb.htm> accessed on 13/02/2014.

⁹⁹ ICSID Discussion Paper on Possible improvements of the framework for ICSID arbitration (2004) <http://www.worldbank.org/icsid/highlights/improve-arb.htm> accessed on 13/02/2014.

¹⁰⁰ Gaiger R, above note 97 at 170.

¹⁰¹ See UNCTAD *Latest Developments in Investor-State Dispute Settlement*, [2013] IIA Monitor, No. 1, at 1–2, U.N.Doc UNCTAD/WEB/ITE/IIA/2013/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 23/07/2013.

¹⁰² See UNCTAD 'Investor – State Dispute: Prevention and Alternative to Arbitration' (2010) at 16-18 available at http://www.unctad.org/en/docs/diaeia200911_en.pdf accessed on 05/10/2013.

¹⁰³ International Centre for Settlement of Investment Disputes -ICSID) fees are set at US\$3000 a day

see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&ScheduledFees=True&year=2012&language=English> accessed on 05/10/2013.

¹⁰⁴ See the Report of the SRSG, Business and Human Rights: *Towards Operationalizing the 'Protect, Respect and Remedy' Framework* A/HRC/11/13, para 30 (2009); See also, Report of the SRSG, Business and Human Rights: *Further Steps Towards the Operationalization of the 'Protect, Respect and*

court structure presided by fully employed judges' costs for litigation will go down as the court members are normally paid by the establishing institution and not the parties. The WTO serves a good example on this. At panel and appellate stage the parties to the dispute are exonerated from paying costs for the Appellate Body presiding members. Article 8(11) and 17 (8) of the DSU respectively provides that 'the expenses of persons serving on the panel and Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration'.¹⁰⁵

Another advantage of the court system is the possibility of establishing a strict timeframe for settling disputes. A recent study indicates that at ICSID a dispute takes up to an average of 4 – 5 years.¹⁰⁶ In fact there are cases which have been dragging at ICSID for over 11 years. *Antoine Goetz v. Burundi*,¹⁰⁷ for example, was filed in December 2000 and ended in June 2012,¹⁰⁸ (over 11 years); *EDF International S.A. v. Argentina*¹⁰⁹ was filed in June 2003 and ended in June 2012 (over 9 years), just to mention a few. Again the WTO permanent system has addressed the issue of timeframe appropriately. The WTO DSU clearly provides for the timeframe within which the dispute is supposed to be resolved. Article 20 of the DSU clearly set out the timeframe of settling WTO disputes at a panel stage to be nine months where no appeal lies to the AB and 12 months where there was an appeal. This means that the dispute at Panel level takes nine months while at AB it takes three months.¹¹⁰

In addition to the above, the court structure will help to make the investor – state machinery sustainable.¹¹¹ It is only when the system provide clear principles which meets the expectations of its stakeholders that the system will be able to be trusted hence make itself sustainable. Lack of trust from stakeholders will ultimately lead to members' withdrawal from using it hence the collapse of the same. The current investor - state arbitration system is not sustainable because it is not consistent and lacks predictability. As a result, some members have already shown discomfort and have withdrawn or indicated they would do so.¹¹²

Remedy' Framework A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/03/2014.

¹⁰⁵See Article 8(11) and 17(8) of the WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

¹⁰⁶Raviv A 'Achieving a Faster ICSID' (2014) 11 *Transnational Dispute Management* at 4 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

¹⁰⁷ ICSID Case No ARB/01/2.

¹⁰⁸See List of ICSID Cases, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=Cases> accessed on 23/03/2014.

¹⁰⁹ ICSID Case No ARB/03/23.

¹¹⁰ See Article 20 WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

¹¹¹ Qureshi A 'An appellate system in international investment arbitration?' in Muchlinski P et al (eds.) *The Oxford Handbook of International Investment Law* (2008) at 1157.

