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International Investment Arbitration in Foreign Investment Disputes

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ABSTRACT

International investment arbitration has evolved as a very important mechanism for solving disputes between investors and foreign states. As Globalization continues to encourage cross-border investment, the conflict between investors and host states has become increasingly common. A fair and efficient dispute resolution mechanism becomes paramount when the countries continue to attract foreign investment for boosting the nation's economic development. The below article aims to explain Foreign investments, what Foreign Investment Disputes are, what causes such disputes, and how such disputes are resolved. While dealing with the resolution of Foreign Investment Disputes the article helps to understand the different mechanisms that are available for resolution and specifically the role of Investment Arbitration in resolving such disputes. The article also highlights the importance of specialized tribunals in resolving disputes between investors and host states.

ICSID is the leading organization with significant experience in this area when it comes to organizations dedicated to the resolution of international investment disputes. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was established in 1966, and since then it has handled about 900 such cases.

In arbitration, disputes are presented to arbitrators or to organizations that do so, who subsequently choose arbitrators in accordance with the parties' agreement. The arbitrators then reach a verdict on the dispute. When the same arbitration is conducted over an international investment issue, it is referred to as an international investment arbitration. By the end of the article, you will understand what foreign investments are, what investment arbitration is, and how investment arbitration helps to settle disputes involving such international investments.

Keywords: *International Investment, Bilateral Investment Treaty, ICSID, International Investment Disputes, Investment Arbitration.*

I. INTRODUCTION

One of the major developments in the field of international economic law since the end of the

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Second World War has been the phenomenal growth of foreign investments by the capital-exporting countries in the capital-importing ones.[3] As international investments developed and expanded, they led to Economic development which in turn played a pivotal role in the growth of international investment law (IIL) and international economic law (IEL).[4] Since then, Foreign investments are no exception to disputes. Investment disputes arise from time to time between investors and host states, such disputes may arise for several reasons, an example being when a foreign investor alleges that a state has violated its obligations under an investment treaty or other international law instruments, there arises a need to have different dispute settlement mechanisms.

For decades, from around the 1950s to the 1980s, there were no effective means of adjudicating investment disputes, domestically or internationally. Throughout the twentieth century adjudicating international investment disputes revolved around special claims commissions or tribunals, as well as State-to-State international adjudication and arbitration. But presently there are multiple modes for settling international investment disputes, say Mediation, Arbitration, Judicial settlement, Negotiation, conciliation or inquiry, and Settlement under the auspices of the United Nations Organization. In just 30 years, the investment treaty regime has developed from a small subset of international law to one of its most prominent, with over 3,500 signed treaties[5] and over 1,100 investor-state arbitrations registered.[6] The significance of the regime is attributable to the largely bilateral treaty network and to the tremendous growth in the use of the investor-state dispute settlement(ISDS) mechanisms embedded in the vast majority of all international investment agreements(IIA) currently in force.[7]

Investment arbitration is one of the important prevailing dispute settlement mechanisms. The history of this kind of investment arbitration can be traced to the Colonial and Post-Colonial eras. International arbitration is considered as the most important way to resolve investment disputes because it gives two-sided benefits namely: It gives the foreign investor confidence to go to arbitration in case of any dispute as the procedure in arbitration is far easier compared to

3 G. Schwarzenberger, Foreign Investments and International Law (Stevens & Sons Ltd., 1969).
4 Lee, Y.-S., Horlick, G., Choi, W.-M., and Broude, T. (eds.), Law and Development Perspective on International Trade Law (2011); Schill, S.W., Tams, C.J., and Hofmann, R., International Investment Law and Development: Friends or Foes?, 25 ICSID Rev. – Foreign Investment L.J. 537 (2015); Schill, S.W., Tams, C.J., and Hofmann, R. (eds.), International Investment Law and Development: Bridging the Gap(Edward Elgar).
5 UNCTAD, IIA Navigator, investmentpolicy.unctad.org/interntaional-investment-agreements
6 PITAD database <pitad.org>
7 UNCTAD IIA Navigator (n. 1). See ch. 2 for our updated mapping of ISDS clauses in MAS. See also Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' OECD Working Papers on International Investment 2012/02 (96% of the 1,660 BITs surveyed contained ISDS language).

