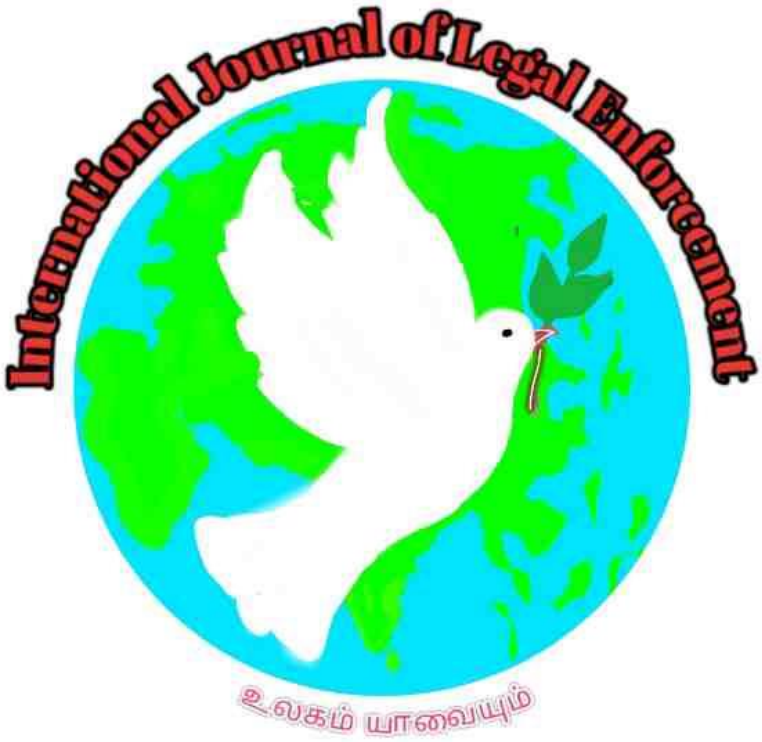
INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT

ISSN: 2582 8894|UIA: AA1003/2020



Volume 1 Issue 2

|June 2021|

Website: www.internationaljournaloflegalenforcement-ijle.com

Email: editorialboard.ijle@gmail.com

INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT

ISSN: 2582 8894|UIA: AA1003/2020

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INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT

ISSN: 2582 8894|UIA: AA1003/2020

Article on

DEMOCRACY AND INVESTMENT ARBITRATION UNDER PRIVATE INTERNATIONAL LAW REGIME.

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ISSN: 2582 8894|UIA: AA1003/2020

Abstract:

In order to understand the relationship between International Investment and Democracy analytical framework is developed, in this article author encompasses the understanding of how Private International law has evolved in recent years, its innovation and its benefits in today's day and age. With an increase in the use of agreements and treaties all over the world, there is a constant need to adapt to such changes legally.

The process of investment arbitration in international law enables a foreign investor to avoid the domestic jurisdiction of the host country, thereby enabling an independent and non-biased decision to resolve the dispute under international treaties. This article deals with the enforcement of awards and how the International Centre for Settlement of Investment Disputes (ICSID) functions.

The article is concluded with the challenges faced in the development and importance of national and international laws, *along with suggestions and opinions.*

Keywords: *International Investment, Agreements, Treaties, Arbitration, Settlements.*

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Introduction

The relation in between law and politics has evolved over the years in respect of international investment law. The international investment regulations have been debated for a long time in order to depoliticize it and thereby justify in the cases of investment disputes. The international investment arbitration and the treaties concerned have been viewed to replace the politics of diplomats with the legal resolving experts. Investment arbitration is the process in which the disputes of foreign investors and the Investor stators are resolved. This process enables that a foreign investor can file a case against the host State in the case of dispute by arbitration by choosing an arbitrator of their choice who would pass an enforceable award.

The process of investment arbitration in international law enables a foreign investor to avoid the domestic jurisdiction of the host country, thereby enabling an independent and non-biased decision to resolve the dispute under international treaties. However, the acceptance and consent of the host state to such international investment arbitration is essential to proceed with such arbitration. The global legal practice administering the confirmation and treatment of foreign investment is in a dynamic position. Various investment treaties and dispute settlement procedures have made international investment a standout amongst the most unique parts of international law, and a significant piece of the legal design supporting the economy for globalization.

