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The Application of ICSID Arbitration in Investor-State Dispute settlement

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Abstract

This article impartially presents a brief analysis of the application of ICSID arbitration in investor-state dispute settlement to find out the advantages and the alleged disadvantages of this option of dispute settlement between investor and state. So far, the greatest advantage of this arbitration regime is salvation from uncertainty and harassment of diplomatic protection for both state and investor plus the direct enforcement of awards including the avoidance from domestic courts mostly for the benefit of investors. States also have the possibility of gaining the ideal investment climate and economic development. The alleged disadvantages of ICSID arbitration for countries whether to be developing or developed as well as local communities are the bias towards the investors, regulatory chill and procedural and substantive defects. At the end of the day, this article comparing both aspects of this arbitration regime in light of the past experiences of dependence on only diplomatic protection and the biased domestic courts admits the achievement of ICSID arbitration and calls for procedural and possible substantive reforms.

Keywords: ICSID Arbitration, Investor, State, Advantages, Disadvantages

INTRODUCTION

International Investment Law has seen quick growth over the past few years. This has led to an increasing number of mutually enforced bilateral investment treaties (BITs). Given the increasing number of treaties between countries, it was important for a system to be developed to pay attention to and facilitate any disputes that may arise. To achieve this goal, the International Center for Settlement of Investment Disputes (ICSID) was created in 1966 by Washington Convention which has been ratified by 154 states until May 2019. It is a neutral, independent, and effective facility for resolution of investment disputes under the auspices of the World Bank. Perhaps the most unique feature of ICSID is that it is the only arbitral system that is de-localized from national jurisdictions, or self-contained. In fact, arbitration as a whole, is particularly well-suited to international cases because it applies a single set of rules to multi-jurisdictional disputes, but still relies on the powers held by national courts to enforce awards.

In contrast to other types of arbitrations, there are some other differential features under the ICSID arbitration which are noteworthy. First, the ICSID awards are directly enforceable in signatory states as if they were judgments of the courts of the state of enforcement. Second, there is a difference of the source of agreement between ICSID and other types of arbitration as for the latter there must be an agreement between the parties to arbitrate while with the former the agreement is contained elsewhere, as the investor is generally not suing its contractual counterparty but the state in which the investment was made. The arbitration agreement is therefore usually found in a bilateral investment treaty (BIT), a multilateral investment treaty or in the host state's national investment legislation. As an example, BIT's provide a framework agreement between two states for the protection and fair treatment of investments made by nationals of either state in the territory of the other state. There are currently more than 3000 BIT's in force globally almost all of them with clauses that link to the ICSID Convention.

Despite all the privileges of the ICSID arbitration mentioned above, there are new trends and criticisms regarding the application of this investor-state arbitration whether by developed or developing,

civil society, and local communities including scholars. The goal of this paper is to comprehensively analyze the application of ICSID arbitration in investor-state dispute settlement by focusing on the important aspects of ICSID arbitration to find out what kind of advantages and disadvantages this mechanism brings to the investor and the host country.

1.Advantages to the Investor

History has proved and no one has a doubt that currently investors are being protected through different optional investor-state dispute settlement mechanism (ISDS) and on the top of them ICSID system more than ever as it is the most comprehensive and well-functioned ISDS mechanism claimed by its proponents. In the past, the options for investors were to sue the host countries governments at their home local courts or make use of other alternative methods such as consultation, negotiation or mediation. (UNCTAD 2010, 12). As a result, these alternatives not only involved a lot of costs, but also uncertainty which sometimes could even senseless when countries alleged the principle of *sovereign immunity* in their defense. This is the reason why there were many cases in which investors decided not to take any action, given the difficulties and costs of the system. For the present time, the ICSID application for investors has numerous advantages such as the lack of a need for diplomatic protection, avoidance of the domestic courts, and the direct enforcement of the award. Each of the above mentioned benefits will be examined respectively.

A.Lack of a Need for Diplomatic Protection

Diplomatic protection is considered one of the oldest methods of international dispute settlement arising from the disagreement between States and private parties. In the past, the most common and substantial aspects of investment disputes such as expropriation and compensation claims were settled by this method. Diplomatic protection is broadly available because of the fact that it does not require any advance requirement between disputing parties. Therefore, it is in principle always within the discretion of the home State of a natural or legal person to take up this private party's claim

(espousal of claims) and to make it the home State's own against allegedly having harmed its national. (A. Redfern 2004 Chap.11).