¹¹² Bolivia, Ecuador, Venezuela and Australia have withdrawn from using the ICSID system. For more on this see also Peterson LE & Hepburn J 'Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh' (2011) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20111231_7; see also Baldwin E 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration*

The adoption of an appellate structure therefore, is expected to bring sustainability of the system as the structure will be mandated to bring about consistency.

Alongside this advantage, the court structure is expected to bring predictability as well.¹¹³ The relevance of predictability cannot be overlooked. First of all, predictability is crucial as it allows the parties to understand the permissible and non-permissible acts hence capable of putting their houses in order when they deal with one another.¹¹⁴ Secondly, predictability is important because it helps the parties to understand from the beginning as to whether they have a winnable case or not. This helps the parties to abstain from instituting frivolous claims hence save costs and time.

In furtherance of the above, it is also expected that an independent and impartial permanent appellate body will create a balanced structure in which all parties' interests will be given same weight and adjudicated impartially. In the current system where parties choose the arbitrators, evidence shows that each arbitrator tends to protect the interest of the appointing party.¹¹⁵ A balanced adjudicative structure will be expected to take into account the host state other policy objectives hence enable a deference to the host state on human rights, environmental protection, labour rights and other social values.¹¹⁶ It is hoped therefore that a permanent appellate structure which is not party based will create a stable and balanced jurisprudence in which government policy making space is protected and the foreign investors' interests are also taken into account. In line with the foregoing, it is also hoped that the permanent appellate structure which is not party – appointment based will help to increase objectivity in the system.

In conclusion it can be said that there are valid and strong reasons for the call of a new court to deal with international investment disputes. The court will help in achieving justice to all parties, consistency and predictability of the system and many other problems could be remedied by this move. While there some concerns about some negative impact of the new court, this

at 7; see also Peterson LE 'Zimbabwe Not Paying ICSID Award' (2010) *Investment Arbitration Reporter* http://www.iareporter.com/articles/20100507_5 accessed on 21/10/2013.

¹¹³ Qureshi A, above note 111 at 1157.

¹¹⁴ Franck S 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1619.

¹¹⁵ See Paulsson J 'Moral Hazard in International Dispute Resolution' (2010) *ICSID Review - Foreign Investment Law Journal* 339; see also Van Harten G 'A Case for International Investment Court' *Society of International Economic Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 accessed on 06/09/2013.

¹¹⁶ See Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 123; see also Spear S 'The Quest for Policy Space in a New Generation of International Investment Law' (2010) 13 *Journal of International Economic Law* 1037 at 1038; see also Salacuse J 'Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N. Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), at 68–70; see also Mann H 'The Right of State to Regulate and International Investment Law: A Comment' in UNCTAD *The Development Dimensions of FDI: Policy and Rule Making Perspective* 2003 at 216; see also Waelde T & Kolo A 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2004) *International Comparative Law Quarterly* 811 - 848 at 811; see also Kingsbury B 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 76 – 118.

work submits that upon weighing the pros and cons one will find that establishment of the court will be more beneficial than continuing to operate in the current setting. Careful consideration of the available options will be needed so as to create a stable and sustainable court.

1.2 Institution to Host the Courts

It is submitted here that UNCTAD as a UN affiliate with the mandate to organise the World Investment Forum, which brings together major players from the international investment community to discuss challenges and opportunities and to promote investment policies and partnerships for sustainable development and equitable growth, is better positioned to initiate the MAI negotiations and host the MAI and the relevant courts.¹¹⁷ The MAI and the Courts can be established and hosted at the Division of Investment and Enterprise of the UNCTAD. The Division is recognised as ‘a global centre of excellence on issues related to investment and enterprise for sustainable development’.¹¹⁸ The division also provides technical support to over 150 world economy. This research strongly advises that hosting the dispute settlement system should be considered as technical assistance to the international investment regime.¹¹⁹

1.2.1 Phasing out investor- state arbitration

Once the court system is established, the current system will be allowed to phase out through the member states act of signing to the new MAI system. The MAI may remain silent on the matter leaving the Vienna Convention rules on successive Treaties to take its course.¹²⁰ Article 59 of the Vienna Convention on the Law of Treaties provides for circumstances under which a Treaty may come to an end. The Article provides as follows:

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty.