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the national courts and also protects the host state in many ways whenever such a dispute arises.[8] The term "arbitration" refers to a process that is identical to that used in municipal law, namely the referral of a disagreement to a panel of individuals known as arbitrators who are freely selected by the parties and who render a decision without being required to adhere strictly to the legal considerations. In its simplest form, the same arbitration when done between a host state and an investor becomes an investment arbitration. Investment arbitration is typically conducted by the International Centre for Settlement of Investment Disputes (ICSID) or other international arbitration institutions, such as the International Chamber of Commerce (ICC) or the United Nations Commission on International Trade Law (UNCITRAL). Over recent years there has been an exponential rise in arbitration related to international investments. Since the coming up of and the introduction of the Bilateral Investment Treaties (BITs), there have been 2500 investment arbitration agreements since 1990.

II. FOREIGN INVESTMENT

Before understanding the method of resolving investment disputes, it is pertinent to understand what foreign investments are. Capital is the base of economic growth, in a number of cases there is a possibility that many nations couldn't find enough capital to fulfill their requirements, it is at this juncture that foreign investments are used to fill the investment gap. It was noted that private capital flows are assuming an increasing role as a source of finance for emerging markets.[9] This changing pattern of capital flows is the result of the process of globalization of production through the internalization of transactions within the transnational corporations (TNCs) (inducing more FDI activities) and the increasing securitization of financial transactions (inducing more cross-border FPI in equities and bonds).[10] Foreign investments is an investment strategy that focuses on investing outside the domestic markets, by selecting global investment instruments. Investing internationally helps in the heterogeneity of one's portfolio and it offers a variety of opportunities that one cannot find in domestic markets. The developed economies offer the individuals a higher return rate on investment and there is substantially more influx of money. International investment is actually a method of integrating various economies. The expansion of international investment has also led to the diversification of disputes related to

[8] FE El Hajraoui & D Ed-Daran, 'The Enforcement of Investment Arbitral Awards under International Law and Moroccan Law' 3(2) Journal of Law and Criminal Justice 55.

[9] Total Net Resource Flows to Developing Countries, as Reported by the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD) (1985 & 1997).

[10] The Securitization of Capital Flows: Fundamental Structural Changes in International Financial Markets and the Growing Role of Institutional Investors in OECD Countries, see UNCTAD, The Growth of Domestic Capital Markets, Particularly in Developing Countries, and Its Relationship with Foreign Portfolio Investment, TD/B/COM.2/EM.4/2 (Mar. 19, 1998).

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international investment.

The definition of foreign investment, based on the Balance-of-Payments, transactions between residents and non-residents refers to investments made by individuals or enterprises that have their center of economic interest in an economy other than the economy in which they invest.[11] The Balance-of-Payments Manual by the International Monetary Fund(IMF) classifies foreign investment into the following components: a) Foreign Direct Investment (FDI); (b) Foreign Portfolio Investment (FPI); (c) other investments.

(A) Foreign direct investment (FDI):

The definition of foreign direct investment (FDI) is an investment involving a long-term relationship and reflecting a long-term interest and control of a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)[12]. A long-term relationship between the investor and the business defines a lasting interest. There is also some degree of influence by the investor on the management of the enterprise. Foreign Direct Investment (FDI) occurs "when an investor based in one home country acquires another asset in another country (the host country) tent to manage that asset."[13] Usually, FDI occurs when the host country's economy is in need of technological, managerial, and other resources. World FDI surged from only $200 billion in 1990 to more in 2000.[14]

Three components in Foreign Direct Investments(FDIs) are;

- Equity Capital: Equity capital is the purchase of shares of an enterprise in another country by a foreign direct investor.
- Reinvested earnings are the direct investor's portion of profits that are not distributed as dividends by affiliates or that are not remitted to the direct investor (in proportion to direct equity participation). Affiliates invest such residual earnings.