In this respect, the problem seems to be that it implies that investors are wholly dependent upon the willingness of their home States to "espouse" their claims. In addition, the willingness of home States of investors to espouse such claims will be influenced by various political considerations and thus, ultimately, remains unpredictable. Further, they always have the possibility to waive "espoused" claims as a whole or in part. An example of the political consideration is in the case of widespread expropriation namely in case entire industrial sectors are nationalized, the home States of affected investors have frequently been content to conclude lump-sum agreements with the expropriating State by which they accept a portion of the total outstanding claims as a global settlement payment. Injured private parties of such agreements have no entitlement under international law to receive the proceeds of such agreements from their home States. As a rule, however, national legislation will provide for the proportionate distribution of the lump-sum payment to them. (Lillich 1988, 69-80). In addition, the cases in the past like *Barcelona traction* case (*Belgium v. Spain 1970, ICJ Reports*, 3-357) was a famous and mostly cited example of defect of diplomatic protection through home States of investors although the case was regarding the majority of shareholders who were nationals of a different country (Belgium) rather than the incorporation place of the company (Canada) affecting from the measures taken by the Spanish government.

In this context, and taking into account the aim of encouraging FDI and the trust of international investors, states started to sign and ratify International Investment Agreements (IIAs). From one hand, states and foreign investors were provided with specific obligations and substantive rights(such as fair compensation against expropriation, national treatment and fair and equitable treatment) and, from the other hand, created a dispute resolution system (ICSID) that allowed foreign investors when seeking redress to take action directly against their host governments. As article 27 of the ICSID Convention provides that "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have

submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute". In short, all these risks can be avoided by choosing the ICSID arbitration which does not contain any limitation relating to diplomatic protection after providing consent to it.

B. Avoidance of the Domestic Courts

In the past, investor-state disputes were mostly settled either before national courts or through ad hoc arbitration both of which have serious disadvantages. As a matter of fact, in the absence of any specific agreement, investment disputes between States and private parties would normally fall under the jurisdiction of national courts, most likely those in the host State of an investment. The courts of which particular State will have jurisdiction is a question of conflict of laws rules. They will normally point to the national courts of the host State. The ICSID Convention does not exclude access to national courts as such. In other words, States parties and nationals of States parties to the Convention are not automatically prevented from litigating before their own or foreign national courts. However, once they have both consented to ICSID arbitration, such consent, in particular excludes any other remedy including national courts. As art 26 of the Convention provides that "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any remedy".

There is a limited exception which may apply in cases where the State has given its consent to arbitration under the condition of the exhaustion of local remedies. As the second sentence of article 26 of the ICSID Convention provides that "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention. Furthermore, only a few States have conditioned their consent to ICSID jurisdiction on the prior exhaustion of local remedies. Also, a relatively small number of bilateral investment treaties and a few investment agreements with investors contain such a condition.

An important factor that investors avoid domestic courts and go for application of ICSID arbitration in investor-state disputes is that investors tend to assume that local courts of some host countries

for example in the developing countries lack the expertise, competence, or impartiality to adequately and fairly resolve international investment disputes. As an example, the partiality and loyalty of domestic courts towards the host state is well illustrated in *Deutsche Bank v. Sri Lanka*. (2012) The case concerned a hedging agreement between the Ceylon Petroleum Corporation (CPC) and Deutsche Bank (DB) which led to an obligation of CPC to pay sum to DB. However, the Supreme Court of Sri Lanka 48 hours after receiving a petition, ordered that all payments be suspended. The Supreme Court of Siri Lanka reached this finding in part on the basis of a public statement by Siri Lanka's Chief Justice saying that the government was forced to comply with the hedging agreement.

Likewise, in *Saipem v. Bangladesh* (2009) the Tribunal found that the courts, including the Supreme Court, had expropriated the Claimants' contract rights reflected in an ICC award by nullifying that award without good cause. The Tribunal found that the Bangladeshi Courts had abused their supervisory jurisdiction. As the tribunal provided that "the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights. Overall considering all these claims and cases, the ICSID arbitration system as its advocates believe, mostly benefit foreign investors entitling them to claim their host states in a neutral place when they breach agreed investment regime regardless of the local system.