Be that as it may, the multiplication of the treaties and the disputes arising out of it, have likewise made universal speculation law a challenging field: a few specialists and campaigners have addressed substantive norms and question settlement instruments[1], and a few pundits have talked of an authenticity emergency or a reaction against the venture routine[2]. There have been insistent calls for change, and new open doors are rising for multilateral exchange on the change of the speculation settlement regime.[3]

[1]Van Harten, 2007; Bernasconi et al., 2012; Eberhardt and Olivet, 2012

[2]Franck, 2005; Waibel et al., 2010

[3] Conference on Trade and Development (UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT) on “Transformation of the International Investment Agreement Regime: the Path Ahead”, Geneva, 25–27 February 2015

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ISSN: 2582 8894|UIA: AA1003/2020

There is additionally vulnerability about the future international investment law. A few states have ended probably a portion of their investment bargains. Others are arranging mega treaties that could make a portion of the world's most aggressive venture bargains ever[4]. In the meantime, a few states have tried to recalibrate their venture bargains, nuanced definitions in manners that move the harmony between various approach objectives. However, others have investigated completely novel ways to deal with the drafting of venture settlements, expanding assorted variety in the universal treaty scenario.

These fast, extensive, and mostly differentiating advancements in open discussions and strategy decisions make this an especially significant point in time for forming the eventual fate of international investment law. Furthermore, in numerous pieces of the world, common society and natives' gatherings are venturing up support on the said law by investigating treaty exchanges, mediating in questions among financial specialists and states, catalyzing grassroots preparation or advancing open discussions. This developing native commitment may reconsider significant parts of international investment law, and fortify its apparent authenticity.

Consent of Host State

Under International Investment Agreements[5], which includes Bilateral Investment Treaties (BIT's), Free Trade Agreements (FTA's) and multilateral agreements require the consent of the host state to ensure international arbitration for investment.

Further, such consent to the host state may be instituted in the agreement between such State and the foreign investor, in the absence of which, the domestic investment laws shall apply. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT of the United Nation ensure a list of instruments which provide for the consent of the host State to such investment arbitration, which is available to be observed in case of any dispute of investment arbitration.

[4]UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2014
[5] Investment Policy Hub, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2019

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Consent, however, is based on the said nation and that shall be applicable on the investor individual of the entity concerned, as provided under the treaties of investment arbitration concerned.

Investment Arbitration

Usually, around 6 months is provided whereby the foreign investor and the concerned State engage in certain negotiations to ensure the solution of the dispute. Such period is initiated by a Notice of Intent which initiates an arbitration against such State. In situations, which most often than not exists, where the dispute is not resolved in the said period, the foreign investor files for Request for Arbitration in accordance with the rules of Arbitration.

In certain situations, the investor may have to exhaust the existing domestic remedies available to them in order to initiate the arbitration procedure. However, certain arbitration agreements ensure that the foreign investor files a case in a domestic court or an international arbitral tribunal exclusively. This is very important for the investor so as to ensure that the instrument agreed upon is not later refused to be accepted in the proceeding by the host State or by an international tribunal.

Time Scale

According to ICSID[6], the investment arbitrations duration is a little of three years, counted from the date of the arbitral tribunal's constitution to when it is concluded. According to ICSID history, the longest-running dispute is of nineteen years which involved two tribunals for arbitration.[7]

Arbitral awards are final and do not allow appeals; be that as it may, the rules of arbitration as decided by the agreement of the parties, provide for grounds of annulment in case the arbitral award needs to be set aside.

For instance, the ICSID Rules allow for the annulment of an award if:

[6]International Centre for Settlement of Investment Disputes statistic, 2015
[7] International Arbitration Information, 2019

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- The arbitral tribunal was not constituted as prescribed.
- The arbitral tribunal acted over and above its powers.
- Member of the arbitral tribunal was corrupt.
- Fundamental procedure was not followed by the arbitral tribunal.
- Ratio decidendi of the award was not provided.

Enforcement of Awards

Enforcement of international investment awards are essential, and the host States are bound to accept it under the ICSID Convention[8]. According to the Convention, every State under the contractual obligation shall recognize an award under this Convention as binding and enforce the obligations of monetary interest imposed by that said award by the tribunal within the country as if it were a final judgment of a court within that State.