[11] See International Monetary Fund, Balance-of-Payments Manual, Fifth Edition.
[12] This general definition of Foreign Direct Investment (FDI) is based on Organization for Economic Co-operation and Development (OECD), Detailed Benchmark Definition of Foreign Direct Investment, Second Edition (Paris: OECD, 1992), and International Monetary Fund (IMF), Balance of Payments Manual, Fifth Edition (Washington, D.C.: IMF, 1993).
[13] Press Release, World Trade Org., Trade and Foreign Direct Investment (Oct. 9, 1996), available at http://www.wto.org/english/news_e/pres96_e/pr057_e.htm. Eric M. Burt, Comment, Developing Count and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization, 12 Am. U. Int'l L. Rev. 1015, 1019 (1997).
[14] Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 Pac. McGeorge Global Bus. & Dev. L.J. 337, 338 (2007).

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- Intra-company loans or intra-company debt transactions: these refer to short-term or long-term borrowing and lending of funds between direct investors (parent enterprises) and affiliate enterprises

Foreign direct investors may also obtain an effective voice in the management of another business entity through other means than acquiring an equity stake. These are non-equity forms of FDI, and they include, inter alia, subcontracting, management contracts, turnkey arrangements, franchising, licensing, and product sharing.[15]

(B) Foreign Portfolio Investment(FPI):

Foreign Portfolio Investment includes a variety of instruments that are traded (or tradeable) in organized and other financial markets: bonds, equities, and money market instruments. Even derivatives and secondary instruments, including options, are categorized as FPIs by the International Monetary Fund.

FPI is the acquisition of stocks or bonds issued by a foreign company or government body. Financial markets, whether domestic or international, serve as a medium for FPI, and as a result, they must be reasonably liquid. From the point of view of the recipient country, FPI does not result in a loss of control or ownership of the issuing companies. Investment in a portfolio is "purely" financial and does not involve the transfer of managerial expertise or intangible assets. Investors in portfolios are primarily driven by two goals: increasing return and lowering risk through portfolio diversification. FPI is expected to help in the further development of capital markets,[16] as it adds liquidity 18 to local markets.

Thus it may be noted that foreign TNCs own FDI and are sector or firm-specific, while local companies or Governments issue FPI in general and is not sector-specific; also While FPI can support the growth of the domestic capital market, FDI can transfer technology and increase market access.

Both FDI and FPI play a very important role as a source of foreign investment in a country's economy. The key is to strike a balance between the two and attract the right mix of foreign investment to achieve sustainable economic growth.

III. FOREIGN INVESTMENT DISPUTES

An increase in foreign investment will inevitably give rise to differences of opinion which in

[15] World Investment Report 1999: Foreign Direct Investment and the Challenge of Development, at 464.
[16] The Contribution of Foreign Portfolio Investment to the Development of Local Capital Markets is Also Analyzed in UNCTAD, The Growth of Domestic Capital Markets, Particularly in Developing Countries, and Its Relationship with Foreign Portfolio Investment, 18.

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turn will result in investment disputes. Disputes are a common phenomenon but success relies on how such disputes are tackled, effective resolution of disputes is necessary in order to maintain relations between the parties and also the involved countries. Too little attention is generally paid to the legal aspects of international investment, or to the legal solutions necessary for further development of this important vehicle of modern cooperation.[17]

The impediments to investment which give rise to complaints by the foreign investor are many.[18] Expropriation, Discrimination, Contractual disputes, Regulatory Measures, Environmental and Social Issues, Claims over jurisdiction, Matters of taxation, and Political Instability are all reasons that may result in International Investment Disputes. Some of the important investment treaty arbitration cases involve:

a) Tokios Tokelés v. Ukraine,[19] The arbitral tribunal held that the nationality of a company is determined not based on the provisions of Article 25(2)(b) of the ICSID Convention but by the respective BIT.

b) Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan, Switzerland-Pakistan BIT,[20] it was held that even when the relevant investment contract has a clause that limits the jurisdiction over disputes regarding the contract to a separate tribunal, Such disputes fall under the purview of the arbitral tribunal established by the BIT if the main basis of the claim is a BIT violation.

c) Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador,[21] The arbitral tribunal held that, despite the relevant BIT's exclusion from its application with regard to "matters of taxation" other than those listed, claims regarding customs duties are "matters of taxation" and are therefore outside the arbitral tribunal's jurisdiction

Even if arbitral awards are not binding as a precedent, it has a significant influence on subsequent arbitral awards. In any case, resolving investment disputes in a fair and transparent manner is important so as to maintain relationships, protect investments, promote economic growth, etc.. for both the investing country as well as the foreign country.

[17]See S. J. Res. 21, 85th Cong., 1st Sess. (1957), introduced by Senator Olin D. Johnston, of North Carolina, on January 9, 1957, concerning the establishment of a commission to make recommendations "for the security of American foreign investment." Memorandum of Explanation, 103 Cong. Rec. 357 (1957) (statement of Senator Olin D. Johnston).

[18] Report on American Investments Abroad, 6 Record of the Association of the Bar of the City of New York 127 (1951).Report on American Investments Abroad, 7 Record of the Association of the Bar of the City of New York 219 (1952).Report on American Investments Abroad, 8 Record of the Association of the Bar of the City of New York 250 (1953).Problems of Foreign Trade and Investment, 17 Ohio St. L.J. 252 (1956).

[19] Case No. ARB/02/18, ICSID

[20] Case No. ARB/01/13, ICSID

[21] Case No. ARB/04/19, ICSID

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IV. INVESTMENT ARBITRATION

Arbitration itself can be seen as one of the different means for settling disputes between foreign investors and host states. It is a method of resolving disputes out of court. For example, India promises to be one of the best destinations for foreign direct investment but many states in India still do not agree with relaxing the FDI norms, this makes India one of the difficult places for international investment. Similar is the condition in different countries, thus investor-state disputes are unavoidable. Traditionally the investment disputes were resolved by the home state of the investor, that is the dispute was treated as the home state's own. In short, the investment disputes were typically resolved by the home state's diplomatic espousal of the investor's claim, putting settlement by means of gunboat diplomacy aside - Palmerston had defended the use of the threats of armed force during the *Don Pacifico* affair[22]. But the nineteenth century and twentieth century witnessed the resolution of settlement through various mixed claims. Diplomatic espousal and mixed commissions were among them. The commissions persisted until the second world war before yielding to lump-sum negotiated settlements. By 1950 treaty-based arbitration was granted to investors, however, the popularity of treaty-based arbitration increased during the 1990s. Thus investment treaty arbitration was born, and it existed alongside contractually based arbitration and other forms of investment arbitration which we have currently.

In the gamut of a sound and systematized International Arbitration regime, Investment Arbitration (IA) is more than often described as an insurgent counter against "*Gunboat Diplomacy'.*[23]

The ability of a foreign investor to sue the host state plays a very pivotal role in the investment arbitration process. Investment arbitration which is commonly known as investor-state dispute settlement is used to tackle the issues between foreign investors and the host state. It deals with the dispute arising out of a public treaty between two contracting states and the basic legal framework, which is provided by public international law. Often investment arbitration is brought under a bilateral treaty that assures that the host state should provide absolute protection to foreign investors and gives the investors a private right of action against the host states if they fail to follow certain obligations. One of the distinctive features of investment arbitration is the lack of an appellate mechanism, even though the procedures under which the arbitration

[22] O.T. Johnson, Jr. & J. Gimblett, From Gunboats to BITS: The Evolution of Modern International Investment Law, in K. Sauvant (ed.), Yearbook of International Investment Law and Policy 2010-2011 (Oxford University Press 2012) 649, 652.