C. The Direct Enforcement of the Award

The greatest advantage of ICSID for investors is that it employs the domestic courts to enforce the decision of the ICSID arbitral tribunal after initially removing the jurisdiction of the dispute from municipal courts. Use of this mechanism requires the Contracting States to enforce the decision of the Center. According to article 54 of the ICSID Convention, the award is to be recognized by the parties to the Convention as if it were the final judgment of a court in that State. Subsequently, failure to enforce the decision would be a violation of international treaty, and thus would allow direct recourse to international remedies. Furthermore, article 52 of the ICSID

Convention expressly forbids annulment proceedings before the national courts. Instead, it creates a special regime regarding the annulment of ICSID awards. An *ad hoc* committee consisting of three arbitrators instead of local courts has the authority to annual the award. Moreover, the ICSID Convention excludes the possibility that an ICSID award may be reviewed by a national court during the enforcement proceedings.

From the comparative perspective, under the current system, for ICSID awards there is a treaty obligation to recognize, which extend to entire award and an obligation to enforce, which extends only to the pecuniary obligations imposed by the award. Most other instruments governing international adjudication do not cover enforcement but leave the issue to domestic laws or applicable treaties. Therefore, non-ICSID awards are enforceable under the normal rules governing the recognition and enforcement of arbitral awards established by national law, the New York Convention, and other relevant treaties which give the principle role to domestic courts. Under the New York Convention, the national court could refuse to honor an award. In general, Contracting States of the ICSID, contrary to the commercial arbitration, cannot intervene in the ICSID proceedings and likewise none of the parties can take legal action before national courts during the ICSID arbitration proceedings; or after the award is rendered.

With respect to direct enforcement of the ICSID awards in domestic courts, recognition and enforcement should be differentiated from execution of awards. Recognition and enforcement are the first steps for the prevailing party to receive payment of the ICSID award. But to receive anything out of a monetary award the judgment has to be executed. While recognition and enforcement are covered by the Convention and no review under domestic laws is accepted, execution of ICSID awards can only be carried out under the domestic laws of the state in which execution is sought. Furthermore, article 55 of the convention gives the enforced domestic law of the Contracting State the desired immunity. This means, member states of the Convention have to recognize and to enforce ICSID awards immediately but they may execute any award under the applicable domestic law. If a member state under its domestic laws denies execution of a judgment, because of the sovereign immunity another state's assets, then the

execution of ICSID awards may be refused by this country. ICSID tribunals cannot execute their awards. This is exemplified by the decision of the District Court for the Southern District of New York in LETCO v. Liberia (ICSID, 1987), in which the court relied expressly on Article 55 in holding that, on the facts, certain Liberian property was immune from execution (Schreuer 2001, 1141-1180).

In brief, regarding the execution of ICSID awards, ICSID depends on the cooperation of national courts. Therefore a successful party may face difficulties with execution of an ICSID award under the sovereign immunity topic but noncompliance with the award is still regarded as violation of the Convention and does not affect the award at all. Generally, the parties to a dispute comply voluntarily with ICSID awards in respect of the judgment and only a small number of cases (approx. four) were challenged with the sovereign immunity objection. Therefore the prevailing party in a dispute can be very optimistic that award obligations will be carried out by the other party. As a result, it can be said that the binding nature and finality of ICSID awards give investors the confidence to receive a consistent or resistant judgments.

2. Advantages to the Host State

From the host State's perspective, the most obvious advantage of investment protection is the improvement of its investment climate. The legal framework for foreign investors is one important factor in determining the investment climate. Therefore, the idea of investment arbitration as an incentive or at least a safety net for foreign investment was the inspiration for the ICSID Convention. In other words, an impartial and effective dispute settlement such as ICSID is an essential aspect of the protection of investments. As in an earlier publication, *Aron Broches*, the spiritual father and principle architect of the ICSID Convention explained that "the world bank considered it appropriate to explore whether it could make a contribution to an improvement in the investment climate, by reducing the likelihood of unresolved conflicts between host countries and investors, and in particular by doing so in a manner which would eliminate the risk of a confrontation of the host country and the national State of the investor". (Broches 1972, 331-343). Furthermore, the directors of the World Bank in their Report on the Convention had also emphasized

on the importance of Convention as an instrument of international economic development. In one of the early cases namely *Amco v. Indonesia* (1983), the tribunal recalled the same idea saying that "the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries".