In the case where the host-State is not a party to the said convention, in that case, the enforcement is ensured in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [9] of 1958. The awards of international arbitrators, under this convention, can be enforced in around 150 countries.

International Centre for Settlement of Investment Disputes (ICSID)

The International Centre for Settlement of Investment Dispute Convention is a treaty ratified by 155 Contracting States or jurisdictions. It entered into force on October 14, 1966, after ratification by the first 20 States. Article 42(1) is the main provision applicable consisting of two parts whereby the first part prescribes the applicability of the relevant law on the basis of the merits of the concerned issue. It enables that an arbitral tribunal constituted under this Convention may resolve the dispute in accordance with the rules and regulations agreed by the parties. The rule of law is being adopted by the UNCITRAL Model law as well.[10] This ensures that the concerned

[8] Article 53 to 55, ICSID Convention
[9]United Nations Commission on International Trade Law (UNCITRAL)
[10] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985

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parties agree with domestic law as well as the international law concerned along with a combination of rules and regulations. The agreement on the laws which need to be applied may not be expressed as the Convention states that "an implicit agreement which could be deduced from the facts and circumstances of the relationship between the parties."[11]UNCITRAL Model Law and the UNCITRAL Arbitration Rules apply in case there is no agreed law to be applicable.[12]

The second part of Article 42(1) states that along with the international laws and rules, domestic laws shall apply during inconsistencies. This ensures the applicability of the law of the other country wherever deemed essential. This is in reference to international law. In the event of a gap in the applicable domestic law, arbitrators might under this provision turn to international law to fill the gap.[13]

This law empowers the arbitrator to apply the international law in the arbitration procedure and not the domestic law when it is violating the international law.[14] This enables to fill in the gaps of international law, at the same time obliging the domestic laws of the host country in order to ensure that the host State, as well as the international obligations of the concerned host State, is fulfilled.

The ad hoc committees which are being established under Article 52 of the Convention with regard to annulment provisions were of the opinion that the international law supplemented the functions of the host State. However, the application of international law is to the extent of assisting the host State to ensure that the inconsistencies between the domestic law and the international laws are corrected.

The decision of the case of *Amco Asia Corp. v Indonesia*n 1986 facilitates that the second part of Article 42(1) of the Convention empowers that the arbitral tribunal under the Convention

[11] Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica, award of Feb. 17, 2000, 5 ICSID Rep. 153, 170 (2002).
[12] UNCITRAL Arbitration Rules, supra note 5, at art. 33 (1); UNCITRAL Model Law on International Commercial Arbitration, supra note 9, at Article 28(1)
[13]ICSID, 2 History of the Convention, supra note 10, at pg 803.
[14] As demonstrated by Emmanuel Gaillard and Yas Banifatemi, the drafters of the Convention did not rule out other roles for international law under the provision. Gaillard and Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process," 18 ICSID Rev., FILJ 375, 383-88 (2003).

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is to apply international law and rules to fill in the gaps of domestic law which are applicable to the dispute[15]. However, all the earlier cases concerned what are called contract claims; none was brought under an investment treaty in respect of alleged violations of the substantive protections of the treaty.

The majority of the ICSID Convention cases are concerned with treaty issues. The tribunals have all connected the arrangements of the hidden settlements as to the international laws. They have in the meantime commonly likewise recognized the importance of the law of the host State concerned. This extensively comparable result has been come to in various ways under Article 42(1) of the ICSID Convention. This might be seen from an examination of the 20 awards on the benefits hitherto rendered in ICSID Convention mediations started as per speculation arrangements. In these, as it occurs, the hidden venture bargain was a BIT.

Bilateral Investment Treaties

BIT provides guidelines for international law applicable to the host State and the tribunals during dispute settlement proceeding under BITs.[16] In the case of *Siemens AG v Argentine Republic*, the tribunal did not accept the idea of international law applicability as "as a corrective to municipal law or as a filler of *lacunae* in that law."[17] It opined that the tribunal was guided by ICSID Convention, by the concerned BIT and the relevant international law.