[23] James Cable, Gunboat Diplomacy: Political Applications of Limited Naval Force (Chatto and Windus for the Institute for Strategic Studies 1971) 10.

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is conducted may give specific grounds for annulment or setting aside the judgment. Today investment treaty arbitration is the principal means and definitely the most prominent method for settling investment disputes. In the *AAPL vs Srilanka*[24]case involving the destruction of a shrimp farm by Sri Lankan government security forces during the armed incident, the case dealt with the first investment arbitration treaty award which was the result of a unilateral offer contained in a treaty.

The absence of a contractual obligation is another notable feature of investment arbitration, although contractually based investment arbitration exists alongside it. Investment arbitration proceeds with the fact that a state has stipulated in a law, treaty or investment authorization, or any other document that it consents to an investment claim being brought, irrespective of the fact that the investor and the host state have no prior contract between them containing an arbitration clause[25]Thus when a written notice of arbitration is submitted by the disputing parties any treaty-based or other consent becomes perfect. This ex-contractual form of arbitration was most famously dubbed 'arbitration without privity 'by Jan Paulsson. Steingruber adds, In investment arbitration, there is possible - not only no privity but in most cases a dissociation in the timing when consent arbitration is expressed by the state party and the investor.[26]

(A) Evolution of Investment Arbitration:

For decades especially around 1950 - 1980, there were no effective ways either nationally or internationally for the settlement of investment disputes. That gap was filled by international negotiation of lump sum settlements. Throughout The twentieth century investment settlement claims were settled internationally by special claims commissions or tribunals as well as state-to-state international adjudication and arbitration. The 1965 ICSID[27] convention included arbitration clauses in the contract between states thereby providing a platform for the resolution of disputes between investors and states. The inclusion of the arbitration clause was the first of its kind however India like many other countries hasn't ratified this. Even though India has not ratified it, India has entered into several Bilateral investment protection agreements(BIPAs)[28].

[24] Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3.

[25] In a sense, the question of form does not matter, as there is no legal definition of arbitration as such, for it is a creature of antiquity which has developed in a dynamic fashion over time. What matters is the autonomy of the parties' will—so-called 'Party autonomy'. See A.M. Steingruber, Consent in International Arbitration (Oxford University Press 2012) 11-12, and further at 25 et seq.

[26] Another way of describing all this, as Dolzer and Stevens have, is by calling the states' consent 'advance consent'; or by looking to the existence of a unilateral standing offer to arbitrate. See Dolzer & Stevens,and A.M. Steingruber, Consent in International Arbitration (Oxford University Press).

[27] Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 315-49 (2008), as cited in S.I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime? 3 Yearbook on International Arbitration (forthcoming 20xx), at 17.

[28] Bilateral Investment Promotion and Protection Agreements, Ministry of Finance, Government of India, available

India and the United Kingdom signed their first BIT in 1994. Since then, it has signed BITs with more than 83 different countries throughout the world, 72 of which are currently in effect. The remaining BITs have not been put into effect. In the Dabhol Power Plant case, the manufacturing plant was supposed to be set up in the state of Maharashtra, India. However various investor states like the United Kingdom, Netherlands, Mauritius, France, Switzerland, and Austria invoked the BIT arbitration against India alleging that the Indian government expropriated theory interest in the power plant. The Claims by the investors were settled, however, India had to compensate for the losses.

(B) Process of Investment Arbitration:

The leading forum for international investment dispute settlement is the international center for Settlement of Investment Disputes (ICSID). The investor must first give a notice which describes the factual and legal basis of the claim and the damages sought by the host state. After receiving the notice the host state and the investor should try to sort things amicably. If things are not sorted amicably the matter may go up for arbitration. The arbitration proceedings will start when the investor files a request for arbitration.