The improvement of the investment climate of host States is not the only advantage of the application of the ICSID arbitration. A major benefit that is often overlooked is the impact on the relations between the States concerned. For example, diplomatic protection by the investor's state of nationality has been a frequent source of irritation and discord. In the presence of an effective system of investor-state arbitration such as ICSID, the host State and the investor's home State are less likely to get drawn into investment disputes. Again, in the availability of ICSID arbitration, these dispute are transferred from the political arena to a judicial forum. As in the course of ICSID Convention's drafting, the exclusion of diplomatic protection was explained *inter alia* in terms of the removal of the dispute from the realm of politics and diplomacy into the realm of law. In general investment arbitration and in particular ICSID arbitration, has drastically reduced the potential for inter-state conflict. By consenting to ICSID arbitration a host state obtains the assurance that it will not be exposed to an international claim by the investor's home state as long as it abides by an award. In turn, the investor's home State is absolved of the inconvenience of representing its national and is able to conduct its foreign policy free from the embarrassment and obstruction caused by investment disputes. This aspect of investment arbitration is reflected in Article 27 of the ICSID Convention which proscribes diplomatic protection in cases where there is consent to arbitration under the Convention. (ICSID 1966, 19). In brief, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories as well as avoid the harassment of the diplomatic protection for host States which are the main purposes of the ICSID Convention.

3. Disadvantages of the ICSID Arbitration

Recently, investment treaty arbitration as a whole and ICSID at the center of it has been criticized by scholars, developed or developing, civil society and local communities. Their main claim is that the current system of ICSID arbitration one and only benefits the investors and has caused that some of the developing countries such as Bolivia, followed by Ecuador and Venezuela withdraw from the Convention and even some countries such as India and brazil have not even signed the Convention yet. Furthermore, for some countries the concern is the fear of losing initiatives for enactment of laws and likewise civil societies and local communities in those countries are concerned regarding their losses arising from changing domestic laws and regulations for the favor of investors and their lack of participation in the cases brought to the ICSID arbitration between the investor and their State.

The other claim is that there are some procedural and substantive deficiencies of the ICSID arbitration which has been under the scrutiny and discussions of many scholars and some developed countries particularly in Europe and North America. The scholars have been writing and debating about the possibility of an appeal mechanism for bringing consistency and coherence of the awards issued by the arbitrators and subsequently modification through that appellate body. Furthermore, the United States after the enactment of the US Trade Act in 2002 has inserted the option whether to establish a bilateral appellate body for reviewing awards in its free trade agreements with some countries such as Chile, Singapore and Morocco or not. (Annex 10-H, 2003) Likewise, the European Union has declared its dissatisfaction with investor-state dispute settlement (ISDS) including ICSID and its intention to replace it with an investment court system. Each of these disadvantages and criticism targeted toward ICSID arbitration will be discussed below.

A. Investors as the only Beneficiary

There is a growing displeasure with ICSID arbitration among some states which believe that it excessively favors investors. (UNCTAD 2016, 1). In fact, one of the main purposes of ICSID dispute resolution proceedings is to encourage the development of the rule of law, promote international investment agreements and create a favorable

investment climate in host countries. However, investor-state arbitration poses a challenge for developing countries, which do not have the capacity to handle the increasing number and growing complexity of investment disputes, the potentially high cost of conducting such procedures, and the potential impacts of awards on their budgets and national reputations as investment destinations. (UNCTAD 2008, 29). According to one non-governmental organization (Food and Water Watch 2007) investment treaty arbitration rules are weighted heavily in favor of global corporations and against mostly poor countries caught up in disputes of 93% of the cases at the ICSID involve low or middle-income developing countries and as such the ICSID tribunals have ruled in favor of the investor and ordered the government to pay compensation in nearly 70% of cases.

ICSID is also very expensive. According to UNCTAD, the average legal costs incurred by governments range between 1 to 2 million USD, including the lawyers' fees. (UNCTAD 2005, 8). Some claims involve sums reaching hundreds of millions of dollars. Although they are not particularly high for large multinational enterprises, these costs may be insurmountable for small and poor countries. Heavy legal costs especially hurt developing nations, which are either forced to hire expensive teams of foreign lawyers or risk losing their cases and paying foreign investors significant amounts diverting finances from other areas. Developing countries will remain capital-importing countries and it is they primarily who will bear the burden of heavy awards against them. Argentina is the most frequent respondent in ICSID cases, the majority of which arose after major economic crises there. Although foreign investors are able to recover their losses through ICSID, heavy ICSID awards against countries recovering from economic meltdowns may aggravate problems in those countries even more