In the case of *ADC Affiliate Ltd.* v. the *Republic of Hungary*, the host State and foreign investment arbitration provision of the BIT, in that case, was applicable to the issue between parties and the foreign investor as the concerned party.[18]The tribunal awarded that arbitration between the foreign investor and the host State provision with respect to such a dispute, the parties concerned agreed to the application of the provision of BIT and the concerned agreement is valid under the first part of Article 42(1) of the ICSID Convention.

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[15] Amco Asia Corp. v. Republic of Indonesia, ad hoc committee decision of May 16, 1986, 1 ICSID Rep. 509, 515 (1993). 1 ICSID Rep. 569, 580 (1993)

[16] These were the BITs in Fedax NV v. Republic of Venezuela, Maffezini v. Kingdom of Spain, Vivendi Universal v. Argentine Republic, Olguin v. Republlc of Paraguay and Siemens AG v. Argentine Republic).

[17] Siemens AG v. Argentine Republic, award of 6th February 2007

[18]*ADC Affiliate Ltd.* v. *Republic of Hungary*, award of 2nd October, 2006290.

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The consent to the application of such laws should contain a choice in general international law and customary international law along with provisions of BIT. The tribunal opined that the only exception to this is any provision of BIT in order to compensate according to laws of the concerned State, that "it must be presumed that all other matters are governed by the provisions of the BIT itself which in turn is governed by international law."[19]

Understanding of Democracy

It is difficult to ensure justice to this huge assemblage of ideas in the space accessible in democratic countries. When all is said in done terms, the democratic system alludes to the assorted courses of action for designing political expert that empowers, in Abraham Lincoln's commended words, 'government of the general population, by the general population, for the people.[20]Beyond this expansive detailing, positions separate broadly on alluring or really watched game plans to guarantee government by the general population, mostly reflecting distinctive political arrangements. In political hypothesis, a few originations center around the highlights and advantages of representative democracy[21] and on constituent components for choosing those in power;[22] while different originations accentuate the estimation of immediate, grassroots-level deliberation.[23] Recognizing the clouded side of liberated dominant part rule, numerous scholars have propelled originations of a liberal democratic system that join government by the general population with shields for human rights and the standard of law.[24] Sensible approaches to group and order the assorted originations of majority rule government are practically interminable, contingent upon the nature and motivation behind the examination. One valuable methodology recognizes originations dependent on the relative significance they join to rules and to activity in surrounding law-based processes. Some conceptions of democracy are mainly for public decision-making by focusing on procedure and formal rules. While the specific features of these rules and

[19] Applicable law in Investor-State Arbitration by Antonio R. Parra
[20] A. Lincoln, 'Address Delivered at the Dedication of the Cemetery at Gettysburg', 19 November 1863, available at www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.
[21] J.S. Mill, Considerations on Representative Government (1861).
[22] J. Schumpeter, Capitalism, Socialism, and Democracy (1972)
[23] , J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (translated byW. Rehg) (1996)
[24] R. Dworkin, Taking Rights Seriously (1977), pg. 223–47

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procedures vary, the focus is often on electoral processes and relations of democratic accountability.[25]

A few originations of democratic government center on the formal standards and methods for public leadership. While the highlights of these principles and systems fluctuate, the idea is regularly on appointive procedures and relations of just accountability. Public foundations are the official underwriters of these rights and freedoms and at last of democratic administration itself. While various terms have been utilized to portray these methods for surrounding democratic administration, this article alludes to them as the principles-based originations of majority rule government. In connection to international investment law, pertinent viewpoints would incorporate, for instance, the lawful right of residents to choose parliamentarians and the formal procedures that characterize the capacity of parliament to impact arrangement making.