Therefore upon both member states signing to the new MAI and signifying their intention to terminate the BIT, Article 59 of the Vienna Convention could be invoked to terminate the BIT in favour of the MAI. It is submitted here that through such international practice, the new system will develop quickly.

Alternatively, the MAI may provide clearly that it replaces the BITs involving the respective member states. The Central America–Mexico FTA¹²¹ provide a good example as it clearly provides that it replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras

¹¹⁷ UNCTAD about Us available at <http://unctad.org/en/Pages/AboutUs.aspx> accessed on 26/05/2014.

¹¹⁸ UNCTAD Investment and Enterprise Division available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

¹¹⁹ UNCTAD Investment and Enterprise Division available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

¹²⁰ Vienna Convention on the Law of Treaties (1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 21/05/2014.

¹²¹ The Central America–Mexico FTA 2011 available at http://www.sice.oas.org/tpd/CACM_MEX/CACM_MEX_e.asp accessed on 31/05/2014.

(2000), and Mexico and Nicaragua (1997).¹²² As earlier stated, in Europe also, the coming into force of the Lisbon Treaty of the European Union in 2009, gives the European Commission the mandate to negotiate Investment agreements on behalf of all 27 Member states.¹²³ This means that many BITs between individual EU countries will be replaced by common EU treaties hence tremendously cutting down the number of BITs.¹²⁴ The European Union Regulations 1219/2012 provides how the EU Member states BITs with third States will come to an end.¹²⁵ The Regulations, which entered into force on January 9, 2013, provide that the member states BITs with third states will remain in force until progressively replaced by an investment agreement between the European Union and the third State in question.¹²⁶ Therefore, the inclusion of such a provision in the MAI will not be an isolated incident. The MAI may have a similar provision directing that all BITs to which both parties are MAI member States shall automatically come to an end by parties signing to the MAI or shall be progressively replaced with the MAI when its lifespan comes to an end. After all, the good news is that many of the old BITs are coming to an end, member states to the MAI will be encouraged to phase out the old BITs and become members of the MAI court structured dispute settlement system.¹²⁷

VI. CONCLUSION

This article has analysed the solutions suggested by different stakeholders. In addition the article has presented its own solution which is believed can curb almost all issues haunting ISA system. The Article has shown that while some of the suggested solutions carry greater weight than others, they all aim at improving the system. It should be noted from the discussion that under the fragmented BIT system none of the suggested solutions will work better than that of creating an independent international investment court. It is further submitted here that the creation of such a court will ensure consistency; predictability, independence and impartiality of adjudicators and increased transparency. As a result, the legitimacy of the whole system could be realized.

¹²² The Central America–Mexico FTA (2011) replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras (2000), and Mexico and Nicaragua (1997).

¹²³ See Art. 207(4) of the Treaty on Functioning of the European Union (TFEU), available at <http://eur-lex.europa.eu/legal-content/BG/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> accessed on 02/06/2014.

¹²⁴ UNCTAD *World Investment Report 2012* ‘Towards a New Generation of Investment Policies’ at 84 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 21/05/2014.

¹²⁵ Regulation (EU) No. 1219/2012, OJ L 351/40, 20.12.2012 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF> accessed on 02/06/2014.

¹²⁶ See the EU Regulations Arts. 3 and 5 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF> accessed on 02/06/2014.

¹²⁷ The UNCTAD *WIR Report 2013* indicates that 1300 BITs which constitutes 45% of all existing BITs came to an end in 2013, see UNCTAD *World Investment Report 2013 Global and regional investment trends*, available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

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