Many developing countries, particularly those in Latin America, view ICSID as a challenge to their sovereignty and a tool of foreign investors rather than an impartial forum. (Skadden 2008). Although statistically investors lose at least as often as government, (OECD 2006, 11-14) financial implications are significant even when the state has to defend a meritless claim that does not result in an award favoring the investor. It is also argued that ICSID, which is a part of the World Bank, is not impartial because it encourages privatization

and the privatized companies resort to ICSID dispute resolution mechanism. This may potentially result in a conflict of interest because the Secretary-General can play an important role in ICSID proceedings, particularly in appointing a third arbitrator if the parties have failed to agree on such. It is also argued that investment treaty tribunals are biased in favor of investors because the former depend on claims brought against the latter. (Van Harten 2007, 4) As a matter of fact, ICSID Tribunals often arbitrate very sensitive issues, such as the management of water (Bolivia), (Jim Shultz, 2003) indigenous land rights (Guatemala), or protecting the economy during crises (Argentina). (People' Rights not Corporate Profits 2009). Nearly all proceedings are carried out behind closed doors without any meaningful participation or even knowledge of the social groups affected by the ICSID decisions. That is the reason some of these Latin American countries since 2007 have withdrawn the ICSID and even cancelled their BITs with other countries not to even include ISDS mechanisms at all.

B. Losing Initiatives for Enactment of Laws

There is another concern about ICSID arbitration that it leads to what is known as "regulatory chill" for that tribunals will stop States from taking measures that are necessary for the public good, such as protecting the public interest, the environment, health and safety. In other words, there is a growing imbalance between shrinking state options to exert their sovereign regulatory prerogatives and expansive interpretations of investor rights, protections and privileges. (Muthucumaraswamy 2004, 44-45). This has caused some countries such as India, Indonesia, South Africa and some Latin American countries seeking to reinforce the role of domestic courts in resolving investment claims. They also seek to protect the finality of domestic courts judgments and administrative decisions against subsequent arbitral claims that an investor might take to effectively overrule domestic decisions. As a result, some of these countries mainly in Latin America have taken recent initiatives through their governments to change model BITs, to renegotiate or terminate treaties, and even to withdraw from the ICSID Convention that they have serious concerns about investment arbitration at all. (Gilbert Gagne 2006, 357-82).

An example of the regulatory chill has occurred in the *CMS v. Argentina* case, (ICSID Case No. ARB/01/8) Argentina tried to change contractual arrangements with foreign investors to reduce effects of the financial crisis for the state. Some investors disagreed with the measures and refused to recognize the later changes by the government about contractual conditions. The investor CMS suffered losses from imposed emergency laws by Argentina and submitted its claim to ICSID under the USA-Argentina BIT. In the end the tribunal held Argentina liable for breach of the fair and equitable treatment under the USA-Argentina BIT because of interference in the required stability and predictability of business environment. Any exceptions under the rule of "state of necessity", exceptions because of the especially deep economic crisis and the situation of government finances, were denied. Elements of "necessity" were partially present but were not cumulatively satisfied. The Argentina crisis in connection with ICSID and BITs shows that rights of investors are well protected and even within special circumstances as in the case of Argentina exceptions from the treaty obligations are hardly possible.

In practice, the beliefs of regulators will vary between states and even between government departments within a state and will depend on their prior experience with arbitration as well as the level of information and advice that they have access to. However, some statements by government officials clearly indicate that they believe that investment arbitration is a threat to bona fide regulation. For example, Dr. Perera, a legal advisor in the Sri Lankan Ministry of Foreign Affairs, has stated "Sri Lanka believes that an expansive interpretation of regulatory measures could circumvent the national policy space hindering the government's right to regulate, creating a risk of "regulatory chill", with governments hesitant to undertake legitimate regulatory measures in the public interest for fear of claims for compensation being preferred by investors". (A. Rohan Perera 2005)

C.ICSID Procedural and Substantive Deficiencies

According to common belief, ICSID arbitration is bringing about global improvement in the process of FDI and economic growth of developing countries. It is important however to look at some systemic weaknesses in the process as there are both procedural and

substantive shortcomings in ICSID arbitration. For example, on the procedural level, the lack of clear and universally accepted codes of conduct and ethics rules for arbitrators, (Susan 2015, 496-97) lack of transparency, expertise of the arbitrators cost of the process and so on. With respect to substantive law, issues of consistency across arbitrations addressing similar issues, differing interpretations regarding the scope and meaning of treaty terms that are identical across large number of BITs to name a few.