The next step is the nomination of the arbitration tribunal. In the majority of the cases, the parties nominate one arbitrator and the arbitrators that are suggested by the parties will select the president of the arbitration tribunal. The arbitration normally happens according to the treaty or the norms of the arbitration institution. After that, the parties submit written pleadings which include the investor's claim and the host states response, it can also include the counterclaims. There will be an exchange of memorials , the memorials shall contain legal and factual arguments. Additionally, it is usual for the parties to agree on a document disclosure phase during which each party may submit a document request.

After that, the arbitration panel will hold a hearing where they will hear the arguments, and the investors and host state can produce evidence. Upon Hearing of both parties, the arbitration panel will take a decision, which shall be binding on both parties. The decision shall normally contain an award for damages, an order for specific performance, or for a declaration of rights. If the host state refuses or fails to perform any of these awards the investor can take up the matter before a national court or international tribunal. After a final hearing on the merits, it typically takes the ICSID tribunals 14 months to issue their award. The total duration of an ICSID proceeding, from request through arbitration to final award, is normally three to five years.

at http://www.finmin.nic.in/bipa/bipa_index.asp (12.00pm [27th July]).

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V. ROLE OF INVESTMENT ARBITRATION IN RESOLVING FOREIGN INVESTMENT DISPUTES

Depending upon the investment goals, risk tolerance, regulatory environment, and different other factors the method of foreign investments varies. Bilateral Investment Treaties(BITs), Free Trade Agreements(FTAs), Investment Promotion and Protection Agreements(IPPAs), and Foreign Direct Investments(FDIs) are some of the common methods of foreign investments. In a Bilateral Investment Treaty, the host country voluntarily qualifies its sovereign ability to control FDI by entering into a bilateral investment treaty with the home country's government.[29] Most of the liberalization of host country investment requirements has come through the proliferation of BITs.[30]

Investors are given the right and the means to initiate an arbitral proceeding against a foreign government under international law, seeking redress for the foreign government's violation of the BIT, if a Bilateral Investment Treaty (BIT) contains an Investor-State Arbitration (ISA) provision.[31] The arbitrator in ISA matters has the authority to interpret both the contract between the disputing parties and any applicable relevant BIT clauses[32].

Chapter 11 of the North American Free Trade Agreement (NAFTA) is an example of an Investor-state arbitration provision. Chapter 11 allows investors of one NAFTA party (the United States, Canada, or Mexico) to bring claims directly against the government of another NAFTA party before an international panel of arbitrators.[33] Because NAFTA Article 1121 waives the local remedies rule, an investor is not required to exhaust his remedies in a domestic court before filing a Chapter 11 claim.[34]Investors may begin arbitration proceedings under Chapter 11 against a NAFTA party according to the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) or the Arbitration Rules of the United

[29] Burt, supra note 1, at 1027
[30] Burt, supra note 1, at 1027
[31] Steven P. Finizio, Ethan G. Shenkman & Julian Davis Mortensen, Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures, 15 Global Arbitration Rev. (author's last name), http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/investor_state_arbitration.pdf.
[32]Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, 104 Am. J. Int'l L. 179, 225 (2010).
[33] Ray C. Jones, Notes and Comments, NAFTA: Chapter 11 Investor-to-State Dispute Resolution be Embraced or a Sword to Be Feared? 2002 B.Y.U. L. Rev. 527, 528 (2002). Research has shown developments in legal education around the world have resulted in a diversity of backgrounds and ties among the chosen arbitrators. No longer is there a small "exclusive club" of arbitrators. The pool of arbitrators has grown, and there is now a greater variety of them to choose from. Tai-Heng Cheng, Reshaping the Images of Consent and Control in Investment Treaty Arbitration, 30 Fordham Int'l L.J. 457, 480 (2007).
[34]Jacob S. Lee, Note, No "Double-Dipping" Allowed: An Analysis of Waste Management, Inc. v. United States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA, 69 Rev. 2655, 2657 (2019).