The second arrangement of originations centers on the acts of contestation and negotiations whereby residents look to impact the administration of open affairs. These methodologies conceptualize majority rule government, not as a situation characterized by formal principles and systems, however as a never accomplished, continually developing practice fixated on discussion, contradiction and deliberation.[26] Relevant strands of thought incorporate deliberative popular government hypotheses that feature the job of levelheaded, collective deliberation; originations of a democratic system that considers dispute and contestation as the characterizing highlight of democratic politics; and investigate that point to the significance of city affiliations and grassroots co-activity in setting up the social preconditions for a democratic system to prosper. This environment of the democratic system around the acts of native commitment isn't limited to the individuals who have formal citizenship status. Or maybe, it is the act of connecting with that comprises the citizen.[27]

[25] R. Dworkin, *Taking Rights Seriously* (1977), 223–47; R. Dahl, *On Democracy* (2000); Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by W. Rehg) (1996)
[26] J. Gaventa, 'Triumph, Deficit or Contestation? Deepening the "Deepening Democracy" Debate', (2006)
[27] A. de Tocqueville, La Democratie en Am ´ erique ´ , Vol. 1 (1835)

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The substantive, as well as procedural ideologies of the democratic system, have been critiqued. It has been argued[28] that even in the case of perfect procedural democracy, the knowledge and interests' production can affect the democracy in a negative manner rather than helping it.[29] Despite the acceptance of deliberative democracy, socio-economic inequalities have negatively impacted the system.

The two ideologies lead to dimensions of democratic procedure. The use of rights of citizens, along with negations for political rights including freedom of speech and assembly leading to fundamental rights and the process of judicial review is included under the democratic procedure. Hence, these procedures highlight the need for democratic regimes and the rules of application in the country. The substantive, as well as procedural rules of democracy, are expressed in the activities and functioning of the government.

Democracy and International Investment Agreements (IIA)

Democracy enables the interpretation of International Investment Agreements among the investors during dispute settlement and the interpretation of international treaties. However, this does not entail the impact of democracy on investment laws and the arbitration it leads to during arbitrations, for instance, transparency, the decision of the arbitrator, and publishing of decisions.[30] These are essential elements for a relationship between investment arbitration and democracy. Firstly, it is important that the impact of democracy on the interpretation of IIA to fair and justified treatment and avoid discrimination of ambiguous interpretation; and secondly, the impact of democracy on the authority interpreting the agreements for the investors. This pinpoints international investment law at the interface between democratic governance and liberal safeguards.

[28] Michel Foucault
[29] N. Gordon, 'Dahl's Procedural Democracy: A Foucauldian Critique', (2001) 8(4) Democratization 23–40
[30] 'Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights' [2008-2009] 46 Alberta Law Review 983, 1005-1007

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Conclusion

The globalization of the economy along with development in international law for foreign investment has increased over the years. The arbitration between investor and State creates the concept of public action and the law with regard to international investment is relating to public policy as opposed to earlier times. While establishing its authenticity on the indicated avoidance of outside financial specialists from the fair procedure, the speculation routine in actuality brings up testing issues about its association with domestic governance.

The developments of international laws for investment enable the domestic lawmakers to ensure adequate legal provision's application in the host State. The interchange among standards and activity-based elements of a vote-based system is at the focal point of these reflections. Verifiably, worldwide investment law has developed through an exceedingly powerful procedure including decentralized exchange and contestation. This component is reflected in relations between states, which arrange the bargains, and between legislators and those called upon to decipher and apply the provisions of law for instance, where states have refined settlement details because of arbitral elucidations. The dynamic, decentralized nature of worldwide venture law is additionally reflected in the job of non-state on-screen characters. The dynamic idea of the universal venture routine aggravates the case for considering the guidelines, yet in addition the activity-based measurements that support their advancement. While the previous 15 years have seen an opening up, though fractional, of speculator state contest settlement, time is currently ready to reexamine spaces for law-based basic leadership in the advancement of investment law.

The development and significance of national and international laws give pointers to potential changes. Points of interest rely upon the unique circumstance.

International investment law includes the assignment of power to host state arbitral councils, and the developing collection of amicus curiae entries demonstrates that these worldwide procedures give a few chances to domestic commitment. Be that as it may, it is the investment making stage that presents a more noteworthy degree for impacting the key parameters of the venture routine. Different countries are thinking about comparative issues, making significant space for the resident activity that rises above national limits. While investment settlement

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arrangements are respective or territorial, there is a degree for worldwide spaces to encourage open discussion, exercise sharing, and coalition building which supplements the existing master and government-based forms on the specialized parts of universal speculation law with progressively open spaces for domestic gatherings and parliamentarians to ponder the fundamental strategic decisions. Such global activities may likewise catalyze open discussion in developing nations where residential or parliamentary commitment has so far been progressively constrained.