First, in the procedural level, there are concerns regarding the impartiality and independency of ICSID arbitrators. In respect to their independency, there is a perception they might not be neutral in their adjudication, giving rise to a number of doubts on the parties regarding the integrity and real fairness of the arbitration process. As a matter of example, there are not few cases in which the same arbitrator has served as arbitrator and as a counsel of a corporation in two different cases involving the same company, or where the arbitrator has purposely delay the process to favor one of the parties. (Franck 2008, 187). It seems clear that in those cases the existence of potential conflict of interest is hardly deniable, and that is why there are those who stood up for the creation of a "*code of ethics for arbitrators*" that could serve to avoid those undesired cases of conflicts of interest. (Karl 2015, 8-9) The lack of transparency during the whole process as well as in the awards, are nowadays one of the major ICSID arbitration concerns. The concern is that within ICSID arbitration proceedings parties request private hearings and the resulting arbitration awards are normally not published unless the disputing parties give their consent, including the involvement of countervailing public interest. (Trakman 2012, 101-103).

The arbitration expertise and cost of the process are the two other alleged procedural disadvantages of the ICSID arbitration. For the cost of the process, from one hand, we have the economic costs for example in case that it is concluded that the host state violated any of the treaty provision, damages ranges from tens of thousands to billions of euros and dollars. In the other hand, there are also costs of the own process, which entails the payment of legal fees, arbitrator's fees, the cost of experts and/or witness if needed and the administration fee of the arbitration center knowing about the dispute. (Muchlinski 2010, 6). Moreover, the cost are becoming even

higher due to the complexity of the investment disputes. (Karl 2015, 12). An example can be realized from Plama Consortium v. Bulgaria (ICSID Case No. ARB/03/24), the claimant's legal costs were $4.6 million, while respondent's ones amounted to $13.2 million. Plama was required to pay not only its own all arbitration costs, but also half of the host state's legal expenses. The issue of arbitration expertise has also concerned states in cases brought to ICSID arbitration as arbitrators tend to be experts in commercial law field but have less or no expertise in the field of public international law. This can lead not to pay the due attention to the eventual public consequences of the award. Thus, one of the critics is that investment arbitrators do not take into regard a wide state's policies such as labor, health, environmental, national security or the regulation and protection of the national market. (Trakman 2012, 102).

Second, at the substantive level the biggest challenge is the inconsistency of the decisions and awards rendered by the arbitrators. Unreasoned and inconsistent awards can create confusion on both sides; (i) they may make difficult for the parties to understand the scope and the extent of investor's protection under a treaty, as well as the circumstances that need to concur so the host state is found liable under an IIA; (ii) they could be questioned by the parties because the awards might be perceived as unfair and lacking the required reasoning, especially as far as cost-related measures and costs shifts is concerned; and (iii) parties may not be able to negotiate effectively because they lack the necessary criteria, rules or precedent system to make an accurate cost-benefits calculus. (Franck 2008, 190). An example can be found in *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3) while the foreign investor claimed around 25,000,000 USD in damages, the settlement made the host state responsible for 1,600,000 USD in legal expenses; that is to say, more than the five per cent of the initially claimed compensation. Thus, it can be said that an ICSID arbitration comprises substantial public interests -e.g. environmental standards and protections, public health regulation, labour standards or nuclear power related measures-, inconsistent, contradictory, unwell reasoned and mistaken decisions are therefore difficultly justifiable. (European Parliament 2014, 64-65).

CONCLUSION

Investor-state arbitration under the auspices of ICSID from its establishment in 1966 until now has gone many stages of development to promote its goals and bring changes in the area of international investment law. Its primary goal has been providing protection for investors by excluding the defective and challenging methods of dispute settlement such as espousal of cases in diplomatic protection and recourse to domestic courts between states and national of other states after their consent to ICSID arbitration. Moreover, the other purpose is the development of the host states' investment climate by way of promotion of foreign direct investment (FDI) in host states. As IIAs in particular BITs began to increase, the recourse to ICSID arbitration also multiplied as a result the weaknesses of this regime also appeared. Some developing countries in different parts of the world started their opposition towards the ICSID arbitration and ISDS in general. Their main claims were the one sidedness of this type of arbitration and their lack of ability to enact domestic laws and policies for different public interest such as health, environment and safety. Besides, the substantive and procedural shortcomings of the ICSID arbitration namely independence and impartiality of the arbitrators including their lack of expertise in international public law, the cost of the process and inconsistency of the decisions and awards have been their biggest concern. Finally, going through each of these advantages and disadvantages, one can realize that the benefits of this system of arbitration weighs its disadvantages and likewise there is a need for improvement particularly in the procedural and substantive directions of the ICSID arbitration.

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