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Nations Commission on International Trade Law (UNCITRAL).[35] Similarly, there are more than 2,500 BITs currently existing, affecting 170 countries.[36] Investment Arbitration is a standard method of dispute settlement used while creating a foreign investment agreement between parties.

International investment arbitration—also known as investment treaty arbitration or investor-state arbitration—is a procedure through which foreign investors may obtain a binding adjudication of claims against host States,believed to have broken their national foreign investment law, their contractual obligations, their treaty-based investment protection, or both.In general, upon the request for arbitration, it is the parties or the arbitration institution who appoints certain arbitrators to form a tribunal. The arbitrators so appointed, not only achieve efficient and effective dispute settlement, but they also, through their independent and impartial application of the governing law, foster the international rule of law and an investment-friendly environment.[37]

It is true that investment law gives governments the flexibility they need to carry out their policy decisions and pass laws in a self-determined and sovereign manner.[38] If one prefers, by contrast; a world where property interests must yield to any other public interest, where the host nation's contractual promises have no real value in the face of changed political preferences, and where good governance standards cannot be enforced; one can do away with BITs and ISA.[39] To do so, however, would lead to a chill in the global economy that is not in the best interest of host nations or their citizens.[40] Therefore, BITs and ISA are "legitimate mechanisms for structuring and stabilizing international investment relations without institutionalizing a pro-investor bias or disregarding the host state's legitimate power to regulate.[41]

It is a commonly held belief that investment arbitrators are generally biased against the host nation and are likely to be in favor of the investors.[42] However, there are studies that tend to refute the same, one such study even emphasized that investment arbitrators strive to be fair and impartial in their decisions because they place a high value on their professional reputations.[43]

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[35]Jones, supra note 17, at 534.
[36]Jeswald W. Salacuse, The Treatyfication of International Investment Law, 13 Law & Bus. Rev. 156 (2007).
[37]. Charles N. Brower et al., Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, 9 Chi. J. Int'l L. 471, 497-98 (2018).
[38] Id.
[39] Id. at 498
[40] Id.
[41] Id.
[42] Jose E. Alvarez, Recent Book on International Law: Book Review, 102 A.J.I.L. 909 (2008) (reviewing Gus van Harten, Investment Treaty Arbitration and Public Law (2007)).
[43] Daphna Kapeliuk, The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators, 96 Cornell L. Rev. 47, 89-90 (2021).

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In addition to this, another study indicated that the outcome of investment treaty arbitration was not reliably associated with (1) the degree of economic development of the respondent host nation; (2) whether the arbitrator was from an economically developed nation or an underdeveloped one; or (3) a combination of the first two variables.[44]

For a long, investment arbitration has been used as the default mechanism to resolve international investment disputes. In 2003, in the early stages of the "baby boom" of investment treaty arbitration,[45] all signs pointed toward an international consensus in favor of international arbitration, including for international investment disputes. An editorial note in the American Journal of International Law observed:It could be argued that the international community as a whole is now closer than ever to reaching an agreement on both (1) the usefulness of international arbitration as a suitable replacement for national court litigation of international investment and commercial disputes, and (2) the basic procedures necessary for fair and efficient international dispute resolution, (3) the role that states must play in creating an international and national legal environment that fosters effective arbitration, and (4) the need for a reciprocally supportive relationship between national courts and arbitral tribunals.[46]

Foreign direct investment has a very powerful impact on the host country. The international investment agreement is generally structured in such a way that there will be liberal norms that will excessively benefit both the host state and the home country. The regulation of FDI will mean to benefit the economic well-being of the home and the host states. Therefore the international law by the establishment of an arbitral tribunal has restricted the host countries' controls over foreign direct investment. The investment arbitration has paved the way to control the host states' control over FDI.

Why the countries should agree to investment arbitration in their bilateral treaty can be answered by several important reasons. Arbitration is a private forum, the parties can protect their business secrets and other confidences, regardless of whether such secrets need protection or not. Investment arbitration allows for the protection of sensitive information, which is something that both the investor and the host nation seek. The judge in a country might have very little or less knowledge about international investment. Arbitrators will be skilled to do the particular job. Investor-state arbitration can be useful for developing countries to deal with

[44]Susan D. Franck, Development and Outcomes of Investment Theory Arbitration, 50 Harv. Int'l L.J. 435, 487 (2009).
[45] Stanimir A. Alexandrov, The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals-Shareholders as "Investors" under Investment Treaties, 6 J. World Inv. & Trade 377 (2005).
[46] Charles N. Brower & Jeremy K. Sharpe, International Arbitration and the Islamic World: The Third Phase, 97 Am. J. Int'l L. 643, 647 (2003).

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burdensome, time-consuming international investment cases and it will help boost the judicial economy of the developing countries. Potential investors take advantage of the fact that ISA is available to settle conflicts, and this favorable feature will indirectly encourage Foreign Investment by strengthening the rule of law. Since there exists an impartial forum to handle problems, the foreign investors will be more motivated to invest.[47] The ICSID Rules do not permit judicial review, increasing the arbitrator's decision's level of finality. Finality and correctness as goals are not at odds with one another. Correctness becomes less of a problem and finality stays practical when outstanding arbitrators are used. Investors and host states will have more flexibility if international arbitration is chosen as the dispute resolution method since a variety of rules may be taken into account. Arbitrators can concentrate on broader legal principles rather than strictly adhering to any one specific legal norm. As a result, arbitration frequently leads to improved satisfaction of investors' needs while also defending the host state's security interests.

VI. Conclusion

International investment arbitration plays a crucial role in resolving foreign investment disputes. Foreign investment conflicts are resolved in large part through international investment arbitration. It guarantees a predictable and stable environment for foreign investments and offers a fair and impartial platform for investors and states to settle their differences. Parties can use investment arbitration to avoid lengthy and expensive judicial processes in local courts, which frequently lack competence in complicated investment matters. Many international investment agreements (IIA) contain the investor-state dispute settlement (ISDS), which is a treaty-based dispute resolution procedure. The most ambitious bilateral free trade agreements (FTAs), such as the Comprehensive and Economic Trade Agreement (CETA), the People's Republic of China (PRC)-Australia FTA (ChAFTA), etc., now include investor-state dispute settlement in their investment chapters.

It can be well understood from the article that even the best written and drafted treaty can also run into problems, they are not immune to the issues arised from the interpretation of the treaty. Some of them can be solved by the investor and the home state through negotiations, but some definitely need an external form of settlement. There comes the importance of investment arbitration.It offers procedural flexibility, confidentiality, and the capacity to use international treaties to enforce arbitral rulings internationally. By allowing access to arbitral proceedings and rulings, it also promotes transparency and accountability. Additionally, the majority of

[47] Franck, Foreign Direct Investment at 340 (citing to supra note 2).

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investment arbitration panels are made up of independent, seasoned arbitrators with knowledge of international investment law, assuring a fair and impartial decision-making process. So developing countries should actually promote investment arbitration for the economic prosperity of the country. The signing of BITs between developing and developed countries is advisable since they may make it easier for them to later obtain other benefits and favors.

The BIT will frequently result in a closer relationship with the developed country, which may then lead to increased trade, foreign aid, security assistance, technology transfers, or other advantages even if a developing country does not see increased investment flows from its treaty partner. Investment arbitration was at its peak a few years ago. 2015 marked the year with the most arbitration cases in ISCID's history. Despite this, some professionals believe that in the future arbitration will be replaced by other forms of dispute resolution. It appears unlikely that this will occur, though. Investors will continue to rely on arbitration as long as it offers a speedy and affordable dispute resolution option, especially when compared to alternatives.

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